

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.463 OF 1996

The State of Maharashtra

...APPELLANT
(Orig. Complainant)

VERSUS

- 1) [Ram Sheshrao Pawar,
Age-20 years,
(Appeal abated as against Respondent
No.1)],
- 2) Nandkumar Wamanrao Kondapure,
Age-19 years,
- 3) Avinash Nagappa Holkunde,
Age-19 years,
- 4) Shahbuddin Kasim Bagwan,
Age-22 years,
- 5) Balaji Devidas Mane,
Age-18 years,

All residents of Aurad Shahajini,
Tq-Nilanga, Dist-Latur.

...RESPONDENTS
(Orig. Accused Nos.1 to 5)

...
Mr. A.V. Deshmukh, A.P.P. for Appellant.
Mr. R.N. Dhorde, Senior Counsel i/b. Mr. P.G.
Patil Advocate for Respondent Nos.2 to 5.
Appeal abated as against Respondent No.1.

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**CORAM: S.S. SHINDE AND
A.I.S. CHEEMA, JJ.**

DATE : 11TH JUNE, 2015

JUDGMENT [PER A.I.S. CHEEMA, J.] :

1. This is an Appeal by the State against acquittal of Respondents – original Accused (hereafter referred as “Accused No.s 1 to 5), as arrayed in the cause title). The Accused along with one Govind Vishwanath Shinde were charged with offence punishable under Sections 376(2)(g), 302, 457 read with Section 120-B and 34 of the Indian Penal Code, 1860 (“I.P.C.” in brief). The Accused No.6 Govind Vishwanath Shinde came to be discharged and trial was held before the Additional Sessions Judge, Latur against the Respondents – Accused Nos. 1 to 5.

2. The case of prosecution, in brief, can be stated to be as follows:

(A). Incident occurred in the night between

22nd - 23rd October 1991 at Aurad Shahajani, Tq- Nilanga, Dist-Latur. The victim (hereafter referred as "S" or "Victim"), college going daughter of complainant - Shivajirao Jadhav (hereafter referred as "Jadhav") was gang-raped and murdered by pouring kerosene and setting her on fire in her kitchen situated on the first floor of the house owned by one Ramnivas Darak. The complainant was professor in local college and had taken on rent two rooms on 1st floor in the house of Darak and was living there with his two daughters (S and another daughter Dharti). He was strict in holding of examinations, which annoyed certain students. On 22nd October 1991, he had, after attending college, left for Sayagaon, where his wife was living and in which village he had agricultural property. Victim and Dharti stayed back in the house at Aurad. Dharti was studying in high school. As per the prosecution, the Accused were waywards, teasing girls and Accused No.1 Ram had one sided love for the Victim. Earlier Accused

No.2 — Nandkumar had been warned by the complainant when he had come to the house of complainant on some pretext. In another incident, Accused No.1 Ram had thrown chit at the Victim when she was sitting in the bus at the time of Dasara festival. Victim at that time was with Dharti. The Victim had torn off the chit.

(B). It is the case, the concerned night when incident took place was being celebrated by people as "Kojagiri Pournima". One Azimoddin Attar had been asked by the complainant to stay back at the house to take care of the girls. That evening the Victim had gone to the house of her friend Vedanti Sharma to celebrate Kojagiri but came back early. The other daughter of complainant, namely Dharti and the servant Azimoddin slept in the house. Dharti slept on the cot in the other room and the servant slept on floor. There was passage between the two rooms, which had been taken on rent by the complainant. That evening Accused persons had been

seen lingering around the narrow road/ lane in front of the house of the Victim and had been seen by one Mallikarjun Lature, and one Satyajit @ Bablu Sharma had also objected to them. The Accused persons were drunk. The Accused had been seen consuming wine at hotel of one Soudagar Sanjay, that evening. That evening at about 10.00 p.m. Accused No.1 with other Accused had been seen in the lane trying to talk to Victim, who was on the terrace and who refused to come down to talk to him, as he was drunk.

(C). Prosecution claims that at about 1.00 a.m. in that night, Dharti heard foot steps and when she got up to check, she saw from the *Somana* (little window fixed on the first floor), Accused Nos. 1 to 3 leaving the house and after having left the house (which had only one main door for entry) she had seen the Accused persons latching the main door of the house from out side and going away. She woke up the servant Azimoddin and when

they came out of the room, it was seen that there was fire and smoke in the other room abutting the passage. They went down and woke up Bhamabai Jadhav, the other tenant staying on the ground floor, who came up and asked Azimoddin to pour water and put out the fire. At that time it was seen that body of the Victim was lying in the kitchen near a wall and she had been burnt to death. These three persons came down and woke up the other tenant staying on ground floor, namely Vishwanath Shinde and when they all tried to open the door of the house, it was found that it was bolted from outside. By calling out the neighbours, the door was got opened. Message was sent to the Principal of the college and messenger was also sent to Sayagaon to bring the complainant. The complainant and his wife reached Aurad at about 3.00 a.m. The complainant and his wife were loosing consciousness.

(D). According to the prosecution, the Accused

persons had, with the help of discharged accused, gained access to the house of the Victim and gang-raped her and making her unconscious, burnt her to death.

(E). Initially Police Head Constable Dnyanoba Gaikwad from Aurad Shahajani out-post of Kasar-Shirshi Police Station had reached the spot in the night. When the complainant reached the spot, after some time Head Constable took signature of complainant on paper and a form. Initially it was mentioned that it was a case of suicide. The Inquest Panchnama and Spot Panchnama was carried out against A.D. registered. In the day time of 23rd October 1991, the funeral was carried out after the post-mortem and later on complainant along with Azimoddin and his daughter Dharti, started for Sayagaon and on the way, Dharti informed complainant about having seen Accused Nos. 1 to 3 at the time of incident. On 24th October 1991 the complainant along with Azimoddin

and Dharti came back to Aurad. He wanted to give application to P.S.I. Mohd. Naimuddin Khan but he avoided and telegram was sent by the complainant to Dy. S.P. against the P.S.I. Later on in the day of 24th October 1991 complainant wrote out his F.I.R. and submitted the same to the police and Crime No.81 of 91 was registered at 7.30 p.m. The villagers were agitated and caught hold of Accused No.2 Nandkumar and took out his procession on donkey and took him to police station. Still he was not arrested. When higher police officials reached, the investigation was transferred to P.S.I. Narhari Athawale. Later on investigation was transferred to C.I.D., and P.I. Sayasrao Sanap investigated. Departmental action was taken against P.S.I. Khan.

(F). After investigation, charge-sheet was filed. The prosecution examined as many as 20 witnesses after the matter was committed to the Court of Sessions. The defence of the Accused, as

it appears from the cross-examination of the witnesses in the trial Court, is of total denial. The Additional Sessions Judge, after holding trial, acquitted all the Accused persons. Hence the Appeal.

3. We have heard the learned A.P.P. for State and perused the record. We have also heard learned Senior Counsel for Respondents – Accused.

4. The learned A.P.P. submitted that in the trial Court, prosecution brought on record evidence of PW-5 – Mallikarjun Lature, who had seen in the evening the Victim talking with Accused No.1, who was accompanied by other Accused persons and who was on the road insisting to talk to her and Victim had refused. The learned A.P.P. submitted that there was evidence of earlier occasions when the Accused No.1 had conveyed his love to the Victim but she had not responded. There were witnesses who had seen the Accused

persons in the vicinity having drinks at the hotel of one Soudagar Sanjay, who runs Anuradha Permit Room. One Satyajit @ Bablu Sharma (PW-16) had also objected to the Accused persons lingering around the lane in front of the house of the Victim. The A.P.P. submitted that there was evidence of PW-4 Bhamabai Jadhav, PW-12 Azimoddin and PW-13 Dharti regarding the incident. PW-13 Dharti had woken up due to the noise of foot steps and had seen the Accused Nos. 1 to 3 leaving the house from *Somana* and the trial Court wrongly disbelieved her. The learned A.P.P. submitted that the Victim had suffered 100% burns and had died on the spot, was clearly established by the prosecution. According to him, some of the witnesses turned hostile, as the witnesses were terrorized due to murder of Panchshil, son of the complainant at Latur when the present matter was pending and in which case father of Accused No.2 and brothers of Accused Nos.2 and 3 and one Govind are accused. The A.P.P. submitted that P.S.I. Khan

had not acted fairly immediately after the incident and looking to all this, the Judgment of the trial Court is not maintainable and deserves to be set aside and the Accused should be convicted.

5. Per contra, the learned Senior Counsel for the Accused persons referred to the observations of the trial Court in Para Nos. 132, 135 of the Judgment and the other evidence available on record to submit that the prosecution is relying on the sole testimony of PW-13 Dharti that in the night concerned, after the incident, she had seen Accused Nos. 1 to 3 leaving the house and bolting the door of the house from out side. The learned counsel submitted that the defence clearly brought on record that the evidence of PW-13 Dharti was suffering from unnatural conduct. She never told, having seen Accused Nos. 1 to 3, to PW-12 Azimoddin, whom she had woken up. She did not tell about the same to PW-4 Bhamabai Jadhav or

anybody else during the course of incident or immediately after the incident unfolded. The counsel submitted that the prosecution case itself is that she told her father about seeing Accused Nos. 1 to 3 only after the funeral when they were proceeding to Sayagaon. In spite of that, the complainant filed the F.I.R. only on the next day i.e. on 24th October 1991 and although he himself wrote the F.I.R. Exhibit 111, he did not mention in it that his daughter had told him about seeing the Accused Nos. 1 to 3 leaving the spot when the incident was unfolding. Thus, according to the counsel, the view taken by the trial Court is a possible view and no interference is called for.

6. Points of Determination are:

- (1) Whether the prosecution has proved that the Accused persons committed criminal house breaking by night and gang raped the Victim and murdered her?

(2) Whether the Judgment of the trial Court is not maintainable and the acquittal needs to be set aside?

7. A brief reference needs to be made to the evidence brought by the prosecution.

8. Regarding earlier conduct of the Accused persons:

(I). Prosecution examined PW-2 Jiwan Bondge, who appears to have written letter Exhibit 85 to the Victim suggesting her to treat him as a brother and not to treat Accused No.1 Ram as brother as he had other motive. This witness stated in cross-examination that Accused Ram used to say that he was in love with Victim. Then there is evidence of PW-3 Sanjay Pandurang Gavane, who turned hostile, but stated that Accused No.1 used to say that he was in love with Victim and claimed that Victim also loved him. This witness denies that Accused No.1 had claimed that if anybody will

come in his way, he will teach him a lesson. Another witness is PW-6 Kamal Shinde, the friend of Victim, who deposed that on 22nd October 1991 she along with the other friend Vedanti and the Victim had decided to celebrate Kojagiri and they had earlier in the day, laboured to colour wall and then she had accompanied the Victim to her house as the Victim wanted to change clothes. This witness denied that she had accompanied the Victim home because the other friend Vedanti had told that Accused No.1 Ram was after the Victim. Prosecution has then brought the evidence of PW-5 Mallikarjun to the effect that in the night concerned, he had seen Victim standing on the terrace of her house at about 10.00 p.m. and the Victim was talking to Accused No.1 Ram. According to this witness, there were 2-3 other boys with the Accused No.1. This witness deposed that Victim was telling Ram that he should better see her tomorrow. According to this witness, at that time time one Bablu Sharma (PW-16) had came and he had

taken away Accused Ram.

(II). The other witness PW-7 Shridhar Pawar examined, to show that the Accused persons were seen that night near the house of the Victim. He turned hostile and did not support the prosecution. PW-9 Laxman Shinde, the brother of PW-6 Kamal was examined. He was examined to prove that on the day concerned, Accused persons had tried to send a chit to the Victim by asking this witness to send it through his sister Kamal. The witness turned hostile and did not support the prosecution. PW-10 Soudagar Sanjay was examined by the prosecution to bring on record that the Accused persons had been to his Anuradha Permit Room on the day concerned and had consumed wine. Even this witness did not support the prosecution. PW-11 Maheboob Maqbul Saheb Jade was examined to prove that the Accused were seen in the drunk condition near the house of one Dayanand Shetgar at that time and had quarreled with one Vilas and

Shetgar. However, even this witness turned hostile. PW-16 Satyajit @ Bablu Sharma supported the prosecution to the effect that he had seen the Accused persons sitting in front of one Tapowan Hotel that evening but turned hostile and did not accept the case of prosecution that he had seen the Accused in the lane concerned in drunk condition.

(III). Regarding the earlier conduct of the Accused, PW-13 Dharti deposed that at the time of Dasara she and Victim were proceeding in bus to Sayagaon from Aurad and at that time Accused No.1 Ram had thrown a chit to the Victim and the Victim tore the same. Then there is evidence of complainant Jadhav (PW-14) that earlier once he had seen Accused No.2 Nandkumar coming to his house at Aurad and when he had questioned him, Accused No.2 told that he had come to handover pen to the Victim. According to the complainant he had warned Accused No.2 that in future he should not

come to their house.

9. The witnesses turned hostile have been discredited in the cross-examination by the A.P.P. However, above is the substance of the facts proved/tried to be proved by the prosecution regarding the earlier conduct of the Accused.

10. Regarding the incident, the main witness of the prosecution is PW-13 Dharti. If her evidence is read along with the evidence of PW-12 Azimoddin, the servant who slept in the house in the night concerned and the evidence of PW-4 Bhamabai Jadhav is considered, the evidence in brief shows that the house concerned had a main door and on the ground floor there were rooms in which one Shinde and PW-4 Bhamabai were residing and on the first floor there were two rooms which were with the complainant Jadhav. One room was used as a kitchen and other as living room. PW-13 Dharti and the servant Azimoddin were sleeping in

other room. PW-4 Bhamabai had seen Victim earlier in the evening going for Kojagiri and soon she came back saying that the programme had been cancelled. At night at about 1.30 a.m., PW-13 Dharti claims to have heard noise of foot steps. She says that she woke up Azimoddin and they came out of the room and saw that there was fire in the other room. PW-13 claims that she saw through the *Somana* and found that the Accused Ram Pawar, Nandkumar Kondapure and Avinash Holkunde were leaving the building. She claims that these Accused Nos. 1 to 3 closed the main door and had latched the door from outside. Her evidence is that she and Azimoddin went to the room of PW-4 Bhamabai and woke her up. PW-13 claims that she had seen the Accused Nos. 1 to 3 in the light. She told PW-4 Bhamabai that there was fire in the room and then these three persons came up and Azimoddin threw water on the fire and then it was found that the Victim had been burnt to death. The evidence is that these three persons then came to the

ground floor and woke up the other tenant Shinde. Azimoddin and Shinde were asked by PW-4 to inform the landlord who was residing in another house nearby. However, it was noticed that the main door of the building was latched from outside. Evidence is that one Appa Lature was given calls to open the door and then somebody opened the door from outside.

11. PW-13 Dharti deposed that her parents reached the house at about 3.00 – 4.00 a.m. in the night and they were loosing consciousness. She claimed to have been frightened. The evidence is that funeral of the Victim took place in the day time of 23rd October 1991. PW-13 Dharti deposed that thereafter when they were proceeding to Sayagaon in the Jeep, her father inquired from her and she told him about the incident and told that she had seen Accused Nos. 1 to 3 in the building at the relevant time. Her evidence is that they halted at Sayagaon on that day and next day

returned to Aurad.

12. If the evidence of the witnesses is perused, PW-13 Dharti is not supported by PW-4 Bhamabai or PW-12 Azimoddin about she informing any such thing of seeing the Accused Nos. 1 to 3 leaving the house concerned in the night of incident or even when it was day time of 23rd October 1991.

13. If the evidence of complainant Jadhav (PW-14) is perused, he claims that at about 3.00 a.m. in the night concerned, person Shivaji came by Jeep to his village Sayagaon and told him about the Victim getting burnt. His evidence is that he and his wife came down to Aurad. He saw the dead body of Victim in the North West corner of the room by the side of the wall. She had burnt. He claims that he was in grief and his wife was also in similar condition. One police constable handed over to him a paper and pen and asked him to write

his complaint and he had written that Victim died of burn injuries. After some time the constable asked him if he wanted to make complaint against any body and claimed that the body was to be sent for post-mortem. Complainant claims that he had told the constable that he wants to make inquiry with his daughter. He claims that after that he had written on the paper which was already handed over to him, that he would inform the police after making inquiry with his younger daughter. He claims that he added sentence in that regard in the application. In this context there is form Exhibit 108 which appears to mention that the Victim had committed suicide. It appears that A.D. No.33 of 1991 was registered on this basis at 5.15 a.m. on 23rd October 1991. The application Exhibit 109 mentions that the Victim had burnt and died. Admittedly, line was added that further information would be given after talking to the younger daughter.

14. Now, even if the evidence of PW-13 Dharti to the effect that on 23rd October 1991 while they were proceeding to Sayagaon after funeral, she had for the first time told her father about seeing Accused Nos. 1 to 3, was accepted to be correct, still if Exhibit 111, which complainant claims to have himself written and submitted after he had a tiff with PW-18 P.S.I. Khan, is perused, even this document did not mention that PW-13 Dharti had told about seeing the Accused Nos. 1 to 3 leaving the spot in the course of incident. Rather Exhibit 111 claimed that the Accused Nos. 1 to 5 had jumped over the wall of the house and entered the house and burnt and killed his daughter. He claims that the Accused persons used to tease his daughter and he had scolded Accused No.2 Nandkumar in this regard, in the past. He rather mentioned about witness Bablu Sharma objecting to the Accused persons coming in the lane in the night concerned. However, he did not write that his daughter had told him about seeing Accused Nos. 1

to 3 leaving the spot in the course of incident.

15. The trial Court has, in exhaustive details, discussed the evidence on this count and observed that the evidence of PW-13 Dharti is not supported by any other witness. Trial Court observed that PW-13 had not mentioned in this regard in her statement to Police also on 24th October 1991 and it was material omission, as entire case of the prosecution was resting on such statement. The trial Court discussed the evidence of PW-13 Dharti as well as her father PW-14 Jadhav and did not accept the same. The trial Court found that there was no material to show that PW-13 Dharti, in the course of incident, told about seeing Accused Nos. 1 to 3, to PW-12 Azimoddin or PW-4 Bhamabai. Even after the incident, on 23rd October 1991 also in the day time, she did not disclose any such thing to any body.

16. The trial Court has discussed that if

Victim was set on fire by pouring kerosene, why she had not raised shout or cries. Trial Court concluded that truth about the incident was not forthcoming. PW-12 Azimoddin and PW-13 Dharti were sleeping in the adjoining room and it was not possible that they had not heard any shrieks if the Victim had been forcibly attacked. There was no material in support that the Victim was made unconscious before burning.

17. We have gone through the other evidence also which is brought on record by the prosecution, like that of PW-1 Vijaykumar Kulkarni regarding the Inquest Panchnama and PW-15 Dr. Angad Kadam who did the post-mortem. PW-1 Vijaykumar claims that the Victim did not have burn injuries on her back. However, Dr. Angad found that Victim was 100% burnt and had even injury on her back. There is evidence of PW-17 Head Constable Dnyanoba Gaikwad regarding the Inquest Panchnama he prepared as well as the Spot

Panchnama. The Spot Panchnama showed the incident of burning near the wall. The learned A.P.P. accepted that no scientific evidence was collected from the spot which could connect the Accused persons to the spot. Prosecution brought on record the evidence of PW-18 P.S.I. Khan, PW-19 Narhari Athawale who took over investigation from P.S.I. Khan on 25th October 1991, as well as evidence of PW-20 Sayasrao Sanap, P.I. from C.I.D. who had investigated the matter after 26th December 1991. From the evidence of investigating officers, the various contradictions and omissions were proved.

18. Going through the material available on record, the earlier conduct of the Accused persons tried to be proved by the prosecution, even if the same was to be accepted, would by itself not be sufficient circumstance to presume guilt of rape and murder by the Accused persons. The evidence of PW-13 Dharti regarding her seeing the Accused Nos. 1 to 3 leaving the spot in the course of the

incident, has been discarded by the trial Court for the various reasons recorded. We have gone through the reasons recorded. We find from the record that the view taken by the trial Court in this regard is a possible view, looking to the observations regarding conduct of the witness. We also find that it was unnatural that if Dharti had really seen the Accused Nos. 1 to 3 at the spot, she would not tell the same to PW-12 Azimoddin immediately, whom she had already woken up and PW-4 Bhamabai, to whom they had run down for help in the course of incident. Had she told such facts, the first report of suicide would not have been there. The natural conduct of the complainant also, even if he was in shock, would have been to ask as to what happened to whoever were on the spot. It is unnatural that he would not ask his own daughter who was in the neighbouring room at the time of incident, as to what happened. Thus, we do not find fault with the reasonings and conclusions recorded by the trial Court as they

are possible view. The present matter being Appeal against acquittal, it would not be appropriate to interfere with the Judgment of the trial Court, if the comprehensive reading from the material available, depicts that the view taken by the trial Court is a possible view.

19. For such reasons, we agree with the trial Court that the prosecution has failed to prove that the Accused persons committed criminal house breaking by night and murdered the Victim. Although gang-rape was alleged by the prosecution, no evidence in this regard was brought on record.

20. For the above reasons, the Criminal Appeal is dismissed.

[A.I.S.CHEEMA, J.]

[S.S. SHINDE, J.]