

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

CRIMINAL APPEAL NO. 490 OF 2002

The State of Maharashtra

... Appellant

VERSUS

1. Baburao Raghunath Merad,
Age : 72 yrs., Occu.

2. Rambhau Baburao Merad,
Age : 40 years,
Both R/o. Deotakali,
Taluka Shevgaon, Dist. Ahmednagar

... Respondents
(Orig. Accused)

.....
Mr P. G. Borade, APP for appellant/State
Mr R. K. Temkar, Advocate for respondent no.2
Appeal abated as against appellant no.1
.....

CORAM : **T. V. NALAWADE &
A. M. DHAVALA, JJ.**

DATE : 05.12.2017.

ORAL JUDGMENT (PER A. M. DHAVALA, J.) :-

1. This is an appeal by the State against acquittal of respondents no. 1 and 2 for offence punishable u/s 302/34 IPC by IInd Addl. Sessions Judge, Ahmednagar by judgment dt. 13.05.2002 in Sessions Case No. 127/98. Respondent No. 1 has died during the pendency of the appeal and the appeal stands abated against him.

2. The facts relevant for deciding this appeal may be stated as follows :

. PW5 Uttam Kharat on 07.04.1998 at 10:30 a.m. lodged FIR at Shevgaon Police Station to the effect that, on 26.03.1998 at 3:00 p.m. his son Bhagwat aged 6 years had gone for lunch but he did not return. His brother Bansi had reported about the missing to the police on the next day and they were searching for him. On 06.04.1998, at 06:00 p.m. Head Constable Rathod reported to him that the dead body of his son in decomposed condition was found in an unattended edifice of Uttam Merad. He had gone there and found the dead body of his son in cupboard inside the wall. He accordingly lodged FIR of murder and causing disappearance of evidence against unknown persons. On the basis of his FIR, crime was registered at C.R. No. 35/98 u/s 302, 364, 201 IPC and was investigated into by PW12 Police Inspector Ithape. He drew spot panchanama and inquest panchanama on 07.04.1998. He took the help of Dogs Squad. The sniffer dog led them to a locality one km. away from the spot. It was of Baburao (A1) and Rambhau (A2). Accused no. 2 is son of accused no. 1. Thereafter, post-mortem was conducted on dead body. Both the accused were arrested. The statement of material witnesses were recorded. During interrogation, accused no.

1 showed the place where he had cut the throat of the deceased. Accordingly, his statement was recorded and he led the police and panchas to the Jungle where blood mixed soil, hairs, one aluminum wire similar to the articles found on the dead body were recovered concealed under big stone. Those articles were labelled and sealed and seized. He forwarded the seized articles to CA and after receipt of CA report, he submitted charge-sheet in the court. After submissions of charge-sheet, the case was duly committed to the court of Sessions, Ahmednagar.

3. The Id. Sessions Judge, Ahmednagar framed charge at Exh. 14 against both the accused u/s 302, 364, 201 r/w 34 IPC. The accused pleaded not guilty and the prosecution examined 13 witnesses. The defence of the accused is of total denial. By a statement Exh. 107, the accused took defence that accused no. 2 had lodged report with Police about missing of his sister's son Ganesh, in which, Bhausahab, father of PW1, was the accused. PW3 Ranjit is his cousin brother. There were two factions in the village due to politics. The accused and the witnesses belonged to rival factions. Accused no. 2 had contested election from a panel which was opposite to the panel of PW4 Ramesh. All prosecution witnesses are interrelated. All prosecution witnesses were prosecuted for assaulting accused no.1

and others. People of group led by Krishna Kharad to which the prosecution witnesses belonged were prosecuted.

4. Ld. APP Shri. P. G. Borade argued that, there is evidence of PW1, PW2 and PW3 of last seen the accused at the spot where the dead body was found. PW3 had seen accused no. 2 carrying a load on his shoulder which was probably the dead body of the child. It is supported with evidence of panch PW9 Ashok Bhandari before whom accused no. 1 had made statement showing willingness to discover the spot where the murder was committed. He then led the police and panchas to Jungle and showed the spot and discovered by excavation below a big stone some hairs, blood, maggots and aluminum wire. Those were seized and sent to CA office. Those were tallied with blood, aluminum wire and hair found on the spot where the dead body was found. Besides, there is evidence of dog tracking. The sniffer dog had led the police and panch PW8 near the house of the accused and one red cloth having blood stains was found near a Jambhul (rose apple) tree of the accused. The said cloth was sent to CA matched with the cloth found on the spot. The prosecution witnesses should be believed and the accused should be convicted.

5. Per contra, learned advocate Shri. Temkar for respondent no. 2 argued that, the prosecution evidence of last seen together is totally unreliable. PW1 to 3 have not disclosed the material facts to the police or father of the child PW5 Uttam immediately. The dog tracking is not admissible in evidence. The panch to the discovery PW9 Ashok has enmity with the accused. All the witnesses have enmity with the accused. The prosecution has examined only interested witnesses. Independent witnesses though available were not examined. The Id. trial Judge has given very sound reasons for discarding or doubting the prosecution evidence and his findings need no interference.

6. Prosecution has examined following material witnesses.

[I] Last seen together (?) :

- (i) PW1 Mahendra, PW2 Bhagwan & PW3 Ranjit: On 02.04.1998, at 11:00 p.m. when they had been for urination, they had seen both the accused visiting the spot where dead body was found.
- (ii) PW8 - PSI Subhash Nawale of Dog Squad.
- (iii) PW9 - Ashok Bhandari. Statement given by Baburao leading to the discovery of the spot and seizure of some articles under a big stone.

7. The points for our consideration with our findings thereon are as follows :

Sr.No.	Point	Finding
1	Whether deceased Bhagwat met with homicidal death?	In the affirmative.
2	Whether accused nos. 1 and 2 in furtherance of their common intention kidnapped Bhagwat for committing murder?	Not proved.
3	Whether accused nos. 1 and 2 in furtherance of their common intention committed murder of Bhagwat?	Not proved.
4	Whether accused nos. 1 and 2 in furtherance of their common intention caused disappearance of evidence of murder?	Not proved.
5	What order?	The appeal is dismissed.

Point No. 1 :

8. PW5 Uttam has deposed that, deceased Bhagwat was his son and studying in 2nd std. He was with him for playing in cattle-

shed on a holiday, just one day before lodging of missing report dt. 27.03.1998 by his brother PW6-Bansi. Thereafter, he was missing and *in spite* of search he could not be found till 06.04.1998. On 06.04.1998, at 06:00 p.m. Head Constable Rathod saw the dead body in the edifice of Uttam Merad. Head Constable is not available as he is suffering from Paralysis. PW7 Police Constable Subhash was with him. He has deposed about discovery of the decomposed body of the child. The same was identified from his clothes by PW5. There was challenge to the identification of the dead body of the child but PW5 has categorically identified the clothes of his son and we do not find that PW5 could have claimed dead body of somebody else as dead body of his son. Ld. trial Judge has held that it was dead body of deceased Bhagwat, son of PW5 Uttam. We do not find any reason to raise doubt about the said finding.

9. The dead body was forwarded to Post-mortem. The post-mortem report is admitted (Exh.23). It shows that, the body was highly decomposed and there was incised wound cut through and through on the neck. Only small part of tag of skin was present on left side about 1 inch. All structures were cut down. Even the penis of poor boy was cut from the root. As per PM report, the child met with death due to hemorrhage due to cut throat injury. There is no

dispute raised about the homicidal death. Hence, we find that the ld. trial Judge has rightly held that the boy met with homicidal death.

As to point Nos. 2, 3 & 4 : The evidence in this regard is as follows :

- (i) PW1, PW2 & PW3 on 02.04.98 at 10:30 to 11:00 p.m. had seen accused nos. 1 and 2 near abandoned edifice of Uttam Merad where the dead body was found on 06.04.1998. PW3 Ranjit had seen accused no. 2 was carrying a load on his shoulder. This can be categorized as evidence of last seen together.
- (ii) On 14.04.1998, accused no. 1 Baburao had given statement before PW9 Ashok Bhandari to the police that he would discover concealed dead body of Bhagwat? Accordingly memorandum was recorded at Exh. 79. Then accused no. 1 Baburao led the police and panchas to the central part of village where there was a fallow land surrounded with only Babhul trees (acacia trees). He showed one big stone and on removing the same and excavating the land, reddish soil, some maggots, some hairs and one piece of aluminum wire, articles having

sticky smell were recovered and sealed under seizure memo Exh. 80. It was 100 to 125 ft. away from edifice of Uttam where dead body was found.

- (iii) As per evidence of IO PW12 PI Ithape and Carrier PW11 Narayan, these articles were sent to CA through Carrier and covering letter Exh. 84 and as per CA report Exh. 87, these articles were similar to the hairs, aluminum wire and blood found near the dead body recovered from a cupboard in wall.
- (iii) PW8 - PSI Subhash Nawale has led evidence of dog tracking. The dog was given smell of clothes found on the spot and the dog led the police to the house of the accused 1 km. away from the spot and near the house of the accused they found one red piece of cloth having blood stains. The tree was belonging to the accused. The same were sealed (Exh. 77) and the CA report shows that, it was similar to the cloth found on the spot.

Following other witnesses are not material :

- [i] PW4 Panch- Ramesh Kharad : Panchanama Exh.64 and seized articles 5 to 9. Inquest panchanama Exh. 65.

- [ii] PW5 Uttam - father of the deceased child. He has deposed as per FIR and proved clothes of the deceased articles 4 & 5.
- [iii] PW6 - Bansi. He has lodged missing report Exh. 70.
- [iv] PW7 - Subhash. He was inquiring with the missing case. He has visited the spot and traced out the dead body.
- [v] PW10 - Circle Inspector Ashok Kshirssagar. He has drawn map Exh. 82.
- [vi] PW11 - Police Constable Dhakne. Carrier.
- [vii] PW12 – Investigating Officer - P. I. Baban Ithape.
- [viii] PW13 - Chemical Analyzer.

10. The evidence on record shows that, the child was missing from 26.03.98. His dead body was found in an abandoned edifice of Uttam Merad on 06.04.1998 evening. PW1, 2 and 3 have deposed that, on the night of 02.04.1998, they had seen accused nos. 1 and 2 near the abandoned edifice of Uttam. PW1 Mahendra has stated that, he was studying at Sonai and he had been to his village Deotakli on 01.04.1998. His house was 100 ft. away from the edifice of Uttam Merad. On that night at 10:30 to 11:00 p.m. he got up to answer the nature's call (urination) and that time, he saw both the accused coming out of edifice of Uttam Merad. There was electric bulb on the electric pole near the edifice. The accused had seen that he had seen them. In his cross-examination, he admitted that, his father was

shown as accused in murder of Ganesh, nephew of accused no.1. Thus, he must be having strong grudge against the accused. He is a chance witness. He was not expected to be in the village nor he was expected to be near the spot. He belongs to the group led by Krishna Kharad. The accused belongs to the opposite group. The accused have produced certified copy of FIR, charge-sheet and judgment from Sessions Case No. 81/89. These, documents disclose that, 63 accused from the group led by Kashinath Kharad were prosecuted for committing house breaking in the houses of several persons and assaulting several witnesses by means of deadly weapons and thereby committing offences of rioting u/s 504, 506 r/w 149 IPC. Though the said case ended into acquittal, the fact remains that the said prosecution must have given cause for grudge and creating enmity between the two factions.

11. Evidence of PW2 Bhagwan is similar. He is a grocery shopkeeper and his house is 40-50 ft away from the main gate of dilapidated edifice of Uttam. He stated that, on 02.04.98 at 10:30 to 11:00 p.m. he heard barking of dog. He opened the door, came out of the house and saw in the illumination of electric bulb on the road that both the accused were coming out of dilapidated edifice of Uttam Merad. The accused are residing 1 km. away from the said

spot. His cross-examination reveals that, the spot is surrounded by several houses and commercial premises and one temple. PW2 admitted that, accused no. 2 had contested election from his ward but he denied that there were two factions one led by accused no.1 Baburao and other by Krishna Kharad. He denied that, Baburao Merad had filed criminal case against 60-70 persons in connection with the fight between two groups in Ganesh festival of 1988, but, he admitted that there was such a fight. Certified copy of the judgment in Sessions Case is on record. It is difficult to conceive that PW2 would not be aware of filing of such case against so many persons from his own village.

12. PW3 is again witness on last seen together but he has gone one step further. He stated that, about 5 to 6 days after incident of missing of Bhagwan, at 10:30 to 11:00 p.m. he has gone near the dilapidated wada (edifice) of Uttam Merad for latrine and that time he saw accused nos. 1 and 2 coming towards wada (edifice). Accused no. 1 was carrying a head load on his shoulder. Thereafter he left the spot.

13. The ld. trial Judge has rightly observed that there was enmity between the witnesses and the accused and the conduct of the

witnesses in not disclosing this material fact to the police immediately or to PW5 Uttam, whose son was missing, is highly suspicious. He relied on **Gambhir v State of Maharashtra AIR 1982 SC 1157** to hold that it is unsafe to rely on such witnesses. We agree with the arguments that, PW1 to PW3 are chance witnesses. Their presence on the spot itself is doubtful. There could have been several independent witnesses who could have seen accused nos. 1 and 2 visiting the spot or leaving the spot but they are not examined. the ld. trial Judge has rightly discarded the evidence of last seen together led by PW1 to PW3.

14. It is also relevant here to note that, actually it is not the evidence of last seen together as the boy Bhagwat alive was not seen along with the accused. The medical evidence does not show when Bhagwat had died. If Bhagwat was kidnapped on 26.03.98 and when it was not for ransom, it is highly improbable that he would have been kept alive till 02.04.98. If the accused has killed Bhagwat and kept his dead body in the abandoned edifice of Uttam, it would have been much earlier and in that case accused nos. 1 and 2 had no reason whatsoever to come near the said edifice. Hence the evidence of PW1 to PW3 is not reliable to link the accused with the murder of Bhagwat.

15. PW5 Uttam is father of deceased Bhagwat and PW6 Bansi is uncle of Bhagwat. PW6 has lodged missing report at the Police Station on 27.03.98 (Exh. 70) whereas PW5 has lodged FIR Exh. 67 on 07.04.98 after recovery of dead body. They have no personal knowledge about any material which could link the accused with the crime.

16. PW4 Ramesh is a panch to dog tracking evidence. PW8 PSI Nawale has drawn the spot panchanama. According to them, the smell of red cloth found on the spot was given to the sniffer dog and he led the police and panchas to rose apple tree near the house of the accused. The said cloth was seized by police and it was sent to CA and it tallied with the cloth piece found on the spot where dead body was found.

17. Their evidence is quite improbable. If accused nos. 1 and 2 would have committed murder, they would not have taken a piece of blood stained cloth and hanged it near their own tree of Black Plum for around 10 days. Besides, Id. trial Judge has rightly held that evidence of dog tracking is not admissible in evidence.

18. With respect to evidence regarding showing of the spot by accused no.1, where he has committed murder and discovery of certain articles like hairs, blood stained soil, maggots and aluminum wire similar to those articles found near the dead body is concerned, there is evidence of PW9 Ashok Bhandari. However, the evidence shows that, brother of this witness was prosecuted in a case filed by accused no.1. Therefore, the act of Investigating Officer in selecting such panch witness is tainted. This evidence is also not trustworthy and reliable.

19. After considering the entire evidence, we find that, the prosecution witnesses or their relatives had grudge against the accused. The accused had prosecuted relatives of the prosecution witnesses in connection with some severe charges. Their evidence of last seen together is not at all reliable. The evidence of dog tracking is not admissible and even if it is considered, still it does not show the complicity of the accused. The discovery of spot by accused no. 1 is also not probable and reliable. The ld. trial Judge has appreciated the evidence on record in detail and has given sound reasons. We find that the view taken by the ld. trial Judge is reasonable and probable view. The prosecution evidence does not form complete chain of circumstances to show that accused nos. 1 and 2 must have

committed murder of Bhagwat. Accused no. 1 is already dead. there is no reliable material against accused no. 2. We therefore find no reason to interfere with the finding of the ld. trial Judge of not holding accused nos. 1 and 2 guilty for murder of Bhagwat. Hence, we find no substance in the appeal against acquittal. The same deserves to be dismissed. Hence, the order.

ORDER

1. The Criminal Appeal No. 490 of 2002 is dismissed.

[A. M. DHAVALE]
JUDGE

[T. V. NALAWADE]
JUDGE

sgp