

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,**

**NAGPUR BENCH, NAGPUR**

**CRIMINAL APPEAL NO.46 OF 2005**

Sanjay s/o. Madhavrao Girmekar,  
Aged about 28 years, r/o. Sironji,  
P.S., Khapa, Tq. Saoner,  
Distt. Nagpur (In Jail).

..... APPELLANT

**// VERSUS //**

The State of Maharashtra,  
Through P.S.O., Khapa, Distt.  
Nagpur.

..... RESPONDENT

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Mr.R.M.Daga, Advocate for the Appellant.  
Mr.S.M.Ukey, A.P.P. for the Respondent/State.

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**CORAM** : B.R.GAVAI  
AND  
M.G.GIRATKAR, JJ.

**DATED** : 20TH MARCH, 2018.

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

1. The appellant has approached this Court being aggrieved by the Judgment and Order passed by the learned Sessions Judge, Nagpur in Sessions Trial No.498 of 2003 thereby convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay a fine of Rs.1,000/- and in default of payment of fine, to suffer three months' rigorous imprisonment. The appellant has also been convicted for the offence punishable under Section 201 of the Indian Penal Code. For the said offences, he has been sentenced to suffer three years' rigorous imprisonment and to pay a fine of Rs.1,000/- and in default to suffer three months' rigorous imprisonment.

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

On 10.8.2003, Police Station, Khapa received an oral report from Police Patil of Bhondetal informing that, when he was going to his field at around 12.00 noon, one Shamrao Ahake and Prakash Khursam met him on the way and they told him that a corpse of an unknown person was lying near nala. Therefore, he went to the spot along with them and saw a corpse of unknown person. He also called Police Patil of village Nagalwadi namely Satish Morghare and they both came to Police Station to lodge report. On the basis of oral report of said Kisan Uike, Marg was registered and further investigation was set in motion.

3. The spot panchanama was prepared by police on 11.8.2003 in presence of Police Patil Kisan Uike and Police Patil of Nagalwadi village namely Satish Morghare. Inquest Panchanama was drawn and dead body was referred for post mortem. At that time, when the dead body was being kept in the jeep, Narendra Hemraj Girmekar (PW-1) came along with his mother, sister and one Horelal. They identified the dead body to be of his father namely Hemraj. The First Information Report came to be lodged on the basis of information given by Narendra (PW-1) expressing his suspicion

against three persons including present appellant to have committed murder of his father. He had suspected the accused because he was having dispute with the deceased over agricultural land. He had also suspicion on one Dholendra as the deceased had given evidence against him. He had also expressed suspicion with regard to one Eknath Kumbhare since he had taunted his sister and therefore, his father Hemraj had slapped Eknath. He informed that, on 7th August, 2003, his father had gone to village Nagalwadi and these persons had followed him at 7.00 a.m. On the basis of oral report of Narendra (PW-1), the F.I.R. came to be registered vide Crime No.36 of 2003. Investigation was set in motion. As per the Post Mortem report, the cause of death of deceased was found to be multiple injuries. All the three accused were taken in custody. At the conclusion of investigation, charge sheet came to be filed against the present appellant and the other two suspects were discharged.

4. The charge sheet was filed in the Court of learned Judicial Magistrate, First Class. Since the case was exclusively triable by the learned Sessions Judge, the case came to be committed to the Court of learned Sessions Judge. The accused pleaded not guilty and

claimed to be tried. At the conclusion of trial, the learned trial Judge passed the order of conviction and sentence, as aforesaid.

5. We have heard Mr.R.M.Daga, learned Counsel for the appellant and Mr.S.M.Ukey, learned A.P.P. for the Respondent/State.

6. Undoubtedly, the present case is based on circumstantial evidence. The law with regard to conviction on the basis of circumstantial evidence has been very well crystalized by the Hon'ble Apex Court in the case of **Sharad Birdichand Sarda vs. State of Maharashtra** reported in (1984) 4 SCC 116, wherein it is observed as under ;

*153. A close analysis of this decision would 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 the panchsheel of the proof of a case based on circumstantial evidence. "*

7. It could thus be clearly seen that Their Lordships have held that there is not only grammatical distinction between “may” and “must”, but also a legal distinction. It has been held that unless prosecution proves that it is the accused and the accused alone who has committed the crime, conviction under Section 302 of the Indian Penal Code would not be tenable. It has been held that all the probabilities except the one which is

consistent with the guilt of the accused have to be ruled out. In the light of the guidelines laid down by the Hon'ble Apex Court, we will have to examine the present case.

8. In the light of these guiding principles, we will have to examine the present case. Learned trial Judge has relied on the evidence of Narendra Girmekar (PW-1) to come to the conclusion that the deceased was last seen in the company of appellant. It will be relevant to refer to the evidence of Narendra (PW-1). He states that since long there was a dispute between his father and accused on the point of agricultural land. He states that, on 7.8.2003, his father had gone to village Nagalwadi. He has expressed his suspicion against the present appellant as well as Dolendra Sahare and Eknath Tarachand. He states that, when his father had gone to village Nagalwadi, these persons had followed him at 7 a.m. In the evening, he came back home and his mother told him that these persons followed his father. He states that, for next two days, his father did not come back home. On Monday, he came to know that one unknown dead body is lying in Bhondetal Shivar. He went there and identified the dead body to be of his father. It could thus be seen that this witness is

also not a direct witness on the point of last seen theory. He states that he was informed by his mother that these persons followed the appellant. In any case, even according to him, his mother had informed him that those persons had followed his father. It could thus be seen that though hearsay evidence of Narendra (PW-1) would not be admissible, even then, according to his mother, who has not been examined, three persons had followed the deceased. Mother of Narendra (PW-1), for the reasons best known to prosecution, has not been examined.

9. It is further to be noted that though, according to this witness, his father was missing from 7.8.2003, no missing report has been lodged till 11.8.2003.

10. The other circumstance that is relied on by the learned trial Judge is extra-judicial confession alleged to have been given to Horelal Bajanghate (PW-4). In his evidence, Horelal (PW-4) states that, on the day of incident, which was Saturday, at around 8.00 to 8.30 a.m., he was going to forest with cycle. The accused was going by road with bicycle. He states that he had seen Sanjay while pulling deceased Hemraj towards

forest, after his murder. However, in the cross-examination, he has clearly admitted that, even after the incident, he had not informed about the said fact in the house of Hemraj since he was ill for 3 to 4 days. He has further admitted that he had not disclosed this fact in his house also. It could thus be seen that much credence could not be given to the evidence this witness.

11. Insofar as other witnesses i.e. Ravindra Likhar (PW-6) and Dharamdas Dhadade (PW-8) are concerned, they have turned hostile. Insofar as alleged recovery of weapon used in the crime is concerned, the Chemical Ananalyser's report does not connect the said recovery with crime. In any case, the recovery as per memorandum under Section 27 of the Evidence Act is from the place open and accessible to one and all.

12. In this view of the matter, we find that prosecution has failed to prove the incriminating circumstances and in any case, has failed to establish the chain of incriminating circumstances which are so interwoven to each other that it leads to no other conclusion than guilt of the accused. In the result, the following order is passed.

- a) The Criminal Appeal is allowed.
- b) The impugned Judgment and Order of conviction and sentence dated 20.11.2004 passed by 1st Adhoc Additional Sessions Judge, Nagpur in Sessions Trial No.498/2003 is quashed and set aside.
- c) The appellant is acquitted of the offences charged with.
- d) The appellant is on bail. His bail bonds shall stand discharged.

**JUDGE**

**JUDGE**

[jaiswal]

The case of prosecution against the appellant, in short, is as under :

Kisanrao Bobde was sleeping in the night in front of his house on road. Previously, his son Santosh used to sleep at that place since several days. Prior to 3-4 days from the time of incident, Kisanrao Bobde was sleeping on that place. They had purchased a cooler before 3-4 days of incident. However, the air of cooler not suited him. Therefore, he was sleeping outside the house. Kisanrao was in a deep sleep. At about 2.00 a.m., accused dealt a sickle blow to his left side of stomach. He shouted loudly by saying “are baapre”. He saw the accused. When he turned on left side, accused dealt second blow of sickle on right side of stomach.