

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Criminal Appeal No.947 of 2015

Bapu @ Chhotu Namdeo More,
Age 27 years, Occupation : Nil,
R/o Talani Pilkhod, Taluka Chalisgaon,
District Jalgaon.

.. Appellant.

Versus

The State of Maharashtra.

.. Respondent.

Smt. R.R. Mane, Advocate, appointed for appellant.

Smt. V.N. Patil-Jadhav, Additional Public Prosecutor,
for respondent.

**Coram: T.V. NALAWADE &
K.K. SONAWANE, JJ.**

Date: 2nd AUGUST 2019

JUDGMENT (Per T.V. Nalawade, J.):

1) The appeal is filed against the judgment and order of Sessions Case No.131/2014 which was pending in the Court of learned Additional Sessions Judge, Jalgaon. The trial court has convicted the present appellant of the offence punishable under section 302 of Indian Penal Code. Sentence of imprisonment for life is given. Both the sides are heard.

2) In short, the facts leading to the institution of the appeal can be stated as follows :-

The deceased Prashant @ Sopan was a son of informant Prakash Nikam. They are residents of village Pilkhod, Tahsil Chalisgaon, District Jalgaon. The accused is also resident of the same village.

3) On 12-3-2014 Sopan left home at 10.00 p.m. by saying that he was proceeding to the field to supply fodder to the cattle which were kept in the field. On the night between 12-3-2014 and 13-3-2014 Sopan did not return to home. The informant was sleeping in the workshop and at about 2.00 a.m. Sitaram Talware came there and informed that there was quarrel between Sopan and present appellant Bapu @ Chhotu and during quarrel Chhotu had run after Sopan with iron bar and Sopan had run towards the field. Due to this information and as Sopan had not returned home till 2.00 a.m. of 13-3-2014, the informant started searching for Sopan. He met present appellant and Bharati, a daughter of one lady by name Gumphabai. Chhotu informed that Sopan had taken away Gumphabai

and by saying so he started quarreling with the informant. At about 3.30 p.m. when the informant accompanied by Pravin Mali and Dilip Mali were searching for Sopan, near the grocery stall of Gumphabai they heard the call of Gumphabai and she requested them to take her outside as her stall was locked from outside. They removed the lock and she came out. The informant then realised that present appellant, accused had given false information to them.

4) Chhotu also came there and he started assaulting Gumphabai. The informant and others rescued Gumphabai and then Gumphabai disclosed to them that at 11.30 p.m. Sopan and Chhotu were taking dinner in her house and at that time Chhotu had asked Sopan as to whether he had physical relationship with Gumphabai and upon that Sopan had informed that Gumphabai was like mother to him and he was unnecessarily taking such suspicion. Gumphabai informed that even after giving this explanation Chhotu rushed at Sopan. Gumphabai informed that she somehow rescued Sopan but Chhotu had become angry and he took iron bar and rushed at Sopan to assault

him. She informed that Sopan had then run towards the field.

5) On 13-3-2014 the informant kept searching for Sopan but he could not trace Sopan. On 14-3-2014 when they were searching for Sopan, at 11.30 a.m. the dead body of Sopan was found in the field of Bhaskar Nathu Mahajan, where there was standing crop of sugarcane. There were injuries of assault on the dead body. The informant then gave report against Chhotu and crime at CR No.33/2014 came to be registered at 2.05 p.m. of 14-3-2014 for offence of murder against Chhotu. It was informed that out of suspicion that Sopan had illicit relationship with Gumphabai, murder was committed by the accused. Accused had kept Gumphabai as his mistress.

6) Inquest of the dead body was prepared and the dead body was referred for post mortem examination. Opinion was given that death took place due to cardio respiratory failure due to severe head injury.

7) During investigation, spot panchanama was prepared of the spot where the dead body was found. Iron bar was found near the dead body. Statements of the witnesses like Sitaram Talware, Pravin Mali, Gumphabai, Ashpak Khan, Dilip Mali came to be recorded and charge sheet came to be filed for aforesaid offence. Charge was framed for the aforesaid offence. The accused pleaded not guilty.

8) The prosecution examined in all 11 witnesses including investigating officer and medical officer, who had conducted post mortem. Gumphabai turned hostile. During investigation statement of Gumphabai was recorded under section 164 of the Code of Criminal Procedure. The trial court has held that Gumphabai is deposing falsely and by believing the other witnesses to whom Gumphabai had allegedly disclosed the incident, and after considering statement of Gumphabai recorded under section 164 of the Cr.P.C., the trial court has given conviction. The conviction is mainly on the basis of "last seen" circumstance and motive.

9) It is not disputed that Sopan died homicidal death. Dr. Bapu Baviskar (PW 8), the medical officer, who conducted post mortem examination, has given evidence on the post mortem report. Two injuries like contused lacerated wound on frontal region and occipital region of the size of 3cm × 1cm and 6cm × 2cm were found and they had caused subdural haematoma over occipital region of the size of 8cm x 8cm. The post mortem was conducted on 14-3-2014 between 4.45 p.m. and 5.40 p.m. During cross-examination the doctor has given evidence that the death had taken place 36 hours before starting of post mortem examination. As per the story of the prosecution the incident took place between 11.00 p.m of 12-3-2014 and midnight hours, the night between 12th and 13th of March 2014. Thus, it can be said that the time of death given by the medical officer corroborates the case of the prosecution.

10) The oral evidence of the informant Prakash (PW-1) shows that he learnt about the incident of quarrel between Sopan and the appellant from Sitaram Talware. He has given evidence that Chhotu, and a daughter of

Gumphabai had also come to him and they had informed that Sopan had kidnapped Gumphabai and Gumphabai was keep of Chhotu. He has given evidence that after 3.30 p.m. when he, Dilip Mali and Pravin Mail were searching for Sopan they found Gumphabai and Gumphabai disclosed about the incident which had taken place inside of her house at 11.30 p.m. He has deposed that in her house quarrel had started due to suspicion the accused was having against Sopan that Sopan had physical relationship with Gumphabai and then Sopan ran out of the house and accused started giving chase to him after taking iron bar from the house of Gumphabai. Thus, the entire evidence of Prakash (PW 1) about the incident of quarrel which could have been the incident of last seen also is based on the so called information supplied by Gumphabai (PW 7).

11) Gumphabai (PW 7) turned hostile. She has deposed that on that night the accused had come to her house but no incident had taken place in her presence. She has denied all the suggestions given to her in respect of the aforesaid incident which prosecution wanted to

prove. Nothing could be brought on record during her cross-examination to infer that the incident had taken place in her house of the aforesaid nature. She has admitted that she had visited the jail to see the accused. In respect of the statement recorded under section 164 of Cr.P.C. she has stated that under threat of police, the statement was given. As there is no substantive evidence in support of prosecution case, the statement under section 164 of the Cr.P.C. is of no use to prove the offence.

12) Sitaram (PW 3), who had supplied information to PW 1 has given evidence that on that night he had taken motor cycle from the appellant as he wanted to go to programme, *tamasha* and up to 11.00 p.m. he was having the motor cycle of the accused. He has deposed that he had returned the motor cycle to the accused and after some time he was called by accused to one hotel. He has deposed that when he was proceeding towards hotel, Sopan met him on the way and he took Sopan with him towards hotel. He has deposed that in the hotel Sopan and Chhotu consumed liquor by purchasing bottle of liquor and one bottle of water and from there all of them went

towards house of Gumphabai. He has deposed that in the house of Gumphabai they again consumed liquor and there Gumphabai had offered dinner to both Sopan and the accused. He has deposed that as they were to stay there for some time the accused asked him to bring a bottle of liquor from village. He has deposed that Gumphabai had signalled him not to do so but due to insistence of Chhotu he had gone to the village. His evidence shows that Sopan had called Ashpak on phone and he searched for Ashpak also but he could not find Ashpak and then he returned back to the house of Gumphabai. He has deposed that when he reached the house of Gumphabai he noticed that Chhotu and deceased Sopan were not present in the house of Gumphabai. He has deposed that Gumphabai then disclosed the incident of quarrel to him.

13) Evidence is given by Dilip Mali (PW 7) that after learning about the incident he had gone to village and had informed about the incident to the father of Sopan. He has deposed that father of Sopan and Ashpak and he had then started for the house of Gumphabai and

on the way they heard the call given by Gumphabai from her *tapari*, stall and they took her out of *tapari*. He has deposed that in the mean time accused Chhotu also came there and he assaulted Gumphabai and then again Gumphabai narrated the incident to all of them.

14) The evidence is given by Pravin Mali (PW 4) that on 13-3-2014 they were taking search for Sopan, at that time they had approached Gumphabai and she had narrated the incident to him.

15) Ashpak (PW 5) has given similar evidence but his evidence is in respect of disclosure made by Gumphabai on the night between 12th and 13th March 2014. His evidence shows that he had also gone to see *tamasha* which was on the boundary of his village Upkhed and there he had received phone call from Sopan and then he had proceeded towards village to see Sopan.

16) The evidence of Dilip Mali (PW 6) is on the disclosure made by Gumphabai to him on 13-3-2014 at about 6.00 a.m.

17) The evidence of the aforesaid witnesses except the evidence of Sitaram (PW 3) is hear-say in nature. When Gumphabai turned hostile and she has not given evidence on the incident of last seen and when it is not her evidence that she disclosed the incident to these witnesses, the evidence of these witnesses cannot be used as the evidence on the incident of last seen. Only Sitaram (PW 3) has given evidence that on that night he had gone to the house of Gumphabai with Chhotu and Sopan. However, his evidence shows that when Sopan and Chhotu stayed there to take dinner, he left the house of Gumphabai as he was asked to fetch a bottle of liquor by Chhotu. The evidence about the time given by Sitaram is not that convincing. On one hand he says that he wanted to see *tamasha* which was to go on up to 1.00 a.m. and he had taken two-wheeler of Chhotu for going to *tamasha*. He says that they had gone again to the village and then he was in the company of Chhotu and Sopan for some time. He has tried to say that amount of Rs.100 was given to him for purchasing liquor and amount of Rs.10 was given for purchasing petrol. But his evidence shows that Chhotu himself had filled petrol in his motorcycle. These

circumstances create serious doubt about the evidence of Sitaram that he was present in the house of Gumphabai on that night up to 11.00 p.m. to 11.30 p.m. In any case it is not his evidence that in his presence some incident of quarrel took place or both Sopan and Chhotu left the house of Gumphabai together. Such evidence could have been given only by Gumphabai. It is the case of the prosecution that from the house of Gumphabai, they ran towards field. When the case rests on circumstantial evidence each circumstance needs to be fully established so that from such circumstance inference can be drawn for use of section 106 of the Evidence Act. This Court holds that in view of nature of evidence of present matter, the provisions of sections 106 and 114 of the Evidence Act cannot be used against the accused.

18) Some evidence is given on subsequent conduct of the accused by the father of the deceased (PW 1). He has tried to say that after 3.00 p.m. when he was searching for Sopan, Chhotu and daughter of Gumphabai approached him and Chhotu informed that Sopan had kidnapped Gumphabai. This circumstance, if it was

satisfactorily established, could have been used in both ways. The circumstance could have been used against the accused if the aforesaid circumstance of last seen was established. As such circumstance of last seen is not established, this circumstance can be used to say that the conduct of Chhotu was not consistent with the guilt and immediately after the so called assault made on Sopan he was available in the village. If on that night Prakash (PW1) was sure that Chhotu had supplied him incorrect information, if he had believed that the alleged incident as disclosed by Gumphabai must have happened, in ordinary course he would have questioned Chhotu and would have asked about whereabouts of Sopan and he would have approached police as he would have taken suspicion against Chhotu that Chhotu had done something to Sopan. That did not happen. FIR was not given on 13-3-2014 but it was given on 14-3-2014 and the crime was registered at 14.05 hours. This delay in giving of the FIR is not explained. Only after the dead body of Sopan was found the report was given against the accused. This circumstance creates serious doubt about the entire version of Prakash (PW 1). In a case based on 'last seen'

circumstance, late F.I.R. under section 154 of the Cr.P.C. proves fatal to the prosecution case when there is no other incriminating circumstance.

19) Though in the evidence of the witnesses like Ashpak Khan (PW 5), it is brought on the record that the field where the dead body was found is situated at a distance of 150 feet from the house of Gumphabai, the map of scene of offence was not prepared. There is nothing on the record to show the area of that field owned by Yuvraj Nathu Mahajan. In the FIR itself PW 1 had informed to police that he had dispute with one Sanjay Uttam Koli and there was quarrel between said Sanjay and deceased Sopan as the road was prepared by Sanjay Uttam Koli and Nana Uttam Koli through the field of the informant by using JCB machine. He had given report against Nana and Sanjay to Mehunbar Police Station in the past. Thus, there was reason for others for committing the offence. On the contrary, the evidence on the record if it is accepted as it is would show that deceased Sopan had cordial relations with the accused and on that date they had consumed liquor together at least on two occasions.

20) Dilip Mali (PW 6) has given evidence on motive by deposing that on 13-3-2014 at 6.00 a.m. he had received a phone call from Gumphabai and she had told him that some incident had taken place on the previous night. He has deposed that on 13th Chhotu had met him and he had expressed that he had suspicion that Sopan had illicit relationship with Gumphabai and so he was not willing to live with Gumphabai and he wanted to leave the village. He has given evidence on the disclosure made by Gumphabai on the incident but, as already observed, that part of the evidence cannot be used as it is hearsay in nature. In the evidence of Gumphabai it is brought on record by the prosecution that even after filing of the case against accused Chhotu, she kept visiting the jail to see Chhotu. This circumstance cannot be ignored.

21) When the case rests on circumstantial evidence and the evidence on most important circumstances is weak, the other circumstances need to be there to complete the chain of circumstances for proof of the offence. In the present matter the weapon, iron bar was lying near the dead body. No article of the accused was

lying there. There was no blood on the clothes of the accused. There was no injury on the person of the accused. The accused was aged about 36 years at the relevant time and the deceased was aged about 22 years. In ordinary course the deceased would have offered resistance if the accused had given chase to him to assault him with iron bar. There is no such evidence. Even when there were bleeding injuries on the dead body and chase was given and the dead body was found in the standing crop of sugarcane, not a single scratch, injury was found on the person of the accused. It is the case of the prosecution that murder was committed at the place where the dead body was found in the standing crop of sugarcane. The spot panchanama does not show that in the vicinity of this field there was the house of Gumphabai. On the contrary, on all the sides of this land, there were lands of other persons. In view of this circumstance it was necessary to have the map of scene of offence on the basis of which it could have been ascertained as to whether in the night time the accused could have given chase to the deceased and could have finished the deceased at that place considering the age of

the deceased. When prosecution case rests on the circumstance of "last seen", the place where the incident took place and the place from where they had left together need to be considered the time of death also needs to be considered.

22) When the dead body is not found in closed space, house or room, the inference which is available on the proof of circumstance of "last seen" is not of that kind as in case when the inference is available against accused when he was last seen in the company of deceased in closed space. When the dead body is found in open space and particularly when the space does not belong to accused, the prosecution needs to establish other circumstances fully which can connect the accused to the guilt. Those circumstances can be recovery of weapon from accused on the basis of his statement, the blood stains found on the clothes of accused which were of the blood of the deceased, the injuries found on the person of accused which could have been caused during scuffle, if there was any, etc. When murder takes place in closed space and the accused and deceased were close relatives

of each other like husband and wife then the evidence of "last seen" can make available the inference against the accused easily, as in that case the provision of section 106 of Evidence Act becomes easily available and absence of one or more circumstances mentioned above will not give benefit of such absence to the accused.

23) Like in ordinary case of murder witnessed by some witnesses, in case of last seen it is always desirable to prepare map of scene of offence to show the possibility of the witnesses to notice that the deceased was in the company of the accused. When murder takes place in closed space, such map can help the Court to appreciate the evidence of such witnesses.

24) There is always possibility of disclosure by the witnesses that in their presence the accused and deceased had taken together food or any liquid like alcohol. At the time of post mortem examination, investigating agency needs to pay special attention to ascertain as to what kind of food intake was made by the deceased prior to the death and further it is always desirable to send viscera in such cases to C.A. office to ascertain as to whether it is a

case of poisoning or it is a case in which some substance was administered to make the deceased unconscious or the deceased had consumed a liquor. If steps are taken in advance in that regard, it becomes easy to the court to appreciate the evidence of the witnesses who have given evidence on the incident of last seen.

25) Not only the conduct of the witnesses who had lastly seen the deceased in the company of accused but also the conduct of the witnesses to whom such witnesses had disclosed about that incident is relevant. The courts are always hesitant to place reliance on the evidence of a witness who had given F.I.R. very late or whose police statement was recorded belated and who came forward only after discovery of the dead body if there is considerable time gap between the incident of last seen and the time of recovery of the dead body. In such cases the Court would always expect more circumstances to be established for reliance on evidence on the incident of last seen. When there is a missing report, not mentioning the incident of last seen in it and when after long gap of time of the missing of the person, the dead body is found and

the prosecution wants to rely on the incident of last seen, there needs to be more circumstances fully established so that the doubt created by the late disclosure of such incident is cleared. In the present matter there was nothing of that sort and so the benefit of doubt needs to be given to the accused.

26) The discussion of the evidence made above shows that there was reason for the informant to have suspicion against the accused but suspicion cannot take place of the evidence. If informant had belief in the story given to him on that night, he would have certainly approached police but that did not happen. The chain of circumstances is not completed in the present matter and due to that, it is not possible to convict the accused. Learned counsel for the appellant placed reliance on some observations made by the Apex Court in the case of **Ratan Lal vs. State of Rajasthan** reported as **2018 ALL SCR (Cri) 472**. In this case the Apex Court held that the case was based on circumstantial evidence and the dead body was found lying in the field and the circumstance that, the accused and the deceased were seen together in

the morning of 17-6-1999 and then whereabouts for rest of the day of the deceased were not known, was not clinching circumstance considering the time gap between the time of death and the incident of last seen. The benefit of doubt was given to the accused. In the present matter, if Gumphabai had not turned hostile, conviction could have been safely given against the accused but as Gumphabai has turned hostile and the other evidence is not satisfactory and sufficient to prove the circumstance of last seen, the accused must get benefit of doubt in the present matter. In the case of **Digamber Vaishnav v. State of Chhattisgarh** reported as **2019 ALL SCR (Cri) 1009** the Apex Court has laid down that strong suspicion, strong coincidences and grave doubt cannot take place of legal proof. There cannot be dispute over this proposition. In the present case also the evidence and the record has created suspicion against the accused but the evidence is not sufficient to prove the guilt beyond all reasonable doubt. In the present case not a single circumstance which can be called as incriminating is fully established. This Court holds that trial court has committed error in convicting the appellant. In the result, following order.

27) The appeal is allowed. The judgment and order of the trial court (Additional Sessions Judge, Jalgaon) delivered in Sessions Case No.131 of 2014 dated 20-8-2015 is quashed and set aside. The appellant/accused stands acquitted of the offence punishable under section 302 of the Indian Penal Code. He is to be released forthwith. Fine amount, if any, deposited be refunded to him. Before releasing him on bail, bond as provided under section 437-A of the Code of Criminal Procedure be obtained from him of the amount of Rs.15,000/-. The fees of Rs.10,000/- (Rs. Ten Thousand only) is quantified for the learned counsel appointed for the appellant.

Sd/-
(K.K. SONAWANE, J.)

Sd/-
(T.V. NALAWADE, J.)

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