

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

CRIMINAL APPEAL NO.375 OF 2014

The State of Maharashtra
Through V.G.Tambe, Pl,
Ghargaon Police Station,
Tq. Sangamner, Dist. Ahmednagar

APPELLANT
[Ori. Complainant]

VERSUS

Santosh Baban Madhe,
Age 25 Years, Occu. Labour,
R/o. Kelewadi, Tq. Sangamner,
Dist. Ahmednagar

RESPONDENT
[Orig. Accused]

...
Mr. V.D.Godbharle, A.P.P. for Appellant – State
Mr. S.S.Bora, Advocate [Appointed] for Respondent
...

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

Reserved on : 25.06.2015
Pronounced on : 02.07.2015

JUDGMENT [Per S.S.Shinde, J.]:

1] This Criminal Appeal is filed by the Appellant – State, challenging the Judgment and Order dated 10.01.2014 passed by the Additional Sessions Judge, Sangamner in Sessions Case No.25/2012, thereby acquitting the accused for the offence punishable under Section 302 of I.P. Code.

The prosecution case, in brief, is as under:

2] Complainant Manisha Bharat Bhutambare, resident at village Pavaladara, Taluka Parner, District Ahmednagar, lodged a complaint at Exhibit-11 on 21.12.2011 before Ghargaon Police Station, alleging that, her mother was deserted by her father. Therefore, her mother was residing at village Ghargaon-Shelkewadi along with grandmother of complainant. Since last 2-3 Years prior to the incident, her mother was residing along with accused at village Kelewadi, as there were illicit relations in between them.

4] On 21.12.2011, accused made a phone call to the brother-in-law of complainant on Mobile and informed that, mother of complainant Rakhamabai died at around 3.00 a.m. Therefore, complainant along with her father-in-law and her husband went to village Kelewadi near the irrigation tank. The dead body of Rakhamabai was near the northern sidewall of irrigation store room. Complainant noticed the wounds on the forehead and on the backside of dead body. She also noticed scratch marks on both hands and chest of dead body.

5] It is further alleged that, as there were illicit relations in between accused, and deceased Rakhamabai, accused was always demanding money for drinking liquor, to Rakhamabai. On refusal to give money by Rakhamabai, accused was always assaulting Rakhamabai and was giving threat to kill her. These facts were disclosed to the complainant at Pavaladara, when deceased came to the complainant.

6] On 20.12.2011, deceased Rakhamabai received her wages. Accused demanded money to her for drinking liquor. As Rakhamabai refused to give money, accused assaulted her by means of hard and blunt object on her forehead, on the backside of her head and thereby killed her mother. On lodging complaint by the complainant, Crime No. I-111/2012 was registered at Ghargaon Police Station for the offence punishable under Section 302 of Indian Penal Code. After completion of investigation, accused was charge sheeted.

7] As the alleged offence is exclusively triable by

Court of Sessions, the Judicial Magistrate, F.C., Court No.4, Sangamner, committed matter to the Court of Additional Sessions Judge, Sangamner. Thereafter, charge was framed against accused, at Exhibit-2. The contents of it were read over and explained to the accused in vernacular. Accused pleaded not guilty and claimed the trial. Accordingly, his plea was recorded at Exhibit-3. The defence of the accused was of total denial. Consequently, accused denied evidence led by prosecution, by way of explanation, during his statement recorded under Section 313 of Criminal Procedure Code. Accused did not examine any witness in his defence.

8] After full-fledged trial, the trial Court acquitted the accused for the offence punishable under Section 302 of I.P. Code. Hence this Appeal.

9] The learned APP appearing for the Appellant – State invited our attention to the medical evidence and submits that, medical evidence unequivocally indicates that, death of the deceased was homicidal. It is submitted that, the prosecution proved all circumstances including the

deceased was last seen in the company of the accused soon before her death. It is submitted that, PW-4 Gajanan Kondaji Khade and PW-5 Parsharam Mahadu Shelar had seen the deceased in the company of the accused on 20.12.2011, and dead body of the deceased was found at 3.00 a.m. near storage tank on 21.12.2011. Therefore, the learned APP relying upon the evidence of prosecution witnesses submits that, the Appeal deserves to be allowed.

10] On the other hand, the learned Advocate Mr. Satyajit S. Bora [Appointed] made following submissions:

11] The entire case of the prosecution is based on circumstantial evidence, and if the entire evidence on record is perused, it is very difficult to come to the conclusion that, the respondent and respondent alone has committed murder of deceased Rakhamabai and as such, the prosecution has failed to prove its case beyond reasonable doubt. It is submitted that, the prosecution has failed to prove the chain of the circumstances, which would only point guilt of the respondent. It is submitted that, by appreciating all the material evidence brought before the

Court by the prosecution, the trial Court was pleased to acquit the accused / respondent and as such, there is no legal and just reason to interfere in the said finding. It is further submitted that, it is for the prosecution to either stand or fall on its legs and it is not expected of the accused to give any explanation.

12] It is further submitted that, the prosecution has tried to prove the motive for murder by examining PW-1 Manisha – daughter of deceased and PW-2 Budhabai – mother of deceased but both these witnesses have admitted in their cross that, since the time deceased developed illicit relations with the accused, they have cut off their relations with deceased, and according to prosecution, the alleged illicit relations between the accused and deceased were going on since last 2-3 years and as such, the alleged motive for killing the deceased for refusal to pay the money for liquor is not proved by the prosecution. It is further submitted that, the prosecution has tried to show that, deceased and accused were last seen together by PW-4 – Gajanan and PW-5 Parsharam but again, the trial Court has rightly observed in para no. 34 of

the Judgment that, both these witnesses cannot be believed to prove the case of prosecution for last seen together as both these witnesses do not inspire confidence. It is further submitted that, the prosecution is relying upon the memorandum statement of the accused, which led to discovery of the spot of incident and recovery of the stone but again the prosecution case cannot be believed even for a second for the reason that, the alleged stone recovered from the spot does not show that, it was having any blood stains, and *secondly*, the prosecution case is not that accused has killed the deceased on one spot and then dragged her body to the spot where the dead body was seen and as such, on this ground also, the prosecution case fails.

13] It is further submitted that, the another aspect for which the memorandum statement cannot be believed is that, the said statement was made when accused was handcuffed and as such, it cannot be said that, the statement was voluntary. It is further submitted that, the prosecution is also relying upon C.A. reports wherein the Chemical Analyzer has found blood stains on the cloths of

accused as well as deceased of blood group 'B'. Here again, the prosecution case cannot be believed for the reason that, though human blood of 'B' group was found on the cloths of deceased and accused, but the prosecution has failed to prove as to what was the blood group of deceased Rakhamabai. It is further submitted that, the prosecution case is further not believable for the reason that, at the time of seizure panchanama of cloths of deceased, no blood was detected on the petticoat whereas in CA report, blood is shown to be detected on petticoat. Similarly, no blood was detected on the stone, which was seized in recovery panchanama but C.A. report shows the blood on the stone. The Court below has rightly observed that, 'the M.M. articles were sent to C.A. on 29.12.2011 and same were received back on 30.12.2011 from C.A. and then again the M.A. articles were sent to C.A. on 10.01.2012 and during this period, the articles were not kept in the custody of M.M. Clerk and same were in the custody of Investigation Officer Tambe PW-7 and as such, this goes to show that, the possibility of tampering with the M.M. Articles by the Investigating Officer cannot be ruled out which creates doubt in the entire prosecution.

14] We have given careful consideration to the submissions of the learned APP appearing for the appellant – State, and the learned counsel appearing for the respondent. With their able assistance, we have perused the entire evidence. It appears that, the entire prosecution case rests upon circumstantial evidence. The prosecution examined PW-1 Manisha Bharat Bhutambare i.e. daughter of deceased and PW-2 Budhabai Haribhau Khande, mother of deceased, to prove motive for commission of offence by the accused. PW-1 Manisha, in her evidence stated that, deceased Rakhamabai was her mother. Her father left her mother. Thereafter, her mother was residing at Shelkewadi under the village Ghargaon with her grandmother Shantabai Maruti Madhe. One Santosh Madhe i.e. accused, resident of Kelewadi, who belongs to their community, developed illicit relation with her mother. Accused and her mother, both were addicted to liquor. So far actual incident of the death is concerned, she stated that, on the day of incident, her brother-in-law Sharad Bhutambare received a phone call on his mobile from accused, he informed that, mother of PW-1 died. Therefore, they went to village Kelewadi and they noticed dead body of her mother near an irrigation tank. She noticed dead body of her mother

Rakhamabai. She noticed wounds on the forehead and on the backside of the head of the dead body. She also noticed scratch marks on both the hands, so also she noticed scratch injuries on the chest of the dead body.

15] She further stated that, her mother and accused both were addicted to liquor and quarrels used to take place in between them. Accused was demanding money to deceased Rakhamabai for drinking liquor. On failure to give money, he was giving threats to kill Rakhamabai. However, she stated that, her mother was doing labour work. She further stated that, the incident had taken place due to refusal by her mother to give money to the accused, and accordingly, the complaint was lodged with Ghargaon Police Station.

During her cross examination, she stated that, she has not personally seen the incident. Before her marriage, she was residing along with her maternal uncle. Her grandmother and maternal uncle always used to tell Rakhamabai not to keep illicit relation with the accused. However, deceased Rakhamabai was not listening to them,

and therefore, her grandmother, her maternal uncle and PW-1 had cut off their relations with deceased Rakhamabai. They were not on visiting terms with Rakhamabai. She further admitted that, on the day of incident, her mother consumed liquor. She has admitted in her cross examination that, she stated before the Judicial Magistrate First Class that, she had not seen the incident of killing Rakhamabai, and therefore, she was not knowing anything else. She further stated that, she was not willing to give statement. She admitted the thumb impression put by him on statement under Section 164 of Criminal Procedure Code recorded before the Judicial Magistrate First Class. It is also stated that, due to illicit relations with Rakhamabai, PW-1 and her relatives were annoyed with the accused.

If the evidence of this witness is considered in its entirety, she herself has not witnessed the incident. *Secondly*, during her cross examination, she admitted that, since her mother was not cohabiting with her father, before marriage of PW-1, she was residing along with her maternal uncle. It has also stated that, her maternal uncle, grandmother and PW-1 did not maintain relations with

Rakhamabai because of her immoral behaviour of keeping illicit relations with the accused. Therefore, the evidence of this witness is not useful to the prosecution to prove motive that, the accused used to demand money from the deceased for consuming liquor. This witness had no opportunity to witness such demand of money by the accused to the deceased.

16] The prosecution examined Budhabai Haribhau Khande as PW-2 to prove the motive. This witness also stated that, Rakhamabai and Santosh Madhe i.e. accused were addicted to liquor. On not giving money by Rakhamabai, Santosh was assaulting her. However, she has not witnessed the incident. She admitted in her cross examination that, Rakhamabai was maintaining illicit relations with Santosh, they disliked it, and therefore, all relatives were annoyed with Santosh Madhe. She never went to Rakhamabai afterwards. She further admitted that, when she went near the dead body at that time there was a smell of liquor from the said dead body. The irrigation tank is in hilly area. The road near that tank is in up and down condition. There are stones and rocks on the said road.

There were big stones lying on the earth near the dead body. At the place where the dead body was lying was having slope. She further stated that, it is true that, she is giving evidence against the accused since she was annoyed by the act of the accused of keeping illicit relations with her daughter Rakhamabai.

If the evidence of this witness is considered in its entirety, it appears that, since deceased Rakhamabai was maintaining illicit relations with the accused in spite of telling her to cut off the said relations, this witness was not on visiting terms with the deceased, and therefore, she had no opportunity to witness the quarrel between the accused and the deceased and further that the accused used to demand money from the deceased for consuming liquor.

17] The prosecution examined PW-3 Sandip Khandu Burke as Panch Witness. According to this witness, the accused, who was present in the Police Station stated that, he will point out the place where he killed deceased Rakhamabai by means of stone, and accordingly, the said spot was shown by him near the land, where the said spot

was shown by the accused, he admitted that, he killed the deceased at that place, wherein small pieces of stones for the construction of road were lying. Accused pointed out the spot and the stone by which he killed Rakhamabai. The said stone was seized by the Police. According to this witness, panchanama was prepared and same was signed by him and other panch witness. In cross examination, he admitted that, the distance between Aklapur fata and Kelewadi is of near about 1 ½ kilo meters. He is aware about the location of irrigation tank of Kelewadi. He stated that, the distance between the irrigation tank and village Kelewadi is near about 1 to 1 ½ kilo meters. The land of Ismail Shaikh is situated in between Aklapur Fata and Kelewadi. From the land of Ismail Malik Shaikh, Kelewadi is at the distance of near about 1 to 1 ½ kilo meters. Village Kelewadi is situated within hilly area. While proceeding towards Kelewadi, so many stones like the seized stone lying on both the side of road. Except the seized stone nothing was noticed at the place of incident. The seized stone was in the same condition as it is appearing now before the Court. It is true that, the seized stone is of *Murum*.

18] If the evidence of this witness is carefully perused, it is abundantly clear that, the dead body was recovered nearby storage tank and the stone allegedly recovered, and seized by the Police at the instance of the accused is about 3 kilo meters away. When the witnesses have admitted that, nearby storage tank dead body was found, number of stones are lying there, it is highly improbable that, the accused killed the deceased 3 kilo meters away, that too, by stone and then, the dead body was taken near the storage tank. In fact, the prosecution has not led any evidence that, how the dead body was taken by the accused from the spot, which was shown by him and the dead body was actually found. In fact, approximate distance between two places is three kilo meters, and therefore, it was incumbent upon the prosecution to bring on record the evidence showing that, the accused killed the deceased at the spot, which was shown by him and he took the dead body near the storage tank so as to destroy the evidence. However, there is no evidence on record to that extent. Admittedly, the prosecution has not brought on record the spot panchanama. In absence of bringing the spot panchanama on record, the prosecution has not proved where actually

the deceased was killed. Admittedly, nothing was recovered from the spot except stone, which was shown by the accused.

19] The prosecution examined PW-4 Gajanan Kondaji Khade to prove that, the accused was last seen in the company of the deceased on 20.12.2011. He stated that, when he was proceeding towards Pokhari from Kelewadi fata, on 20.12.2011, during morning time, he noticed that, by the side of road Rakhamabai and accused were scuffling, and they were under the influence of liquor. He went to Parner from Pokhari on that day. During his cross examination, he stated before the Police that, he personally saw, when Rakhamabai and accused were scuffling by the side of road. However, he cannot assign any reason as to why this fact is not appearing in his police statement. However, when he was confronted with the portion marked 'A' from his police statement, he stated that, said portion marked 'A' is true and correct. It is true that if a person is unable to understand anything else on account of influence of liquor then in such condition that person may fall on the ground. The Kelewadi road is of odd

level having ditches. It is further stated that, within the limits of Kelewadi the portion is of Murum, rocks, stones, etc. However, PW-7 Vasant Ganpat Tambe, who was attached to Ghargaon Police Station, at the relevant time, was the Investigating Officer. In his evidence he stated that, PW-4 i.e. Gajanan Khade did not state before him that, at the time of incident, accused and deceased were scuffling. Therefore, there is material improvement in the version of PW-4 that, he saw Rakhamabai and accused were scuffling by the side of road.

20] PW-5 Parsharam Mahadu Shelar, in his evidence stated that, he know accused. On 20.12.2011, he was going to Aaale-fata from his village by motor bike. From village Bota, Kelewadi fata is of the distance of near about 1 ½ kilo meter. At Kelewadi-fata, he noticed that, accused and Rakhamabai were scuffling and they were under influence of liquor. It was near about 5.00 to 6.00 p.m. However, during his cross examination, he stated that, his statement was not recorded by the Police, and for the first time he is telling before the Court that, he saw the accused and Rakhamabai were scuffling under the

influence of liquor at about 5.00 to 6.00 p.m. on 20.12.2011. He also admitted in his cross examination that, he noticed that, both of them were unable to control their balance. The evidence of this witness for the first time before the Court appears to be highly doubtful. If the version of PW-4 and PW-5 is compared, PW-4 in his evidence stated that, on 20.12.2011, during morning hour, he saw the accused and deceased were scuffling by the side of road. However, PW-5 stated that, he saw the accused and deceased Rakhamabai were scuffling at about 5.00 to 6.00 p.m. on the road side. The prosecution has not brought on record, whether both were staying on said road side for whole day under influence of liquor or otherwise. Therefore, it is not safe to rely upon the evidence of PW-4 and PW-5 so as to accept the prosecution case that, the deceased was last seen in the company of the accused on 20th December, 2011.

21] The prosecution examined PW-6 Dr. Bhaskar Madhavrao Bhavar. In his deposition, he stated number of injuries sustained by the deceased. However, during his cross examination, he admitted that, the injury no. 1

mentioned in column no. 19 is possible if person falls on the rough rocky surface or stones, when person is under the influence of liquor. Injury no. 2 is also possible if a person under influence of alcohol falls on stone or rough surface facing to sky. The scratch marks noticed on both the elbows are possible if a person falls on the ground and elbows are coming into contact of rough surface.

Therefore, the evidence of PW-6 clearly does not disclose that, the death of deceased Rakhamabai was homicidal.

22] Vasant Ganpat Tambe, who carried out the investigation, is examined as PW-7. Upon careful perusal of his evidence, nowhere he stated that, spot panchanama was prepared. He stated that, in pursuant to the memorandum statement of accused, one stone was discovered and panchanama at Exh. 23 was prepared. He admitted during his examination that, deceased was addicted to liquor. On the day of incident, deceased had consumed liquor. There were illicit relations in between the accused and deceased. Village Kelewadi is situated within

hilly area. The soil within limits the Kelewadi is of Murum, rocks etc. Kelewadi is towards the south of Aklapur Phata. The distance in between Aklapur phata and place of incident is near about three kilo meters. Kelewadi Phata to Kelewadi dam road was a *Kachha* road. While going towards Kelewadi dam from Akalapur phata, there are some *Vasties*. He did not record statements of witnesses from village Kelewadi. He did not record the statements of Gajanan Khade and Parshuram Shelar on 21.12.2011, though they were available on that day. He did not prepare spot panchanama. He visited the spot where the dead body was lying. Nothing was seized by him from that spot. Though he visited the spot, he did not feel it necessary to prepare the spot panchanama. He further stated that, it is not the prosecution case that, deceased was killed by the accused at one place and then he removed dead body and dropped it at a different place. He stated that, the stone which was seized under panchanama at Exh. 23 was not having blood on it. However, C.A. report shows that, blood group 'B' was found on all articles seized by the Investigating Officer. However, the prosecution has not produced on record any C.A. report regarding the blood group of the accused or the deceased. Therefore, in

absence of bringing on record blood group of the accused or the deceased, the report of C.A. finding 'B' group on the seized articles is of no consequence and not helpful to the prosecution.

23] On independent scrutiny and re-appreciation of the entire evidence brought on record by the prosecution, we are of the opinion that, the prosecution has utterly failed to establish the guilt of the accused. The findings recorded by the trial Court appears to be in consonance with the evidence brought on record. We are in the agreement with the findings recorded by the trial Court that, the view taken by the trial court is possible view.

The Supreme Court in the case of **Nepal Singh V/s State of Haryana**, in Criminal Appeal No. 383 of 2002 decided on 24.04.2009, held that, in case of acquittal, there is a double presumption in favour of the accused-firstly, the presumption of innocence is available to him-secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened.

24] Yet in another judgment in the case of **State of A.P. V/s M. Madhusudhan Rao**¹ the Supreme Court in para 13 held thus :-

“13. There is no embargo on the appellate court to review, reappreciate or reconsider the evidence upon which the order of acquittal is founded. Yet, generally, the order of acquittal is not interfered with because the presumption of innocence, which is otherwise available to an accused under the fundamental principles of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a court of law, gets further reinforced and strengthened by his acquittal. It is also trite that if two views are possible on the evidence adduced in the case and the one favourable to the accused has been taken by the trial court, it should not be disturbed. Nevertheless, where the approach of the lower court in considering the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse, then, to prevent

¹. 2009 All MR(Cri) 547 (S.C.)

miscarriage of justice, the appellate court is obliged to interfere.”

25] Yet in another judgment in the case of ***Muralidhar alias Gidda and another Vs. State of Karnataka***² the Supreme Court in para 12 held thus:-

12. The approach of the appellate Court in the appeal against acquittal has been dealt with by this Court in *Tulsiram Kanu Vs. State*, AIR 1954 SC 1, *Madan Mohan Singh Vs. State of U.P.*, AIR 1954 SC 637, *Atley Vs. State of U.P.*, AIR 1955 SC 807, *Aher Raja Khima Vs. State of Saurashtra*, AIR 1956 SC 217, *Balbir Singh Vs. State of Punjab*, AIR 1957 SC 216, *M.G. Agarwal Vs. State of Maharashtra*, AIR 1963 SC 200, *Noor Khan Vs. State of Rajasthan*, AIR 1964 SC 286, *Khedu Mohton Vs. State of Bihar*, [1970] 2 SCC 450, *Shivaji Sahabrao Bobade Vs. State of Maharashtra*, [1973] 2 SCC 793, *Lekha Yadav Vs. State of Bihar*, [1973] 2 SCC 424, *Khem Karan Vs. State of U.P.*, [1974] 4 SCC 603, *Bishan Singh Vs. State of Punjab*, [1974] 3 SCC 288, *Umedbhai Jadavbhai Vs. State of Gujarat*, [1978] 1 SCC 228, *K. Gopal Reddy Vs. State of A.P.*, [1979] 1 SCC 355, *Tota Singh Vs. State of Punjab*, [1987] 2 SCC 529, *Ram Kumar Vs. State of Haryana*, 1995 Supp [1] SCC 248,

2. 2014 [4] Mh.L.J.[Cri.] 353

Madan Lal Vs. State of J & K, [1997] 7 SCC 677, Sambasivan Vs. State of Kerala, [1998] 5 SCC 412, Bhagwan Singh Vs. State of M.P. [2002] 4 SCC 85, Harijana Thirupala Vs. Public Prosecutor, High Court of A.P., [2002] 6 SCC 470, C. Antony Vs. K.G.Raghavan Nair, [2003] 1 SCC 1, State of Karnataka Vs. K.Gopalakrishna, [2005] 9 SCC 291, State of Goa Vs. Sanjay Thakran, [2007] 3 SCC 755 and Chandrappa, Chandrappa Vs. State of Karnataka, [2007] 4 SCC 415. It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate Court must bear in mind the following: (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate Court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate Court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial Court had an advantage of seeing the demeanor of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate Court with

the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate Court in interfering with such conclusions is fully justified, and (iv) Merely because the appellate Court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial Court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate Court in the judgment of the trial Court.

[Underlines supplied]

26] In the result, the Judgment and Order dated 10th January, 2014 passed by the Additional Sessions Judge, Sangamner in Sessions Case No. 25/2012 stands confirmed. Appeal sans merit; and hence dismissed. The respondent i.e. original accused shall be released forthwith unless required in any other case.

We quantify Rs.6,500/- towards fees payable to Mr. Satyajit S. Bora, learned Advocate appointed to represent the Respondent. Copy of this Judgment should be sent to the accused free of cost.

Sd/-

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

Sd/-

[S.S. SHINDE, J.]

DDC