

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 157 OF 2003

1. Datta s/o. Daulatrao Mundhe,
Age 20 years, Occu. Agriculturist,
2. Thakubai Kishan Mundhe,
Age 30 years, Occu. Household,

All residents of Pradhan Savangi,
Taluka Kinwat, Dist. Nanded.

....Appellants.

Versus

1. The State of Maharashtra
2. Kanhoba Shyamji Pathre,
Age 70 years, Occu. Agriculture,
R/o. Kanakwadi, Taluka Kinwat,
Dist. Nanded.

....Respondents.

Mr. A.H. Kapadia, Advocate for appellants.

Mrs. D.S. Jape, APP for respondent No. 1/State.

**CORAM : T.V. NALAWADE AND
K.L. WADANE, JJ.**

DATED : JUNE 18, 2018.

JUDGMENT : [PER T.V. NALAWADE, J.]

1) Appeal is filed against judgment and order of Sessions Case No. 71/2001, which was pending in the Court of learned Ad-hoc Additional Sessions Judge, Nanded. The appellants, who were accused Nos. 2 and 3, are convicted and sentenced for the offence punishable under section 302 r/w. 34 of Indian Penal Code (hereinafter referred to as 'IPC' for short) and sentence of

imprisonment of life and fine is imposed. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal can be stated as follows :-

Deceased Manohar was son of Kanhoba Patre and at the relevant time, Kanhoba was living in village Pradhan Savangi, Tahsil Kinwat, District Nanded with the family of Manohar. Accused No. 1 Rekha is the widow of deceased. Accused Nos. 2 and 3 were living in the neighbourhood of the house of deceased. Manohar had deserted his first wife and so, he was living only with accused No. 1 and his father in his house.

3) The deceased had illicit relations with accused No. 3 Thakubai. Kanhoba had suspicion that Rekha had illicit relations with others like Maroti alias Babu. There was also suspicion that accused No. 2 Datta had illicit relations with Rekha.

4) The incident in question took place on the night between 7.11.2000 and 8.11.2000. On that, night after taking dinner Kanhoba was sleeping in the courtyard of the house. Kanhoba had seen Rekha, Thakubai and Salu, sister of Thakubai together and they had left for answering nature's call. Initially Manohar was not at home as he was invited at other place for dinner. At about 10.00

p.m. Manohar and Rekha together returned to home and after that Kanhoba went to bed.

5) At about 3.00 to 4.00 a.m. due to some noise Kanhoba woke up from the sleep. As the noise had come from inside of the house, he knocked the door of the house. From inside, accused No. 1 Rekha said that the deceased was vomiting and for some time, she did not open the door and then she opened the door. Kanhoba said that he would bring onion for giving treatment and he went to the house of Thakubai. Thakubai was present in the house. She gave onion to Kanhoba. Kanhoba handed over onion to Cholaji and Cholaji went to the house of Manohar with onion. Cholaji came to Kanhoba and said that somebody had murdered Manohar. Kanhoba then entered the house and noticed that by assaulting Manohar on his head, somebody had finished him. Thakubai was inside of the house on that occasion and she had made arrangement of light by using lantern. Neighbours also gathered. After some time, police came.

6) Rakha disclosed to police that she had illicit relations with Kanhoba and as Manohar was proving to be obstacle in the relationship, she and Kanhoba had together finished Manohar. Police prepared inquest and dead body was referred for P.M. examination.

7) Hari Mundhe, Police Patil of village learnt about the murder of Manohar and he gave F.I.R. He informed that some unknown person had murdered Manohar and the widow had no definite information about the person, who had murdered Manohar. During the course of investigation, Rekha, Kanhoba and some more persons of the village came to be arrested. Afterwards present appellants Datta and Thakubai were also arrested as it transpired that Datta had illicit relations with Rekha.

8) The doctor gave opinion that death had taken place due to head injuries. More injuries were found on the dead body. During the course of investigation, statement of Kanhoba came to be recorded on 12.11.2000. Statements of more persons came to be recorded. During the course of investigation, Rekha gave statement to police that she had concealed the weapon axe in the dung-pit situated in the property of Manohar. On the basis of said statement, axe came to be recovered. There was blood on the axe. The blood of deceased was also sent to C.A. Office. The blood found on the axe and the blood of deceased were of same group. Afterwards accused Nos. 2 and 3 also gave statements to police and on the basis of these statements, sickle, another weapon and stone came to be recovered from the same dung-pit and they were seized. Clothes of accused persons came to be recovered. On the clothes of appellants

blood of group 'A' was detected and blood was detected on stone and sickle also of the same group. Chargesheet came to be filed for offence punishable under section 302 r/w. 34 of IPC against Rekha, Datta and Thakubai. They were granted bail. During trial, Rekha absconded and so, the case of present appellants was separated and it was decided.

9) The appellants had pleaded not guilty. Prosecution examined in all 13 witnesses to prove the offence. The prosecution mainly relied on the circumstantial evidence which was given by Kanhoba (PW 10) and also the evidence of discovery of weapons on the basis of statements of appellants and on the circumstance of presence of blood of group 'A' on the clothes of the appellants. The Trial Court has believed this evidence and the Trial Court has held that there is evidence on last seen, there is evidence on motive and there is other circumstantial evidence of aforesaid nature.

10) This Court has carefully gone through the evidence of Kanhoba (PW 10) who is the main witness of the prosecution. Kanhoba has deposed that on that evening, Thakubai had arranged sexual intercourse for accused Datta with Rekha and Thakubai had illicit relations with Manohar. The evidence of Kanhoba in cross examination shows that he wants to say that on that evening, Datta,

Manohar and these two ladies had free sex inside of the house of Manohar. Kanhoba (PW 10) was confronted to his previous statement recorded by police and it is pointed out that he had not stated before police this incident. This omission in the previous statement of Kanhoba (PW 10) is duly proved in the evidence of Investigating Officer Tribhuvan (PW 13). Though this omission is duly proved, the Trial Court has ignored this omission and the Trial Court has used this part of evidence against the appellants. This is material omission and it amounts to contradiction. This evidence cannot be used against the appellants. Thus, the evidence on last seen together is hit due to this material omission.

11) In the cross examination also, Kanhoba (PW 10) has stated that on that night when Rekha opened the door on the request made by Kanhoba, he could see only Rekha inside of the house and after that he had gone to the house of Thakubai to fetch onion. He had seen Thakubai inside of her house. This admissions falsifies the case of prosecution that Thakubai was in the company of deceased on that night. Inference is easy that before fetching onion by Kanhoba, Manohar was finished. If the evidence of Kanhoba is considered as it is, it can be said that he had sent third person, not the accused to the house of Kanhoba with onion and so, there was no possibility of finishing Manohar afterwards.

12) The evidence of Vasant (PW 1) and Kanhoba (PW 10) show that on that night not only Kanhoba and Rekha were arrested, but some other persons of the village like Arjun, Bibhishan, Gajanan and Sadanand were also taken in custody by police for the purpose of investigation. This circumstance shows that initially there was no clue and no specific information was supplied against the appellants by anybody including Rekha and Kanhoba. The F.I.R. given by Police Patil also shows that there was no specific information about the culprit and even no suspicion was expressed by Police Patil against the appellants immediately after the incident. In view of these circumstances, not much weight could have been given to the evidence of Kanhoba which is used by the Trial Court for proof of circumstance of last seen. Further, the police statement of Kanhoba was recorded on 12th, after four days of incident and there is no explanation given about the delay caused in recording statement of Kanhoba. Thus, the Trial Court has committed serious error in believing Kanhoba and in holding that his evidence is sufficient to prove the circumstance of 'last seen'.

13) The aforesaid evidence of Kanhoba (PW 10) also creates serious doubt about the motive. If the deceased and Datta believed in free sex, there was no question of motive for finishing Manohar.

Kanhoba has tried to say that on the evening, Datta had sex with Rekha, wife of Manohar and after that Manohar had sex with Thakubai. Thus, the evidence on motive is also not convincing in nature.

14) The spot panchanama at Exh. 29 is duly proved in the evidence of Vasant (PW 1). This evidence shows that incident took place inside of house of Manohar. The hand sketch map annexed with the spot panchanama shows that on northern side of the house, there is dung-pit and prior to that there was pendal of Manohar. The houses of Datta or Thakubai are not shown in the map. Thus, their houses were not in the vicinity of the house of Manohar. Specific evidence is given that their houses were at the distance of 200 ft. from the house of Manohar. Thus, if Kanhoba (PW 10) was really sleeping in the courtyard of the house, he would have definitely noticed others entering the house of Manohar on that night or atleast leaving the house. His evidence does not show that he could see either Thakubai or Datta in the house on that night. The evidence hit by contradiction is already mentioned.

15) Alimoddin (PW 4) is examined to prove the memorandum of statement of Rekha and recovery of weapon axe from the aforesaid dung-pit. This witness was cross examined by the

learned APP. Even if his evidence was available for consideration, this evidence could not have been used against the present appellants in view of the object behind the provision of section 27 of Evidence Act. Surprisingly, the Trial Court has used the evidence on discovery of all the three weapons. Mohammad Usman (PW 5) is examined to prove the memorandum of the statement given by Datta and Thakubai. Exh. 40 is joint statement of two accused. Exh. 41 is the panchanama of seizure of sickle and stone and these articles are shown to be recovered from the aforesaid dung-pit. When the first recovery of axe was made on 10.11.2000, the recovery of other two weapons on the basis of statements made by the present appellants was shown to be made on 12.11.2000. As recovery is made from the same place and as there is joint statement, Exh. 40, this Court holds that this part of evidence cannot be used against the appellants in view of provision of section 27 of Evidence Act. Surprisingly, the Trial Court has used this evidence even when it was joint statement of two accused shown to be given under section 27 of Evidence Act. The Trial Court has committed serious error in placing reliance on this part of evidence and due to that, error is committed of giving conviction.

16) The provision of section 27 of Evidence Act is clear enough to presume that the information collected from a person

accused of an offence can be used only against that accused. The provision of section 162 (2) of Cr.P.C. relaxes the restriction put by section 162 (1) of Cr.P.C. in respect of use of information given by accused to police for the provision of section 27 of Evidence Act. That information can be only for 'discovery' of fact mentioned in section 27 of Evidence Act and so, when the place where the dead body or weapon or relevant thing is discovered on the basis of information given by one accused, the information given subsequently by other accused about the same place cannot be used against the second accused.

17) The Court is expected to keep in mind the interpretation of term 'proved' given in section 3 of Evidence Act at the time of appreciation of evidence when there are many statements on 'discovery' mentioned in section 27 of Evidence Act. The case of prosecution that all the three accused were involved in murder and three different weapons were used by them and one after other each of them concealed the weapon in the same dung-pit cannot be accepted as probable case and for that reason also, this Court holds that there was no proper appreciation of evidence by the Trial Court.

18) Panch witnesses Subhash (PW 6) and Sakru (PW 7) are examined to prove the recovery and seizure of clothes of the

accused persons, but they have turned hostile. It can be said that the clothes of only Rekha could be seized immediately i.e. on 8.11.2000. But, the clothes of present appellants and aforesaid two weapons are shown to be recovered late i.e. on 12.11.2000. The property was sent to C.A. Office on 6.12.2000, late and no explanation is given by the prosecution on this circumstance also. When the prosecution case rests on circumstantial evidence only, each circumstance needs to be clinching and satisfactorily proved. The delay caused in sending the property to C.A. Office cannot be ignored in the present case as there are aforesaid circumstances which have created doubt about the involvement of the present appellants in the crime.

19) The evidence of Dr. Utta (PW 11) and the P.M. report at Exh. 43 show that as many as 9 injuries were found on the dead body. Due to external injury No. 1 which was incised wound on the right side near eyebrow of size 3.5" x 1.5" and incised wound near right ear pinna of size 6 cm x 3 cm, there was intracranial haemorrhage and these injuries caused the death. Doctor has given evidence that such injuries can be caused by axe. The other weapons like sickle and stone were not shown to the doctor during his examination. This circumstance also needs to be considered in favour of appellants. The defence has not disputed that Manohar

died homicidal death. In P.M. report, time of death is given as 3 hours after the last meal. No substantive evidence is given by Kanhoba (PW 10) as to when and where Manohar had taken dinner on that night. Prosecution was expecting him to state about the time of taking dinner outside. He has given evidence that only early in the morning he heard and sound and he woke up. But, he appears to be illiterate person and time is not given of this incident. Police Patil has given evidence that as per his information incident took place on 8.11.2000 at about 6.30 a.m. The time given by Police Patil is not matching with the P.M. report. These circumstances have created more doubt about the case of prosecution against the appellants.

20) It can be said that the evidence of Kanhoba (PW 10) was mainly against Rekha, who absconded after starting of the Trial. The Trial Court could not have used aforesaid circumstances against the appellants as they are not clinching and they are not satisfactorily proved. This Court has no hesitation to hold that the Trial Court has committed serious error in relying on the aforesaid evidence given against the appellant. In the result, following order is made.

ORDER

The appeal is allowed. Judgment and order of the Trial Court, convicting the appellants for the offence punishable under section 302 r/w. 34 of IPC is hereby set aside. Both the appellants

are acquitted of the offence for which they are charged. The bail bonds of the appellants already given are to continue for the period of six months from today. Record and Muddemal property is to be preserved for trial of the absconding accused.

[K.L. WADANE, J.]

[T.V. NALAWADE, J.]

ssc/