

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,  
BENCH AT AURANGABAD**

**APPELLATE SIDE JURISDICTION**

**CRIMINAL APPEAL NO.: 331 OF 2012**

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| <b>Keshav S/o. Shriram Kendre,</b> ]<br>Age: 37 years, Occu.: Driver, ]<br>R/o. Murud, Tq. & District: Latur. ] | <b>...APPELLANT</b><br><b><u>[ORIG.ACCUSED 1].</u></b> |
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**VERSUS**

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| <b>The State of Maharashtra.</b> ]<br>(Copy to be served on G.P. ]<br>of High Court Bench at ]<br>Aurangabad. ]... | <b><u>RESPONDENT</u></b> |
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Mr. S. J. Salgre, Advocate for the Appellant (Appointed).  
 Mr. K. S. Patil, A.P.P. for the Respondent.

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**CORAM:- T. V. NALAWADE &  
SMT. I. K. JAIN, JJ.  
DATED:- 19th MARCH, 2015.**

**ORAL JUDGMENT [PER SMT.I.K.JAIN, J.]:**

. The Appellant/ original accused has preferred this appeal against the judgment and order dated 30<sup>th</sup> March, 2012 passed by the learned Additional Sessions Judge, Ahmedpur in Sessions Case No.75 of 2011 (New), 32 of 2010 (Old). By the said judgment and order the learned Additional Sessions Judge convicted and sentenced the accused/ appellant as under:

| Sections             | Sentence                                                                                                |
|----------------------|---------------------------------------------------------------------------------------------------------|
| 302 read with 34 IPC | Rigorous Imprisonment for life and fine of Rs.2,000/-, in default Rigorous Imprisonment for two months. |
| 392 IPC              | Rigorous Imprisonment for 3 years and fine of Rs.1,000/-, in default Rigorous Imprisonment for 1 month. |
| 201 read with 34 IPC | Rigorous Imprisonment for 3 years and fine of Rs.1,000/-, in default Rigorous Imprisonment for 1 month. |

The learned Additional Sessions Judge directed the substantive sentence of imprisonment to run concurrently.

2. For the sake of convenience we shall refer the Appellant as he was referred before the trial court i.e. original accused.

3. The prosecution case briefly stated is as under:

(i) Bapurao Shamrao Nagargoje, resident of Malakoli, was the driver on truck-cum-water tanker No.MH-31-M-5493. Through the said truck-cum-water tanker he used to supply water to the villagers of Malegaon and villages around Malegaon. The said truck-cum-water tanker was owned by P.W.13 Manik Kagne.

(ii) On 5th June, 2009, at around 06.00 a.m. Bapurao left the

house as usual for supplying the water in the villages. At 04.00 p.m. he returned home. Thereafter, he had been to Loha at the house of his master to collect money. He again came back to the house at 07.00 p.m. and had his dinner. Then, Bapurao went to Malegaon for supplying water and did not return. As water was not supplied villagers came to the house of Bapurao and inquired. On search whereabouts of Bapurao were not found. So, P.W.5 Mahananda, mother of Bapurao lodged missing report to Police Station, Malakoli.

(iii) On 7<sup>th</sup> June, 2009 at about 10.00 a.m. Babu Gurling Swami saw the dead body lying beneath Dukarband bridge. He reported the same to Ahmedpur Police Station. P.W.7 P.H.C. Annarao Kanpurne registered A.D. No.23 of 2009. Its inquiry was handed over to P.W.17 PSI Nagorao Kapale.

(iv) P.W.17 PSI Kapale visited the spot and recorded spot and inquest Panchanamas. The dead body was then forwarded to Government Hospital, Ahmedpur for postmortem.

(v) P.W.1 Dr. Vishnu Padature was the Medical Officer on duty at the Government Hospital, Ahmedpur. He conducted postmortem examination. CLW over back side of left ear, size 2x1x1", was noticed on the dead body. Doctor opined probable cause of death as asphyxia due to strangulation.

(vi) Therefore, P.W.17 PSI Kapale lodged report Exhibit-78. Crime No.98 of 2009 was registered under sections, 302 and 201 IPC against an unknown person. Investigation was taken over by PW17 PSI Kapale.

(vii) During investigation Investigating Officer visited the house of deceased at Malakoli. P.W.5 Mahananda, mother of the deceased was interrogated. All the Police Stations in the State of Maharashtra were informed about the missing truck-cum-water tanker No.MH-31-M-5493.

(viii) Investigating officer then received message from Bhosari Police Station that the truck-cum-water tanker came to be seized from accused Keshav. It was identified by the relatives of deceased. Accused was arrested. Seizure Panchanama of the truck-cum-water tanker was drawn. On 13<sup>th</sup> June, 2009 investigating officer returned to Ahmedpur along with the accused.

(ix) When in police custody accused Keshav gave memorandum to discover Tommy and handkerchief concealed in the truck-cum-water tanker. At his instance bloodstained Tommy and handkerchief concealed in the truck-cum-water tanker were recovered. Accordingly, memorandum and

recovery Panchanama came to be drawn.

(x) Thereafter, accused Keshav led P.W.17 PSI Kapale and the staff to village Dhoki at the house of absconding accused Shamrao Pawar. Accused Shamrao Pawar was not found in the house. At the instance of accused No.1 Keshav one locked box kept in the house of accused Shamrao was opened. Accused Shamrao was found in that box and he was arrested. The clothes of both the accused were seized. The seized Muddemal was sent to Chemical Analyser for examination. The statements of witnesses were recorded. On completion of investigation charge sheet came to be filed against the Appellant/ accused and absconding accused before Judicial Magistrate, First Class, Ahmedpur, who, in turn, committed the case for trial to the Court of Sessions.

4. Charge was framed against the Appellant/ accused under sections 302, 201 and 392 IPC. Appellant pleaded not guilty to the charge and claimed to be tried. His defence was of total denial and false implication. He raised the defence that he was called by Swami Kishan Jadhav and Balaji Nagargoje to Pune. At Pune he alighted from bus at Chandan Nagar. He was then called at Bhosari. He went to Bhosari where police arrested him and brought to Ahmedpur Police Station.

5. On going through the evidence of prosecution witnesses learned Additional Sessions Judge convicted and sentenced the appellant as stated hereinbefore in para No.1. Hence, this appeal questioning the correctness of judgment of conviction and order of sentence.

6. We have heard the learned Advocate for the Appellant and learned A.P.P. for the State. We have carefully considered their submissions, the judgment and order passed by the learned Additional Sessions Judge and the evidence on record. After meticulously considering the same, we are of the opinion that there is no merit in the appeal for the reasons mentioned below.

7. Needless to say that in a case of murder factum of homicidal death is to be established by the prosecution beyond reasonable doubt. P.W.1 Dr. Vishnu Padature was the Medical Officer on duty at Rural Hospital, Ahmedpur. On 7<sup>th</sup> June, 2009 he conducted postmortem examination on the dead body and found CLW over back side of left ear, size 2x1x1", eyes closed, tongue protruded, and cyanosis of face. Doctor opined probable cause of death as asphyxia due to strangulation. The injury was found ante-mortem. In cross examination doctor stated that the injury can be a cause of death.

8. It can be mentioned here that accused has not seriously disputed that deceased met with homicidal death. Further the evidence of P.W.1 Dr. Padature, postmortem report Exhibit-23, spot Panchanama Exhibit-26 25A, and inquest Panchanama Exhibit-25 proved by P.W.2 Chandrakant Kotwad clearly show that the death in question was homicidal death.

9. To establish that accused was the author of commission of crime, prosecution case exclusively rests on circumstantial evidence. In respect to the law on circumstantial evidence learned counsel for Appellant relied upon the following decisions:

- a) **Mustkeem alias Sirajudeen V. State of Rajasthan <sup>1</sup>.**
- b) **Surendra V. State of Rajasthan <sup>2</sup>.**
- c) **Geeta Keshav Shankar @ Geeta Mukesh Kharewa & Anr. Vs. State of Maharashtra <sup>3</sup>.**  
and
- d) **Sambhaji S/o. Chindhuji Pachare Vs. State of Maharashtra <sup>4</sup>.**

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1: AIR 2011 S.C. 2769.

2: AIR 2012 SC (Supp) 78

3: 2009 ALL MR (Cri) 642 (Bom)

4: AIR (34) 1947 Privy Council 67

10. We have carefully gone through the above authorities. These authorities reiterate well settled proposition of law on circumstantial evidence.

The Supreme Court has held that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. A legal trend would further show that for a conviction in murder case on circumstantial evidence, following conditions must be fulfilled:

*(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established.*

*(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is, they should not be explainable on any other hypothesis except that the accused is guilty.*

*(iii) The circumstances should be of a conclusive nature and tendency.*

*(iv) They should exclude every possible hypothesis except the one to be proved.*

*(v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and it must show that in all human*

*probability, the act must have been done by the accused and the accused alone.*

Keeping in view the settled law on circumstantial evidence, the evidence of prosecution witnesses examined in the present case needs to be scrutinized. prosecution has examined in all 17 witnesses in support of its case. The conviction of appellant is based on the following circumstances:

- (A) **RECOVERY OF TRUCK-CUM-WATER TANKER FROM THE ACCUSED KESHAV.**
- (B) **DISCOVERY OF BLOODSTAINED TOMMY AND HANDKERCHIEF AT THE INSTANCE OF ACCUSED KESHAV.**
- (C) **MOTIVE.**

**11. RECOVERY OF TRUCK-CUM-WATER TANKER FROM THE ACCUSED KESHAV.**

(i) To prove this circumstance prosecution has placed strong reliance on the evidence of P.W.15 Bhagwan Mandlik and P.W.16 API Prabhakar Pawar. API Pawar was attached to Bhosari Police Station at the relevant time. On 7th June, 2009 he was on patrolling duty. At about

03.30 p.m. when patrolling squad reached near Nasik Phata they saw one truck parked and the driver of truck making inquiry with the passersby. API Pawar suspected and went near the truck. On seeing police party driver of the truck tried to run away. With the help of police staff he was chased. API Pawar interrogated the driver. He was asked to produce the documents of truck and driving licence. The driver could not give satisfactory answer and tried to avoid the same. He disclosed his name as Keshav Shriram Kendre i.e. the present appellant. Another person sitting in the cabin with the driver was Swami Kisan Jadhav. Appellant was taken in custody as per section 41-(d) of the Code of Criminal Procedure. API Pawar seized the truck and recorded its seizure Panchanama Exhibit-60. Accused and his companion were arrested. Crime No.252 of 2009 was registered at Bhosari Police Station.

(ii) The evidence of API Pawar further shows that during investigation he came to know that seized truck was stolen property of Crime No.98 of 2009 registered at Ahmedpur Police Station. Accordingly, he informed Police Station Ahmedpur regarding seizure of the truck. On receiving message P.W.17 API Kapale along with police staff and relatives of the deceased went to Bhosari Police

Station. The truck was identified by the relatives of the deceased. On transfer warrant he took the custody of accused and seized the truck vide Panchanama Exhibit-28.

(iii) The testimony of P.W.16 API Pawar is fully corroborated by Pancha Witness P.W.15 Bhagwant Mandlik. He stated that on 7th June, 2009 police called him to act as Pancha and truck was seized from the accused in his presence. It is pertinent to note that P.W.15 Bhagwan was resident of Dapoli, district Pune. He had no reason to depose a lie against the accused. A stray admission is elicited in his cross examination. He admitted that vehicles were not found parked on the spot. Referring to this admission it was vehemently contended by learned counsel for Appellant that vehicles include the truck in question and if it was not found parked the entire process of seizure of truck goes away. He also submitted that the truck was never seized from the accused and prosecution has failed to establish this circumstance beyond doubt.

(iv) If evidence of P.W.15 Bhagwan and P.W.16 API Pawar is minutely scrutinized it is apparent that the evidence is consistent except the stray admission referred above. P.W.15 Bhagwan never stated that vehicles included truck in question. From his entire evidence it can be seen that

the admission pertains to the other vehicles and not the truck. Therefore, we do not find any merit in the contention of the learned counsel for the Appellant.

(v) In this connection learned A.P.P. referred to the following authorities -

**(a) Net Raj Singh V/s State of Madhya Pradesh**<sup>5</sup>

**(b) Mohan Lal and another V/s Aji Singh and another**<sup>6</sup>

(vi) Learned A.P.P. submitted that under section 114 of the Code of Criminal Procedure illustration (a) presumption needs to be drawn against the Appellant accused as he has failed to explain possession of stolen truck. We have gone through the decision relied upon by the learned A.P.P. From these authorities it is clear that provisions of Section 114 Illustration (a) can be extended even to a murder case.

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5: 1997 (3) SCC 525

6: AIR 1978 SC 1183

(vii) The learned counsel for the Appellant accused made a futile attempt to show that in a criminal trial burden is always on the prosecution and no such presumption under section 114 Illustration (a) can be drawn against the accused. He relied upon the following authorities:

**(a) Deoraj Deju Suvarna and etc., V/s State of Maharashtra <sup>7</sup>**

**(b) Smt. Alka Gopinath Dhanawade Vs. The State of Maharashtra <sup>8</sup>**

(viii) The authority of Smt. Alka Gopinath Dhanawade (Supra) is helpful to the prosecution and it is against the accused. It relates to section 106 of the Evidence Act. In several decisions the Supreme Court has held that the principles which underlies section 106 of the Evidence Act can be applied in the cases when any fact is specially within the knowledge of any person

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7: 1994 Cri.L.J. 3602 (Bom)      8: 2013 ALL MR (Cri) 2835 (Bom)

and he does not discharge the burden of proving that fact within his knowledge. If the accused fails to offer an explanation on the basis of facts within his special knowledge he fails to discharge the burden cast upon him by section 106 of the Evidence Act. In a case based on circumstantial evidence if accused fails to offer a reasonable explanation in discharge of the burden placed on him that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in criminal trial which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon the facts within his knowledge which could not support any theory of hypothesis compatible with his innocence the Court can consider his failure to adduce any explanation as an additional link which completes the chain. In the present case, prosecution has proved this circumstance beyond reasonable doubt against the accused through the cogent evidence of P.W.15

Bhagwan and P.W.16 API Pawar.

**12. DISCOVERY OF BLOODSTAINED TOMMY AND  
HANDKERCHIEF AT THE INSTANCE OF  
ACCUSED KESHAVE.**

(i) During the course of arguments learned counsel for the Appellant relied upon following decisions in respect to the recovery under section 27 of the Evidence Act.

**(a) Pulukuri Kottaya and others Vs. Emperor <sup>9</sup>.**

**(b) Deoraj Deju Suvarna and etc. V/s State of  
Maharashtra <sup>10</sup>.**

(ii) The decision of Privy Council in Pulukuri Kottaya and others is a landmark decision which still holds the field. The law relating to discovery under section 27 of the Evidence Act is settled. The extent of the information admissible under section 27 of the Indian Evidence Act depends upon the exact nature

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9: AIR (34) 1947 Privy Council 67.

10: 1994 Cri.L.J. 3602 (Bom).

of the fact discovered to which such information is required to relate. In the present case prosecution examined P.W.9 Gopal Tidke, Panch and P.W.17 API Kapale to establish discovery of Tommy and handkerchief at the instance of Appellant accused. P.W.9 Gopal Tidke has not supported the prosecution. The learned trial Judge relied upon the evidence the evidence of P.W.17 API Kapale, Investigating Officer as his evidence was found reliable. According to API Kapale on 13th June, 2009 accused Keshav was in custody. He made a voluntary statement to produce Tommy and Handkerchief kept by him. His memorandum was drawn vide Exhibit-41. It is further stated by API Kapale that then accused led them to Malegaon near a gate of Khandoba. He pointed out a tanker parked there. Its Panchanama was recorded as per Exhibit-42. Then, accused led them to a truck and produced Tommy and handkerchief hidden in the truck. The articles were seized. The seizure Panchanama was accordingly drawn. The same was

proved by API Kapale at Exhibit-42. In the piercing cross examination of the Investigating Officer nothing otherwise could be extracted. He had no reason to grind an axe against the accused. As his evidence inspired confidence trial Court placed reliance on the same. We do not find any reason to take a different view than taken by the trial Court.

### 13. **MOTIVE.**

(i) Another circumstance relied upon by the prosecution is the motive to commit the crime. It is needless to state that in a case based on circumstantial evidence, motive assumes pertinent significance as existence of motive is an enlightening factor in a process of presumptive reasoning in such a case. The absence of motive however, puts the court on its guard to scrutinize the circumstances more carefully to ensure that surmises and conjectures do not take place of legal proof.

From the incriminating circumstances discussed in the foregoing paras, motive of the accused in the present case has been established i.e. to rob the truck and cause the death of victim so that he should not implicate him. As motive is apparent prosecution does safely cross this hurdle too.

14. All the above circumstances conclusively prove that all links in the chain are so complete that they do not leave any reasonable ground for a conclusion consistent with the hypothesis of the innocence of the accused. On the contrary, the same are of exclusive nature consistent only with the hypothesis of the guilt of the accused and conclusively lead to an irresistible conclusion that the accused and accused alone is responsible for the commission of crime. As such we do not find merit in the Appeal. Appeal is dismissed.

15. Office to communicate this decision to Appellant through the concerned jail authority.

16. We quantify the legal fees to be paid to Mr. Salgare, by the High Court Legal Services Committee, to Rs.5,000/- (Rupees five thousand only).

**[SMT. I. K. JAIN, J]**

**[T. V. NALAWADE, J.]**

Dated:19/03/2015.

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