

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.453 OF 2010

Salim Dastgir Shaikh,	]
Age: 27 years, Occ: Tailor work,	]
Residing at : Vairag, Tal: Barshi,	]
A/p: Krantinagar, (Subhashnagar),	]
Kurul Road, Kohol, Tal: Mohol,	]
District Solapur.	]
(At present detained in Yerwada	]
Central Prison, Pune 411 006.)	]..Appellant
	(Org. Accused No.1)

Versus

State of Maharashtra,	]
(At the instances of Mohol Police	]
Station C. R. No.436/08).	]..Respondent
	(Org. Complainant)

**ALONGWITH
CRIMINAL APPEAL NO.138 OF 2010**

Sarabi Dastgir Shaikh,	]
Age: 55 years, Occu: Household,	]
R/o: Subhashnagar, Kurul Road,	]
Mohol, Tal: Mohol,	]
Dist: Solapur.	]
(At present Central Prison, Yerwada)	]..Appellant
	(Org. Accused No.2)

Versus

State of Maharashtra	]
(Through Mohol Police	]
Station, Tal: Solapur,	]
Dist: Solapur)	]..Respondent

Mr. Prassanna Sahane I/by Mr. Rajesh Shivaji Jadhav, Advocate for the Appellant (Accused No.1) in Appeal No.453 of 2010.

Mr. Prassanna Sahane I/by Mr. Milind Deshmukh, Advocate for the Appellant (Accused No.2) in Appeal No.138 of 2010.

Ms. M. H. Mhatre, APP for Respondent – State in both the Appeals.

**CORAM : B. R. GAVAI &
SARANG V. KOTWAL, JJ.
DATE : 26th JULY, 2018**

ORAL JUDGMENT (Per B. R. Gavai, J)

1] Being aggrieved by the judgment and order dated 22nd January 2010 in Sessions Case Nos.61 of 2009 and 227 of 2009 passed by the learned Ad-hoc Additional Sessions Judge, Solapur, thereby convicting the Appellants for the offence punishable under Section 302 of Indian Penal Code (“IPC” for short) and sentencing them to suffer imprisonment for life and to pay fine of Rs.5000/- and in default to suffer rigorous imprisonment for 15 days, the Appellants have approached this Court.

Since both these Appeals arise out of the same incident and challenge the same judgment and order, the same are being decided by this common judgment and order.

2] The prosecution case in brief as could be gathered from the material placed on record is thus :-

That the original Accused No.2 – Sarabi Shaikh is wife of the deceased Dastgir Shaikh. The original Accused No.1 – Salim Shaikh is his son. The deceased Dastgir Shaikh was serving as Head Master in school. After his retirement, he received an amount of Rs.5,00,000/- towards his terminal benefits. Out of the said amount, he purchased house property in Subhashnagar (Krantinagar) at Mohol. It is the prosecution case that the Accused No.1 – Salim Shaikh was demanding Rs.2,00,000/- from his father Dastgir Shaikh for investing in tailoring business. However, the deceased was avoiding to make the said payment. On 10th October 2008, at about 7:00 p.m., Accused No.1 – Salim Shaikh again demanded Rs.2,00,000/- from his father. That time, his father Dastgir Shaikh told him that he would pay amount after 2 to 3 months. It is the further prosecution case that on the said date they all went to sleep. On 11th October 2008, at about 2:00 a.m. when Accused No.2 – Sarabi Shaikh woke up and reached to the bed room of her husband

Dastgir Shaikh, she found that quarrel was going on between her husband and Accused No.1 – Salim Shaikh on the ground of amount of Rs.2,00,000/-. Accused No.1 – Salim Shaikh asked Accused No.2 – Sarabi Shaikh to go outside of the room and to increase volume of T.V. to maximum. Thereafter he asked Accused No.2 – Sarabi Shaikh to catch hold hands of the deceased, which she accordingly did and Accused No.1 – Salim Shaikh then by means of razor inflicted injury on the neck of his father. He also inflicted injury with razor on wrist. Accused No.1 – Salim Shaikh thereafter asked Accused No.2 – Sarabi Shaikh to go outside the room to sleep. When Accused No.2 – Sarabi Shaikh woke up at about 8:00 a.m. and went in the bed room of her husband, she found that her husband was dead. Accused No.2 – Salim Shaikh was not present in the house. Accused No.2 – Sarabi Shaikh then informed to some ladies at about 4:00 p.m. that she and her son committed murder of her husband. On the say of those ladies, she reached to Police Station, Mohol and narrated about the incident. Her oral report was reduced into writing. On the basis of the said oral report, Crime No.436 of 2008 came to be registered below Exh.53.

3] After registration of the offence, (ASI) N. M. Mallad alongwith PW-12 – M. Y. Maske went to the house and verified the fact that the deceased was lying dead in the bed room of his house. Thereafter case came to be entrusted to PW-14 – Deepak Patil (PSI) for the purpose of investigation. Accused No.2 – Sarabi Shaikh was arrested on the date of the incident. Upon completion of investigation, initially charge-sheet came to be filed against Accused No.2 – Sarabi Shaikh. Since the case was exclusively triable by the learned Sessions Judge, the same came to be committed to the learned Sessions Judge. In respect of the said charge-sheet, Sessions Case No.61 of 2009 came to be registered. Subsequently, Accused No.1 – Salim Shaikh came to be arrested on 1st June 2009 and separate charge-sheet came to be filed against him. Upon committal of the case to the learned Sessions Judge, Sessions Case No.227 of 2009 came to be registered in respect of the said charge-sheet. Charges came to be framed against accused. Accused pleaded not guilty and claimed to be tried.

4] At the conclusion of the trial, learned Trial Judge passed the order of conviction and sentence as aforesaid. Being aggrieved

thereby, the present Appeal.

5] Mr. Prassanna Sahane, learned counsel appearing on behalf of the Appellants submits that the learned Trial Judge has grossly erred in convicting the Appellants. He submits that as a matter of fact that present case is the case of no evidence and by no stretch of imagination, the learned Trial Judge could have convicted the Appellants. He therefore submits that the judgment and order of conviction is liable to be quashed and set aside and the Appellants acquitted of the charges, charged with.

6] Ms. M. H. Mhatre, learned APP on the contrary submits that as a matter of fact the Accused No.2 – Sarabi Shaikh had herself lodged an FIR, wherein she has stated about the commission of crime. She submits that in view of provisions of Section 8 of the Indian Evidence Act (for short “the said Act”), the conduct of Accused No.2 – Sarabi Shaikh can very well be taken into consideration. She further submits that though the confession made to the Police by the Accused No.2 – Sarabi Shaikh cannot be used in evidence against her in view of provisions of Section 25 of the said

Act, the same can very well be used against the Accused No.1 – Salim Shaikh in view of provisions of Section 30 of the said Act.

7] With the assistance of the learned APP and the counsel for the Appellants, we have scrutinized the evidence on record.

8] Undisputedly, there are no eye witnesses to the present case and as such, the case is based on circumstantial evidence.

9] Their Lordships of the Hon'ble Apex Court in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra reported in AIR 1984 SC 1622 has laid down principles for considering the case entirely based on circumstantial evidence.

“153. A close analysis of this decision show that the following conditions must be fulfilled before a case against an accused can be said to be fully established.

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade & Anr

v. State of Maharashtra where the following observations were made:

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and must be' is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute panchsheel of the proof of a case based on circumstantial evidence.”

10] Following the observations of Their Lordships, it can thus be clearly seen that, for resting the conviction based on circumstantial evidence, the prosecution will have to establish each and every circumstance beyond reasonable doubt. Not only that, the prosecution will have to establish the chain of proven

circumstances which lead to no other conclusion than that of the guilt of the accused. As held by Their Lordships, hypothesis inconsistent with the guilt of the Accused will have to be ruled out. As has been held by Their Lordships, there is not only grammatical distinction between “may” and “must” but also a legal distinction. A suspicion, howsoever strong, cannot be substituted for a case proved beyond reasonable doubt.

11] In the light of these guiding principles, we will have to examine the present case. The prosecution has examined 14 witnesses. Most of the witnesses have turned hostile. PW-1 – Dattatraya Katake, was a Panch on the spot Panchnama. He has also turned hostile. He has further admitted in his cross-examination that the documents Exhs.23 and 24 were already prepared by the Police and only signatures were obtained. PW-2 – Padmini Chavan was a Panch on the arrest Panchnama of Accused No.2 – Sarabi Shaikh. She has also turned hostile. PW-3 – Nabilal Inamdar was a Panch on the Inquest Panchnama. He has also turned hostile. PW-4 – Shakil Inamdar was another Panch on the Inquest Panchnama. He has also turned hostile.

12] PW-5 – Shankar Chormule was a Panch on Seizure Panchnama of the blood stained clothes from the house of the deceased and the accused. However, it is to be noted that he has admitted in his cross-examination that the Police had opened the lock of the house and neither house owner nor relatives of the house owner were present with them. It could thus be seen that the said recovery cannot be connected to any of the accused. PW-6 – Dilip Sherkhane was Police Head Constable, who deposes with regard to Seizure Panchnama of deceased's material.

13] PW-7- Nagappa Malhad (ASI), is the person who has taken oral report of Accused No.2 – Sarabi Shaikh. He states that on receipt of information, on the directions of Thane Amaldar, he went to the spot. The door of the house was found closed. He opened the door. He noticed that there was dead body of male person lying on cot in that house. He further states that he noticed incised wound on the neck and on the right hand wrist of the deceased. PW-8 – Shrikant Joshi is carrier of the Muddemal. As such, his evidence does not have much relevance.

14] It appears that PW-9 – Ravindra Shendage was the witness, which the prosecution wanted to examine to establish that the deceased Dastgir Shaikh and both the Appellants were residing together in the house in question. However, he has also not supported the prosecution case and turned hostile.

15] PW-10 – Dr. Chandrakant Kshirsagar is the medical expert, who has conducted autopsy on the deceased. However, since it is not even the case of the accused that the death of the deceased was not homicidal, we need not scrutinize his evidence.

16] PW-11 – Sudhir Doke is the photographer, who had taken photographs of the dead body. PW-12 – Mohan Maske is Police Head Constable, who has reduced in writing complaint of the Accused No.2 – Sarabi Shaikh. PW-13 – Chandrashekhar Sutar (PSI) and PW-14 – Deepak Patil (PSI) are the Investigating Officers, who have conducted the investigation.

17] It could thus clearly be seen that there are no incriminating circumstances, which can be said to have proved

against the present Appellants. Though PW-9 – Ravindra Shendage was sought to be examined to establish that the deceased and the accused persons were last seen together, he has not supported the prosecution case. As such, leave aside establishing that the deceased and Appellants were last seen together the prosecution has even failed to establish that the deceased and the Appellants were residing together in the house, where the deceased was found dead.

18] It is sought to be urged by the prosecution that dead body of the deceased was found on the information given by the First Informant. However, no memorandum of Accused No.2 – Sarabi Shaikh is recorded under Section 27 of the said Act. On the contrary, the evidence of PW-7 – Nagappa Malhad (ASI) would totally demolish the prosecution case. He has admitted that he had opened the door of the house of the deceased and neither the accused nor any relatives of the deceased were present there. In so far as the incriminating statement of the Accused No.2 – Sarabi Shaikh in the FIR is concerned, it will be relevant to refer to the following observations of the Hon'ble Apex Court in the case of **Aghnoo Nagesia Vs. State of Bihar** reported in **AIR 1966 SC 119** :-

“17. A little reflection will show that the expression “confession” in Ss. 24 to 30 refers to the confessional statement as a whole including not only the admissions of the offence but also all other admissions of the offence but also all other admissions of incriminating facts related to the offence. Section 27 partially lifts the ban imposed by Ss. 24, 25 and 26 in respect of so much of the information whether it amounts to a confession or not, as relates distinctly to the fact discovered in consequence of the information, if the other conditions of the section are satisfied. Section 27 distinctly contemplates that an information leading to a discovery may be a part of the confession of the accused and thus fall within the purview of Ss. 24, 25 and 26. Section 27 thus shows that a confessional statement admitting the offence may contain additional information as part of the confession. Again, S. 30 permits the Court to take into consideration against a co-accused a confession of another accused affecting not only himself that the other co-accused. Section 30 thus shows that matters affecting other persons may form part of the confession.

18. If the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by S. 25. The confession includes not only the admission of the offence but all other admissions of incriminating facts related to the offence contained in the confessional statement. No part of the confessional statement is receivable in evidence except to the extent that the ban of S. 25 is lifted by S.27.”

19] It could thus be clearly seen that Their Lordships have held that in view of provisions of Section 25, the confession made by the accused cannot be used against him. The confession includes

not only the admission of the offence but all other admissions of incriminating facts related to the offence contained in the confessional statement. It has been held that no part of the confessional statement is receivable in evidence except to the extent that the ban of Section 25 is lifted by Section 27.

20] It could thus be seen that there is absolutely no material against the Appellants to convict them. The learned Trial Judge has observed that since the Appellants were residing with the deceased and since the deceased was found dead in the house, it was upon the present Appellants to discharge the burden as to how the death of the deceased has occurred.

21] However, as held by Their Lordships of the Hon'ble Apex Court, it is settled position of law that unless prosecution discharges its initial burden of proving the case against the accused, the burden would not shift on the accused under Section 106 of the said Act. As already discussed hereinabove, leave aside establishing that the deceased and the Appellants were last seen together and thereafter the deceased was found dead, the prosecution has also failed to

establish by cogent evidence that the deceased and the Appellants were living together. In that view of the matter, we find that the view taken by the learned Trial Judge is not at all sustainable.

22] In the result, we pass the following order :-

ORDER

- I] The Appeals are allowed.
- II] The conviction and sentence as recorded by the learned Additional Sessions Judge, Solapur, vide the Judgment and Order dated 22/01/2010 in Sessions Case No.61/2009 and 227/2009, is quashed and set aside.
- III] The Appellants are acquitted of all the charges charged with.
- IV] Appellant/Original Accused No.1 is in Jail. He is directed to be set at liberty, if not required in any other crime.
- V] Appellant/Original Accused No.2 is on bail. Her bail bond shall stand discharged.

[SARANG V. KOTWAL, J.]

[B. R. GAVAI, J.]