

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

**CRIMINAL APPEAL NO. 121 OF 2016
WITH
CRIMINAL APPLICATION NO. 1700 OF 2016
IN
CRIMINAL APPEAL NO. 121 OF 2016**

Bharat S/o Laxman Bidwe
Age:- 32 years, Occu. Agriculturist,
R/o:- Village Satona (BK.), Taluka Partur,
District Jalna.

...Appellant
(Orig. Accused)

versus

The State of Maharashtra

...Respondent

.....
Mr. Sagar Adhav, Advocate for the Appellant/Applicant (appointed).
Mr. M. A. Deshpande, A.P.P. for Respondent-State.
.....

**CORAM : S. S. SHINDE AND
V. K. JADHAV, JJ.**

RESERVED ON : 31st JULY, 2018

PRONOUNCED ON : 07th AUGUST, 2018

JUDGMENT (PER V.K. JADHAV, J.) :-

1. By way of this criminal appeal, the appellant has challenged the judgment and order dated 15.05.2015 passed by Sessions Judge, Jalna in Sessions Case No. 176 of 2011 thereby convicting the appellant/original

accused for the offence punishable under Section 302 of IPC and sentencing him to undergo imprisonment for life and to pay fine of Rs.1,000/-, in default to undergo R.I. for three months.

2. As this appeal has been filed by the appellant from jail, this Court, by order dated 17.03.2016, appointed Mr. Sagar Adhav, Advocate, to prepare appeal memo and argue the case on behalf of the appellant and admitted the appeal.

3. Brief facts, giving rise to the present appeal are as follows:

a. The appellant/accused married Savita (complainant) 10 to 12 years ago and out of said wedlock, the complainant has given birth to two sons, namely, Krishna and Ishwar (deceased). The appellant/accused was a labour and at times used to work in the agricultural field of one Asaram Bidve. Since marriage, he doubted Savita's character and alleged that she is having illicit relation with somebody and on that count he used to harass her. Many times the complainant had left company of the appellant/accused and had gone to reside with her parents at her parental home being fed up by the harassment by appellant/accused, and each time the appellant/accused had fetched her after two months or so and resumed cohabitation. One

month prior to the incident, complainant Savita had returned to him and they had started residing in the agricultural field of Asaram Bidve where the accused had taken labour work. She had agreed to come and reside with him because the appellant had assured her of good behaviour. However, soon he started harassing her by alleging that the two sons are not from him as she was staying at her parental house for much time. He also used to think of the two sons as hindrance in doing labour work and due to them the complainant cannot do labour work in the agricultural land. He also asked the complainant to take the two sons to her brother's house, to which the complainant explained that younger son Ishwar (deceased) is only one and half years of age and cannot stay away from her.

b. On 18.07.2011 in the morning at 7.30 to 8.00 a.m., the appellant/accused was about to go to work in the agricultural land when he saw deceased Ishwar playing outside. The appellant picked him up and went away with him while the complainant started cooking food. After some time, the appellant alone came back to take sickle. The complainant asked him about Ishwar to which he replied that he had left Ishwar and he does not know where he is. The complainant started searching for Ishwar in the agricultural land but he was not found. The appellant/accused suggested her to look for Ishwar towards the well but

she did not went there out of fear that the appellant might push her in the well. She called her cousin brothers who, along with the labours of the agricultural land, started search of missing Ishwar. On the say of the accused, they also peeped into the well but could see nothing due to high level of water. On next day, i.e. on 19.07.2011, the dead body of Ishwar was found floating in the well.

c. Initially, A.D. No. 28 of 2011 was registered. However, on 21.07.2011, the complainant lodged FIR with Aashti Police Station, Taluka Partur, District Jalna and Crime No. 32 of 2011 came to be registered for the offence punishable under Section 302 of IPC. The accused was arrested on 18.10.2011. After completion of investigation, charge sheet came to be submitted to the J.M.F.C., Partur. Since the offence under Section 302 is exclusively triable by the court of sessions, the case was committed to the Sessions Court, Jalna. The learned Sessions Judge framed charge and explained it to the appellant/accused in vernacular, to which the appellant/accused pleaded not guilty and claimed to be tried. His defence was of total denial. The learned Sessions Judge, Jalna, by the impugned judgment and order, sentenced the appellant/accused as aforesaid.

4. The learned counsel appearing for the appellant/accused submits that the prosecution case entirely rests upon circumstantial evidence. There are material omissions and contradictions which were brought before the court while cross-examining the prosecution witnesses. The chain of circumstantial evidence is not complete. On the contrary, the evidence on record clearly reflects that the charge framed against the present appellant is not proved beyond reasonable doubt. There is also unreasonable delay in lodging the FIR. The incident had occurred on 18.07.2011 and the FIR was lodged belatedly i.e. on 21.07.2011. However, this unreasonable delay in filing the FIR has not been considered by the learned Sessions Judge. The prosecution has not satisfactorily proved that the appellant had on any occasion committed mental or physical cruelty against his wife Savita. Had it been an intent of the appellant/accused to commit any offence, he would have killed his another son too because, as per the statement of the complainant, the appellant used to doubt her character and allege that the sons are not from him. The appellant and the complainant were married since last 10 to 12 years and no particular incident was proved by the prosecution to demonstrate that during the said period, the appellant had committed any serious willful conduct. The prosecution has cooked up a story that immediately after marriage the appellant doubted character of Savita. If the prosecution story is believed that prior to the death of Ishwar, there

was a history of the appellant harassing Savita by doubting her character, then the natural and spontaneous reaction of the complainant ought to have been of immediately lodging police complaint against the appellant anytime during last 10 to 12 years of their marriage. All these facts go to show that the appellant is victim of false prosecution and concocted theory.

5. The learned counsel further submits that the learned Sessions Judge has appreciated that in order to attract the ingredients of Section 302, the prosecution has made out a story that on 18.07.2011, the appellant picked Ishwar and in order to murder him, threw him in the well. However, the learned Sessions Judge has failed to appreciate the contradiction in the cross examination. In the FIR also, which came to be lodged on 21.07.2011, the complainant has stated that when the appellant was going to work in the agricultural field, deceased Ishwar followed him. This shows presence of affection and cordial relation between appellant/accused and his son Ishwar. In cross examination, the complainant has admitted that she married appellant/accused about 15 years ago. Elder son Krishna was born after about 2 to 3 years of their marriage and younger son Ishwar (deceased) was born three years thereafter. As per this admission on the part of the complainant, even if it is considered that their marriage was solemnized 10 years ago, then,

deceased Ishwar must have been at least five years of age on the date of the incident. The learned counsel submits that the complainant in her examination in chief has deposed that her brothers Prabhakar and Shivaji searched for Ishwar, but could not find him. It is pertinent that in spite of the appellant/accused having asked the complainant to look for Ishwar in the well, neither the complainant nor her brothers took search of Ishwar in the well.

6. The learned counsel further submits that the learned Sessions Judge has ruled out the possibility of accidental death which was very probable and in absence of the prosecution discarding the probability of accidental death, the appellant could not have been sentenced for the offence punishable under Section 302. The learned counsel lastly submits that the prosecution has failed to prove its case beyond reasonable doubts and prays that this appeal may be allowed.

7. The learned counsel for the appellant, in order to substantiate his contentions, placed reliance on the following two cases:

1. ***Sharad Birdhichand Sarda vs State of Maharashtra***, reported in **(1984) 4 SCC 116** and

2. ***Bodhraj alias Bodha and Others vs State of Jammu and Kashmir***, reported in ***(2002) 8 SCC 45***.

8. The learned APP appearing for the State, on the other hand, submits that the prosecution has proved that the accused had taken deceased Ishwar with him and on his return immediately after some time, deceased Ishwar was not with him. The appellant/accused being father of the deceased, his conduct in not lodging missing report or not even informing any relatives or his employer about missing Ishwar is also doubtful. The prosecution has also established that the appellant/accused doubted complainant's character and he was also under the impression that the sons are not by him. He also had grudge against deceased Ishwar because of whom complainant was not doing labour work. The learned APP submits that thus, the motive is also established. Learned APP further submits that the theory of accidental fall of deceased in the well cannot be trusted as deceased Ishwar was a little boy aged only one and half years and he had no reason to go to the well which is situated at a considerable distance from the residence of the appellant/accused. Moreover, the said well is protected by boundary wall of the height of one and half feet. The learned APP thus submits that all the circumstances together establish the guilt of the accused and his appeal may not be entertained.

9. The learned APP, in order to substantiate his contentions, placed reliance on the case of ***Rohtash Kumar vs State of Haryana***, reported in ***(2013) 14 SCC 434***.

10. We have considered the submissions advanced by the learned counsel for the respective parties. With their able assistance, we have perused the appeal memo, grounds taken therein, annexures thereto and the case law cited by both the counsel. We have also gone through the original record.

11. The prosecution case entirely rests upon circumstantial evidence. Needless to say that the conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence laid down by the Supreme Court in various judicial pronouncements. If the prosecution 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. The circumstances from which the conclusion of guilt is to be drawn should, in the first instance, must be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of conclusive nature

and tendency and they should be such as to exclude every hypothesis, but the one proposed to be proved. In other words, there must be a chain of evidence so far as complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all humane probability the act must have been done by accused.

12. The prosecution case mainly rests upon the circumstance that deceased Ishwar lastly seen alive in the company of the appellant/accused. In order to establish this circumstance, the prosecution mainly relies upon the evidence of PW2 Savita. The marriage of PW2 Savita and the appellant/accused took place some 10/15 years ago and they were having two children, namely Krishna and Ishwar. According to PW2 Savita, there used to be quarrels between her and the appellant/accused during the course of aforesaid period of cohabitation. The appellant/accused was suspecting about her character. Even she used to go and stay at her maternal house for some days. At the time of incident, they had started residing at village Satona in the agricultural land of one Asaram Bidve. The appellant/accused had undertaken labour work in the said agricultural land. PW2 Savita has deposed that the appellant/accused started saying that she should leave both of her children to her brother's house because they are not allowing

her to do labour work. However, PW2 Savita has avoided to do so by saying that the younger son Ishwar is only one and half year old. Even on that count, the appellant/accused said that to do something about him and even he slapped deceased Ishwar. This incident had taken place two days prior to the main incident. PW2 Savita has further deposed that on the date of incident at about 8.30 a.m., she was standing outside of the house alongwith her son Ishwar. At that time, the appellant/accused said that he will take Ishwar with him and she should bake vegetables. Thereafter, the appellant/accused took Ishwar with him and PW2 Savita came to the house for cooking. Thereafter, the appellant/accused came to PW2 Savita. She had asked him as to where deceased Ishwar is. Thereupon, the appellant/accused said that he does not know and she may go and search him towards the well. Thereafter, PW2 Savita talked with her brother Prabhakar and told him that deceased Ishwar is missing and he should come. Thereafter, her two brothers, namely, Prabhakar and Shivaji came there. They searched for Ishwar but could not find him. On the next day, her another brother PW6 Dnyaneshwar came. Her maternal cousin had also undertaken search alongwith PW6 Dnyaneshwar. On that day, i.e. on 19.07.2011, dead body of Ishwar was found floating on the water of the well. The said well is situated in the same agricultural land but it is at a distance of 500 to 1000 feet from the house of PW2 Savita and the appellant. As per the report Exhibit 28

submitted by the Police Patil of village Satona to the concerned Police Station, the dead body of deceased Ishwar was found floating on the water of the well on 19.07.2011 at about 18.00 hours. As deposed by PW2 Savita, deceased Ishwar was missing from 8.30 a.m. on 18.07.2011 and he was lastly seen alive in the company of his father appellant/accused.

13. The circumstance of last seen together would normally be taken into consideration to find the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with deceased could completely be ruled out. In other words, the time gap between the accused persons seen in the company of deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. In the instant case, the time gap cannot be stated to be so small. The learned APP has vehemently submitted that in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is a considerably long duration.

14. In order to establish the chain of circumstantial evidence so as to place reliance on the main circumstance of last seen together, the prosecution claims to have established two circumstances i.e. (i) motive and (ii) deceased Ishwar was one and half years old and considering the height of the parapet of well, deceased Ishwar could not have fallen into the well accidentally.

15. In a case mainly based on the circumstantial evidence, motive has a greater relevance. However, like any other circumstantial evidence, proof of existence of motive is necessary. PW2 Savita and the appellant/accused got married some 10/15 years back. It is the prosecution story, and particularly PW2 Savita has deposed, that since marriage the appellant/accused was suspecting about the character of PW2 Savita and on that count, he used to harass her. It is also the prosecution story that many times the complainant PW2 Savita left company of the appellant/accused and had gone to reside with her parents at her parental home and each time the appellant/accused had fetched her to resume cohabitation. PW2 Savita had agreed to come and reside with the appellant/accused some one month prior to the incident because the appellant/accused had assured her of good behaviour. However, he started harassing her by alleging that the two sons are not born from him as she was staying at her parental house for a long time.

It has come in the evidence of the prosecution witnesses that the elder son Krishna was born to PW2 Savita and appellant/accused 2/3 years after their marriage and deceased Ishwar was born three years thereafter. There is no evidence to establish that the appellant/accused, during the long span of their marital life, on any occasion caused mental or physical cruelty to his wife PW2 Savita by suspecting her character. On the other hand, it has come in the evidence of PW2 Savita that the accused used to fetch her from her parents' house for further cohabitation. The prosecution has not brought a single circumstance on record to show that PW2 Savita was submitted to severe beating or harassment by the appellant accused on the count of suspecting about her character. On the other hand, it appears that there was cordial and affectionate relations between the appellant/accused and his son Ishwar. In our considered opinion, the prosecution has failed to establish the motive in this case on the part of the appellant/accused for commission of murder of his own son.

16. The prosecution claims that deceased Ishwar was one and half years old at the time of the incident and it was not at all possible for him to crawl up to the well, which is at a considerable distance from the house, on his own. Further, the height of the parapet wall of the said well is near about two and half feet and as such it was not possible that deceased Ishwar might have fallen into the well accidentally. PW2

Savita has admitted in her cross examination and even the other prosecution witnesses have also deposed that the elder son Krishna was born to PW2 Savita and the appellant/accused 2/3 years after their marriage and deceased Ishwar was born to them three years thereafter. Deceased Ishwar must have been at least five years of age as on the date of the incident. Apart from this, as admitted by PW2 Savita, the appellant/accused has immediately replied to the query made by PW2 Savita that deceased Ishwar was not with him and to search him near the well. However, on the basis of this alone, no inference could be drawn that the appellant/accused had thrown his son Ishwar in the water of the well. It is difficult to draw such inference as there is no previous history of criminal behaviour on the part of the appellant/accused while treating PW2 Savita and also the children. Only on the next day, i.e. after more than 20 hours of lastly seen deceased Ishwar alive in the company of the appellant/accused, the dead body of deceased Ishwar was found floating on the water of the well. At the most, even by stretching the things, the circumstances as discussed above may raise suspicion as against the appellant/accused. However, it cannot take place of proof.

17. In the case of ***Bodhraj alias Bodha and others*** (supra), relied upon by learned counsel for the appellant/accused, in para 31 of the judgment, the Supreme Court has made the following observations:

“31. The last-seen theory comes into play where the time-gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased, A-1 and A-2 were seen together by witnesses. i.e. PWs 14, 15 and 18; in addition to the evidence of PWs 1 and 2.”

18. In the instant case, there is a long gap between the point of time when deceased Ishwar was lastly seen alive in the company of the accused and deceased Ishwar found dead. Even assuming that on 18.07.2011, accused took deceased Ishwar with him, however this circumstance alone short fall for considering the guilt of the appellant/accused. There is no further positive evidence to show that deceased Ishwar was found alive in the company of the appellant/accused near the well and after a small gap, the dead body of deceased Ishwar was found floating on the water of the said well.

19. The prosecution further claims that the appellant/accused has made a disclosure statement before the Investigating Officer in presence of the panch witness on 20.10.2011 to the effect that he had thrown the towel in the well used in commission of the crime. The learned APP submits that in terms of the provisions of Section 27 of the Indian Evidence Act, 1872, the said statement is admissible in evidence. However, as per the evidence of the Investigating Officer, though the Investigating Officer alongwith the panch witness tried to find out the towel with the help of dried sticks, they could not find it. Accordingly, the panchnama was prepared to that effect and it is marked at Exhibit 34. The statement which is admissible under Section 27 of the Indian Evidence Act, 1872 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved. The basic idea embedded in Section 27 of the Indian Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from an accused, such a discovery is a guarantee that the information supplied by the accused is true. In absence of any such recovery pertaining to the alleged information given by the appellant/accused, the prosecution cannot take the aid of Section 27.

20. In the case of ***Rohtash Kumar*** (supra), relied upon the learned APP, the appellant therein was last seen together with the deceased just before her death and there is also recovery made on the basis of disclosure statement made by the appellant. In the facts and circumstances of the said case, the Supreme Court dismissed the appeal of the appellant therein. The said case cannot be made applicable to the facts and circumstances of the present case.

21. In the instant case, even there is inordinate delay in lodging the complaint. Though the dead body of deceased Ishwar was found floating on the water of the well situated in the same agricultural land on 19.07.2011 and though PW2 Savita was suspecting about involvement of the appellant/accused in the crime, there was no reason for her to cause delay in lodging the complaint when all her brothers and cousin were present all the while with her. So far as the the last circumstance that the prosecution wants to rely upon, that the appellant/accused remained absconding for a considerable period, it is well settled law that mere abscondence of the accused would not suffice to hold that he must be the culprit.

22. In the circumstances, we find that the learned Sessions Judge, Jalna has not correctly appreciated the evidence. In that view of the matter, we are of the considered opinion that the guilt of the accused has not been proved beyond reasonable doubt. Hence the following order:

ORDER

- I. The appeal is hereby allowed.
- II. The judgment and order of conviction dated 15.05.2015 passed by the learned Sessions Judge, Jalna in Sessions Case No. 176 of 2011 convicting thereby the appellant/accused Bharat Laxman Bidwe for the offence punishable under Section 302 IPC and sentencing him to undergo imprisonment for life and to pay fine of Rs.1000/-, in default to undergo R.I. for three months, is hereby quashed and set aside.
- III. The appellant/accused Bharat Laxman Bidwe is hereby acquitted of the offence punishable under Section 302 of IPC vide Sessions Case No. 176 of 2011.
- IV. The appellant/accused Bharat Laxman Bidwe is in jail, he be released forthwith if not required in any other crime.
- V. The amount of fine, if deposited, shall be refunded to the appellant/accused.

VI. The Appellant shall furnish Personal Bond of Rs.15,000/- (Rupees fifteen thousand only) and one surety of the like amount under Section 437-A of the Code of Criminal Procedure, before the concerned trial court.

VII. Criminal appeal is disposed of.

23. Since Mr. Sagar Adhav, learned counsel is appointed to prosecute the cause of the appellant, his fees and expenses are quantified at Rs.7000/- (Rupees Seven thousand only).

24. In view of disposal of the main appeal, nothing survives for consideration in criminal application no.1700 of 2016 and the same also stands disposed of.

(V. K. JADHAV, J.)

(S. S. SHINDE, J.)