

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

CRIMINAL APPEAL NO. 190 OF 2017

Datta s/o Sahebrao Giri,
Age: 33 years, Occu: Nil,
R/o. Itt, Tal: Beed, Dist. Beed.
Presently at – Central Jail, Nashik.

... **APPELLANT**
(Ori. Accused)

VERSUS

The State of Maharashtra,
Through, Police Station Officer,
Pimpalner Police Station,
Tal. Beed & Dist. Beed.

... **RESPONDENT**

...
Mr. Vilas P. Savant, Advocate for Appellant.
Mr. R. V. Dasalkar, APP for Respondent / State.

...

CORAM : **T. V. NALAWADE &
SMT. VIBHA KANKANWADI, JJ.**

DATE : 31st October, 2018.

JUDGMENT: (Per T. V. Nalawade, J.)

. The appeal is filed to challenge the judgment and order of
Sessions Case No.43 of 2016, which was pending in the Court of

learned Sessions Judge, Beed. The Trial Court has convicted the Appellant for the offence punishable under Section 302 of the Indian Penal Code and he is sentenced to suffer imprisonment for life and to pay fine of Rs.10,000/-. In default, of payment of fine, he is to further undergo rigorous imprisonment for three years.

2 Both the sides are heard.

3 In short, the facts leading to institution of the appeal can be sated as follows:

Deceased, Kashibai was the wife of first informant Sahebrao Giri. Kashibai could not conceive, Sahebrao married second wife and her name was Kamalbai. Appellant is a son of Kamalbai. His mother died during other delivery, 15 years prior to the date of incident. Kashibai was living in village Itt, Tahsil and District Beed. Appellant was living with his wife in the field and the first informant, Sahebrao was living in the temple of which he is the priest.

4 On 19th December, 2015, Sahebrao had taken Kashibai to the office of village for collecting money, which the Government gives

to the persons, who have no support of anything. Sahebrao was also a beneficiary, but he could not get money as the cash amount brought by the office was over. Probably Kashibai got the money. As Kashibai was sick, Sahebrao went to the place where she was living to see her and the Appellant also went there. They had taken sweets for Kashibai. Sahebrao left for the field, but Appellant stayed back in the house of Kashibai.

5 At about 08:00 pm on 19th December, 2015 itself, Appellant went to the field and informed Sahebrao that Kashibai was dead. Sahebrao, one Prabhakar Kundlik Giri and the wife of Appellant then went to the house of Kashibai. Somebody had murdered her by cutting her throat and the dead body was lying in the open space situated by the side of the house of Kashibai. Appellant shifted the dead body from that space to ota portion of the house of Kashibai. As it was late, Sahebrao went to Pimpalner Police Station on the next morning and gave report that unknown person had murdered Kashibai.

6 Postmortem on the dead body of Kashibai was conducted

on 20th December, 2015 itself and doctor gave opinion that the death took place due to injury, which was found on the neck of Kashibai. After funeral was over, present Appellant came to be taken in custody by police. Spot *Panchanama* of the place where the dead body was lying, open space, was prepared by police already and *inquest* was already prepared.

7 On 22nd December, 2015, the clothes, which were on the person of Appellant came to be taken over under *Panchanama* as there were blood stains his clothes. On the same day, on the basis of statement given by the Appellant under Section 27 of the Evidence Act, the weapon, *Vili* (sickle) came to be recovered from the heap of stones lying by the side of the house of Appellant. Statements of some witnesses came to be recorded and it transpired that on 20th December, 2015, Appellant had disclosed to the witnesses that he had committed the offence of murder of Kashibai. Statements of such witnesses came to be recorded under Section 164 of the Code of Criminal Procedure. The clothes of Accused, clothes of Kashibai, blood sample of Kashibai, blood sample of Accused and weapon were sent to C.A. office. Blood group of Kashibai was 'AB'. Blood of

this group was detected on the clothes of Accused. Human blood was detected on the weapon. Blood group of Accused is 'B'. Blood of Kashibai was found in the open space where the dead body was found. Charge-sheet came to be filed on the basis of aforesaid material against the Appellant.

8 Prosecution examined in all 13 witnesses. The Appellant took the defence of total denial. The Trial Court has believed the evidence given by the prosecution on last seen circumstance and also on motive.

9 It can be said that the prosecution gave evidence on some circumstances as follows:

- i) Motive, to get money (amount of Rs.2,400/-), which Kashibai had collected under the Government Scheme on 19th December, 2015.
- ii) Circumstances of last seen – evidence of a witness, who had heard voice of Accused at about 07:30 pm on 19th December, 2015.
- iii) Evidence of a witness on extrajudicial confession of the Accused.

- iv) Circumstance that the weapon having human blood was discovered on the basis of statement given by Accused under Section 27 of the Evidence Act.
- v) Circumstance that blood of 'AB' group, blood of deceased was found on the clothes of the Accused.

10 Sahebrao (PW-1) was expected to give evidence as per the report, which was given by him to police that murder of Kashibai was committed by unknown person and on 19th December, 2015, Accused had stayed back in the evening in the house of Kashibai and he had informed to Sahebrao at 08:00 pm in the field that Kashibai was dead. Sahebrao (PW-1) turned hostile. He denied everything, even in the cross-examination made by the learned Prosecutor in the Trial Court.

11 In FIR, it was informed that Sahebrao, Prabhakar Giri, Accused and wife of Accused had gone to the house of Kashibai after 08:00 pm, but such evidence is not given by Sahebrao (PW-1). Prabhu (PW-5), who appears to be the same person, Prabhakar, is

examined by the prosecution, but he also turned hostile. In the cross-examination of this witness, the learned Prosecutor has brought on record that Kashibai was living alone in that house. In the cross-examination, he admitted that he had advised Datta to inform about the incident to police, but Datta, Accused had given threat of life to him to prevent him to disclose the incident to anybody. His statement was recorded under Section 164 of the Code of Criminal Procedure and it is marked as Exhibit-34. The answers given in the affirmative to all the aforesaid suggestions during cross-examination, do not show that Appellant had given confession that he had committed murder of Kashibai. In the cross-examination made by the defence counsel, this witness admitted that he is not aware the contents of statement recorded under Section 164 of the Code of Criminal Procedure. His age is only 45 years, but he admitted in the cross-examination that he is not in a position to recollect as he had an accidental fall and from that time he is not in proper state of mind. Thus, the evidence of Prabhu (PW-5) is not sufficient to lead to an inference that the Appellant had given extrajudicial confession to him.

12 Rajesh Waje (PW-4) is examined to prove the

circumstance of “last seen”. He hails from village Itt. He has given evidence that on 19th December, 2015, he, Gorakh Doiphode and Vishwas Bhosale were passing by the side of the house of Kashibai at about 07:30 pm and at that time, he heard shouting coming from the house of Kashibai. In his deposition, it was recorded that it was the house of Datta Giri, but it is admitted that the Appellant was not living there and he was living in the field. He has given evidence that when he heard the shouting, he gave a call and asked as to who was there. He has given evidence that from inside of the house, Appellant replied by saying that it was him and he was giving medicine to his mother. His police statement was recorded on 21st December, 2015. He admits that he learnt on 20th December, 2015 itself that Kashibai was murdered. His evidence shows that he had visited the house of Kashibai on 20th December, 2015 and he has seen the dead body, which was lying on the ota portion. He has not given explanation as to why he did not approach police immediately on 20th December, 2015. In the examination-in-chief, he has tried to say that when he went there to see the dead body, he noticed that Appellant was in frightened state of mind. In any case, the evidence needs to be closely scrutinized as the incident did not take place inside of the

house and it is a case of prosecution that Kashibai was murdered at the distance of about 40 feet from the house, in the open space.

13 Shivaji Chaure (PW-2) is examined by prosecution to prove the *Panchanama* of spot of offence. *Panchanama* is proved at Exhibit-20. He acted as *Panch* witness on the *inquest Panchanama* also. These two documents show that they were prepared on 20th December, 2015 between 11:00 am and 12:45 pm.

14 The aforesaid two *Panchanamas* show that they were prepared in the Station Diary Entry No.354. Admittedly, crime was not registered when two *Panchanamas* were prepared. Station Diary Entry No.354 was not produced in the Court. In ordinary course, somebody must have given report of unnatural death of Kashibai and only after that police must have visited village and must have prepared aforesaid two *Panchanamas*. That record is not produced by prosecution and that lacuna creates doubt about the case of prosecution, which was put forth before the Court.

15 The spot *Panchanama* shows that spot was shown by

Sahebrao (PW-1). It shows that the spot is situated in the open space belonging to Prabhu Giri, prosecution witness and this spot is at a distance of 40 feet from the house of deceased. At a distance of 30 feet from the spot of offence, there was house of Tulshiram Gavli where he was living. At a distance of 35 feet from the spot of offence, there was east-west road of village proceeding to inner part of village. Blood was found only on the spot of offence. The *Panchanama* does not show that the police had made search of the house. This circumstance needs to be mentioned as prosecution wanted to prove the motive, getting money, which Kashibai had received under the Government Scheme. In ordinary course, police ought to have searched house of Kashibai to ascertain as to whether the money was still there.

16 The aforesaid evidence of spot *Panchanama* shows that the house of Kashibai is situated at a distance of more than 80 feet from the road. This circumstance needs to be kept in mind as the evidence of last seen given by Rajesh Waje (PW-4) is to the effect that he heard shouting from the road and Accused replied to him when call was given and when Accused was inside of the house. It

was 07:30 pm according to Rajesh Waje (PW-4). This circumstance creates doubt about the version Rajesh Waje and story given by Rajesh Waje does not appear to be probable in nature. Admittedly, incident did not take place inside of the house. There is nothing on record creating probability that from inside of the house, Kashibai was dragged or lifted to open space. No other injury was found on the dead body and there was no mark of resistance. No injury was found on the person of Accused. Statement of Rajesh Waje (PW-4) to police was belated. In view of these circumstances, this Court holds that it is not safe to accept the evidence given by Rajesh Waje (PW-4) on the circumstance of last seen. In FIR, it is mentioned that at 08:00 pm, the Accused had reached field to inform the father about the death of Kashibai. The evidence of doctor, who conducted postmortem examination shows that approximate time of death of Kashibai is not fixed. There was no *rigor mortis* over the dead body when the postmortem was conducted between 04:30 pm and 05:30 pm on 20th December, 2015. There was no food in stomach and small intestine though there was material in large intestine. Thus, there is no evidence on approximate time of death of Kashibai. This circumstance cannot be ignored while considering the evidence of

Rajesh Waje (PW-4). For this reason also, this Court holds that the evidence given by Rajesh Waje (PW-4) cannot be used to base conviction.

17 Sayyad (PW-3) was examined to prove the circumstance that the weapon, which is shown to be recovered on the basis of statement given by Accused, was in the custody of the Appellant. Sayyad (PW-3) has deposed that on 19th December, 2015 at 07:30 pm, Accused had come to his house and for cutting apple for his mother, he had taken cutter (weapon) from his house. In examination-in-chief, he identified the cutter, article-8, but in the cross-examination he has admitted that the cutter does not belong to him. Thus, in cross-examination he wiped out the evidence, which he had given the chief examination and that also creates doubt about the case of the prosecution that the weapon was recovered on the basis of statement given by the Accused.

18 Rajesh Gavli (PW-6) is examined by prosecution to prove discovery of weapon, *Vili* (sickle) on the basis of statement given by Accused under Section 27 of the Evidence Act. He has deposed that

on 22nd December, 2015, he was called by Pimpalner Police to the police station and in his presence, Accused showed willingness to show the place where he had kept kept *Vili* (sickle). According to him, *Panchanama* of that incident was prepared and then Accused took Police and *Panchas* to a small colony, *Tanda*. He has deposed that Accused took police to the backside of his house and from there, he took out sickle, which was lying under the stones. He identified article-8 as the same sickle. *Panchanama* of memorandum is proved at Exhibit-38 and *Panchanama* of seizure is given Exhibit-38/A. It is already observed that human blood was found on the sickle.

19 In the cross-examination, the *Panch* witness has admitted that his place of residence is situated in the vicinity of Pimpalner Police Station. The evidence in cross-examination shows that to the east side of the place, there is house of Accused, but he was not sure as to who was owner of land from where the weapon was recovered. The evidence of doctor shows that he has given opinion that such weapon can cause injury found on the neck of the dead body. Though there is such circumstance, only human blood was found on the sickle and recovery was made on 22nd December, 2015 when

Accused was taken in custody on 20th December, 2015. It needs to be mentioned here that even the clothes of Accused were taken over on 22nd December, 2015 when he was taken in custody by police on 20th December, 2015. It can be said that these circumstances are incriminating in nature, but the Court is expected to consider as to whether this circumstance itself is sufficient to convict the Appellant for the offence of murder. This Court has no hesitation to observe that the circumstance is not convincingly established. It is already observed that the so-called owner of *Vili*, in cross-examination stated that this *Vili* does not belong to him. The case of prosecution that the Accused fetched *Vili* from the house of prosecution witness for committing murder, also does not appear to be probable in nature. The Accused could have finished the old lady simply by throttling or by using any other instrument in view of the location where the house was situated and the circumstance that it was night time. Thus, the nature of case of prosecution shows that there is a possibility of concoction.

20 The circumstance that blood stains were found on the clothes of Accused, which are shown to be recovered on 22nd

December, 2015, cannot be called as incriminating circumstance. The deceased was his step mother and in FIR itself, it was informed that the dead body was initially lying in the open space, at the distance of 36 feet from the house and it was shifted from that place to ota portion of the house by the Accused. The clothes, which Accused were wearing at that time, are shown to be seized and so it cannot be said that presence of blood on his clothes is incriminating circumstance.

21 It is already observed by this Court that there is virtually no evidence on motive. Investigation was not competently made and there is no material to show that for getting amount of Rs.2,400/-, Accused murder his step mother.

22 There is some other evidence like evidence of one JCB owner, Satish (PW-8). He has deposed that the Accused had approached him at 02:00 am on 20th December, 2015 and one person was in his company and he had requested to dig a pit for toilet and bathroom for him by using JCB machine. He has deposed that he informed that excavation work cannot be done in the night time and

he needs to come for such work in the morning. He has given evidence that at 07:00 am, Accused came to him and he sent JCB machine with driver. He has given evidence that his driver informed on phone about the incident and so, he asked the driver to come back with JCB machine. Said driver is not examined by prosecution. This case of prosecution also does not appear to be probable in nature. In the FIR given by father, which prosecution wanted to use, he had informed that at 08:00 am, Accused had informed the father that Kashibai was dead. Not only the father, but the wife of Accused and one Prabhakar Giri had then visited the house of deceased on the same night. In view of these circumstances and the evidence of other witnesses, who had visited the spot on 19th December, 2015 itself to see the dead body, it does not look probable that at 02:00 am, Accused had approached Satish (PW-8) and Accused wanted to take a pit for burying the dead body. Thus, the evidence of Satish (PW-8) also shows that the things are concocted.

23 Evidence of Amol (PW-9), who is cashier in “*Sanjay Gandhi and Shravan Baal Yojna*” shows that on 18th December, 2015 he had made payments to beneficiaries under the aforesaid

Government scheme. His evidence shows that on 18th December, 2015, he had paid Rs.2,400/- to Kashibai Giri. Copy of that extract is produced on record. Even if that evidence is accepted as it is, it cannot lead to an inference that to get that amount, Accused committed murder of Kashibai. It is already observed that no investigation was made to find out as to whether the amount was still there in the house. If the amount was taken by Accused, police could have recovered that amount.

24 Evidence of Chandrakant Doiphode (PW-10) shows that on 19th December, 2015, Accused had contacted him to inform that his mother was dead. This evidence of prosecution again shows that the case of prosecution that Accused wanted to dig a pit by using JCB machine probably for burying the dead body, is concocted one. His evidence shows that after giving information, Accused had requested to help him in bringing his wife and father to the house of Kashibai by using auto-rickshaw and accordingly, he had helped the Accused. This circumstance also shows that the case of prosecution that Accused wanted to bury the dead body to conceal the incident, cannot be believed.

25 Evidence of Madhukar (PW-13), API, who made investigation does not show as to how he got suspicion against the Accused. In FIR given on 20th December, 2015, the husband of deceased had expressed suspicion against unknown person. He has not given explanation as to why blood stained clothes of the Accused were not taken over on 20th December, 2015 itself.

26 The learned counsel for Appellant placed reliance on the observations made by the Apex Court in the cases reported as follows:

- (i) **1991 AIR (SC) 1674**, (*Inderjit Singh Vs. State of Punjab*);
- (ii) **1994 AIR (SC) 2585**, (*Tarseem Kumar Vs. Delhi Administration*); and
- (iii) **2011 AIR (SC) 3681**, (*Haresh Mohandas Rajput Vs. State of Maharashtra*).

27 In aforesaid cases, the Apex Court has discussed the various kinds of circumstantial evidence. In the first case, the Apex

Court held that the circumstance that deceased was last seen in the company of Accused was not sufficient for basing conviction. In the second case, the evidence of extrajudicial confession was not accepted by the Apex Court and it was held that the motive for murder was also not proved. In the last case, the Apex Court has discussed the importance of motive when the case rests on circumstantial evidence. The facts and circumstances of each and every case are always different. Motive is relevant when the case rests on circumstantial evidence though absence of motive cannot come in the way of prosecution to prove the offence. In the present matter, in view of the specific case of prosecution about motive, the motive was important, but the prosecution failed to prove the motive for crime. The evidence on last seen circumstance is also highly suspicious in nature. The evidence on extrajudicial confession is not that specific and convincing. This Court has formed opinion that the investigation was not made competently and fairly. The circumstances mentioned in the spot *Panchanama* including the possibility of hearing something like shouting by the neighbours needs to be kept in mind. Neighbour mentioned in the spot *Panchanama* has not come forward to give evidence on the presence of Accused in the house of Kashibai at the

relevant time and the person, who was allegedly going by the side of the house is examined to prove that circumstance. His evidence does not show that he had seen Kashibai or Accused on that night and the nature of his evidence is already discussed. All the statements of witnesses were recorded late. It can be said that initially police had no clue and even when there were blood stains on the clothes of Accused, police did not arrest him as there was a possibility that blood stains came on his clothes when he had shifted the dead body from open place to ota portion of his house.

28 The Trial Court has not considered the aforesaid circumstances properly. This Court holds that it is not safe to draw inference on the basis of aforesaid circumstances that only Accused could have committed the murder of Kashibai. This Court holds that Accused is entitled to benefit of doubt. In the result, the following order is passed:

ORDER

- I. The appeal is allowed.
- II. The judgment and order delivered in Sessions
Case No.43 of 2016, which was pending in the

Court of learned Sessions Judge, Beed convicting the Appellant for the offence punishable under Section 302 of the Indian Penal Code, is hereby quashed and set aside.

- III. The Appellant stands acquitted of the offence punishable under Section 302 of the Indian Penal Code. He is to be set at liberty forthwith after taking personal bond of Rs.15,000/- from him as provided in Section 437-A of the Code of Criminal Procedure.
- IV. Fine amount, if any, deposited by the Appellant, is to be returned to him.

[SMT. VIBHA KANKANWADI, J.]

[T. V. NALAWADE, J.]

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