

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

CRIMINAL APPEAL NO. 107 OF 2011

Avinash Shashikant Sawant

..Appellant

V/s.

The State of Maharashtra

..Respondent

Mr. Chaitanya Pendse a/w. Mr. B. D. Shinde a/w. Ms. Siddhi
Bhosale for the Appellant.

Ms. Prajakta Shinde, APP for the Respondent / State.

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**CORAM : NITIN JAMDAR AND
C. V. BHADANG, JJ.**

DATE : 19 July 2021

Judgment : (Per C. V. Bhadang, J.)

. The challenge in this Appeal is to the judgment of conviction and sentence recorded by the learned Sessions Judge for Greater Mumbai at Sewree on 30 November 2010 in Sessions Case No.39/2010. By the impugned judgment, the Appellant / Accused has been convicted for the offence punishable under Section 302, 452 and 392 r/w. Section 397 of the Indian Penal Code (IPC). For the offence punishable under Section 302 of IPC, the Appellant has been sentenced to suffer imprisonment for life and to pay fine of Rs.10,000/-, in default, to suffer R.I. for

one year. For the offence punishable under Section 452 of IPC, the Appellant has been further sentenced to suffer R.I. for one year and to pay fine of Rs.2,000/-, in default, to suffer R.I. for four months. Lastly, for the offence punishable under Section 392 r/w. 397 of IPC, the Appellant is sentenced to suffer R.I. for seven years and to pay fine of Rs.10,000/-, in default, to suffer R.I. for one year. The substantive sentences are directed to run concurrently.

2. The prosecution case in brief is as under :

Now deceased Smt. Malti Prabhakar Mahadik was residing alongwith her son Sachin and daughter-in-law Subhadra at House No.306, Saibaba Rahivasi Sangh, Gaondevi, Santacruz (E), Mumbai, which is said to be a part of slum area. On 17 September 2009, when the incident in question is alleged to have happened, Sau. Surekha Kadam who is a married daughter of Malti had also come down to stay with her mother Malti in the said house.

3. It is said that Sachin was working with Kabu Shares and Stocking Pvt. Ltd. while Surekha Kadam had a job in Andheri (W), Mumbai. On the day of incident, in the morning, both of them left the house to attend their jobs. Subhadra Mahadik went to her maternal place.

4. P.W.1 - Ankita Pawar is a next door neighbour of Smt. Malti Mahadik. P.W.1 is a complainant in the present case who claims that whenever she was required to go out, she used to keep the keys of her house with the deceased Malti. This would indicate that there was a certain amount of trust, closeness and acquaintance between P.W.1 and deceased Malti. Be that as it may, P.W.1 claims that on the day of incident at about 5.30 to 5.40 p.m. she was required to go out of her house to fetch her son from the school. She therefore locked her house and as usual went to the house of deceased Malti to keep the keys. P.W.1 saw that the front door of the house of the deceased Malti was partly open. When P.W.1 Ankita Pawar entered the house to keep her keys near the mirror on the wall, she noticed that the deceased was lying down with her face covered with a quilt (godhadi). Ankita suspected that Malti could be unwell and therefore touched her soles and found her to be cold. It is at this point that P.W.1 removed the quilt and noticed that Malti was lying in a pool of blood having multiple injuries on her neck and stomach. P.W.1 shouted for help when some neighbours gathered, one of whom informed to the Police about the incident.

5. The information was received by PSI Rangrao Patil (P.W.10) attached to Vakola Police Station. PSI Patil alongwith staff visited the spot of incident. Dr. Varsha Palkar was called at the spot and after examination, she declared Smt. Malti to be

dead. On the basis of complaint lodged by P.W.1 Ankita Pawar, FIR at Crime No.365/2009 came to be registered under Section 302 of IPC against unidentified person and the investigation was set in motion.

6. During the course of investigation, the dead body was sent for post mortem examination after drawing of an inquest panchanama. The Investigating Officer also drew a spot panchanama. The statement of the witnesses came to be recorded. It may be mentioned that the Appellant (Accused No.1) came to be arrested on 9 October 2009. According to the prosecution, the Appellant while in custody voluntarily gave successive confessional statements offering to discover the ornaments which were on the person of the deceased and other articles. The ornaments and other articles were seized at the instance of the Appellant. The seized articles were sent for report of Chemical Analyzer. It may be mentioned that according to the Investigating Officer, it transpired during the investigation that the offence was committed by the Appellant in conspiracy with now deceased Nilesh Khake (Accused No.2) who met with an accidental death during the course of investigation itself. The prosecution claims that the motive behind the incident was commission of robbery in as much as both the accused were unemployed and jobless.

7. Upon completion of the investigation, a charge-sheet came to be filed which was committed to the Court of Sessions and was registered as Sessions Case No.39/2010. The learned Sessions Judge framed charge against the Appellant under the aforesaid sections to which the Appellant pleaded not guilty and claimed to be tried. The defence of the Appellant is one of total denial and false implication.

8. At the trial, the prosecution examined as many as fourteen witnesses and produced the contemporary record of investigation. The Appellant did not lead any evidence in his defence.

9. The learned Sessions Judge by the impugned judgment found the Appellant guilty under various heads and accordingly he was sentenced as aforesaid. Hence, this Appeal.

10. We have heard the learned counsel for the Appellant and the learned APP. With the assistance of the learned counsel for the parties, we have gone through the record.

11. It is submitted by the learned counsel for the Appellant that the case is based on circumstantial evidence. It is submitted that thus the prosecution was required to establish the various incriminating circumstances individually which should

form a complete chain in itself. It is submitted that except the circumstance of recovery, which also in the submission of the learned counsel is not established, there is no other circumstance brought on record to establish the guilt against the Appellant. He has then taken us through the evidence in order to show that the circumstance about motive is entirely absent much less proved. It is submitted that the recovery of the ornaments and the clothes is also doubtful. In this regard, he has referred to the evidence of the memorandum statement (Exh.22) and the recovery panchanama (Exh.23) in support of which the prosecution had examined P.W.2 – Sachin Sawant as a panch. The learned counsel has pointed out to the timing as stated by the P.W.2 and timing recorded in Exh.22 and 23 to show that they are discrepant. It is submitted that P.W.2 claims that it was the Investigating Officer (P.W.13) who had told him about the statement / willingness of the Appellant to produce the ornaments. It is submitted that if that be so, the essential part of the recovery which is the voluntary statement of the Accused while in custody, itself becomes doubtful and in any event, is not personally witnessed by P.W.2. It is submitted that there were in all four ornaments and one yellow colour plastic bag which was allegedly recovered from the place of which the ownership of the Appellant is neither claimed nor established. It is also submitted that there is discrepancy as to the weight of the ornaments as mentioned in the panchanama and the report of the valuer. Lastly, it is

submitted that P.W. 7 – Sachin Mahadik who is son of the deceased has not given the description / particulars of the ornaments and therefore the alleged identification of the ornaments by P.W.7 before the Court also becomes doubtful and is unacceptable. The learned counsel was at pains to point out that even assuming that the recovery is established, it being a circumstance of a corroborative nature by itself is not sufficient to establish the complicity of the Appellant in the alleged offence.

12. The learned APP has supported the impugned judgment. It is submitted that the motive for the offence is one of robbery which stands corroborated by the recovery of the ornaments notwithstanding some minor discrepancies. In the submission of learned APP, the discrepancy as to the timing as deposed by P.W.2 and the one found in the panchanama (Exh.22 and 23) does not go to the root of the matter or strike at the veracity of the evidence of P.W.2 and the Investigating Officer (P.W.13). It is submitted that there is also recovery of the blood stained clothes and the circumstances taken altogether have rightly been found by the learned Sessions Judge to be sufficient to return a finding of guilt.

13. We have carefully considered the circumstances and the submissions made.

14. Indisputably, the prosecution case rests on circumstantial evidence as there is no eye witness account of the incident available on record. The law relating to the prosecution case based on circumstantial evidence, is too well settled to be restated. It is now well settled that individual incriminating circumstances should be properly established and all such circumstances taken together should form a complete chain unerringly pointing to the guilt of the accused. It is now well settled that the conclusion arising out of such circumstances should not only be consistent with the hypothesis of the guilt but should be inconsistent with the hypothesis of innocence. It is further well settled that suspicion however strong, cannot take the place of proof.

15. Coming to the present case, there are only two circumstances on which the prosecution rests in its case. One is motive which is said to be robbery and secondly the recovery of the ornaments and other articles at the instance of the Appellant under Section 27 of the Evidence Act. We find that neither the circumstances are established and even assuming for the sake of argument that they are proved, cannot be said to form a complete chain to establish the complicity of the Appellant in the said offence.

16. Before coming to the said circumstances, it is necessary to note that the deceased was found lying in injured condition having multiple injuries on her neck and stomach in her own house which is part of a slum area. P.W.1 is her next door neighbourer. As noticed earlier, there was certain amount of trust and deep acquaintance between the P.W.1 and the deceased in as much as the P.W.1 claims that she was keeping the keys of her house with the deceased whenever she was required to go out. It has come in the evidence of P.W.1 that there is common wall between her house and the house of deceased. Beyond the lane in which their huts are situated there are also other huts. She further claims that the huts in the said area are having two floors and opposite the hut of P.W.1 and the deceased there are other huts which are at a distance of two and half feet. It can thus be seen that the area is thickly inhabited.

17. It has come in the evidence of Investigating Officer (P.W.13) that the house of deceased Nilesh Khake is just opposite to the house of deceased where P.W.14 Rupesh was also residing.

18. The son as well as daughter and the daughter-in-law of the deceased had left the house in the morning on the day of incident and P.W.1 found Malti lying in her house in a pool of blood at about 5.30 to 5.40 p.m. on the same day. Thus, it is clear that deceased Malti was done to death during the course of

the day. We find it improbable that the deceased who had next door neighbours and both their houses being situated in the part of slum area which to a certain extent is densely populated, nobody would notice the Appellant and the co-accused visiting the deceased, assaulting and thereby seriously injuring her and thereafter leaving unnoticed. With this, we would now refer to the two circumstances. The fact that the Appellant is unemployed and jobless is hardly sufficient to attribute an intention / motive of robbery to him. Coming to the aspect of recovery, indeed there are certain discrepancies and incongruities in the evidence of P.W.2. Particularly, as regards the timing when compared with the panchanama (Exh.22 & 23). Briefly stated the panchanama (Exh.22) indicates that the voluntary statement of the Appellant was made between 8.50 a.m. to 9.15 a.m. when P.W.2 clearly claims that he was called at the Police Station at 9.15 a.m. Thus, it appears to be improbable that the alleged voluntary statement and the disclosure made by the Appellant was in the presence of P.W.2 which is further fortified by the fact that P.W.2 claims that it was the Investigating Officer who had informed him that the Appellant had voluntarily expressed his desire to produce the ornaments. According to the prosecution, there were in all five articles recovered, pursuant to the voluntary statement which was seized vide panchanama Exh.23 which comprise of (i) gold chain (ii) gold bangles (iii) gold earrings (iv) one yellow metal ring and (v) one yellow coloured plastic bag

which were wrapped in a paper and thereafter kept in a transparent plastic bag and were sealed. There is separate panchanama drawn at Exh.40 as the ornaments were required to be sent to the Jeweller for valuation. Significantly enough, neither P.W.2 nor panchanama (Exh.40) finds a reference to the paper wrapping or the yellow coloured plastic bag. There is also certain amount of discrepancy in the weight and lastly P.W.7 who is son of the deceased has not given the description / particulars of the ornaments which according to him were allegedly missing and subject matter of robbery before their identification in the Court. Normally the identification in the Court would stand corroborated by the fact of concerned identifying witnesses stating such particulars before the Investigating Officer either in his complaint / FIR and/or statement. That apart, as rightly submitted by the learned counsel for the Appellant, even assuming for the sake of argument the discovery of ornaments is proved, that by itself is not sufficient as a circumstance to find the Appellant guilty of the offence of murder and robbery. The learned counsel for the Appellant rightly submitted that in a given case the person who discovers the ornaments may well be merely a receiver of stolen property.

19. There are two other recoveries, one each on 11 October 2009 and 20 October 2009. On 11 October 2009, the Appellant is alleged to have made a confessional statement and

made discovery of his clothes comprising of a sando baniyan and half jeans pant from his house. There is yet another discovery made by the Appellant on 20 October 2009. It is significant to note that the alleged discovery on 20 October 2009 is of the clothes of the co-accused allegedly recovered from the house of Rupesh Khake, the brother of the co-accused Nilesh Khake. It is difficult to accept any such disclosure and recovery and that too from the house of the co-accused who is dead. In our view, any such recovery of the clothes of the co-accused from the house of the co-accused cannot be considered as an incriminating circumstance in the present case. It is pertinent to note that the Investigating Officer in so far as the discovery made on 20 October 2009 states that P.W.14 Rupesh Khake who is brother of Accused No.2 was present at the house from where the said recovery was made. It is necessary to note that P.W. 14 was examined by the prosecution. However, he has not stated anything about any such recovery being made from his house at the instance of the present Appellant. P.W.14 was examined on the point that on 28 September 2009, according to this witness, at about 5.30 p.m. the present Appellant had met him informing him that he had received a phone call from Nilesh as ornaments of the deceased Malti were with him. Appellant also allegedly told P.W.14 that Appellant had received two more phone calls in Hindi language of a threatening nature. The said evidence does not take the case of the prosecution any further. So called

statement made by P.W.14 can neither be taken as a extra judicial confession nor can it be said to be probable in as much as P.W.14 has admitted that although police were visiting the spot from 17 September 2009 and though P.W.14 is residing next door to the house of the deceased Malti, he did not inform about any such statement by the Appellant to the police till 30 September 2009.

20. The evidence as to Chemical Analysis of the seized articles also does not show that any of the articles / exhibits seized were having the blood stains which were established to be that of the deceased. It has come on record that the blood group of deceased was found to be 'B' and the C.A. report as to the stains on the clothes of the Appellant were found to be inconclusive.

21. Considering the over all circumstances, although the fact that the deceased suffered a homicidal death is not disputed, we are unable to hold that the prosecution evidence establishes the complicity of the present Appellant in the said offence, beyond reasonable doubt.

In the result, the following order is passed.

ORDER

1. The Appeal is allowed.
2. The conviction and sentence recorded against the Appellant / Accused by the learned Sessions

Judge, Greater Mumbai at Sewree, on 30 November 2010 in Sessions Case No.39/2010 is hereby set aside.

3. The Appellant is acquitted of the offences as charged.

4. The fine if paid, be refunded.

5. The Appellant be set at liberty forthwith, if not required in connection with any other offence.

6. The part of the impugned judgment relating to the disposed of the muddemal properties stands confirmed.

(C. V. BHADANG, J.)

(NITIN JAMDAR, J.)