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

**CRIMINAL APPLICATION NO.5722 OF 2014**

**THE STATE OF MAHARASHTRA  
VERSUS  
NANDKUMAR TOLAJI KAMBLE AND OTHERS**

**WITH APEAL/563/2014 WITH APEAL/572/2014 WITH APEAL/  
526/2015**

Mr K. S. Patil, APP for applicant.

Mr V. D. Sapkal, Senior Counsel with Mr A. S. Sakhare, Advocate h/f  
Mr S. R. Sapkal, Advocate for respondent No.1.

Mr Satej S. Jadhav, Advocate for respondent No.3

**CORAM : RAVINDRA V. GHUGE  
AND  
B. U. DEBADWAR, JJ.**

**DATE : 15th January, 2021**

**ORAL ORDER : Per RAVINDRA V. GHUGE, J.**

1. This is an application filed by the State for seeking leave to file an appeal under Section 378(1)(b) of the Code of Criminal Procedure, for challenging the judgment and order dated 14-07-2014, delivered by the Additional Sessions Judge, Ambajogai, thereby acquitting three respondents, in Sessions Case No.54 of 2012, on the charge of having committed an offence punishable under Sections 302 and 201 of the Indian Penal Code. During the pendency of this appeal, respondent No.2, original accused No.2 – Ganesh Nandkumar Kamble has passed away and this appeal, therefore, has been abated as against the late Ganesh Nandkumar Kamble.

2. We have considered the strenuous submissions of the learned Prosecutor on behalf of the State and the learned Advocate appearing on behalf of the respondent Nos.1 and 3, original accused No.1 - Nandkumar Tolaji Kamble and accused No.3 - Sunil Pratap Patil. With their assistance, we have gone through the record and proceeding, threadbare and we have also considered the observations of the Trial Court while concluding that there was no evidence against accused No.1 - Nandkumar Kamble and accused No.3 - Sunil Patil.

**Accused No. 3 - Sunil Pratap Patil**

3. Having considered the submissions of the learned Counsel, we find that the entire case rests on circumstantial evidence and the issue is, as to whether accused No.3 - Sunil Patil was with the deceased and participated in his murder.

4. PW13 is Dr. Raju Rustumrao Surwase, who was the Associate Professor at S.R.T.R. Medical College and Hospital at Ambajogai. As on 23-04-2012, the dead body of the deceased Ganesh Kashinath Sadre was received by him for post-mortem. It was brought by API Gitte, Police Station Ambajogai City. The dead body was received at 10.15 a.m. The post-mortem commenced at 10.30 a.m. and was completed at 11.30 a.m. There is no evidence before the Trial Court as regards

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the probable time of the death of the deceased.

5. From the deposition of PW13, it appears that there were about seventeen external wounds on the body and the internal examination of the chest indicated three wounds inclusive of fractures of several ribs.

The said doctor has stated in paragraph 12 as under :

*“12] Investigating officer has not inquired me about the time of death. I can opined approximate time of death on the basis of rigor mortis, empty stomach, P.m. lividity. It is true to say that rigor mortis was developed up to fingers of hand. Rigor mortis start on the face within 2-3 hours of death. 12 hours requires for rigor mortis in whole body. Next 12 hours it remains persist. It is true to say that after 12 hours it start dis-appearance by the said sequence. 6-7 hours requires for development of rigor mortis up to finger of man. It is true to say that lividity develop over the dependent part of the body. Lividity start after one hour of death. Lividity patches are same well within 3 to 6 hours of death. 6 to 8 hours requires for full lividity. Lividity patches can not be removed manually.”*

6. According to the doctor (PW13), rigor mortis develops from the face within 2 to 3 hours of death and by 12 hours, it covers the whole body. It persists for the next 12 hours. Disappearance of rigor mortis begins thereafter. Lividity develops in the dependent parts of the body, which starts after one hour of the death. Lividity patches persist for about 3 to 6 hours of death and 8 hours require for full lividity. Lividity patches cannot be removed manually. In the post-mortem

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report, the doctor has noted that rigor mortis was well marked in the upper extremities. Relating to the observations of the doctor in the post-mortem report, and his statements in paragraph 12 reproduced above, it is our perception that the death may have occurred about 5 to 6 hours prior to the commencement of the post-mortem. This would place the death of the deceased somewhere in between 4.00 a.m. to 6.00 a.m. of 23-04-2012.

7. Accused No.3 - Sunil Patil has been acquitted by the Trial Court on the ground that in the chain of circumstantial evidence, the principle of "last seen together" eliminates his company with the deceased prior to the murder. The "last seen together" theory cannot be stretched too long, since it is well settled that if the gap between the "last seen theory" timing and the timing of the death is too large, the benefit of doubt goes to the accused. On these legal premises, we have examined the testimonies of the witnesses.

8. The learned Prosecutor has made a valiant attempt by referring to the testimonies of PW4 to PW7, PW9, PW12, PW14 and PW15, to buttress his contention that accused Sunil Patil was along with the deceased when the murder took place. PW4 - Prakash Tanaji Paradwar was the neighbour of the deceased Ganesh Sadre. He was aware of the money transaction between Nandkumar Kamble and the

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deceased, and the dispute that followed on account of the said transaction. We do not find that PW4 had any knowledge about the movements of the deceased on 22-04-2012. His deposition is of no assistance to us.

9. PW5 - Manik Ganpati Dahiphale, a Junior Clerk in the OPD of the said college, was working under the deceased. He was consistently referring to Sunil Patil as "Patil Saheb" since he was senior to PW5. On 22-04-2012, he was on duty in between 8.00 p.m. to 8.00 a.m. of 23-04-2012. As OPD case papers were inadequate, he had called the deceased on telephone. The deceased, as well as Sunil Patil, came together at the hospital at about 8.30 p.m. After the deceased provided 50 case papers to PW5, he left at 8.45 p.m. along with Sunil Patil. According to him, both were in a drunken condition and they travelled on a single motorcycle as they left the hospital. On 23-04-2012, at about 6.30 a.m., the mother of the deceased inquired with PW5 as regards the whereabouts of the deceased. PW5 had no knowledge, except that he recollected that the deceased travelled with Sunil Patil at 8.45 p.m. on a motorcycle as they left the hospital. According to the Prosecutor, this is an important link in the "last seen together" theory.

10. PW12 - Balaji Shankarappa Kale, is the Manager of Hotel Anjali Beer Bar. He was serving there for about three years and he has

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named four persons, who are the joint owners of the hotel in partnership. The deceased had a credit account at the hotel. PW12 was performing the duty of even recovering credit bills. On 22-04-2012, between 11.00 a.m. to 11.30 a.m., he had gone to the OPD for recovery of the bills from the deceased, who paid him Rs.8,000/-, out of Rs.18,000/- dues. PW12 was in the hotel till 11.00 p.m. on that day.

11. On the same day i.e. 22-04-2012, at about 2.00 to 2.30 p.m., the deceased came with two friends in the hotel. They consumed beer. They left at 3.30 p.m. At about 6.00 to 6.15 p.m., the deceased again came with 4-5 friends to the said hotel and again consumed liquor and beer. Then they had their dinner and they left the hotel at about 7.30 to 8.00 p.m. The deceased again came to the same hotel in between 9.00 to 9.15 p.m. along with two friends and again consumed liquor and beer and the bill was about Rs.2500/- to Rs.2600/-. The deceased instructed the amount to be credited to his account. They left the hotel at about 10.45 p.m.

12. The learned Prosecutor has relied upon the testimony of PW9 - Mahadeo Vishwanath Valse, who has deposed that on 22-04-2012 (time not stated), he had gone to the hospital. The deceased was with Sunil Patil. PW9, along with his friend Madhukar Misal, the deceased

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and Sunil Patil went to Pokhari Road to inspect certain plots for sale. PW9 left the deceased and Sunil Patil in front of the hospital and went to his house. At 2.30 p.m., he phoned the deceased to ask him to come at the same Anjali Beer Bar. One Mr Nikam, his friend, PW9 and his friends went to Anjali hotel, where the deceased and Sunil Patil were present. All of them drank liquor and completed the transaction of five plots. After taking dinner, PW9 along with others, left in between 5.00 to 5.30 p.m. The deceased and Sunil Patil left on their individual motorcycle. This, therefore, indicates that the accused No.3 - Sunil Patil was with the deceased right from the morning till about 8.30 p.m., when PW5 saw them leaving the hospital together on a single motorcycle.

13. PW14 – Dhammapal Shivaji Sarwade, whose father works in the same hospital, used to drop his father and pick him from the hospital. He knew accused Nandkumar Kamble and accused Sunil Patil as well as the deceased, all three being employees in the said hospital. He deposed before the Court by saying that on 22-04-2012, he had demanded his dues/hand loan from the deceased at about 10.00 to 10.30 a.m. He was operating a Pan Shop. The deceased and Sunil Patil came to his shop and paid the amount. In between 6.30 to 7.00 p.m. on the same day, he had gone to hotel Anjali along with his friend Manoj Gaikwad. The deceased was sitting there along with Sunil

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Patil, one Mr. Burge and their another friend. All four were occupying a table. At 9.00 p.m., while he was paying at the counter, he saw convicted accused Swapnil Kamble, Mangesh Gund and Sanjay Kakde at a table besides the one occupied by the deceased. He has, however, stated that the deceased left the hotel at 8.30 p.m. PW14 wanted to meet the deceased. He telephoned him and reached the OPD on his instructions. PW5 was in the OPD, where the deceased and Sunil Patil were present. As such, PW5 and PW14 had seen the deceased leaving the OPD in between 8.45 to 9.00 p.m. along with the accused Sunil Patil, on a single motorcycle.

14. This is the “last seen together” theory put forth by the prosecution.

15. PW15 – Sanjay Shriram Pawar has deposed that on 22-04-2012, at about 11.15 to 11.30 p.m., he was at his medical shop. He saw the deceased passing by on a motorcycle of Sanjay Kakde. When he was taking his motorcycle, he saw convicted accused Swapnil Kamble and Mangesh Gund, walking towards Vaidhya Chowk. The deceased and Sanjay Kakde also travelled in the same direction. This is, according to us, the crucial piece of the “last seen together” theory, in which accused No.3 – Sunil Patil is not in the picture.

16. PW6 – Shaikh Imran Shaikh Nijamoddin runs a Pan Shop outside the medical campus. He knew all the accused and the deceased since all of were his regular customers. He had learnt about the murder of the deceased Ganesh Sadre. The deceased, Sanjay Kakde, Swapnil Kamble and Mangesh Gund had come to his Pan Shop on 22-04-2012 at about 11.15 to 11.30 p.m. when he was about to close his shop. They purchased ‘Gold Flake’ Cigarette and Gutka and went towards Chanai Road. According to him, two travelled on a motorcycle and two walked down the road.

17. While scrutinizing the “last seen together” theory of the prosecution, we are conscious of the crystallized position of law that there cannot be two chapters of “last seen together” theory. Though the learned Prosecutor has vehemently put forth the said theory, we find that PW5 and PW14 had seen the deceased along with accused Sunil Patil at about 8.45 to 9:00 p.m. in the OPD. Both saw the deceased and Sunil Patil travelling on a single motorcycle when they left the hospital. When the deceased entered Anjali Beer Bar at about 9.00 p.m., Sunil Patil was not along with him. The testimony of PW12 and PW15 clearly indicates that the deceased was along with the other convicted accused till 11.30 p.m. and they all moved in the direction of the Vaidhya Chowk and then in the direction of Chanai road. The

body of the deceased was found on the same road in the morning of 23-04-2012. The convicted accused as named in the deposition were, therefore, lastly seen together with the deceased and it was not accused No.3 – Sunil Patil. There is no other ocular evidence or evidence of the Forensic Lab or another piece of admissible evidence, which would indicate that Sunil Patil had participated in murdering the deceased or was a part of the conspiracy of murdering the deceased.

18. In these circumstances, the leave sought by the State, to appeal against the acquittal of accused No.3 – Sunil Patil, stands refused.

19. Insofar as the case of accused No.1 – Nandkumar Kamble is concerned, the State has preferred this common application for seeking leave to challenge his acquittal. The learned Prosecutor submits that Nandkumar was the actual hand loan borrower of an amount of Rs.1,65,000/-, from the deceased. His son, Swapnil has been convicted for his active participation in the murder. The link between Swapnil and Nandkumar is, firstly, that both are son father duo and secondly, Nandkumar, being a borrower, will have to be convicted along with Swapnil.

20. The learned Senior Advocate appearing for accused Nandkumar submits that the prosecution should point out the evidence to indicate

the involvement of Nandkumar and should not rest its submissions on assumptions or presumptions.

21. We have referred to the depositions of all the witnesses, whose testimonies have been pointed out and highlighted before us by the learned Counsel for the respective parties. The role of Nandkumar is described as being a person, who had borrowed Rs.1,65,000/- from the deceased as hand loan. There is sufficient evidence before the Trial Court that has been pointed out to us, which indicates that friends and relatives came together and resolved the issue of Nandkumar, by settling the repayment terms at Rs.1,20,000/-. Within one day of such settlement, Nandkumar had admittedly paid Rs.1,00,000/- to the deceased and the outstanding was only RS.20,000/-, which was to be repaid within 4-5 days.

22. There is no evidence indicating that Nandkumar was also with the deceased on 22-04-2012 or 23-04-2012 or was along with him in between one of his drinking episodes. Besides, being a borrower, no witness of the prosecution has led evidence to indicate that Nandkumar held out any threats to the deceased or had uttered such language, which would indicate that he wanted to eliminate the deceased. There is no conspiracy theory, involving accused No.1 - Nandkumar in the murder of the deceased. The “last seen together” theory also does not

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ascribe any role to Nandkumar. As such, in these circumstances, we do not find that the prosecution has any case against accused No.1 - Nandkumar Kamble and we, therefore, refuse leave to the State to prefer an appeal against his acquittal.

23. In view of the above, Criminal Application No.5722 of 2014, stands rejected.

24. List all the appeals for final hearing on 08-02-2021.

**(B. U. DEBADWAR, J.)**

**(RAVINDRA V. GHUGE, J.)**

sjk