

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

CRIMINAL APPEAL NO.791 OF 1998

The State of Maharashtra

...Appellant
(Orig. Complainant)

Vs.

1. Kisan Balbhim Wagh, age 37
2. Pushpa Kisan Wagh, age 31
3. Shankar Balbhim Wagh, age 26
All r/o. Deshmukh Plot, Alipur Road,
Barshi, Dist. Solapur.
4. Nanasaheb Madhukar Sauhare, age 20
r/o Rajure, Tal. Karmala, Dist. Solapur.

...Respondents
(Orig. Accused)

Mrs. S.V. Sonawane, APP for the appellant-State.

Mr. Prosper D'Souza, advocate appointed as Legal Aid Counsel for the respondents.

**CORAM : S.S. SHINDE &
N.B. SURYAWANSHI, JJ.**

DATE : 17TH JANUARY, 2020.

ORAL JUDGMENT : (Per N.B. SURYAWANSHI, J.)

. The State has preferred this Appeal challenging the judgment and order of acquittal, passed by the learned Sessions Judge, Solapur in Sessions Case No.2 of 1998, dated 17th June, 1998, thereby acquitting the respondents-original accused from the offences punishable under sections 302, 201 r/w 34 of the Indian Penal Code (for short 'IPC').

2. The prosecution case in nutshell is as under :-

Deceased Balu, son of PW-2 Parvati, was having illicit relations with accused No.2 Pushpa since eight years prior to the date of incident. Since two years before his death, deceased Balu was leaving separately from PW-2 Parvati, far away from her residential house. He was initially running rickshaw, but later he was running lottery shop. Accused No.1 Kisan was neighbour of PW-2 Parvati at Deshmukh Plot, Barshi. Accused No.2 Pushpa is the wife of accused No.1 Kisan. Accused No.3 Shankar is younger brother of accused No.1 Kisan and accused No.4 Nanasaheb came to reside with accused No.1 Kisan since two months before the death of Balu. There used to be quarrels between Balu and accused No.2 Pushpa. Balu was quarreling with accused No.2 Pushpa saying that he had incurred huge expenses for her and how she is allowing accused No.4 to stay at her house.

In the night of 14th July, 1997, at about 8.30 p.m. Balu came to the house of his mother, viz., PW-2 Parvati, alongwith his friend, PW-3 Munde on the cycle of Munde. At the instance of Balu, PW-2 Parvati gave one bucket and earthen pot to PW-3 Munde and

PW-3 Munde went back to his home. PW-3 Munde left his cycle at the house of PW-2 Parvati on the request of Balu. After sometime, deceased Balu left the house of PW-2 Parvati and entered into the house of accused No.2 Pushpa. Accused Nos. 3 and 4 were present there at that time. Accused No.2 Pushpa was standing outside her house. After Balu entered her house, accused No.2 Pushpa closed the shutters of her house and locked it from outside. Accused No.2 Pushpa was having some talk with deceased Balu, who was inside the house by standing near the window of her house. Balu was insisting accused No.2 Pushpa to open the door. As quarrels between accused No.2 Pushpa and Balu were regular, PW-2 Parvati neglected it and went inside her house and slept. When she woke up in the next day morning, she did not see Munde's cycle. So she thought that Balu might have gone to his house by taking cycle. At about 5.00 p.m., wife of Balu, viz., Kalpana, came to PW-2 Parvati and made inquiry as to whether Balu had come to her house. Thereafter, PW-2 Parvati and Kalpana went to the house of accused No.2 Pushpa to make inquiry of Balu. Accused No.2 told that Balu was at her house upto 11.00 p.m., then he left her house and thereafter she does not know his whereabouts. PW-2 Parvati was

under impression that Balu might have gone to Solapur or for some other place for purchasing lottery tickets.

On 15th July, 1997 an unidentified dead body was found lying in one field to the backside of Shivaji Education Society's College. News about the same was flashed in the local newspapers. On receiving a phone message at Barshi Town Police Station, Head Constable Dhumal, being a police station officer, asked PW-5 Head Constable Rathod to visit the place and confirm the news. PW-5 Head Constable Rathod after visiting the spot, confirmed that one partly burnt dead body was found lying there. Accordingly, complaint (Exhibit 35) was lodged by him, which was registered at C.R. No.51 of 1997, for offences punishable under sections 302, 201 r/w 34 of the IPC. Investigation commenced and inquest panchanama (Exhibit 14) and panchanama of scene of offence (Exhibit 15) were recorded. From the spot, one plastic can and one glass bottle, both having smell of kerosene, cable wire, one leather belt and burnt pieces of gunny bag were seized. Post-mortem was conducted and the medical officer opined in the post-mortem notes (Exhibit 18) that death of the deceased was due to asphyxia and burn injuries were caused after the death occurred.

On 19th July, 1997, PW-2 Parvati approached the police to lodge missing complaint. On inquiry by police as to which clothes were on the person of Balu, she told the description of clothes worn by Balu. Thereafter, police recorded complaint of Kalpana, wife of deceased Balu. The police also showed them photograph, which they identified to be of Balu.

PW-2 Parvati and other relatives identified the said dead body to be of Balu on the basis of clothes and photograph. Their statements were recorded, wherein it was revealed that there used to be frequent quarrels between the accused and the deceased on account of illicit relations of accused No.2 with the deceased. Accordingly, all the accused were arrested.

Accused No.3 disclosed that he would point out the place where he had thrown the cycle, belonging to Balu. Accordingly, Memorandum Panchanama (Exhibit 27) was recorded and cycle was discovered from one well situated near the railway line. So also, accused No.1 pointed out the spot of offence where they committed the murder.

After completion of investigation, charge-sheet came to be filed and the case was committed to the Court of Session.

The learned Sessions Judge framed charge under sections 302, 201 r/w 34 of the IPC. The accused denied the charge and their defence is of total denial. They claimed that they are falsely implicated and the deceased has many enemies in the town as he was conducting the lottery business.

The prosecution, in support of its case, examined 8 witnesses.

3. Heard the learned APP for the appellant-State and the learned counsel for the respondents. We have perused the notes of evidence, the documents on record with the able assistance of both the sides.

4. The learned APP vehemently assailed the impugned judgment and order of acquittal stating that there is cogent and reliable circumstantial evidence on record and the prosecution has established chain of circumstances, i.e., motive, last seen together and recovery of cycle at the instance of accused and since the accused pointed out the spot from where the dead body was recovered, the learned trial court ought to have convicted the

accused persons.

5. The learned counsel representing the respondents, on the other hand, would support the judgment and order of acquittal stating that the learned trial court has rightly appreciated the evidence and has taken a correct view. Hence, the appeal is without any merit and the same deserves to be dismissed. The learned counsel placed reliance in the case of **K.T. Palanisamy Vs. State of Tamil Nadu [AIR 2008 Supreme Court 1095]** to support his arguments.

6. Admittedly, this is a case of circumstantial evidence and according to prosecution, these circumstances are proved on record, viz., motive, last seen together and recovery of cycle.

7. So far as the first circumstance, viz., motive is concerned, the prosecution relied upon the testimony of PW-2 Parvati, who has deposed that deceased had illicit relations with accused No.2 since last more than eight years and the entire town knew about the same. She has stated that there used to be frequent

quarrels between the deceased and accused No.1 and 2 because of illicit relations and therefore the prosecution alleges that the accused had strong motive to eliminate deceased Balu. However, in this behalf even if it is assumed for the sake of argument that there was strong motive for the accused to commit the murder of deceased, there is no corroboration on record to support the version of PW-2 Parvati in this behalf. So also, conviction cannot be recorded only on this sole circumstance that there was a strong motive for the accused persons to kill Balu.

8. PW-2 Parvati is a sole witness on the point of 'last seen together', who claimed to have seen deceased Balu going to the house of accused in the night of 14th July, 1997. Thus, the fact that 'after Balu entered the house of accused, accused No.2 Pushpa closed the shutters of house and locked from outside', was not stated by her in her statement under section 164 of the Cr.P.C. She further did not state in her statement before the police that 'from inside the house Balu was telling Pushpa to open the door'. She has stated that the distance between her house and house of the accused Pushpa is 30 feet. She admitted in her cross-examination

that because of her old age, her eyesight is weak and in the night time, she can not see and walk properly as her vision is not working properly. She further admitted that she was disliking Pushpa, as Pushpa has illicit connection with her son and her son has sold rickshaw and provided money to Pushpa and he was always providing money to her. She further admitted that before the incident, there was a reading of 'Dnyaneshwari' at the house of accused and after completion of its reading, Puja was performed on the next day of the incident. She has also admitted that 'there is no window in a wall of Pushpa's house, which was towards my house' and 'there are other residential houses adjacent to the house of Pushpa'.

On analysing the evidence of this witness, it is clear that she had grudge against Pushpa, as deceased Balu had illicit relations with her and was always providing money to her. Even, Balu had sold his rickshaw to give money to her. So, she had strong reason to implicate the accused persons in the crime. In view of her admissions that there is no window in the wall of Pushpa's house, which was towards her house and taking into consideration the distance of 30 feet between her house and the house of accused,

coupled with the admission that her eyesight is weak and she is not in a position to see or walk during the night time, it is difficult to rely upon her evidence on the point of 'last seen together'. PW-2 Parvati does not mention the presence of accused No.1 at the house on the night of incident. In view of these facts, we are unable to place reliance on the evidence of PW-2 Parvati. There are material omissions in the evidence of PW-2 Parvati, which are proved by the defence which also creates serious doubt about the veracity of this witness.

9. So far as the evidence of recovery of cycle is concerned, though the prosecution has relied upon the recovery of cycle at the instance of accused No.1, admittedly there is no special mark on the said cycle. There is nothing on record to show that the accused had any occasion or reason to carry the cycle of deceased, i.e., PW-3's cycle, when allegedly the dead body of deceased was being carried on the other cycle. Thus, this circumstance is also of no help to the prosecution. The memorandum statement (Exhibit 28), whereby accused No.1 agreed to point out the place where the dead body was thrown, does not take the prosecution case any further, as

admitted earlier, the news items were flashed in the local newspapers about one unidentified partly burnt dead body was found at that spot. Hence, the said evidence cannot be used against the accused persons.

10. The prosecution has also failed to examine the wife of deceased, viz., Kalpana who could have thrown light on the prosecution case. Due to her non-examination, adverse inference needs to be drawn. So also, in the examination of prosecution witnesses, material omissions and contradictions are brought on record by the defence.

11. The fact remains that from 14th July, 1997 till 19th July, 1997, when PW-2 mother of deceased identified the dead body to be that of deceased Balu from the photograph and the clothes, there was no complaint on behalf of PW-2 mother or wife of the deceased about the missing of deceased Balu. It appears from the inquest panchanama (Exhibit 14) that face of the dead body was burnt and the clothes were also almost burnt. In this view of the matter, the identification of the dead body also is doubtful. Apart from that, from

the date of recovery of the dead body, i.e., from 15th July, 1997 till 19th July, 1997 there is absolutely no material collected by the investigating agency connecting the accused person to the alleged crime.

12. In the light of aforesaid observations, we are of the considered view that this is a case of no evidence. The learned trial court has properly appreciated the evidence and has given cogent and plausible reasoning while recording acquittal of the accused. The view taken by the learned trial court is the only possible view and no case is made out by the prosecution to interfere with the finding of acquittal recorded by the learned trial court. We find no merit in the appeal filed by the State and the same deserves to be dismissed. Hence, the following order :-

ORDER

- (i) The Appeal stands dismissed.
 - (ii) The bail bonds of all accused, if any, stand cancelled.
 - (iii) The learned counsel Mr. Prosper D'Souza was appointed to defend the respondents in this Appeal.
- We appreciate his assistance in this matter. We

quantify his fees at Rs.10,000/- (Rupees Ten Thousand Only) and he would be entitled for actual expenses, if any, incurred by him. The High Court Legal Aid Services Committee, Mumbai to pay the aforesaid fees and expenses to the learned counsel within four weeks from the receipt of copy of this judgment.

(N.B. SURYAWANSHI, J.)

(S.S. SHINDE, J.)