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

CRIMINAL APPEAL NO. 744 OF 1999

- | | | | |
|----|---------------------------------------|---|---------------|
| 1. | Usha Alias Dhondubai Nanasaheb |] | |
| | Pawar, Age- 43 years, Occ.-Housewife, |] | |
| | R/o. Shastrinagar, Malkapur, |] | |
| | Tal.- Karad, Dist.- Satara. |] | |
| | |] | |
| 2. | Nanasaheb Krishna Pawar |] | |
| | Age-48 years, Occ.- Agri. |] | |
| | R/o. Shastrinagar, Malkapur, |] | |
| | Tal.- Karad, Dist.- Satara. |] | .. Appellants |

Vs.

- | | | | |
|----|------------------------------|---|----------------|
| 1. | The State of Maharashtra |] | |
| | |] | |
| 2. | Baban Krishna Pawar |] | |
| | R/o. Jakinwadi, Tal.- Karad, |] | |
| | Dist. - Satara. |] | .. Respondents |

Mr. Rahul S. Kate for the Appellants.

Mrs. M. M. Deshmukh, APP for the Respondent-State.

**CORAM : INDRAJIT MAHANTY AND
V. K. JADHAV, JJ.**

Judgment reserved on : **4th DECEMBER, 2018.**

Judgment pronounced on : **10th DECEMBER, 2018.**

JUDGMENT (Per V. K. Jadhav, J.)

1. This is an Appeal preferred by the Appellant-accused against the Judgment and Order of conviction dated 27.12.1999 passed by the 4th Additional Sessions Judge, Satara in Sessions Case No. 162 of 1996.

2. Brief facts giving rise to the present Appeal are as follows:

Appellant-accused No.2-Nanasaheb and Appellant-accused No.1 are husband and wife and they have a son by name Deepak. PW-Baban happens to be brother of Appellant No.2. Their parents were staying with Appellant-Nanasaheb. The properties were partitioned between Appellant-Nanasaheb and his other brothers. The ancestral house which was at Jakhinwadi was demolished for reconstruction. The reconstruction work was in progress. Appellant-Nanasaheb was staying in the portion allotted to PW-Baban. Appellant-Nanasaheb had procured a sale-deed of the said portion from his father in favour of Appellant No.1-Usha. Being aggrieved by this, PW-Baban filed a suit against Appellant-Nanasaheb and the brothers came at loggerhead.

3. On 16.07.1996 at about 5.00 p.m. Sushant son of PW-Baban and one Mayur Fuke were playing near the house of the Appellants-accused. As per the prosecution story, Appellant-accused No.1 Usha came out of the house, picked up Sushant and went back. After some time, a gun-shot was heard by Anil Fuke, Suresh Pawar, Sadashiv Bhosale, Ashok Patil and Vasant Patil. It is alleged that Anil Fuke dashed down to the house of the Appellants-accused and the others also came in the said house immediately and they found that Deepak, son of the Appellants-accused was holding a double barrel gun, which was emitting smoke from its barrel and Sushant,

son of PW-Baban was held by Appellant-accused No.1 Usha near her abdomen and Sushant had sustained injury on his chest. Anil Fuke and Sadashiv Bhosale took Sushant on motor bike to Krishna Hospital. In the meantime, Baban was contacted and Baban came in Krishna Hospital. The doctor declared Sushant dead.

4. On that day, Vijay Gaikwad, Senior P. I. was in Malkapur area around 5.00 p.m. He received information regarding fire shot at Jakhinwadi. Therefore, he proceeded to Jakhinwadi. One Vasant Patil met him. It is alleged that, Vasant told him about the incident and he, therefore, went to the house of Nanasaheb and called two panchas and seized from the house double barrel gun from Deepak who was present holding the gun. He opened the gun and seized the empty cartridge in presence of panchas. It is further alleged that Deepak produced 5 live cartridges and 3 empty cartridges from the cupboard. Deepak was arrested and panchnama of seizure of gun and cartridges was prepared. In the meantime, Anil Fuke went to the police station and lodged complaint regarding the incident. Before carrying out post mortem, the body was x-rayed. The x-ray showed there were about 70 pellets on the left side of chest. After carrying out inquest panchnama, the body of Sushant was sent for post mortem. The doctor found there was a circular wound on the front and right side of the chest, just below the right nipple. It was 5 c.m.

in diameter with margins ragged. The doctor also found burn injury laterally to the right sternum in the middle between nipple and right sternum edge. Blood sample of the deceased was collected and the doctor opined that the death was due to shock and due to injuries to the vital organs caused by fire arm. The police then visited the scene of offence in the presence of panchas and prepared its panchnama. Clothes on the person of deceased Sushant and witness Sadashiv Bhosale were seized under different panchanama, sari on the person of Appellant-accused No.1 was seized. Appellant-accused No.2 produced license of the gun in presence of panchas. The cartridges were sent to ballistic expert for opinion. The ballistic expert opined that the shot gun was used for firing prior to its receipt in the laboratory.

5. After completion of investigation into Crime No. 196 of 1996, charge-sheet came to be submitted against the Appellants-accused. The learned Judge of the trial Court has framed charge against the accused under Sections 302, 364 read with 34 of the Indian Penal Code and Section 30 of the Arms Act. The accused pleaded not guilty to the said charge and claimed to be tried. The prosecution has examined in all 14 witnesses to substantiate the charge levelled against the accused. After recording the statement under Section 313 of the Code of Criminal Procedure and after hearing both the sides, the learned 4th Additional Sessions Judge, Satara

vide Judgment and order dated 27.12.1999 convicted Appellant-accused No.1 Usha for the offence punishable under Sections 302, 364 read with 34 of the Indian Penal Code and Appellant-accused No.2 Nanasaheb for the offence punishable under Section 30 of the Arms Act. Hence, the Appellants-accused have preferred this Appeal against the said Judgment and order of conviction.

6. Learned Counsel for the Appellants-accused submits that PW 6-Sadashiv, PW 7-Ashok Patil rushed to the spot after hearing the fire shot and witnessed that the juvenile accused Deepak was having a double barrel gun and the smoke was coming out of double barrel gun. They have further witnessed that Appellant-accused No.1 Usha was present there and she held Sushant near her abdomen. Deceased Sushant had sustained injury on his chest, it was bleeding. PW 8-Anil Fuke has deposed that while the children playing in front of house, Appellant-accused No.1-Usha @ Dhondubai lifted deceased Sushant and took him to her house. The learned Counsel submits that except this, no further role has been ascribed to Appellant-accused No.1 in any manner. The learned Counsel submits that there is no evidence at all to show that the relations between Appellant-accused No.2-Nanasaheb and his brother PW-Baban were strained to such an extent that even the kids were not going to their houses. Even prior to the incident, there was no quarrel between two

families. There is no direct evidence in this case and the prosecution case entirely based upon the circumstantial evidence. There is only one fire shot injury sustained by deceased Sushant and the possibility of fire by accident cannot be ruled out since the double barrel gun was also held by juvenile accused Deepak. There is no motive for the commission of murder of a small kid aged about 4 years on the part of Appellant-accused No.1 Usha. Even PW-Baban has not made allegation about the same against Appellant-accused No.1 Usha. On the other hand, the conduct of Appellant-accused No.1 Usha prior to and after the incident is quite normal. She had taken deceased Sushant in her house and after the incident she had held deceased Sushant to her chest. The learned Counsel submits that even though prosecution story is admitted as it is, no case is made out under Section 302 of the IPC against Appellant-accused No.1 Usha. The learned Counsel submits that so far as the charge under Section 30 of the Arms Act against Appellant-accused No.2 Nanasaheb is concerned, there is no evidence about the violation of the license conditions. The learned Counsel submits that, thus, the Judgment and order of conviction liable to be quashed and set aside in its entirety and both the Appellants deserve to be acquitted for the offences as charged against them.

7. The learned APP submits that admittedly, the relations between Appellant-accused No.2 Nanasaheb and his brother PW-Baban were

strained on account of civil dispute in respect of residential complex. They were not in visiting terms. Under such circumstances, immediately after taking deceased Sushant in the house by Appellant-accused No.1 Usha, juvenile accused Deepak fired a shot by using double barrel gun. The learned APP submits that no other inference except the guilt of Appellant-accused No.1 Usha could have been drawn. The prosecution has also established the motive. The trial Court has rightly convicted Appellant-accused No.1 Usha under Section 302 of the IPC and further convicted Appellant-accused No.2 Nanasaheb under Section 30 of the Arms Act. There is no substance in the Appeal and the Appeal is, thus, liable to be dismissed.

8. There is enough evidence on record, that deceased Sushant died because of fire arm shot. The Prosecution has examined PW 12-Dr. Prafulla Jadhav who has conducted the post mortem examination of the body of deceased Sushant. Deceased Sushant was 4 years old at the time of his death. Though PW 12-Dr. Prafulla Jadhav has noted six injuries in all on the persons of deceased Sushant, injury No.1 which is circular wound on front and right side of chest is a fire arm injury and injury Nos.2 to 4 are the burn injuries and injury Nos.5 and 6 are the pellet injuries. The nature of internal injury as detailed in the post mortem corresponds to external injury No.1. In the opinion of PW 12-Dr. Prafulla Jadhav, death

was due to fire arm injury and due to injuries to the vital organs caused by fire arm. In his considered opinion, injury No.1 was sufficient in ordinary course of nature to cause death. It is, thus, clear that injury Nos.2 to 6 are the immediate consequence of injury No.1. The prosecution has examined PW 14 Mr. Chandrashekhar Kshtriya, Chemical Analyser, Ballistic Division at Nagpur, who has explained that the distance of fire shot may be about 5-6 feet and if the shot is fired through the seized double bored gun from the distance of 5-6 feet, the exist wound is not possible. He has explained that because of pellets entering into the body, they spread and their velocity get reduced. In the backdrop of the opinion expressed by PW 12-Dr. Prafulla Jadhav and PW 14-Mr. Chandrashekhear, we have carefully examined the evidence of the prosecution witnesses.

9. PW 6- Sadashiv Bhosale, PW 7-Ashok Patil and PW 8-Anil Fuke are the witnesses who have immediately rushed to the spot after hearing the sound of fire arm shot. They are the natural witnesses and their presence on the spot cannot be doubted. PW 6-Sadashiv Bhosale is having shop beyond one house from the house of the accused. PW 7 also resides in the same vicinity and his house is situated on the western side of the accused. The presence of PW 8-Anil Fuke near the spot at the time of incident also appears to be natural. On 18.07.1996 at about 5.00 p.m. these witnesses have heard the sound of gun shot from the house of the accused. Thus,

they rushed to the house of accused Nanasaheb. On reaching there, they noticed juvenile accused-Deepak was having a gun in his hand. It was double bore gun, smoke was coming out of the barrel of the said gun. Appellant-accused No.1 Usha was present there and she held Sushant near her abdomen/chest. Deceased Sushant had sustained injury on his chest and it was bleeding. It has also come in the evidence of PW 7-Ashok Patil and PW 8-Anil Fuke that initially deceased Sushant, juvenile accused Deepak and nephew of PW 8-Anil Fuke were playing in front of the house of the Appellants-accused and Appellant-accused No.1 Usha lifted deceased Sushant and took him inside the house.

10. Except this evidence, there is no other evidence to connect the Appellant-accused No.1 to the crime. If at all, juvenile accused-Deepak held a gun in his hand and the same has been noticed by the aforesaid witnesses on the immediate arrival at the spot after hearing of the fire arm sound and the smoke was also coming from the said barrel of the gun, in absence of any other evidence ascribing the role to the Appellant-accused No.1 Usha, we find it difficult to sustain the Judgment and order of conviction under Section 302 passed against her. The above stated prosecution witnesses have specifically deposed in their chief itself that Appellant-accused No.1 Usha held deceased Sushant near her abdomen/chest, when they reached there. Deceased-Sushant was having a bleeding

injury over his chest. In our considered opinion, it is very unlikely on the part of Appellant-accused No.1 Usha to hold deceased Sushant near her chest, if at all, she lifted deceased Sushant from the play place with some ulterior motive and with the help of her own son, who was less than 12 years of age, murdered deceased Sushant. Thus, the pre-incident and post incident conduct of Appellant-accused No.1 Usha indicates normal and innocent behaviour of Appellant-accused No.1 Usha and it is not possible for us to link the same with a criminal act. The same is also evident from the testimony of PW 4-Baban. PW 4-Baban has nowhere stated in his evidence that deceased Sushant, who happened to be his son, came to be murdered by Appellant-accused No.1 Usha with the help of her son juvenile accused-Deepak. PW 4-Baban has admitted that Appellant-accused No.2 Nanasaheb was staying with the parents, in the old room, opposite side of the construction. It is also not disputed that the old house was dismantled and the construction was going on. According to him, there was oral partition and the portion of the house adjacent to the road was put to his share. He has further explained the accused started staying in the portion allotted to his share. However, he has admitted in his cross-examination that at the time of incident, his parents were staying in the tin shed and Appellant-accused No.2 Nanasaheb was of the opinion that the parents should occupy the said room. However, their father sold the said room which was occupied by him to Appellant-accused No.1 Usha and therefore,

PW 4-Baban has instituted a suit against Appellant-accused No.2 Nanasaheb. Even his application seeking temporary injunction in the said suit came to be dismissed. Thereafter, he withdrew the said suit and instituted another suit in Satara against his parents and both the accused and his other brothers. He has also stated that Appellant-accused No.1 and their children never used to come to his house since five months before the incident. We may say that the relations between them came to be strained to some extent. However, even after occurrence of the death of deceased Sushant due to sustaining of fire arm shot in the house of the accused and the said double bore gun has been used by son of the accused, namely, Deepak, PW 4-Baban has not made any allegations against Appellant-accused No.1 Usha. Even there is no evidence that prior to the incident, there was quarrel between two families for any reason. It further appears that the children of both the families were playing with each others. Admittedly, the prosecution case rests on the circumstantial evidence. None of the witnesses referred above witnessed the actual incident. It is well settled that in a case of circumstantial evidence, the circumstances on which the prosecution relies must be consistent with sole hypothesis of the guilt of the accused. It is the test as to whether the cumulative effect of the circumstances establishes the guilt of the accused beyond shadow of doubt. In a case, **Shankarlal Gyarsilal Dixit Vs. State of Maharashtra** reported in (1981) 2 SCC 35, the Supreme Court in paragraphs 31 and 32 of the

Judgment has made the following observations:

“31. It causes us some surprise that the learned Additional Sessions Judge, Akola, who tried the case, has not shown any awareness of the fundamental principle which governs cases dependent solely on circumstantial evidence. Nowhere in his judgment has the learned Judge alluded, directly or indirectly, to the principle that in a case of circumstantial evidence, the circumstances on which the prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. It is not to be expected that in every case depending on circumstantial evidence, the whole of the law governing cases of circumstantial evidence should be set out in the judgment. Legal principles are not magic incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment. The simple expectation is that the judgment must show that the finding of guilt, if any, has been reached after a proper and careful evaluation of circumstances in order to determine whether they are compatible with any other reasonable hypothesis.

32. The High Court, it must be said, has referred to the recent decisions of this Court in Mahmood v. State of U. P. (1976) 1 SCC 542 : 1976 SCC (Cri) 72 : AIR 1976 SC 69 and Chandmal v. State of Rajasthan (1976) 1 SCC 621 : 1976 SCC (Cri) 120 : AIR 1976 SC 917 in which the rule governing cases of circumstantial evidence is reiterated. But, while formulating its own view the High Court, with respect, fell into an error in stating the true legal position by saying that what the court has to consider is whether the cumulative effect of the circumstances establishes the guilt of the accused beyond the “shadow of doubt”. In the first place, 'shadow of doubt', even in cases which depend on direct evidence is shadow of “reasonable” doubt. Secondly, in its practical application, the test which requires the exclusion of other alternative hypotheses is far more rigorous than the test of proof beyond reasonable doubt.”

11. In the present case, there is only suspicion against Appellant-accused No.1 Usha that she might have committed the alleged crime with the help of her son juvenile accused-Deepak. In the case of **The State of Punjab Vs. Bhajan Singh & Ors.** reported in (1975) 4 SCC 472, the Supreme Court held that, suspicion, by itself, however, strong it may be, is not sufficient to take place of proof and warrant a finding of guilt of the accused.

12. The Supreme Court, in case of **Kali Ram Vs. State of Himachal Pradesh** reported in 1973 (2) SCC 808 observed as under :

“Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence.”

13. In the instant case, we do not think that the circumstances are consistent to the point of the guilt of the Appellant-accused No.1 and inconsistent with her innocence. We have taken into consideration the cumulative effect of the circumstances. It appears that, the circumstances brought on record are not sufficient to conclude that within all probability the Appellant-accused No.1 committed the crime. The circumstances are not conclusive in nature. In view of the same, the Appellant-accused No.1

is entitled for the benefit of doubt.

14. So far as Appellant-accused No.2 is concerned, we find no positive evidence against him about the violation of the conditions of the license so as to punish him under Section 30 of the Arms Act. The learned APP has vehemently submitted that the cover of the said double barrel gun was taken out from the cupboard and it indicates that the said gun was usually kept in the cupboard. The learned APP further pointed out that as per the panchnama, the school books and the notebooks are also found in the said cupboard. The learned APP submits that it is within the knowledge of the Appellant-accused No.2 as to the compliance of the conditions of the license and thus burden shifts on him to prove the same in terms of provisions of Section 106 of the Evidence Act. It is true that the burden shifts on the person, if the fact is exclusive within his knowledge, to prove the same. However, it is always for the prosecution to initially prove its case and if the accused fails to tender an explanation, the same would be taken up as an additional circumstances goes against him. The prosecution has, thus, failed to prove the case beyond doubt against Appellant-accused No.2. Hence, we proceed to pass the following order:

ORDER

1. The Criminal Appeal is hereby allowed.
2. The Judgment and order of conviction dated 27.12.1999 passed by

the 4th Additional Sessions Judge, Satara in Sessions Case No. 162 of 1996 is hereby quashed and set aside.

3. Appellant-accused No.1 Usha @ Dhondubai Nanasaheb Pawar is hereby acquitted of the offence punishable under Sections 302, 364 of the Indian Penal Code.

4. Appellant-accused No.2 Nanasaheb Krishna Pawar is hereby acquitted of the offence punishable under Section 30 of the Arms Act.

5. Criminal Appeal No. 744 of 1999 is, accordingly, disposed of.

[V. K. JADHAV, J.]

[INDRAJIT MAHANTY, J.]