

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

**CRIMINAL APPEAL NO. 78 OF 2016**

Rama s/o. Maroti Ghongde,  
 Age 40 years, Occu. Labour,  
 R/o. Dhuppa, At present at Khanapur,  
 Taluka Degloor, District Nanded. .. Appellant  
 (Original accused)

**Versus**

State of Maharashtra,  
 Through Police Station Degloor,  
 District Nanded. .. Respondent

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Mr.R.S.Mubashir Ali, Advocate for Appellant (*Appointed through Legal Aid*)  
 Mr. S. G. Karlekar, Advocate for Respondent-State.

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**CORAM : T. V. NALAWADE AND  
 MANGESH S. PATIL, JJ.**

**DATE : 18<sup>th</sup> AUGUST, 2020**

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

This appeal is filed against the Judgment and order dated 19-08-2015, passed in Sessions Case No. 14 of 2014, which was pending in the Court of learned Additional Sessions Judge, Billoli, District Nanded. The trial Court has convicted and sentenced the appellant–accused for the offence punishable under section 302 of the Indian Penal Code (IPC). The sentence of imprisonment of life is given, but no fine was imposed.

2. Both sides are heard.

3. In short, facts leading to the institution of appeal can be stated as follows :

The First Information Report (FIR) was given by Vithabai Rama Ghongde. She is mother of deceased Ashutosh and wife of appellant-accused. She was living with appellant, deceased – Ashutosh and another son Anirudha in village Khanapur, Tahsil Degloor, District Nanded. Their family had purchased land at village Khanapur.

4. The appellant-accused was addicted to liquor and he was not doing work for livelihood. When the informant was insisting the accused that he should do some work like labour work, there were frequently quarrels in between informant and the appellant. During quarrel, the appellant used to threat that one day he would give poison to them and he will also consume poison.

5. The incident-in-question took place on 18-12-2013. On that day also, in the morning there was quarrel as usual between informant and appellant. After quarrel, two sons Ashutosh and Anirudha went to the School and informant went to the field of one Hanmant Pulkanthe for labour work. After some time, the appellant gave phone call to informant and said that he wanted to finish all members of his family. Her younger son Anirudha also made phone call to her and told that the appellant would finish them and she should return to home. The informant returned to home at about

12.30 noon. After that, there was quarrel between informant and appellant. This quarrel was witnessed by neighbourers like Rajanna Bakanwar, Raju Chainpure, Sidram Yanalwar and others. They somehow separated quarrel between the informant and the appellant. Thereafter, the informant went to the house of a neighbour. The appellant then left the home with Ashutosh. The age of deceased was around 14 years.

6. After half an hour of aforesaid incident, Rajanna Bakanwar was informed by the appellant on phone that Ashutosh had consumed insecticides. After receiving this message, informant, Rajanna Bakanwar and Kapil Bakanwar went to the spot, which is situated on Khanapur to Khanapur Phata road, near the field of one Bolse. They noticed that fluid was coming from the mouth of Ashutosh. Informant Vithabai (PW-1) also noticed that the deceased had passed stool and it was cleaned by her. Then, the informant took her son Ashutosh along with neighbourers in one auto-rickshaw towards Civil Hospital Degloor. Due to some mechanical defect, auto rickshaw was stopped at Khanapur Phata. From there, Ashutosh was shifted to Civil Hospital, at Degloor on motorcycle of Kapil. Doctors from Civil Hospital, Degloor referred Ashutosh to Civil Hospital, Nanded, for further treatment. Some treatment was given to Ashutosh in Civil Hospital at Nanded, but he died at about 18.30 hours on 18-12-2013. The dead body of Ashutosh was handed over to Vithabai and funeral was completed on 19-12-2013.

She gave report to the Police on 20-12-2013 at about 23.05 hours. A crime came to be registered against the appellant under Section 302 of IPC.

7. During the investigation, appellant came to be arrested. On the basis of statement given by appellant-accused, one bottle of insecticides came to be recovered by the Police. Statements of aforesaid witnesses came to be recorded by the Police. Statements of some persons, like Kushalrao Bhure and Rajanna Bakanwar, came to be recorded under Section 164 of the Code of Criminal Procedure (Cr.P.C.) through Special Judicial Magistrate. Viscera of the dead body and bottle of insecticides came to be sent to the CA office for chemical analysis. As per the opinion of Doctors in Post mortem report, probable cause of death was "suspected poisoning".

8. The charge-sheet came to be filed against the appellant-accused for the aforesaid offence and the charge was framed. The appellant-accused pleaded not guilty. He took defence of total denial. He examined one witness like Maroti Mallu Yannalwar. But, evidence of this defence witness is of no relevance, as it only shows that after funeral he had seen the appellant.

9. To prove the case, the prosecution examined in all ten witnesses including informant, Kushalrao Bhure and Rajanna. The trial Court has believed the aforesaid witnesses. The defence has not disputed that death of deceased took place due to poisoning.

The accused has denied that he had administered poison much-less forcibly. Inquest panchnma dated 18-12-2013 is admitted by the defence. It shows that no injury was found on the dead body. Postmortem report (Exhibit-12) is also admitted by the defence. It also shows no injury was found on the dead body. Though, viscera was preserved and one bottle shown to have been recovered on the basis of statement of accused was sent to CA office with viscera for chemical analysis, as per version of Police Officer, CA report of Viscera and contents of bottle is not produced on record. Thus, there is opinion of Doctor, who conducted postmortem examination of deceased that probable cause of death is "*suspected poisoning*".

10. To prove that it is appellant-accused, father of the deceased had administered poison, only circumstantial evidence in the form of evidence of Vithabai (PW-1) is available. Anirudh, another son of Vithabai has turned hostile. He was expected to give evidence on the initial incident, in which he was involved and in which allegedly threat was given by the appellant to administer poison to both sons. The evidence of other witnesses is not specific to point finger against the accused that he had administered poison.

11. Vithabai (PW-1) has given evidence that accused was addicted to liquor and gambling. She has deposed that accused was not doing any work for livelihood and due to that there used to

be quarrels them. She has deposed that on 18-12-2013 she had quarrel with accused, as accused was not doing the work. She has deposed that she left the home at about 9.30 a.m. for doing labour work. She has deposed that her two sons went to School on that morning. She has deposed that at about 11.00 to 11.30 a.m. she received phone call of accused and on call he said that he had no intention to survive and he was giving poison to his sons. She has deposed that Anirudha also made phone call to her and he told that accused was giving threat to kill both the sons. It is her evidence that due to such disclosure, she rushed to home at about 12.30 p.m. Anirudha, another son, turned hostile. There is nothing on record to show that in the noon time there were such calls from accused or Anirudha to Vithabai (PW-1).

12. Vithabai (PW-1) has deposed that when she reached to home in noon time, his two sons and accused were present in the house. The neighbourers like Rajanna Bakanwar, Kapil Bakanwar, Laxmibai and 10 to 15 other persons gathered there, as she had quarrel with accused. She has further deposed that neighbourers advised her to stay in the home. She has deposed that accused then left home and he took deceased with him.

13. Vithabai (PW-1) has deposed that after half an hour, Rajanna made phone call to her and informed that Ashutosh had consumed poison. She has deposed that she and Kapil went

towards the field of Bolse. She has deposed that fluid was coming from the mouth of Ashutosh and she noticed that Aushtosh had passed stool in the pant and she cleaned it. She has deposed that she took Ashutosh in auto-rickshaw towards Civil Hospital, Degloor. Persons Rajanna, Kapil, Kushalrao gave her company. She has deposed that at Khanapur-phata, auto-rickshaw stopped due to some mechanical defect. From there, Ashutosh was shifted to Civil Hospital, Degloor on motorcycle of Kapil. She has deposed that Doctor of Civil Hospital, Degloor referred Ashutosh to Civil Hospital, Nanded, for further treatment. So, they took Ashutosh to Civil Hospital at Nanded. She has deposed that Ashutosh died in the Civil Hospital, at Nanded on the day of incident. She has deposed that funeral took place on the next day. The FIR at Exhibit-8 is proved by Vithabai (PW-1) in her evidence.

14. The evidence of Vithabai (PW-1) shows that she has avoided to admit the presence of appellant-accused on the spot where Ashutosh was lying. In the cross examination, she has stated that when she reached on the spot, she noticed that Ashutosh was already kept in one auto-rickshaw. The other evidence shows that accused was already there and he was making an attempt to hire auto-rickshaw to shift the deceased to the Hospital. Her evidence shows that from the spot till the death of Ashutosh, she was in the company of Ashutosh. This evidence needs to be kept in mind as prosecution had come with a case that

Ashutosh had given dying declaration against the accused to witnesses like Kushalrao and Rajanna. No such mention was there in the FIR and no substantive evidence is given by Vithabai (PW-1) and these two witnesses also on such dying declaration.

15. Kushalrao (PW-2) hails from the same village Khanapur. He has deposed that when he learnt that Ashutosh was lying unconscious by the side of the road, he went there. His evidence shows that when he reached on the spot, he noticed that accused was already there. He has deposed that he hired auto-rickshaw for shifting Ashutosh to Hospital. He has deposed that persons like Vithabai (PW-1) and others were also there. All of them took Ashutosh to Civil Hospital at Degloor. This witness is declared hostile by the prosecution as he did not give evidence on dying declaration, which was allegedly given by Ashutosh. Nothing is brought on record to create probability that such dying declaration was given to him. Ashutosh was unconscious when he was seen on the road for the first time and there is nothing to show that he became conscious when he was being taken from the spot to hospital. The mother (PW-1) has not given evidence that Ashutosh was conscious and he had talked with this witness. Due to this circumstance, it is not possible to infer that Kushalrao has given false evidence and he has tried to save the accused.

16. Evidence of Rajanna Naganna Bakanwar (PW-4) shows

that he is neighbour of Vithabai (PW-1) and he witnessed the quarrel which had taken place between Vithabai (PW-1) and the appellant-accused at about 12.00 noon. He has deposed that after quarrel accused left home with Ashutosh. He has not given evidence that it revealed to him from the quarrel that accused wanted to commit suicide and he wanted to finish all members of family by administering poison. Rajanna (PW-4) has deposed that at 1.00 p.m. accused called him on phone and informed that Ashutosh had consumed poison and his condition was critical. He has deposed that he went to the spot. He has deposed that Vithabai (PW-1) was already there. He has deposed that accused was there and all of them tried to shift Ashutosh to Civil Hospital in one auto-rickshaw. His further evidence is similar to the evidence of other witnesses like Vithabai (PW-1) and Kushalrao (PW-2). Rajanna (PW-4) also did not give evidence on the dying declaration allegedly given by Ashutosh. He has admitted that the statement was recorded by Special Judicial Magistrate, subsequently by making inquiry with him. His statement recorded under Section 164 of Cr.P.C. is at Exhibit-18. He has deposed that he knew that accused was addicted to liquor. However, there is no evidence from him that accused had desire to commit suicide and he wanted to administer poison to his two sons. In the cross-examination, statement recorded under Section 164 of Cr.P.C. was shown to him and he denied the contents of his statement. In spite of this circumstance,

this witness was not declared hostile by the prosecution.

17. Raju Laxman Chainpure (PW-5) was declared hostile by the prosecution. In the cross-examination taken by APP, Raju (PW-5) has given some admissions to the effect that the dying declaration was there. In the cross-examination taken by defence counsel, he denied that there was such dying declaration. The evidence of this witness shows that he admitted that the accused was addicted to liquor. Further evidence is similar to the evidence of other three witnesses.

18. In the evidence of Bhimrao Jalbaji Hatkar (PW-6), Special Judicial Magistrate, it is brought on record that he recorded statements of witnesses like Rajanna Bakanwar and Kushalrao Bhure, under Section 164 of Cr.P.C. The statements of these two witnesses are proved in his evidence and they are at Exhibits-23 and 24 respectively. As already observed, there is no substantive evidence from these three witnesses against the accused and so Exhibits-23 and 24 are of no use to prosecution. Further, as already observed, due to nature of evidence given by Vithabai (PW-1), it cannot be believed that the dying declaration was given by deceased.

19. Anirudha Rama Ghongde (PW-7) is the brother of deceased. He turned hostile in the Court. He was not cross-examined by APP, though he turned hostile. The record shows that

even no procedure for administering oath to him was followed. The circumstance that even brother of deceased, who is son of informant, is not supporting the informant, creates serious doubt about trustworthiness of evidence of Vithabai (PW-1).

20. Syed Gous Abdul Raheman (PW-8), auto-rickshaw driver has deposed that he had taken accused and Ashutosh in auto-rickshaw towards Civil Hospital at Degloor. His evidence shows that after crossing some distance, there was some mechanical defect in auto-rickshaw, therefore, Ashutosh was taken on motorcycle of Kapil to hospital at Degloor. His evidence shows that accused was in the company of informant when they were taking Ashutosh to Hospital. This conduct of accused was not consistent with his guilt. He was trying to save live of Ashutosh.

21. Vilas Laxman Patil (PW-9), panch witness is examined to prove the statement of accused given under Section 27 of the Evidence Act. The prosecution wanted to prove that on the basis of statement of accused, one plastic container of insecticides was recovered. Memorandum statement is at Exhibit-29 and seizure panchnama is at Exhibit-30. These documents were prepared on 22-12-2013. The record shows that plastic container was recovered from the field of Dilip Patne and not from the field of Bolse. There was standing crop of cotton in his field and name of insecticides was Mono Star.

22. The evidence of Investigating Officer - Hanuman Vithalrao Parande (PW-10) shows that he had prepared memorandum panchnama (Exhibit-29) and discovery panchnama (Exhibit-30). In his evidence, he has tried to say that he had sent the bottle and viscera to the CA office for chemical analysis. No covering letter is produced to show that these articles were sent to CA office. There is no CA report in that respect. Due to this circumstance, the evidence regarding recovery of container of insecticides is of no use to the prosecution. In view of aforesaid circumstances, this Court holds that the prosecution has failed to prove that insecticides from the container shown under Exhibit-30 was either consumed or administered to Ashutosh.

23. There must be such a chain of circumstantial evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. But, there is no such evidence. Discussion of the evidence that, there is no corroboration to the version of Vithabai (PW-1) that on the date of incident the appellant had expressed desire that he wanted to finish his two sons and he had also no desire to survive. There is no evidence from Vithabai (PW-1) that while leaving the house, accused had not taken anything like bottle of insecticides with him. If the accused had procured the bottle of insecticides after leaving home, in ordinary course, investigation

would have been made on that line. There is no record to show that from where and when accused procured the bottle of insecticides. The field of accused is in village Khanapur, but the incident did not take place in that field. First time, accused was seen on the road near the deceased and he had contacted others and had told that the deceased had consumed poison. There used to be quarrels between the accused and the informant and that could have been the reason for deceased to take such step. This probability can not be ruled out in the present matter.

24. When the incident took place on 18-12-2013, the deceased died on 19-12-2013. FIR came to be lodged on 20-12-2013 and funeral was probably attended by the accused. No explanation is given for delay caused in filing FIR by PW-1. This delay creates doubt about the case against the appellant-accused. There is evidence on record to show that the accused had bad habit of taking liquor. He was not doing any work for earning livelihood. Due to this circumstance, doubt is created of false implication. The accused is of no use to PW-1 and as there is family land, to protect the land probability is that such allegations are made against the accused. If accused had already expressed that he wanted to administer poison to his son, PW-1 would not have allowed Ashutosh to go with him. This Court holds that in such a serious case, evidence of Vithabai (PW-1) cannot be believed in the aforesaid circumstances and conviction cannot be given to the

accused. The FIR was given late and this circumstance is also not explained. This delay of 2 days has created more doubt about the case of prosecution. No injury was found on the dead body. It cannot be believed that boy aged about 14 years did not resist.

25. The trial Court has used the provision of Section 106 of Evidence Act against the accused to draw inference against him. When prosecution came with a case that the deceased had given dying declaration, the provision of Section 106 of Evidence Act cannot be used against accused. In such circumstances, it cannot be said that relevant fact was especially within the knowledge of accused as provided by Section 106 of Evidence Act. The trial Court has committed error in using the Section for giving conviction to the accused. Further, there are aforesaid circumstances, which are creating probabilities in favour of accused and against the prosecution. There is probability of concoction in this matter. Even CA report is not produced to establish that the death took place due to insecticides from bottle shown to have been recovered under so-called statement of accused under Section 27 of Evidence Act. This Court holds that the prosecution has failed to prove the case against accused beyond all reasonable doubts. The trial Court has committed error in convicting the accused under Section 302 of IPC.

26. Learned counsel for the appellant has placed reliance on

the propositions made by the Apex Court in the cases viz. (1) ***Dev Kanya Tiwari Versus The State of U.P.*** reported in 2018 All SCR (Cri) 616, (2) ***Lavkumar Bhardwaj Versus The State of Chhattisgarh***, reported in 2018 All SCR (Cri) 510, and (3) ***Eswarappa @ Doopada Eswarappa Versus State of Karnataka***, reported in 2018 All SCR (Cri) 507.

27. In the case of ***Dev Kanya Tiwari Versus The State of U.P. (supra)***, the Apex Court, in paragraph No.10, has observed as under :-

*"10. Having heard learned counsel on either side, we have carefully gone through the material on record. Apparently, there is no eyewitness to the incident and the case is entirely based upon circumstantial evidence. In such a case, the Court is expected to be more careful while analyzing the evidence and convicting the accused. In other words, in all probabilities, the chain of circumstances should lead to the irresistible conclusion that the accused participated in the commission of crime and committed the offence. This Court has long back set the mode of evaluating circumstantial evidence in Hanumant Govind Nargundkar Vs. State of Madhya Pradesh, 1953 CriLJ 129 in the following terms :-*

*"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of*

*a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, **there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.**"*

28. In the case case of *Lavkumar Bhardwaj Versus The State of Chhattisgarh (supra)*, the Apex Court, in paragraphs No. 4 and 5, has observed as under :-

*"4. The sole basis on which the accused appellant has been convicted is the evidence with regard to the accused being last seen with the deceased at about 8.30 p.m. on the date of occurrence which fact is established by the evidence of P.W.1. The dead-body was recovered early next morning.*

*5. Proof of the aforesaid circumstance i.e. last seen together, by itself, cannot and does not conclusively establish that it is the accused and the accused alone who is responsible for the crime. At best, it is one of the circumstances in the chain that the prosecution is obliged to build to succeed in a given case. There being no other evidence, except, what has been discussed above, we are of the view that the conviction of the accused appellant under Section 302 IPC and the consequential sentence of life imprisonment is legally untenable."*

29. There is no dispute about the propositions made by the

Apex Court in aforesaid cases. In the present matter also, the chain of circumstances is not completed. The prosecution has failed to prove the case beyond all reasonable doubts. The benefit of doubt needs to be given to the accused. Hence, the following order :-

**ORDER**

1. The Criminal Appeal is allowed.
2. Judgment and order passed by learned Additional Sessions Judge, Biloli, District Nanded, in Sessions Case No. 14 of 2014, dated 19-08-2015, convicting the appellant-accused for the offence punishable under Section 302 of the Indian Penal Code, is hereby quashed and set aside.
3. The appellant-accused - Rama s/o. Maroti Ghongde stands acquitted of the offence for which he is charged and tried. The appellant-accused is to be set at liberty.
4. Writ of this order be sent to the Jail authority concerned, as appellant-accused is in jail, for his release forthwith, on obtaining bond as provided in Section 437-A of the Code of Criminal Procedure of Rs. 15,000/- (Rupees Fifteen Thousand) with one surety of like amount for a period of six months. The order regarding muddemal property is maintained as it is.
5. Fees of the appointed learned counsel Mr. R. S. Mubashir Ali on behalf of appellant is to be quantified by the High Court Legal Services Authority, Sub-Committee at Aurangabad, as per rules.

Sd./-

[ MANGESH S. PATIL ]  
JUDGE

Sd./-

[ T. V. NALAWADE ]  
JUDGE