

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

CRIMINAL APPEAL NO.160 OF 2020

Shabnam @ Shabrya @ Sunil

Laxman @ Lasnyappa Pawar

Versus

The State of Maharashtra

... Appellant

... Respondent

.....

WITH

INTERIM APPLICATION NO.558 OF 2020

IN

CRIMINAL APPEAL NO.160 OF 2020

....

Ms. Dhanlakshmi Iyer, Advocate (appointed through Legal Services) for the Appellant.

Ms. S.V. Sonavane, APP for the Respondent–State.

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**CORAM : SMT. SADHANA S. JADHAV &
SARANG V. KOTWAL, JJ.**

RESERVED ON : 13th SEPTEMBER, 2021

PRONOUNCED ON : 28th SEPTEMBER, 2021

JUDGMENT : [*PER SARANG V. KOTWAL, J.*]

1 The appellant has filed this appeal challenging the judgment and order dated 7.12.2019 passed by the Sessions Judge, Sangli in Sessions Case No.70/2015. The appellant was the original accused No.1 in that case. Vide the impugned judgment

and order, the appellant was convicted for commission of offence punishable under Section 302 of the Indian Penal Code and was sentenced to suffer R.I. for life and to pay a fine of Rs.10,000/-; and in default, to suffer further R.I. for two years. He was convicted for the offence punishable under Sections 392, 395 of the Indian Penal Code and was sentenced to suffer R.I. for five years and to pay a fine of Rs.5,000/-; and in default, to suffer further S.I. for six months. He was convicted for commission of offence punishable under Section 397 of the Indian Penal Code and was sentenced to suffer R.I. for seven years and to pay a fine of Rs.5,000/-; and in default, to suffer further S.I. for six months. He was convicted for the offence punishable under Section 398 of the Indian Penal Code and was sentenced to suffer R.I. for seven years and to pay a fine of Rs.5,000/-; and in default, to suffer further S.I. for six months. All the sentences were directed to run concurrently. There were other three accused in the case. All of them were acquitted from all these offences.

2 The prosecution case in brief is as follows:

. On 13.12.20214, the first informant Dipali Gaikwad, her

mother, sister-in-law and mother-in-law were returning home from a fair. At about 8:30 p.m., the accused intercepted them. Her mother Mangal Yeware and sister-in-law Sunita Gaikwad were murdered. Their ornaments were robbed. Even the first informant Dipali was robbed of her golden Mangalsutra. The murder was committed by using a knife. After that, the assailants went away. The informant's relatives were informed. The police were informed. FIR was lodged vide C.R. No.133/2014 at Miraj Rural Police Station. The investigation was carried out. Spot panchnama was conducted. Articles from the spot were seized. The appellant was arrested on 25.12.2014. Other accused were arrested after quite some time. Separate charge-sheets were filed. The case was committed to the Court of Sessions and was conducted as Sessions Case No.70/2015 before the Sessions Judge, Sangli as mentioned earlier.

3 In its support, the prosecution examined 15 witnesses. The evidence consisted of direct evidence as well as circumstantial evidence. At the conclusion of the trial, the appellant was convicted and sentenced as mentioned earlier and the other

accused were acquitted.

4 We have heard Ms. Dhanlakshmi Iyer, learned counsel appointed through Legal Services for the appellant and Smt. S.V. Sonavane, learned APP for the State.

Prosecution evidence :

5 The prosecution evidence, in brief, can be categorized and summarised as follows.

Direct evidence :

6 The most important witness in this case is PW-3 Dipali Gaikwad. She was an eye witness and a victim in the incident. She is a resident of village Belanki, Taluka-Miraj, District-Sangli. Their family land is known as “Gaikwad Mala”. On 13.12.2014, there was a fair in the honour of their Goddess. Her mother Mangal Yeware had come to her house for going to the fair and to the temple. On 13.12.2014 at 6:00 p.m., PW-3 along with her mother Mangal, mother-in-law Shakuntala, sister-in-law Sunita (husband’s sister), sister-in-law Kalindi (wife of husband’s brother), her children and Kalindi’s children had gone to the temple. In the evening, they started returning home. She has stated that it was

about 8:00 p.m. They were having a battery operated torch and there was moon-light. On their way, she suddenly heard shouts from her mother-in-law. She saw that two persons were scuffling with her mother-in-law and Kalindi. PW-3 has stated that she saw faces of those persons in the light of a battery operated torch and in moon-light. They were beating both these ladies. Kalindi ran away from the spot towards the temple. One of them, came towards this witness. He snatched her Mangalsutra. He told this witness not to shout. She removed her ear-rings and Painjan and gave them to that person. Thereafter those two persons went away from the spot towards the railway-line. This witness raised shouts. She saw that her mother Mangal Yeware and sister-in-law Sunita Gaikwad had died on the spot because of the assault. She sought help from the motorcycle riders passing from the road. Her family was informed. Her relatives came to the spot. Then, she along with others went to Miraj police station and lodged her FIR. The FIR is produced on record at Exhibit-47. On the next day morning, she showed the spot of incident to the police. In February 2015, she attended the test identification parade held in Sangli Jail. She

was accompanied by her mother-in-law. It is her case that she identified one of the persons whose name was given to her as Shabnam @ Shabraya. This is the name of the appellant.

7 After two years, she identified another accused Gouda Sunil Bhosale in another test identification parade. She has stated that the golden ornaments were shown to her in the police station.

. In her cross-examination, she admitted that there were no electricity poles between her Wasti and the temple. According to her, the culprits were carrying a battery operated torch and during the scuffle the light from that torch fell on the faces of the culprits and, therefore, she could identify them. She denied the suggestion that the appellant was shown to her in the police station after his arrest. Significantly, the ornaments which were allegedly recovered from the appellant were not shown to her in the Court and there is no identification of those ornaments by her in the Court.

Recovery at the instance of the appellant :

8 The prosecution examined PW-5 Chandrakant Kore as a pancha in whose presence the appellant had given a statement

pursuant to which his clothes and some ornaments were recovered on 30.12.2014. The memorandum statement is proved by this witness at Exhibit-53 and the panchnama is at Exhibit-54. According to the prosecution case, pursuant to the appellant's statement, some ornaments in the form of two small golden pieces used in mangalsutra, a golden chain, the appellant's clothes, deceased Sunita Gaikwad's Aadhar card were recovered from one of the temporary tents near Arag village. The articles were kept in a tin box in that tent. The ornaments and the Aadhar card were kept in the pant pocket. That pant was kept in that tin box.

. We have carefully seen the memorandum of the statement given by the appellant, which is marked as Exhibit-53. In that statement, excluding the inadmissible portion, there was no mention of authorship of concealment and the place where the ornaments and clothes were kept. As mentioned earlier, the ornaments were not shown to PW-3 in the Court. Therefore, that important link is missing. There were no allegations that the deceased Sunita Gaikwad's Aadhar card was also taken away. It was recovered under this panchnama. The box was not locked and

the tent could be accessed by anybody.

Identification of the accused :

9 The prosecution has examined PW-13 Arun Sonavane, who had conducted test identification parade concerning the appellant. This witness was a Naib Tahsildar in Miraj Tahsil office. His evidence is short and cryptic. He has produced Exhibits-106 & 107 purportedly being the memoranda of T.I. parade. We have perused Exhibits-106 & 107. These are not detailed memoranda of test identification parade. These documents are merely two charts in respect of PW-3 Dipali Gaikwad and her mother-in-law Shakuntala Gaikwad. It mentioned that those were prepared on 10.2.2015. There were only four dummies and they were in the age group of 21 to 36, whereas the appellant was 19 years of age. Both these charts merely mention that both of them i.e. Dipali and Shakuntala identified the appellant. Apparently, PW-3 and Shakuntala had identified the ornaments before him. However, he has not deposed about the same in his deposition. The panchnama dated 10.2.2015 to that effect was produced through the evidence of the investigating officer. PW-13 has given absolutely no details

about the procedure followed and precautions taken by him in conducting the T.I. parade.

. In his cross-examination, however, he has stated that on enquiry with Dipali and Shakuntala they told him that the investigating officer had not shown the appellant to them.

Fingerprint of the appellant on the battery operated torch found at the spot :

10 The prosecution has examined PW-1 Vasantrao Gaikwad as a pancha, in whose presence, the spot panchnama was prepared. He has stated that on 14.12.2014, PW-3 Dipali showed the spot of occurrence. It was 25 ft. away from a small bridge on that particular road. He identified all the articles shown to him in the court which were recovered from the spot. The spot panchnama is produced on record at Exhibit-42. It was conducted between 7:15 a.m. to 8:30 a.m. on 14.12.2014. Various articles were seized at that time, including blood stained earth, bangle pieces etc.. Importantly, a battery operated torch was also recovered, which has some significance. The panchnama clearly mentions that the

articles and samples were seized, labelled and sealed.

11 The prosecution has examined PW-4 Anil Yeware, who is a pancha, in whose presence, a finger print found on the battery operated torch was extracted by the finger print expert. He snapped photographs of the torch. The panchnama is produced on record at Exhibit-49 through this witness. It was conducted between 9:00 a.m. to 10:00 a.m..

12 The prosecution has examined PW-8 Anil Koli as the finger print expert. He has stated that he was attached to finger print office, Sangli. On 13.12.2014 he received a phone call from the police at 10:20 p.m.. He went to the spot at around midnight. It is his case that he stayed there for the entire night. On the next day, he was shown a red coloured battery (torch). This witness then examined it for finger prints. He collected one chance finger print on that article. The photograph of that chance print was taken. The investigating officer Shri Sonavane, during investigation sent some specimen signatures of the suspects. According to this witness, the chance finger print found on the battery was that of the present appellant. He has also deposed that

his office was having finger prints of the appellant as he was a habitual offender. This witness sent his report for final opinion to CID office, Pune along with his letter dated 5.1.2015. The final report from the CID office was received on 13.3.2015. It is produced on record at Exhibit-64. In his cross-examination, he admitted that the investigating officer had not seized the battery in his presence. The reports are produced on record through him.

Medical evidence ::

13 PW-9 Dr. Surekha Ghavade had conducted the postmortem on the dead bodies. Mangal Yeware had two injuries. The fatal injury was on the left side over back which had caused injury to left lung causing the death. Sunita Gaikwad had suffered nine stab injuries causing her death. There is no dispute about the fact that both of them died a homicidal death.

Other evidence :

14 The other evidence in the context of the case is not very material. PW-2 Farukh Bagwan was a pancha for seizure of the clothes of the deceased. PW-6 Chandrakant Bhandare is in respect of recovery of knife at the instance of accused No.2 Gauda Bhosale.

PW-7 Rekha Patil was a pancha for inquest panchnama. PW-10 Mahesh Joshi had taken photographs of the dead body. PW-11 Rajesh Gavali was a pancha when clothes of the accused Gauda Bhosale were seized.

15 PW-12 PI. Devidas Sonavane was attached to Miraj Rural Police Station and had conducted first part of the investigation and had gone to the spot. He had called finger print expert at the spot. The recovery of articles were made allegedly at the instance of the appellant under the supervision of this witness. On 25.12.2014 the police officer Bajirao Pawar had produced the appellant and this witness had arrested him. Very significantly he has admitted that he had shown the accused-appellant to PW-3 Dipali after his arrest.

16 PW-14 PI. Mohan Jadhav and PW-15 PI. Sandip Kolekar had conducted some part of the investigation, and in particular, had conducted the investigation in respect of other accused.

C.A. report :

17 Besides the ocular evidence, another important piece of evidence is C.A. report which shows that the earth and most of the

clothes of the deceased showed presence of human blood but the blood group was inconclusive. There was “A-Group” blood on one saree, one petticoat and on the appellant’s shirt. However, the appellant’s blood group was not determined as the results were inconclusive.

. This is the evidence led by the prosecution.

Submissions on behalf of the appellant and the State ::

18 Learned counsel for the appellant submitted that the prosecution has not proved its case beyond reasonable doubts. The evidence of PW-3 Dipali Gaikwad is not reliable. It is doubtful as to whether she was present at the scene of offence at all. There was no way she could have watched the features of the offenders. There was darkness in the area. The identification of the appellant is disbelieved by the learned trial Judge. She submitted that the other circumstance of finding of finger-print on the torch recovered from the spot is also not free from doubt. The evidence in that regard does not inspire confidence. She submitted that the evidence of recovery cannot be held against the appellant as it does

not satisfy the requirement of Section 27 of the Indian Evidence Act.

19 Learned A.P.P. on the other hand submitted that PW-3 has explained as to how she could see the accused including the appellant. The torch carried by the accused themselves was the reason why PW-3 could see their faces. The recovery evidence is important. Aadhar card of one of the deceased was recovered at the instance of the appellant. The ornaments were identified by PW-3 before the SEM and, therefore, this recovery is an important incriminating piece of circumstance of evidence which is sufficiently proved by the prosecution.

20 Learned A.P.P. submitted that finding of a chance finger print on the battery operated torch and matching it with the appellant is another strong link in the chain of circumstances to establish presence of the appellant at the spot and at the time of incident. Thus, taking into account all these pieces of evidence together, including the direct evidence of PW-3 the prosecution has sufficiently proved its case against the appellant.

Reasoning :

21 We have considered these submissions. The most important evidence in this case is of course evidence of PW-3 Dipali Gaikwad, who herself was the alleged victim as her ornaments were robbed. According to the prosecution, she was present when the offence took place. Therefore, we have considered her evidence very carefully. Admittedly, there were no street lights on the road where the incident had taken place. The incident had taken place at 8:30 p.m.. PW-3 has explained that she could see the faces of the accused because the battery operated torch carried by them was throwing light on their faces during the incident of scuffle. She has also explained that there was moon light.

22 It is difficult to believe that such accidental fall of ray of light from the battery operated torch on the faces of the accused momentarily was sufficient for her to know their features. The accused were total strangers. The explanation about seeing faces in the moon light is also vague. The emphasis was on the torch light. In this context, the identity of the accused assumes great importance. It is important to know that, in the FIR itself, she has

stated that she was not in a position to describe the accused but if they were shown she would identify them. She had added that both the accused were slim and were wearing pant and shirt.

23 The FIR is about two accused, whereas the prosecution case was that there were four accused who had committed the offence and, therefore, four accused had faced the trial.

24 The prosecution has miserably failed to substantiate their case that the appellant was one of the offenders. The prosecution has not brought on record the test identification parade memorandum concerning identification of the appellant on 15.2.2015 by PW-3 Dipali. PW-13 Arun Sonavane has merely produced a chart as mentioned earlier to show that the appellant was made to stand along with four dummies and the chart mentions that he was identified. No evidence was given by PW-13 as to how precautions were taken and what procedure was followed while conducting this test identification parade.

25 Learned trial Judge has already disbelieved identification of the appellant. In our opinion, apart from these infirmities in the

identification of the appellant, the most important admission given by the investigating officer i.e. PW-12 P.I. Devidas Sonavane destroys the circumstance of identification of the appellant. He has admitted in his cross examination that he had shown the appellant to PW-3 after his arrest. Therefore, after all this, whatever little value could be attached to the identification of the appellant has been destroyed completely.

26 The other circumstance is about recovery at the instance of the appellant. As mentioned earlier, the memorandum statement is produced on record at Exhibit-53. Excluding the inadmissible portion, there is nothing else in the memorandum which can be saved as admissible portion under Section 27 of the Indian Evidence Act. There is neither authorship of concealment nor the place mentioned in that portion. Therefore, entire memorandum of statement purportedly given by the appellant is inadmissible and cannot be relied on. Therefore, the recovery made pursuant to such statement cannot be held as an incriminating circumstance against the appellant. The tent was accessible and the box was not locked. In any case, under that

panchnama a piece of golden ornament in the shape of sea-shells was recovered. This article was not shown to PW-3 Dipali in the Court and, therefore, there is no identification of this article. It is the prosecution case that at the time of test identification parade itself a separate procedure was carried out by PW-13 Arun Sonavane wherein PW-3 Dipali had identified this ornament as being part of the stolen articles. However, PW-13 Arun Sonavane has not made any reference to any such identification and, therefore, this also cannot be held against the appellant.

27 Though finding of Aadhar card of one of the deceased Sunita Gaikwad during this recovery procedure at the instance of the appellant would have been incriminating circumstance, but, since the recovery itself cannot be held to be proved against the appellant, even this circumstance cannot be used against him. In any case, it was nobody's case that the offenders had taken away Aadhar card of the deceased Sunita Gaikwad. There was no reference to this Aadhar card in the entire prosecution case till its recovery.

28 Under the same recovery panchnama, the clothes of the

accused were seized. The C.A. report shows that there was blood of “A group” on the T-Shirt of the appellant and human blood was found on full-pant of the appellant, but, the blood group was inconclusive.

29 The prosecution has not further established as to what was the blood group of the appellant himself and, therefore, this again cannot be connected with the appellant particularly when we are holding that the recovery itself is not proved against the appellant.

30 The last circumstance against the present appellant is about finding of a chance finger print of the appellant on the battery operated torch found at the spot. In this regard, the timing of some panchnamas are important. The spot panchnama Exhibit-42 was conducted between 7:15 a.m. to 8:30 a.m. on 14.12.2014. At that time the battery operated torch was seized from the spot. Significantly, the panchnama mentions that the articles were seized, labels bearing signatures of panchas and police officers were pasted on those articles and they were sealed.

31 After that, the finger print was taken under another panchnama which is placed on record at Exhibit-49. That panchnama was conducted between 9:00 a.m. to 10:00 a.m.. At that time, PW-8 Anil Koli had found the chance finger print. It was encircled by using marking-pen. This panchnama was carried out between 9:00 a.m. to 10:00 a.m. on 14.12.2014. The timing is important because after the first panchnama of seizure of the battery operated torch there is no other panchnama or evidence to show as to how the battery operated torch was produced by the police once it was sealed. There is no further panchnama to show that it was unsealed to enable the finger print expert PW-8 Anil Koli to take a chance finger print. That link is missing.

32 Even otherwise and even assuming that the battery operated torch was not actually sealed, the prosecution story itself shows that it was handled by the police officers, various panchas etc. and yet, only one chance finger print could be found by PW-8 Anil Koli. This itself is not free from doubt.

33 The evidence of PW-8 Anil Koli, the finger print expert, is also important. He has stated that he had reached the spot in the

midnight between 13.12.2014 to 14.12.2014. he has stated that he stayed there the whole night. He has not offered any explanation for the same. On the next day, the investigating officer showed him the battery operated torch and then he took that chance finger print. However, he has not uttered a word about any panchnama being prepared when this chance finger print was taken by him. Curiously he has deposed that his office was having finger prints of the appellant as he was a habitual offender. The investigating officer himself has not produced any record to show that the appellant was a habitual offender. Therefore, we do not find that PW-8 is a totally independent witness. He had prepared the report giving his opinion that the chance finger print matched with the thumb impression of the appellant. The appellant's finger prints were apparently taken when he was arrested and then were sent for comparison to PW-8 Anil Koli. Because of these doubtful circumstances, we are not inclined to place reliance on this evidence.

34 Apart from the above circumstances, there is no material against the present appellant. As discussed earlier, the prosecution

evidence is not free from doubt. In our view, the prosecution has failed to prove its case beyond reasonable doubt against the appellant and, therefore, he deserves to be acquitted from all the charges. Hence, the following order :

:: O R D E R ::

- i. The Appeal is allowed.
- ii. The judgment and order dated 7.12.2019 passed by the Sessions Judge, Sangli in Sessions Case No.70/2015 is set aside. The appellant is acquitted from all the charges which he was facing in Sessions Case No.70/2015 on the file of Sessions Judge, Sangli.
- iii. The appellant be released from jail in connection with Sessions Case No.70/2015 if not required in any other case.
- iv. Fine amount, if paid, be returned to the Appellant.
- v. Criminal Appeal is disposed of in aforesaid terms. In view of disposal of Criminal Appeal, Interim Application No.558/2020 also stands disposed of.
- vi. Ms. Dhanlaxmi Iyer was appointed by this Court. Therefore, she be paid her fees as per rules

(SARANG V. KOTWAL, J.)

(SMT. SADHANA S. JADHAV, J.)