

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

CRIMINAL APPEAL NO. 388 OF 2001

The State of Maharashtra,
Through, City Chowk Police Station,
Aurangabad.

**..Appellant.
(Org.Complainant)**

Versus

1. Prakash s/o.Sampat Shejwal,
age 22 years, occu : Labourer,
R/o.Jagegaon, Tq.Phulumbri,
Dist.Aurangabad.

2. Bhimrao Dagdu Shejwal,
age 30 years, R/o.as above,

3. Jairam s/o.Kalu Gangawane,
age 45 years, r/o.Harshnagar,
Aurangabad.

**...Respondents.
(Org. Accused 1 to 3)**

Mr. S.S.Salgare, P.P. for the State.

Mr. C.R.Thorat, Advocate for respondent Nos. 1
and 2.

**CORAM : T.V. NALAWADE AND
S.M. GAVHANE, JJ.**

Dated : 04.09.2017.

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JUDGMENT : (PER T.V.NALAWADE,J)

1. The appeal is filed to challenge the Judgment and order of Sessions Case No.78/1997, which was pending before learned Additional Sessions Judge, Aurangabad. The accused, present respondents were charge sheeted for the offences punishable under section 302, 396 and Section 34 of the Indian Penal Code. The case was tried as against six accused persons, all of them are acquitted but the State has filed appeal only in respect of accused Nos. 1 to 3 who are respondents of the present proceedings. Both the sides are heard.

2. The deceased was husband of first informant-Godbole. The first informant,

deceased and their son were leaving together at Bramhan Galli, Begampura, Aurangabad. First informant was serving as a teacher at Daultabad and was attending her duty going to Daultabad. On 22.03.1994, as usual, she left home at about 6.30 a.m. for Daultabad. When she left, deceased and her son Subodh were at home.

3. The first informant returned to home at 2.00 p.m. She noticed that residential place was closed from outside by putting latch on the door from outside. She noticed that the T.V. Set of her house was on, as when she came home, she heard the sound coming from T.V. Set. She opened the door and entered the house. She noticed that the deceased was lying on the cot and his hands and legs were in tied condition. His head was tied with a piece of bed sheet and a piece of cloth was used to gag him. There was a smell of liquor and one empty bottle of

country liquor was lying on the cot. There was a smell to the mouth of the dead body of the liquor. She removed the cloth which was found tied around the neck and gave call to neighbours.

4. One Dwarkabai was employed by this family to wash cloths and utensils and she also came there with the neighbours. When informant enquired with Dwarkabai, she informed that she had done the work as usual and she had noticed that the deceased was sleeping on the cot and one blanket was taken by him to cover himself. She informed that she had left the place at about 1.00 p.m. after completion of work.

5. The first informant had suspicion against Jairam accused No.3. According to her, Jairam knew that they had ornaments in their

house and further, there was dispute between the deceased and Jairam over the construction of the house of deceased which was started in January, 1993. She gave report against Jairam and his associates. She mentioned in the report that some ornaments and cash amount of Rs.2,000/- was stolen from her house by unknown person and she had suspicion against Jairam and his friends. On the next day, she gave supplementary statement and she gave particulars of articles stolen from her house and they were 35 in number.

6. The dead body was referred for post mortem examination. Doctor found abrasions, ligature mark over neck. Some abrasions were found on the limbs. On internal examination, it was noticed that there was haemorrhage of the size of 5 X 5 cm. over right occipital region. There was inward compression fracture of Hyoid

bone. Opinion was given that death took place due to strangulation.

7. During the course of investigation, the accused persons came to be arrested. Some record with regard to the work of construction given by deceased to accused No.3 was taken over. Accused No.1 Prakash Shejwal came to be arrested on 23.03.1994. He gave statement to Police Station under section 27 of Evidence Act and on the basis of that statement, some articles which are marked as article No.17 to 49 came to be recovered. The police seized articles under panchanama. Articles were recovered from vicinity of residential place of the accused and were found in concealed condition in the heap of dry stems of crop.

8. Accused No.2 came to be arrested and he gave statement on 29.03.1994 under

section 27 of the Evidence Act. He took Police and panchas to the house of his brother and from there, he produced some stolen property, these articles were marked as article No.7 to 11. Statements of aforesaid witnesses came to be recorded and the charge sheet came to be filed. Charge was framed for aforesaid offences to which the respondents pleaded not guilty. The defence of total denial was taken by the respondents.

9. From the evidence given, it can be said that the evidence on motive is given against the accused No.3 Jairam. Though the first informant has tried to say that when she returned to home on that day from the school, she saw that accused Jairam was standing in a liquor shop in the vicinity of her house, that evidence even if it is accepted, cannot be called as incriminating in nature. Thus, there

was evidence on the motive only against Jairam and it can be said that in any case, it is not possible to interfere in the decision of the trial court of acquittal given in favour of Jairam.

10. The evidence as against the accused Nos. 1 and 2 is mainly of the nature of recovery of stolen articles. On that, it can be said that in the first information report description of some articles were given, but in the supplementary statement, the description of remaining articles came to be given. Accused No.1 was arrested on 23rd itself and many articles are shown to be recovered from him. This circumstance needs to be kept in mind while considering the evidence given on the basis of supplementary statement of first informant which was recorded by Police on 23.03.1994.

11. PW-5 Shaikh Naim is a panch witness who gave evidence on the statement given by accused No.1 under section 27 of Evidence Act. He deposed that one Shejwal had given statement and after recording the statement, they had gone to the house shown by Shejwal and after that said Shejwal produced article No.17 to 49 which were found in concealed condition in the heap of dry stems of crop. The memorandum statement of accused and panchanama of the seizure of the articles are proved as Exh.40 and 41 in the evidence of PW-5, but he failed to identify accused No.1 in the Court. He has deposed that he cannot identify Shejwal. It needs to be kept in mind that there were six accused facing the trial and this witness could not identify accused No.1. The cross-examination of this witness shows that he could not pass test of cross-examination. His evidence shows that he could not describe the

place where they had gone. The articles are shown to be recovered from open place. Some silver articles like utensils are shown to be recovered. These articles are identified by first informant by saying that articles belong to her. She has also given the source from where she had collected those articles. On that part of the evidence, there is no reason to have any doubt and the trial court has also accepted that part of evidence. However, the trial court has considered the circumstances like inability of panch witness to give particulars of incident and his inability to identify accused No.1 in the court. If the evidence of PW-6 in this case is considered, it can be said that Investigating Officer has not touched the articles which are shown to be recovered from the place allegedly shown by accused No.1. Evidence of Investigating Officer on this discovery is very vague in nature. Due

to these circumstances and as matter involves offence punishable under section 302, 396 of I.P.C., the trial court has refused to place reliance on the evidence of these two witnesses. In view of the aforesaid circumstances, this Court holds that trial court has not committed any error in refusing to place reliance on the evidence of these two witnesses. There are many more reasons creating doubt about fairness of investigation.

12. Mohmed, PW-4 has given evidence on the statement allegedly given by accused No.2 under section 27 of Evidence Act. He has deposed that after giving the statement, the accused took Police and Panchas to the house of his brother and from there, he produced articles No.7 to 11 which were found kept in one cloth. His evidence shows that he also could not identify accused No.2 in the Court and he did not say

that accused No.2 had given the statement and he had produced the property before Police. Article Nos. 7 to 11 are identified in the court by first informant as articles belonging to her. The Investigating Officer has not touched the articles when he gave evidence and he has not deposed that these articles were produced by accused No.2.

13. The material produced before the trial court shows that many paper slips bearing signatures of panchas were found with the articles but not a single slip was found pasted on the articles. Both the witnesses could not explain and answer many things during cross-examination. In case of accused No.2 recovery is shown to be made from the house of his brother and the said house is occupied by his brother and his own family members. Panch witnesses have given evidence that first

accused (not identified) went inside of the house then he produced the cloth, bundle containing the articles.

14. The evidence shows that blood samples of accused Nos. 1 and 2 were collected and the strip of bed-sheet which was used as a tying material was sent along with blood samples of deceased and these accused to C.A. office. On the strip of the bed-sheet, there was blood stain but blood group of blood of deceased could not be determined. Blood group of Bhimrao, accused No.2 is stated to be "O".

15. The material collected and particularly the cross-examination of Investigating Officer shows that finger prints which were available on the spot and article like the empty bottle of the liquor were collected and they were sent to expert for

comparison purpose. That report was not produced before the trial court and no explanation in that regard is given. Due to that, trial court has drawn adverse inference against the prosecution. Similarly, statements were recorded under section 164 of Cr.P.C. of aforesaid witnesses but those statements were not produced before trial court. These circumstances are also considered against the prosecution. Thus, the first informant had suspicion against Jairam accused No.3 but there was evidence of only motive against accused No.3 Jairam and as against the accused No. 1 and 2 there was some evidence of aforesaid nature but that evidence has not established circumstances satisfactorily. This Court holds that the recovery of stolen property from accused No.1 and 2 is not established. Due to all these circumstances, the trial court has acquitted all the respondents. This Court sees

no reason to interfere in the decision given by the trial court. In the result, the appeal stands dismissed.

(S.M. GAVHANE)
JUDGE

(T.V. NALAWADE)
JUDGE

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