

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 4673 OF 2015

The State of Maharashtra, Through Police
Inspector, MIDC Police Station,
Ahmednagar, Dist. Ahmednagar.

...Applicant.

(Ori. Complainant)

Versus

Balaji Basuraj Kamthane,
Age : 22 years, Ori. R/o Joljapka,
Tq. Bhalki, Dist. Bidar,
Karnataka State, at present R/o
Dangatmala, Navnagapur, Ahmednagar.

...Respondent.

(Ori. Accused)

Mr. D. R. Kale, Addl. Public Prosecutor, for applicant /
State.

Mr. R. D. Sanap Adv. for respondent.

**CORAM : PRASANNA B. VARALE &
SMT.VIBHA KANKANWADI. JJ.**
DATE : 13-04-2018.

JUDGMENT : [Per Smt. Vibha Kankanwadi, J]

(1) Present application has been filed for
leave under Section 378 (1) (3) of Code of Criminal
Procedure for challenge to the judgment and order
passed by the learned Sessions Judge, Ahmednagar in
Sessions Case No. 295/2014, dated 11.6.2015, thereby
acquitting the respondent / accused from the charge

punishable under Section 302 of Indian Penal Code.

(2) Prosecution case in brief was that one Savita Kanse was tenant in the room owned by Gumfabai Dangat in her Chawl situated at Dangat Mala, Ahmednagar. A lady residing in the neighbourhood of Savita informed telephonically to the landlady that something unusual had happened in the room occupied by Savita. Said telephone call was given around 11 AM on 4.6.2014. After Gumfabai came, the neighbouring lady Savita Karande went to the room of Savita Kanse. They found Savita in dead condition beneath heap of clothes in her room. The fact was informed to one Sangle who gave first information to the police around 4.30 PM on 4.6.2014. An accidental death bearing No. 70/2014 was registered in respect of death of Savita Kanse. At that time the spot panchnama as well as inquest panchnama was carried out. On the next day, the son of the deceased by name Amol lodged first information report about the incident. It was stated in the report that he was residing with his mother Savita earlier. His sister got married and is co-habiting with her husband. Thereafter, Amol and Savita continued to stay at

Balajinagar, Bolhegaon, Ahmednagar. Accused used to visit their residence which was disapproved by Amol and, therefore, he had quarrel with accused. Thereafter, Savita shifted her residence elsewhere a year prior to the incident. Amol was residing at the place of his work i.e. Hotel Sairaj. He was informed at about 2.30 PM on 4.6.2014 about death of his mother. He went to the place where his mother was found dead. He came to know that there was quarrel between Savita and accused when they had gone to obtain (Adhaar Card) a day earlier. The informant also came to know that in the evening, on the earlier day, also there was quarrel between the deceased and accused. Therefore, he lodged report with the police to state that the accused has committed the murder in the intervening night between 3.6.2014 to 4.6.2014.

- (3) Offence vide C. R. No. 110/2014 came to be registered on the basis of the said first information report. During the course of the investigation police have recorded the statements of the witnesses. Post Mortem Report was collected. Certain articles were seized at the time of executing spot panchnama. The blood samples of the deceased as well as the

accused and the seized articles were sent for analysis to the Chemical Analyzer. During the period of police custody, the accused had discovered the place of occurrence in presence of Panchas. After completion of the investigation, charge-sheet came to be filed before the concerned Magistrate.

- (4) After the case was committed to the Court of Sessions, the learned Sessions Judge framed charge for the offence punishable under Section 302 of Indian Penal Code at Exh. 10. The contents of the charge were read over and explained in vernacular. He claimed to be innocent. The prosecution has led evidence, oral as well as documentary. After recording the statement of the accused under Section 313 of the Code of Criminal Procedure, the arguments were advanced on behalf of both the sides. After considering the arguments and the evidence on record learned Sessions Judge came to the conclusion that the prosecution has proved that death of Savita Kanse is homicidal. However, the prosecution has failed to prove that the accused has committed murder of Savita. The learned Sessions Judge, Ahmednagar has acquitted the accused. This acquittal is challenged

in this application.

(5) It will not be out of place to mention here that notice was issued to the respondent. However, he could not be found. Ultimately, his presence has been secured by executing his arrest. He was present before this Court on 16th March 2018. He was unable to engage an Advocate to defend himself and, therefore, legal aid has been given to him by appointing Adv. R. D. Sanap by order dtd. 4th April 2018.

(6) Heard learned Addl. Public Prosecutor Shri D. R. Kale for the applicant prosecution / State and learned Advocate Shri R. D. Sanap for respondent. Perused the documents on record.

(7) It is to be noted that there is no dispute and no serious challenge to the finding arrived at by the learned Sessions Judge that death of Savita was homicidal in nature. In order to arrive at the said conclusion, the material that has been relied by the Sessions Judge is the testimony of PW-1 Dr. Gosavi, who had conducted the autopsy and had noted in all 5 injuries externally and 5 injuries internally. The

opinion has been given by him regarding probable cause of death is "death due to head injury due to assault due to hard and blunt object with multiple intracranial haemorrhages with liver rupture with hemoperitoneum". We do not find any error committed in respect of this finding.

- (8) What the prosecution challenges is the acquittal of accused from the charge for the offence punishable under Section 302 of Indian Penal Code. Admittedly, the case is based on circumstantial evidence. The learned Sessions Judge has rightly relied on the decision in **Sharad Birdhichand Sarda V/s State of Maharashtra, reported in AIR 1984 SC 1622**, wherein the law regarding circumstantial evidence has been laid down. The onus was on the prosecution to show that there is complete chain and each segment in the chain points towards the accused to be the culprit. The circumstantial evidence in this case that has been tried to be brought on record is mainly the theory of "last seen together". The important witnesses on which prosecution relied to establish this theory was the evidence of PW-3 Gumfabai. Gumfabai was the landlord of the Chawl.

But it has come in the cross-examination that she stays at the back side row. She has also admitted that only on certain occasions she used to come to the side of the row where Savita was residing. Therefore, if at all it is to be believed that she had come and heard quarrel between Savita and accused on the earlier day, she was intending to say that only by chance she was at that place at that moment. How she was knowing the accused earlier is also a question because accused was not staying with deceased Savita. Even as per the prosecution story the accused used to come to Savita's house occasionally. In her cross-examination she has given admission that besides first day of letting out the room, Gumfabai had not seen the deceased Savita. Therefore, it is hard to believe such a witness. Further she has admitted that she has different water tap and has no reason to take road in front of Savita's room. However, there is inconsistency in respect of darkness because of cut off of the electricity supply. Therefore, the learned Sessions Judge has rightly observed that the isolated evidence of Gumfabai is full of inconsistencies, improbabilities and not worthy of credit. The

testimony of PW-5 Savita Karande, who is stated to be the informant for PW-3 Gumfabai shows that it is hear-say in nature. PW-5 Savita Karande has stated that she had gone alongwith deceased Savita and others to collect the Adhaar Card on 4.6.2014. They returned at about 4 PM. When they were at the centre, Savita Kanse took phone number of one Sangle Sir. Thereafter, there was a quarrel between the accused and deceased Savita on the ground as to why she has taken phone number of Sangle Sir. Accused thereafter left the said place in anger. Savita Karande and deceased Savita returned home and thereafter the witness went to Vikhe Patil Hospital. Thereafter, she was informed by Gumfabai on phone that there was quarrel between Savita and Balaji. Savita Karande was returned at 7.00 PM. Gumfabai was fetching water. At that time also Gumfabai told about the quarrel between the deceased Savita and accused Balaji and then it was told that both of them left the place. Thus, it is to be seen from her testimony that as per her information accused had left Savita's room alongwith Savita. Gumfabai is not corroborating this fact with PW-5 Savita Karande. Prosecution has not examined any witness who had seen

Savita and accused coming back to the room on 3.6.2014 and were there in the room till next day. In **State of U. P. V/s Satish reported in AIR 2005 Supreme Court 1000**, it has been held that the "last seen theory" comes into play where time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found is so small that possibility of any person other than accused being author of the crime is impossible. The ratio as given above has been reiterated in **Shankar Kisanrao Khade V/s State of Maharashtra, reported in (2013) (5) SCC 546**. Thus, taking into consideration, the testimonies of PW-3 Gumfabai as well as PW-5 Savita Karande it can not be stated that in any way, the case is covered under the theory of "last seen together". The testimony of PW-7 Faridabi Pathan is also almost on the line of PW-5 Savita Karande. PW-7 Faridabi was also accompanying deceased Savita and Savita Karande when they had gone to the Adhaar Card Centre. In her cross-examination she has stated that accused had left the Adhaar Centre within one hour and the other persons remained there till 3 PM. In her cross-examination she has clearly admitted that she has no good acquaintance with deceased Savita.

She was not on visiting terms with Savita. In such circumstances, there is very less possibility that she was knowing the exact relationship between Savita and the accused. The other evidence on record is just to prove the inquest panchnama, spot panchnama, etc. Even the circumstantial evidence in the nature of discovery under Section 27 of the Evidence Act is not helpful to the prosecution. It has been stated by the prosecution that in such statement the place of occurrence was discovered by the accused. The place of occurrence was within the knowledge of the Police. In fact, in this case the prosecution has not disclosed or it has not been brought on record as to how the head injury would have been caused. As per the probable cause of death, the head injury might have been due to assault by hard and blunt object. Investigating Officer does not say that he had tried to investigate which could have been the alleged weapon of murder. Therefore, only on the basis of scanty circumstantial evidence, it can not be stated that the prosecution was able to prove the guilt of the accused beyond reasonable doubt. The view that has been taken by the learned Sessions Judge while acquitting the accused is the probable

view and, therefore, it need not be changed merely because a second view is possible. A well reasoned order and judgment has been passed in this case and, therefore, there is no necessity to interfere with the said well reasoned order.

Hence, following Order;

ORDER

- (i) The criminal application is dismissed.
- (ii) The respondent whose presence was secured by bringing him before this Court is set at liberty.
- (iii) The fees payable to the learned Advocate for representing the respondent, appointed by this Court, is quantified at Rs. 3,000/-.

(SMT. VIBHA KANKANWADI)
JUDGE

(PRASANNA B. VARALE)
JUDGE