

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.362 OF 2003

Maruti s/o Mahadeo Raut,
Age-55 years, Occu:Shopkeeper,
R/o-Plot No.24, Sainagar,
Near Bharat Nagar, Aurangabad.

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr.Joydeep Chatterji Advocate for Appellant.
Mr.S.B. Pulkundwar, A.P.P. for Respondent.

...

**CORAM: S.S. SHINDE AND
S.M. GAVHANE, JJ.**

DATE OF RESERVING JUDGMENT : 9TH MARCH, 2018

DATE OF PRONOUNCING JUDGMENT: 15TH MARCH, 2018

JUDGMENT [PER S.S. SHINDE, J.] :

1. This Appeal is directed against the
Judgment and order dated 3rd May, 2003, passed by

the III Ad-hoc Additional Sessions Judge, Aurangabad in Sessions Case No.24 of 2003 thereby convicting the Appellant-accused Maruti s/o Mahadeo Raut for the offence punishable under Section 302 of the Indian Penal Code (for short "I.P. Code") and sentencing him to undergo imprisonment for life and pay fine of Rs.1,000/- and in default to suffer rigorous imprisonment for three months.

2. The prosecution case, in brief, is as under:-

A) On 17th October, 2002, at about 2.00 to 2.30 p.m., there was phone call by unknown person at Mukundwadi police station, that quarrel was going on at Bharatnagar, so PSI Madhav Patil from said police station, rushed with his staff to Bharatnagar and saw gathering of persons in front of one house. On the stairs of said house, he saw blood stains and entering the house, it was found

that lady was lying, she was unable to talk and therefore she was shifted to Ghati Hospital. The daughter of said injured lady was accompanying the police. The statement of Sunita, the daughter of said injured lady, was recorded by PSI Madhav Patil and on the basis of said statement, crime was registered as Crime No.174 of 2002, under Section 307 of the I.P. Code. He directed the investigation to API Bote.

B) In the statement-cum-complaint of Sunita Kachru Kale, it is stated that in Bharatnagar (Sainagar) there is house owned by her father and the parents, one sister, two brothers and cousin Sandip Gadekar stay in that house. She is also residing in Bharatnagar, Jaibhavani Chowk, in her own house alongwith her husband, since last three years.

C) Sunita further stated in her complaint that on 17th October, 2002, her younger sister at

12.00 noon had come to her house to help for house-hold work, so also Sandip had come to her house. She had asked Sandip to take her daughter to her mother and Sandip had taken the daughter to her father's house, but returned after some time and said that he saw blood stains on the steps of the house of maternal uncle, and aunt was shouting in the house, so also the door was closed from inside. By this time husband of the complainant had come home for lunch and she told him to accompany her and she had gone towards house of her parents. She saw blood on the stairs of the house and the front door was closed from inside. She gave calls to the mother to open the door, but the same was not opened. At that time neighbours gathered and her husband also reached there. Though they tried to open the door, it was not opened. Hearing the shouts outside, her father opened the door and from the open door she saw her mother lying in pool of blood and she gave call to her mother but there was no response. Immediately

the father came out of the house and on motorcycle he went away. Her husband, on phone, informed the police. There was injury on the head of her mother and bleeding from the mouth. For about 1 to 1 and 1/2 months there was quarrel between the father and mother for having illicit relations of father with neighbouring lady- Nanda Jagan Nirmal. The father had given threat to mother if she would tell to husband of said Nanda, she would be murdered, even then mother had informed the same. She complained that her father during 1.00 to 2.00 p.m. closing the door from inside, for his illicit relations with the neighbour, with pestle and wooden handle gave blows on head, face of her mother and attempted to murder her. Police had brought her to hospital.

D) PSI Sanjay Bote carried out the investigation. He had drawn spot panchnama, attached wooden handle, pestle, kitchen-knife, nylon rope, samples of blood stains. The injured

was initially admitted in Ghati Hospital and then shifted to Bhavna Hospital. The blood stained saree of injured was attached. On 26th October, 2002 the lady died and the inquest was drawn, postmortem was carried out. On 28th October, 2002 the investigating officer arrested the accused, at his instance one motorcycle was attached, the crime under Section 302 of the I.P. Code was got added, he had sent the Muddemal to the Chemical Analyst. Due to his transfer PSI Bote handed over further investigation to PSI Ghotkar.

E) After completing investigation, on 10th January, 2003, charge-sheet was filed before the learned Judicial Magistrate First Class (Railways), Aurangabad. By order dated 13th January, 2003 the learned Magistrate committed the case to the Court of Sessions.

F) A charge for an offence punishable under Section 302 of the I.P. Code was framed against

the accused and the same was read over and explained to the accused. The accused pleaded not guilty and claimed to be tried, with the defence of total denial.

3. After recording the evidence and conducting full fledged trial, the trial Court has convicted the Appellant-accused for the offence punishable under Section 302 of the I.P. Code and sentenced him to undergo imprisonment for life and to pay fine, as afore-stated. Hence this Appeal.

4. Mr. Joydeep Chatterji, learned counsel appearing for the Appellant submitted that there is no eye witness to the incident and the case of the prosecution is based on the circumstantial evidence only. There is no direct evidence against the accused. He further submitted that all the material prosecution witnesses turned hostile including the first informant, and they did not support the prosecution case. He further submitted

that chain of circumstances on which reliance placed by the prosecution has not been established beyond reasonable doubt by the prosecution. The trial Court has relied on the contents of the First Information Report and convicted the accused. The First Information Report is not the substantive piece of evidence, and it can only be used for the purpose of corroboration and contradictions. He further submits that on the basis of statements recorded under Section 161 of the Code of Criminal Procedure (for short "Cr.P.C.") before the investigating officer the conviction cannot be based. He further submits that there was no motive for the Appellant to commit murder of his wife. Mr. Chatterji, learned counsel further submitted that there is no direct evidence to connect accused with crime and it is not conclusively established that the deceased was last seen in the company of the accused. He further submits that even for the sake of arguments it is admitted that deceased was last

seen in the company of accused then also, the sole circumstance that deceased was last seen in the company of accused is not sufficient to convict the accused when there is no corroborative evidence. He further submitted that the trial Court has not properly appreciated the evidence brought on record and came to the wrong conclusion. Therefore, he submits that the Appeal may be allowed.

5. The learned A.P.P. appearing for the State submitted that though the case of the prosecution is based upon the circumstantial evidence, the chain of circumstances on which reliance placed by the prosecution has been established beyond reasonable doubt by the prosecution. He further submits that after considering the entire evidence on record the trial Court has convicted the accused and the findings recorded by the trial Court are in consonance with the evidence brought on record.

He, therefore submits that the Appeal may be dismissed.

6. To prove its case, the prosecution has examined as many as 12 witnesses. To consider whether the death of Shivkanya was homicidal or otherwise, firstly we will examine the medical evidence.

7. The prosecution has examined PW-2 Dr. Vaishali d/o Vinaikrao Dakle Patil. She deposed that she was serving in Government Medical College and hospital, Aurangabad. On 17th October, 2002 from 2.00 p.m. to 8.00 p.m. she was on duty as Casualty Medical Officer. At about 2.45 p.m. police had brought one injured - Shivkanyabai. She had examined the injured. Following were the injuries:

"1. CLW on occipital scalp region, size 5X1X0.5 cm.

2. CLW on occipital scalp, size 3X1X0.5 cm.

3. CLW on left side parietal scalp, 3X1X0.5 cm.

4. Multiple haemorrhagic contusions on all over scalp."

8. The prosecution has examined PW-9 Dr. Sitalal s/o Narayanan Rathod. He deposed that he was serving as an Assistant Lecturer in Forensic Medicine Department, Government Medical College and Hospital, Aurangabad. On 26th October, 2002 along with Dr. Kotecha, post-mortem was done on the dead body of Shivkanya Maroti Raut. The post-mortem notes were written by him and signed by both the doctors. The cause of death opined is 'due to head injury'. In Column No.17 external injuries have been shown and details have been given. All the injuries were ante-mortem. Corresponding internal injuries have been shown in Column No.19. Injuries to head mentioned are

sufficient in ordinary course to cause death. Injury No.8 in Column No.17 was ligature marks, suggesting an attempt to strangulation.

9. Thus considering the evidence of PW-2 Dr. Vaishali who examined Shivkanya, she found that there was CLW(Contused Lacerated Wound) on occipital scalp region, CLW on occipital scalp, CLW on left side parietal scalp, and multiple haemorrhagic contusions on all over scalp, fracture of right tempo parietal region with contusion of brain with haemorrhage. PW-9 Dr. Sitalal PW-9 Dr. Sitalal s/o Narayanan Rathod, who conducted post-mortem on the dead body of Shivkanya, also deposed about the multiple injuries he noted, and opined the cause of death as "due to head injury". Thus, it is clear from the perusal of medical evidence, the death of Shivkanya was homicidal. However, real question is, who is author of injuries caused to Shivkanya and her ultimate death.

10. Now, we will examine the evidence of other material witnesses of the prosecution. The prosecution examined PW-1 Janbee s/o Sahebnoor Pathan, neighbourer of the accused. She is examined by the prosecution to show that soon after the incident she visited the spot of incident. She deposed that she is staying in Bharatnagar, near her house there is a grocery shop. She further deposed that she did not know the accused, she did not know who is the owner of the grocery shop. Thus, this witness turned hostile and did not support the prosecution case. She was declared hostile and was cross-examined by the A.P.P., but nothing useful for the prosecution case was elicited from her. The prosecution has examined PW-3 Sonabai w/o Ram Kamble, who is also neighbourer of the accused. She was examined by the prosecution to prove that soon after the incident she visited the spot. However, this witness also turned hostile and did not support

the prosecution case.

11. The prosecution has examined PW-4 Kachru s/o Satwaji Kale, son-in-law of the accused and husband of the informant Sunita. The prosecution has examined this witness, as in his police statement he has stated that after the incident he visited the spot of incident with the informant. However, this witness also turned hostile and did not support the prosecution case.

12. PW-5 Sunita w/o Kachru Kale is the informant. She is daughter of accused Maruti. In her examination-in-chief, she deposed that she is staying in Bharatnagar, Aurangabad along with her husband. The accused Maruti is her father who stays in Sainagar. The father is staying with mother, sons and daughter. Shivkanya was her mother. Her mother died while in hospital. She cannot give the date. She further deposed that she cannot tell how her mother died. She was at her

home on the day when her mother died. It occurred four months back from the date of recording her evidence. In the noon she learnt that her mother died. She had not lodged complaint in police station. She was shown the first information report and she admits that the same bears her signature. But she further deposed that in the hospital her signature was obtained on the first information report. Thus, the first informant Sunita turned hostile and did not support the prosecution case.

13. The prosecution has examined PW-7 Bhalchandra Kashinath More, who is panch to the spot panchnama. This witness also turned hostile and did not support the prosecution case. The prosecution has examined PW-8 Gopal s/o Sambhaji Pawar, who is panch to the memorandum of the accused that he is ready to show the motorcycle which he allegedly used to run away from the spot, and recovery panchnama of the motorcycle at the

instance of accused. But this witness also turned hostile and did not support the prosecution case.

14. Thus, it is clear from careful perusal of the evidence of afore-stated witnesses that all the star witnesses of the prosecution turned hostile and they did not support the prosecution case. Even the first informant Sunita, who is daughter of deceased Shivkanya and accused Maruti, also turned hostile and did not support the prosecution case. The trial Court has relied upon the contents of the first information report. However, it is well settled legal position that the first information report is not a substantive piece of evidence and the same can only be used for the purpose of corroboration and contradiction. The conviction cannot be based upon the contents of the first information report. Thus, as observed earlier, all the material witnesses of the prosecution turned hostile and therefore the prosecution has failed to prove its

case.

15. We have perused the findings recorded by the trial Court. After discussing the evidence of first informant Sunita and that she turned hostile, the trial Court has observed that, Exhibit 15 (first information report) therefore gives the real story and it connects accused with his presence in the house with his wife as well as opening the door he had run away. Thus, to base the conviction the trial Court has placed reliance upon the contents of the first information report, which is contrary to law.

16. In Para 11 of the Judgment, the trial Court has observed that, to connect the accused and to prove the prosecution story that soon after the incident accused seen running away opening the door, the prosecution has examined four witnesses i.e. PW-1 Janbee, PW-3 Sonabai, PW-4 Kachru and PW-5 Sunita and they all turned hostile and not

supported the prosecution. Still in Para-12 of the Judgment, the trial Court has referred to the contents of the first information report and further observed that, same is the statement of Kachru before the police who is PW-4. The trial Court has further observed that, for PW-1 Janbee, her statement before the police under Section 161 of Cr.P.C. is that she followed Sunita and Kachru who are her neighbours and were running along with children and reached house of Rahul and the door was closed from inside, Shivkanya was shouting. The trial Court has further observed that, like is the statement of PW-3 Sonabai.

17. Thus, as observed earlier, to rely upon the version of PW-5 Sunita, first informant, the trial Court has relied upon the contents of the first information report, which is not the substantive piece of evidence. So far as PW-1 Janbee, PW-3 Sonabai, both neighbours of the accused, PW-4 Kachru, son-in-law of the accused,

though all these witnesses turned hostile and did not support the prosecution case, the trial Court has relied upon their statements under Section 161 of the Cr.P.C., recorded by the police during the course of investigation. The statements recorded under Section 161 of the Cr.P.C. before the investigating officer is not the legal evidence, and the conviction cannot be based upon such statements.

18. In Para-14 of the Judgment, after referring to the oral evidence of PW-1 Janbee, PW-3 Sonabai, PW-4 Kachru and PW-5 Sunita, the trial Court has observed as under:

"Though these witnesses have turned hostile, considering the situation, circumstances and proof of their statement before police through PW-12 Sanjay Bothe, their presence should be there and they should have seen the accused running away from the house

when behind in the house his wife was lying with injuries and those were bleeding and ultimately she succumbed to those injuries."

. The above said findings recorded by the trial Court are hypothetical, based upon surmises and conjectures. The conviction cannot be based upon such perverse findings.

19. Admittedly, in the present case there is no eye witness and the prosecution case is entirely based upon the circumstantial evidence. The Supreme Court in the case of Shankarala Gyarasilal Dixit Vs. State of Maharashtra¹ in para 13 held thus :

"13. Since this is a case of circumstantial evidence, it is necessary to find whether the circumstances on which the prosecution relies are established by satisfactory

¹ AIR 1981 SC 765

evidence, often described as 'clear and cogent' and secondly, whether the circumstances are of such a nature as to exclude every other hypothesis save the one that the appellant is guilty of the offences of which he is charged. In other words, the circumstances have to be of such a nature as to be consistent with the sole hypothesis that the accused is guilty of the crime imputed to him."

. After discussing the circumstances brought on record and the evidence available therein, in the case of Shankarala Gyarasilal Dixit (supra), the Supreme Court observed that though 12 circumstances have been relied upon by the prosecution, the important circumstance is that the appellant therein was present in the house, was not proved by the prosecution. Therefore, in the facts of that case, Supreme Court held in Para-26 of the Judgment that the crucial link in the chain of circumstances is the

presence of the appellant in his house at the time when the dead body of Sunita was discovered. Once that link snaps, the entire case would have to rest on slender tit-bits here and there. This discussion disposes of the second part of the 4th circumstance, part of 5th circumstance and circumstances (6) and (7). The Supreme Court acquitted the appellant therein.

20. In the present case also the crucial link in the chain of circumstances is the presence of the Appellant in his house at the time when the dead body of Shivkanya was discovered and thus Shivkanya was last seen in the company of the accused. However, all the star witnesses of the prosecution i.e. PW-1 Janbee, PW-3 Sonabai, PW-4 Kachru and PW-5 Sunita turned hostile. Thus crucial link in the chain of circumstances that when deceased last seen in the company of the Appellant, prior to that both of them were present in the house is not proved by the prosecution.

Therefore, benefit of doubt in favour of the Appellant deserves to be extended.

21. In the light of discussion in foregoing paragraphs, we are of the considered view that the entire prosecution case rests upon the circumstantial evidence and the evidence brought on record by the prosecution is not cogent, sufficient and convincing so as to prove the offence against the Appellant beyond reasonable doubt. Therefore, an inevitable conclusion is that the Appellant is entitled for the benefit of doubt. Hence we pass the following order:

O R D E R

(I) The Criminal Appeal is allowed.

(II) The impugned Judgment and order dated 3rd May, 2003, passed by the III Ad-hoc Additional Sessions Judge,

Aurangabad in Sessions Case No.24 of 2003 convicting and sentencing Appellant - Maruti s/o Mahadeo Raut for the offence punishable under Section 302 of the Indian Penal Code, is quashed and set aside.

(III) The Appellant - Maruti s/o Mahadeo Raut is acquitted of the offence punishable under Section 302 of the Indian Penal Code. Fine amount, if deposited as per the impugned Judgment and order, be refunded to the Appellant.

(IV) The bail bonds of the Appellant shall stand cancelled.

(V) The Appellant shall furnish the bail bonds of Rs.15,000/- and surety of like amount under Section 437-A of the

Code of Criminal Procedure, before the
concerned trial Court at Aurangabad.

[S.M. GAVHANE, J.]

asb/MAR18

[S.S. SHINDE, J.]