

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

CRIMINAL APPEAL NO. 1 OF 2006

The State of Maharashtra
through Public Prosecutor,
High Court, Bench at Aurangabad

**APPELLANT
(Prosecution)**

VERSUS

Balu @ Balasaheb Ganpat Pagare,
Age : Major, R/o Vilad, Taluka Nagar,
District Ahmednagar, at present
Bhavani Chawl, Station Road,
Ahmednagar, Dist. Ahmednagar

**RESPONDENT
(Orig. Accused)**

Mr. S.Y. Mahajan, A.P.P. for the appellant/State
Mr. A.K. Gawali, advocate for the respondent

**CORAM : SUNIL P. DESHMUKH AND
SANGITRAO S. PATIL, JJ.**

JUDGMENT RESERVED ON : 14th SEPTEMBER, 2017
JUDGMENT PRONOUNCED ON : 22nd SEPTEMBER, 2017

JUDGMENT (PER : SANGITRAO S. PATIL, J.) :

Heard the learned A.P.P., representing the
appellant/Prosecution and the learned counsel for the
respondent-accused.

2. The appellant has taken exception to the
judgment dated 20th September, 2005, delivered in

Sessions Case No. 25 of 2005 by the learned Additional Sessions Judge, Ahmednagar, whereby the respondent has been acquitted of the offence punishable under Section 302 of the Indian Penal Code ("IPC", for short).

3. The case of the prosecution is that the deceased Surekha and the respondent got married prior to ten years of the year of the incident. From this wedlock, they got two sons namely Sagar and Vishal, who were 7 years and 5 years of age respectively at the time of the incident. The respondent was serving at a petrol-pump at Pune. The deceased Surekha was residing in one of the rooms of her father namely Sahebrao Govind Nikalje (i.e. the informant), situate in Bhauri chawl, Station Road, Ahmednagar. The informant i.e. Sahebrao Nikalje was residing in another room, situate in another lane, which was at the distance of about 100 feet from the room of the deceased Surekha. The respondent used to cohabit with the deceased Surekha in that room. He used to commute from Pune to Ahmednagar after alternate day. It is alleged that the respondent used to suspect chastity of the deceased Surekha and on that count, used to beat and illtreat her. He used to frequently quarrel with her. He had severely beaten the deceased Surekha 5

to 6 days prior to the date of the incident. Therefore, the informant had taken her to his house. However, on the next day, the mother of the respondent came to take her and assured that the respondent would treat her properly. Therefore, the informant allowed the deceased Surekha to go to cohabit with the respondent. It is alleged that the respondent had been at Ahmednagar only and had not joined his duty since before two months of the day of the incident.

4. On 23rd October, 2004, the respondent took meals along with the deceased Surekha and his elder son Sagar at about 9.00 p.m. Thereafter, quarrel took place between the respondent and the deceased Surekha. The younger son namely Vishal was at the house of the informant in that night. The deceased Surekha, the respondent and Sagar only were in their room in that night. Sagar slept on a diwan along with the respondent. The deceased Surekha slept on the floor. Sagar heard some noise of the door and got up from the sleep. He saw the respondent going out of the room. He further saw that the deceased Surekha was covered with a quilt. He thought that the deceased Surekha was sleeping. Therefore, he also went to sleep. In the

morning, his younger brother Vishal came there and gave calls to the deceased Surekha. As she did not wake up, he went back to the house of the informant and narrated him about that fact. The informant visited the room of the deceased Surekha along with his wife. After removing the quilt from the person of the deceased Surekha, he noticed that she was strangulated and had expired. Sagar was still sleeping. The informant made him to wake up. At that time, he narrated before the informant about having heard the sound of the door and seeing the respondent going out of that room. After leaving the room, the respondent did not come back. The informant, therefore, lodged report against the respondent in Police Station, Kotwali, Ahmednagar.

5. Crime No. 209 of 2004 came to be registered against the respondent for the above mentioned offence. The inquest panchanama of the body of the deceased Surekha was prepared. The spot panchanama was prepared. Post-mortem of the body of the deceased Surekha was conducted. The Medical Officer opined that she died of asphyxia due to strangulation. The statements of witnesses were recorded. The respondent was not found till 27th October, 2004, on which day, he was arrested.

After completion of the investigation, the respondent came to be chargesheeted for the above mentioned offence.

6. The learned Trial Judge framed charge against the respondent for the above mentioned offence and explained the contents thereof to him in vernacular. The respondent pleaded not guilty and claimed to be tried. His defence is that since there were three successive holidays, including that of Dassehara, his employer had not sanctioned him leave which made him difficult to visit his room at Ahmednagar on 23rd October, 2004. His cousin telephonically informed him in the morning on 24th October, 2004 about the death of Surekha. He got shocked and was mentally disturbed. He was not in a position to take proper decision as to what he should do. Therefore, he went to the house of his sister, who was residing in Ramwadi at Pune and ultimately, he went to Ahmednagar on 27th October, 2004, when he was arrested by the police. He denied that he ever quarrelled with the deceased Surekha and strangulated her.

7. The prosecution examined eleven witnesses to establish guilt of the respondent for the above mentioned offence. The important evidence is that of the

informant Sahebrao (Exh-14) and Sagar (PW5) (Exh-23). The learned Trial Judge, evaluated the evidence on record and held that the death of Surekha was homicidal. However, the learned Trial Judge did not find sufficient and clinching evidence to establish that it is the respondent only, who strangled the deceased Surekha in the night of the incident. Considering the inconsistencies and material discrepancies in the evidence of the informant and that of Sagar (PW5), the learned Trial Judge did not believe their evidence in the absence of any independent corroboration to show that the respondent was present in his room with the deceased Surekha in the night of the incident. According to the learned Trial Judge, the case being based on circumstantial evidence, it was essential for the prosecution to establish the complete chain of circumstances, which should be consistent only with the hypothesis of the guilt and guilt of the respondent. He, therefore, acquitted the respondent.

8. The learned A.P.P. submits that though Sagar (PW5) was a child witness, his evidence creates a great confidence. The manner in which he deposed before the Trial Court shows that he was not at all tutored by

anybody. The said witness narrated before the Court the circumstances from which an absolute inference could be drawn that it is the respondent only who committed murder of the deceased Surekha. He submits that the evidence of Sagar (PW5) was corroborated by the evidence of the informant – the father of the deceased Surekha. According to him, the sole testimony of Sagar (PW5) was sufficient to bring home guilt to the respondent for the above mentioned offence. He submits that the learned Trial Judge has wrongly rejected the evidence of these material witnesses on the basis of minor and insignificant inconsistencies.

9. On the other hand, the learned counsel for the respondent submits that Sagar (PW5) was completely under the thumb of the informant. He was hammered by the informant that the respondent used to illtreat the deceased Surekha. Sagar (PW5) himself states that the respondent always used to scold and beat him. He further states that after his mother, the informant and his wife i.e. his grandparents, are liked by him more than the respondent. He admits that he would immediately believe whatever is stated before him by his grandparents. The learned counsel, therefore, submits

that there was every possibility that Sagar (PW5) was tutored by the informant. He further submits that the informant does not state that he had actually seen the respondent present in the room of the deceased Surekha in the night of the incident. The said room is situate in a thickly populated area. There are a number of houses nearby that room. However, none of the neighbours has been examined by the prosecution to show that the respondent was present at the room of the deceased Surekha in the night of the incident. He submits that the respondent was on his duty at Pune. This fact is established by Raosaheb (DW1) (Exh-45), who was serving with the respondent on at the petrol-pump namely New Auto Corner, Somwarpeth, Pune. The attendance card (Exh-47) has been produced by this witness to show presence of the respondent on his duty from 6.30 p.m. of 23rd October, 2004 to 9.45 a.m. Of 24th October, 2004. He submits that the learned Trial Judge has rightly appreciated the evidence and rightly held that the prosecution failed to establish guilt of the respondent for the above mentioned offence.

10. Dr. Deokar (PW6) (Exh-27) conducted post-mortem of the body of the deceased Surekha on 24th October, 2004

between 3.30 p.m. and 4.15 p.m. in the Civil Hospital at Ahmednagar. He noticed the following injuries on her body:-

- (i) Contused lacerated wound right arm above elbow joint, admeasuring .5 x .5 cm
- (ii) C.L.W. Right side of forehead, 0.5 x 0.5 cm
- (iii) Four C.L.Ws. on left side cheek, .5 x .5 cm
- (iv) Imprint abrasion 1 cm broad all around neck (like by rope)
- (v) Imprint abrasion plus CLW at the nape of neck 2.5 cm below hair-line, round in shape, 1 x .5 cm

He further found that the neck of the deceased Surekha was moving freely because of fracture of cervical spine. All these injuries were ante-mortem. On internal examination, he found dislocation between 2nd and 3rd cervical vertebrae. He opined that Surekha died of asphyxia due to strangulation. He specifically states that her death was homicidal. In his cross-examination, it was tried to be suggested that the deceased Surekha committed suicide by hanging herself. However, he denied that possibility.

11. From the evidence of the informant, Sagar (PW5)

and Dattatraya (PW2) (Exh-16), the panch to inquest panchanama (Exh-17) of the deceased Surekha, it is clear that the body of the deceased Surekha was lying on the floor of the room where she was sleeping on a quilt. A rope was found tied around her neck. There is nothing on record to show that the deadbody was found hanging inside the room against any fan, ceiling or any other upper side article. In the circumstances, the finding of the Trial Court that the deceased Surekha met with homicidal death, being unassailable, will have to be accepted and accordingly accepted.

12. Admittedly, there is no direct evidence connecting the respondent with the homicidal death of Surekha. The prosecution case is based on the circumstantial evidence. The main circumstances relied on by the prosecution are as under:

- (i) The presence of the respondent in the room of the deceased Surekha in the night of the incident.
- (ii) Quarrel between the deceased Surekha and the respondent in the night of the incident.

- (iii) Abscondence of the respondent from the room of the deceased Surekha after the incident.
- (iv) Motive i.e. suspicion about the character of the deceased Surekha in the mind of the respondent.

13. The prosecution has mainly relied on the evidence of the informant Sahebrao and that of Sagar (PW5) to establish the chain of the circumstances to connect the respondent with the homicidal death of Surekha.

14. The informant states that since before two months of the incident, the respondent had not joined his duty and was residing in the room of the deceased Surekha only. He then states that the respondent used to suspect character of the deceased Surekha and on that count, used to assault her. He states that eight days prior to the incident, the respondent severely beat the deceased Surekha and therefore, he had brought her to his house. He then states that on the next day, the mother of the respondent namely Tarabai came to take her and after her giving assurance that the respondent would treat her properly in future, the deceased Surekha went

to cohabit with the respondent in her room.

15. This version of the informant does not find corroboration from the evidence of Sagar (PW5). He does not at all whisper in respect of the alleged severe beating of the deceased Surekha by the respondent prior to eight days of the incident, taking of the deceased Surekha by the informant to his room and coming of the deceased Surekha back to her room from the house of the informant with her mother-in-law Tarabai. Had the deceased Surekha been severely beaten and taken by the informant to his house, considering the age of Sagar (PW5), who was hardly of seven years old, at that time, he also would have gone with her to the house of the informant. He would not have missed to narrate this glaring fact before the Court. The absence of narration about that fact in the evidence of Sagar (PW5) certainly would create grave doubt about the evidence of the informant in respect of the alleged incident of beating the deceased Surekha by the respondent prior to about eight days of the incident.

16. Sagar (PW5) states that the respondent used to visit his room at Ahmednagar within a month or two and some times, he used to send money by money-order. It

is, thus, clear that the respondent used to be at Pune for doing his duty for a period of about a month or two and then, he used to visit the room of the deceased Surekha at Ahmednagar. It follows that the respondent was not permanently residing in the room of the deceased Surekha at Ahmednagar. If that be so, his presence in the room of the deceased Surekha cannot be presumed and it would be necessary for the prosecution to establish his presence in the room of the deceased Surekha in the night of the incident by positive and clinching evidence.

17. The informant does not state that he had an occasion to go to the room of the deceased Surekha and see the respondent staying there on 23rd October, 2004. He states that the room of the deceased Surekha was at a distance of 100 feet from his residence. He then states that there is one more room belonging to him situate adjacent to the room of the deceased Surekha, in which his son Raju and wife Anita used to sleep in the night. The said Raju and Anita have not been examined by the prosecution, without assigning any reason, to show that the respondent was present in the room of the deceased Surekha in the night of the incident. These two

witnesses certainly had the opportunity to see as to who was present in the room of the deceased Surekha in the night of the incident. However, their evidence has been withheld by the prosecution without any reason.

18. The evidence on record shows that the room of the deceased Surekha was situate in a thickly populated area. Dattatraya (PW2) (Exh-16) and Gulab Shaikh (PW3) (Exh-18), who happened to be the panchas to inquest panchanama (Exh-17) and spot panchanama (Exh-19), respectively, are the neighbours of the deceased Surekha. Dattatraya (PW2) states that his house is situate at the distance of 10 to 15 feet from the room of the deceased Surekha. Gulab (PW3) states that his house is at the distance of 12 feet from the room of the deceased Surekha. Both these witnesses, in the natural course, would have noticed presence of the respondent in the room of the deceased Surekha not only in the night of the incident, but even prior to that. Gulab (PW3) states that he had seen the respondent in that locality prior to about fifteen days of the incident. However, neither Dattatraya (PW2), nor Gulab (PW3) state that they had seen the respondent in the room of the deceased Surekha prior to eight days of the incident and also on

the day of the incident. The family members of these witnesses also have not been examined to establish the presence of the respondent in the room of the deceased Surekha on the day of the incident.

19. The respondent specifically states that he was on his duty at Pune on 23rd October, 2004. He examined his colleague Raosaheb (DW1) (Exh-45) in support of his contention. The said witness produced attendance card (Exh-47) of the respondent wherein his presence on duty has been shown from 6.30 p.m. of 23rd day of the month to 9.45 a.m. of the next day. Thereafter, he is shown to be absent. This attendance card has been disbelieved by the learned Trial Judge on the ground that the month and year have not been mentioned at the appropriate places in this attendance card. However, it may be noted that on the top of the front page of that card, there is mention of the month and year as "Oct. 2004". From the evidence of Raosaheb (DW1) and the contents of the attendance card (Exh-47), a strong doubt is created about presence of the respondent in the room of the deceased Surekha in the night of the incident. The Investigating Officer did not collect any evidence to show absence of the respondent from his working place since before two

months of the day of the incident or even in the night of the incident. He could have examined the manager of the petrol pump to establish this fact. In the absence of such evidence, the defence evidence will have to be accepted on the touchstone of preponderance of probability.

20. Sagar (PW5) was aged about 7 to 8 years at the time of the incident. The informant states that in the room, which is situate adjacent to the room of the deceased Surekha, his son Raju and daughter-in-law Anita used to sleep in the night. However, Sagar (PW5) states that some tenant was residing in that room. He could not tell the name of that tenant. He does not state that his maternal uncle Raju with his wife used to stay in that room in the night. Thus, there is a material discrepancy/inconsistency in the evidence of the informant and Sagar (PW5) in respect of the user of the another room situate adjacent to the room of the deceased Surekha.

21. The Circle Officer Durge (PW8) (Exh-30) prepared the map (Exh-31) of the incident. It shows that the room of the deceased Surekha is facing towards south and to the west of the locality in which that room

is situate, there is railway line. The panchanama (Exh-19) also shows that the room of the deceased Surekha is facing towards south. However, Sagar (PW5) states that the said room is facing towards north. He denies that railway line is nearby the locality in which that room is situate. He is not able to state the names of the persons, who are residing nearby the room of the deceased Surekha. He could not tell the names of the boys of his age group residing in that locality. He could not tell as to in which direction, there is railway line from the room of the deceased Surekha. The inability of Sagar (PW5) to state this factual position reflects on his capacity to grasp the things and to reproduce them. In the normal course, a boy of average intelligence, would be in a position to state correctly the above mentioned factual position. It seems that Sagar (PW5) did not possess that capacity to comprehend the factual position and reproduce it correctly.

22. From the evidence of Sagar (PW5), it seems that he has tried to improve his version by adding something that was not stated by him before the police when his statement was recorded. He had not stated before the police that whenever his father i.e. respondent, used to

come from Pune, he used to quarrel with the deceased Surekha. He did not state before the police that in the night of the incident, when he slept on the diwan, the respondent asked the deceased Surekha not to raise voice or else threatened to kill her. He did not state before the police that when he woke up in the night, he saw his mother covered with a quilt and that he thought that she was under the sleep and therefore, he also went to sleep. He did not state before the police that when the respondent used to assault the deceased Surekha, he used to inform that fact to his grandparents. These are the material omissions in the evidence of Sagar (PW5), which clearly show that he stated those facts for the first time before the Court.

23. It has come in the evidence of Sagar (PW5) that the respondent used to assault him and therefore, he had grudge against the respondent. He states that it was his impression that the respondent is not a man of good character. He states that after the deceased Surekha, his grandparents are close to him. He states that he likes his grandparents more than the respondent. Admittedly, Sagar (PW5) is being maintained by his grandparents. The evidence of Sagar (PW5) clearly shows

his affection towards his grandparents and hostile attitude against the respondent. It is quite natural that he would prefer to believe on what his grandparents impress upon him. He certainly would be under the command of the informant. In the circumstances, the possibility of tutoring of Sagar (PW5) by the informant cannot be ruled out.

24. It is true that the evidence of the child witness cannot be rejected per se, but as a rule of prudence, it is required to be considered with close scrutiny, care and caution. If the evidence of Sagar (PW5), as state above, is considered, it will be risky and hazardous to believe on his sole testimony on the point of the presence of the respondent in the room of the deceased Surekha in the night of the incident. Though independent evidence was available to establish that fact, the prosecution has not examined any independent witness to corroborate the version of Sagar (PW5). Dattatraya (PW2) and Gulab (PW3), the neighbours of the deceased Surekha, though independent witnesses, do not whisper about presence of the respondent in the room of the deceased Surekha in the night of the incident. In the above circumstances, the evidence of

Sagar (PW5) about presence of the respondent in the room in the night of the incident and his leaving the said room as claimed by him, cannot be believed for want of independent corroboration.

25. The prosecution, thus, failed to produce positive, clinching and dependable evidence on record to show the presence of the respondent in the room where the incident took place in the night of the incident. Though the spot of the incident was in a thickly populated area, no independent witness has come forward to state that he had seen the respondent there in the night of the incident. If the presence of the respondent in that room in the night of the incident itself is not proved by the prosecution, the other circumstances relied on by the prosecution would not stand to reason.

26. The learned Trial Judge rightly appreciated the evidence of the informant and that of Sagar (PW5) and rightly held that their evidence is not sufficient to clinchingly prove that it is the respondent only who committed murder of the deceased Surekha. The view taken by the learned Trial Judge is quite a possible view. In the circumstances of the case, we are not

inclined to interfere in the impugned judgment and order acquitting the respondent. The appeal is without any substance. It is liable to be dismissed. In the result, we pass the following order:-

O R D E R

- (i) The Criminal Appeal is dismissed and disposed of accordingly.
- (ii) The bail bonds of the respondent are cancelled. He is set at liberty.

[SANGITRAO S. PATIL]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE

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