

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

CRIMINAL APPEAL NO.128 OF 2013

Maqbul Nazir Hawaldar]
R/at Salwada Naka, Pansare Mohalla,]
Mahad, Taluka-Mahad, District-Raigad,]
At Taloja Central Prison, Taloja] ...Appellant

V/s.

The State of Maharashtra]
(at the instance of Senior Inspector]
of Police Mahad City Police Station]
Vide C.R. No.I-64 of 2010] ...Respondent

Mr.Nitin Sejpal a/w Akshata Desai and Hiren Mehta for the
Appellant.

Smt.M.M. Deshmukh, APP for the Respondent-State.

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

DATE : 2 August 2021

JUDGMENT (Per C.V. Bhadang)

. The challenge in this Appeal is to the judgment and
order dated 19 December 2012 passed by the learned Additional
Sessions Judge, Mangaon, District-Raigad in Sessions case No.2
of 2011. By the impugned judgment the Appellant/Accused has

been convicted for the offence punishable under Section 302, 394 and 397 of Indian Penal Code ('IPC' for short). The Appellant has been sentenced to suffer imprisonment for life and other sentences along with fine.

2. The prosecution case may be brief stated thus :-

Nandakumar Govardhan Sheth (PW-1) is the first informant. The first informant was having a stationary shop by name 'Namrata Stores' and was also running a business of lodging under the name and style as 'Gokul Lodge' in a double storied building, situated at Mahatma Gandhi Road, Mahad, District-Raigad. The Appellant was residing on the first floor of the said building along with his wife Alka (since deceased) and the mother-in-law who was stated to be bedridden.

On 5 October 2010 Nandkumar had been to Mumbai for purchase of stationary articles, his wife Alka and mother-in-law were at home. After purchase Nandkumar returned to Mahad at about 3.00 a.m. on 8 October 2010. His servant Purshottam Modi (PW-2) opened the door and both of

them went to the first floor. It is said that there were two doors to the said building out of which one was found to be open. The door of the room where mother-in-law of Nandkumar was staying, was found locked from outside. When the informant went to the bed room he found that the household articles were scattered and his wife Alka was tied to a wheel- chair with her throat slit. She was found laying dead in pool of blood. The bed, pillow cover and bed-sheet was having blood stains. The dead body of Alka was found garlanded with Zandu flowers (Marigold).

Nandkumar feeling alarmed, asked Purshottam to call his brother Santosh and nephew Ashish. The police upon intimation reached at the spot. On the basis of a complaint lodged by the first informant an offence at Crime No.64 of 2010 was registered with Mahad Police Station, under Section 302 of IPC against unidentified persons.

3. During the course of the investigation a spot panchnama was drawn along with inquest panchnama of the dead

body. The dead body was sent for postmortem examination. The Investigating Officer recorded supplementary statement of Nandkumar on 10 October 2010 disclosing that articles worth Rs.50,000/- including a cell phone of Nokia company, four rose-gold bentex bangles, two ear-rings, one mangalsutra and a ladies purse was missing from the house. Nandkumar also expressed suspicion on the Appellant who was earlier serving with him and was removed from service as the Appellant was allegedly found committing theft in the stationary shop of Nandkumar. The Investigating Officer made seizure panchnama of the clothes and other articles.

4. The Appellant came to be arrested on 24 October 2010 by Local Crime Branch (LCB), Raigad-Alibag from Indian Recreation club at Thane and accordingly information was given to City Police Station, Mahad. According to the Investigating Officer the Appellant during the course of the investigation made multiple confessional statements, offering to produce the articles namely the Nokia cellphone and the ladies purse the which were

accordingly seized. After completion of the investigation a charge-sheet came to be filed.

5. The learned Sessions Judge framed charge for the punishable under section 302, 394 and 397 of the IPC offence 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.

6. The prosecution examined in all 20 witnesses and produced the record of the investigation. The Appellant did not lead any evidence in defence.

7. The learned Sessions Judge accepting the prosecution evidence has convicted and sentenced the Appellant as aforesaid. Hence this Appeal.

8. We have heard Mr.Sejpal the learned counsel for the Appellant and learned APP for the Respondent-State. With the

assistance of the learned counsel for the parties, we have gone through the record.

9. On behalf of the Appellant, it is submitted that the case is based on circumstantial evidence. There is no eye witness account of the incident available on record. It is submitted that various circumstances as relied upon by the prosecution and which have been accepted by the learned Sessions Judge are not sufficient to find the Appellant guilty. It is submitted that the individual circumstances are not established and they are not of incriminating nature to show the complicity of the Appellant in the said incident. It is submitted that the motive as alleged by the prosecution is also not established and in any event it is remote. It is submitted that the prosecution has not shown that the Appellant had any grudge on account of his removal from service.

10. The learned counsel has taken us through the individual circumstances, to submit that they do not form a

complete chain as to unerringly point to the guilt of the Appellant. Reliance for the purpose is placed on the decision of the Supreme Court in the case of *Sharad B. Sharada V/s. State of Maharashtra*¹ It is submitted that the alleged confessional statements and the various discoveries are not established and in any event are doubtful in view of the delay. Reliance in this regard is placed on the decision of this Court in *Sarvanand @ Soiru Gaonkar S/o Purso Gaonkar V/s. State of Goa*² and *Ahmad alias Ahmad Chakri and Others V/s. The State of Maharashtra*³. He submitted that the Appellant has been implicated only on suspension. The learned counsel was at pains to point out that suspension, however strong, cannot take the place of proof.

11. The learned APP has supported the impugned judgment. It is submitted that the Appellant was in service of PW-1 and prior to the incident was removed from service on the allegation that he was indulging in theft in the stationary shop of Nandkumar. It is submitted that the evidence shows that the

1 1984 (4) SCC 116

2 2007 ALL MR (Cri) 28

3 1994 CRI. L.J. 274

Appellant was repeatedly requesting Nandkumar to take him back in service and on account of the refusal, the Appellant was annoyed and had caused the death of wife of Nandkumar when she was alone with her mother who was aged and bedridden. It is submitted that the circumstances as brought on record are sufficient to establish the guilt of the Appellant.

12. We have carefully considered the prosecution evidence, in the context of the defence and we do not find that the prosecution evidence is sufficient to hold the Appellant guilty of the offence.

Homicidal Death

13. PW-14 Dr. Ganesh Jagannath Dhumal who is a medical Officer, attached to Rural Hospital Mahad has conducted the postmortem of dead body of Alka. He found the following external injuries on the dead body.

- (i) Major incised wound, all along the circumference of neck measuring 12 to 13 cm

extending from right sterno cleidomastoid to left sternocleidomastoid.

(ii) trachea cut at the level of hyoid bone.

(iii) upper end of trachea is seen at the level of hyoid bone.

(iv) lower end of trachea is seen at the level of jugular notch.

He accordingly issued the postmortem notes Exhibit-46 and the advance certificate of cause of death Exhibit-47. He states that the injuries in column No.17 are sufficient in the ordinary course of nature to cause death. The record discloses that the deceased was found tied to the wheel chair with marigold flowers stuffed in her mouth. Looking to the circumstances in which she was found and the injuries in Column No.17 there is no manner of doubt that Alka suffered a homicidal death. The question is whether the prosecution evidence is sufficient to show the complicity of the Appellant, in causing death of Alka.

Spot of Incident

14. The evidence of PW-11 Sujeet Gandhi who is spot

panch and PW-17 Surendra Sawant who had drawn sketch map is relevant for the purpose. It has come in the evidence and the spot panchnama Exhibit-33 and the sketch map, that the place where the complainant and the deceased were residing is a double storied building having ground plus two floors. The PW-17 Surendra Sawant has prepared separate sketch maps of the ground, first and second floor, which indicate that the stationary shop of the complainant by name 'Namrata Stores' is on the ground floor along with Gokul Hotel. The first floor consists of the residence and three rooms which are used for Gokul Lodge. The entire second floor is used for Gokul Lodge. There are three stair cases. It has come on record that the staircase on the northern side is permanently closed. There is one staircase in the middle which descends from the first floor, to the lane on the western side. The main staircase is from the Eastern side which leads to the eastern side passage, which eventually leads to the M.G. Road on the Southern side. The learned Sessions Judge has noticed that the first floor comprises of two portions. The northern portion is used for residence where the spot of incident

is situated and the three rooms on the southern side are part of Gokul Lodge. The learned Sessions Judge has also noticed that there is a partition with a door in between these two portions. Broadly this is the nature of the spot of incident.

Circumstantial Evidence

15. This is a case based on circumstantial evidence. The prosecution has relied upon the following circumstances, which in the opinion of the learned Sessions Judge, are sufficient to show the involvement of the Appellant in the offence.

- (i) Motive
- (ii) The Appellant was seen near the residence of the complainant and the shop 'Namrata Stores', in the evening/late hours on 7 October 2010.
- (iii) Abscondance from 8 October 2010 to 24 October 2010 when the Appellant was arrested, from the Indian Recreation Club at Thane.
- (iv) The discovery and recovery of various articles which according to the prosecution are of an

incriminating nature.

(v) Seizure of the incriminating articles, from the scene of offence.

We would now propose to deal with each of the circumstance.

Motive

16. The complainant PW-1 as well as PW-3 Anila Nivate and PW-4 Deepak Yadav, have stated that the Appellant was employed with the complainant in 'Namrata Stores'. He was removed, as he was found in the habit of committing theft. The Appellant was visiting the shop with a request to take him back in service which was not acceded to by the complainant PW-1. Although it has come on record that the Appellant was serving with PW-1 for a period of six years, there is nothing on record, as to when he was removed from service. According to the Appellant, he had secured a job at Mumbai and had therefore left the service of PW-1.

17. Be that as it may, admittedly, there is no complaint which was lodged by PW-1 against the Appellant, for the alleged or attempted theft in the shop. It is also not clear whether the removal was proximate to the incident, so as to attribute motive to take revenge. In our considered view, the mere fact that an employee is removed from a private job, by itself would be insufficient to attribute motive, as serious as committing murder of the wife of the employer. To put it differently, such a circumstance by itself and in the absence of any other incriminating/clinching evidence to show involvement is not sufficient, to be considered as a link. It is now well settled that motive by itself is not a link. It is only when the other circumstances which form a complete chain are properly established pointing to the guilt of the accused, that the proof of motive can lend credence and corroboration to the circumstantial evidence brought on record. Thus, we are unable to accept that the circumstance, in the first place, is proved or is sufficient, as an incriminating circumstance.

Appellant being seen near the shop

18. Second circumstance is about the Appellant being seen near the shop of the complainant in the evening/late hours on 7 October 2010. The evidence of PW-3 Anila Newte PW-4 Yadav and PW-8 Bhagwan Awsare is relevant for the purpose. It may be mentioned that PW-3 is serving with the complainant-PW-1 in Namrata Store, while PW-8 appears to be the person close to the complainant. This is because when the complainant came at 3.00 a.m. on 8 October 2010 and found his wife lying in a pool of blood, he asked PW-2 Purshottam Modi to call PW-8 Bhagwan Awsare. PW-3 Anila states that on 6 October 2010 the Appellant had come to the shop at about 8.30 p.m. Except this there is nothing which is forthcoming in her evidence. PW-4 Deepak Yadav is a peon working with the Municipal Council, Mahad. He states that on 7 October 2010 he had gone to the shop Namrata Stores when he had seen the Appellant moving in front of the shop in between 9.15 p.m. to 9.30 p.m. PW-8 Bhagwan Awsare is a Proprietor of Kundan Shilai Stores engaged in the business of repairs of stitching machines at Bazar peth area

Mahad. There are two to three shops in between Kundan Stores and Namrata Stores. He states that on 7 October 2010 at about 10.30 p.m. he had gone to the shop of Shabbir Panwala for recharge of his sim card and at that time he had seen the Appellant at the pan shop, which is at a distance of 20 feet from 'Namrata Stores'. Subsequent evidence is about this witness being called by Purshottam Modi in the early hours at 3.00 a.m. at the instance of PW-1. It is necessary to note that the Appellant is a permanent residence of Mahad and there is nothing unusual if the Appellant was found at or near 'Namrata Stores' in the evening of 7 October 2010. This circumstance can not be said to be akin to the circumstance of last seen together. Thus, even assuming that the Appellant was seen moving about in the evening on 7 October 2010 near 'Namrata Sotres', we are enable to find that this can be an incriminating circumstance.

Abscondance/Conduct of the Appellant

19. The Appellant is said to be arrested from the Indian Recreation Club, Thane on 24 October 2010 by the officers of

the Local Crime Branch (LCB), Alibaug. Subsequently, he was handed over to the Investigating Officer. PW-5 Jaising Desai is the person who was working with Indian Recreation Club, Thane as a Manager and had since retired. He states that on 8 October 2010 he was on duty at the club where the members visit for playing cards. There is a register maintained at the club of the visitors. He states that on 8 October 2010 a person claiming to be Ashok Suryawanshi had come to the club. According to this witness the Appellant is the same person who came to the club, impersonating himself as Ashok Suryawanshi. What is significant is that this witness has admitted that the said person calling himself as Ashok Suryawanshi had shown his identity card. It has come in his evidence that except the members of the club, none others are allowed entry and identity card was issued to all the members. However, in the next breath he states that the identity card was not issued to the person by name Ashok Suryawanshi. Receipts or entries pertaining to Ashok Suryawanshi were not handed over to the police. PW-5 never verified from the person claiming himself to be Ashok

Suryawanshi, whether he is a member of the club or about his residential address nor he insisted for his identity card. It is the further evidence of this witness that on 24 October 2010 the Raigad Police came to the club in the afternoon and went to the first floor to verify the members who were playing cards. They found Appellant/Accused and brought him down stairs which this witness has identified to be the person who had visited on 8 October 2010, under the name as Ashok Suryawanshi. We do not find that the evidence of PW-5 inspires confidence when the said witness had failed to verify the identity card or the fact about the person called Ashok Suryawanshi being a member of the club. In any event, even assuming that the Appellant had been to the said club for playing cards, is not sufficient to show that he was absconding or was trying to conceal himself.

20. PW-9 Hasan Shaikh is working as receptionist at Hotel Ripon Palace, Mumbai. He states that on 11 October 2010 a person claiming to be Majid N. K., came in the hotel and stayed for two consecutive dates till 13 October 2010 and accordingly

entry at Serial No.3973 was taken in the hotel register. He checked out at 12 noon on 13 October 2010. The said person again came in the hotel at 11.00 p.m. on 13 October 2010 stayed for two days and checked out on 15 October 2010 at 8.00 a.m. which entry is at serial No.4021. The witness identified the Appellant to be the same person who had stayed in the hotel impersonating himself as Majid N.K. There is no identification parade conducted by the Investigating Officer and PW-5 and PW-9 have for the first time identified the Appellant before the Court. Although the identification before the Court is the substantive evidence and can in a given case be acted upon, in a case of the present nature, where the Appellant is alleged to have stayed in hotel in Mumbai and visited a club at Thane (although being a resident of Mahad), it was expected that there was an identification parade conducted involving PW-5 and PW-9 and others as identifying witnesses to lend corroboration to the evidence of identification in the Court. The evidence of PW-9 in our view, does not inspire confidence, for the reason that the witness had not insisted and obtained any identification proof

from the person by name Majid N.K., although the witness has stated that he had demanded the said proof from Majid and the same was not given. If that be so, normally the said person by name Majid N.K. (who according to the prosecution is the Appellant) could not have been allowed to check in again in the evening of 13 October 2010, looking to the earlier experience of the said person not furnishing his identification proof.

21. It is further necessary to emphasise that abscondance by itself is a circumstance, which is in the nature of a corroboration. There are instances where even innocent persons apprehending an action, can take to their heels. Thus the circumstance of abscondance also does not commend to us as an incriminating circumstance, in the present case.

The circumstance as to Discovery and Recovery

22. There are three successive discoveries said to be made by the Appellant, that is on 27 October 2010, 2 November 2010 and 4 November 2010, PW-13 Subhash More is the panch

witness who states that on 27 October 2010 the Appellant made a confessional statement disclosing that he had sold a cell phone of Nokia company and its charger at Ghatkoper, Mumbai. Accordingly, he led the police and the panchas to Ghatkoper West, Near Hotel Meghdut where there were certain ladies out of which the Appellant pointed out to PW-6 Basunda Waghmare, from whom the Nokia mobile (without a sim card and a battery) (Article 4) was recovered. PW-6 claims that she is dealing with the business of purchase of old clothes. On 10 October 2010 at 12 noon, one person had come to her disclosing his intention to sale a Nokia handset and demanded Rs.500/-. She negotiated the deal and purchased the mobile handset for Rs.200/-. The Sessions Judge has noted that the IEMI No.35337700/068158/0 of the mobile handset matches with the mobile handset purchased by PW-1 in the year 2004.

23. The next discovery is on 2 November 2010 where PW-13 Subhash More, is again the panch witness, who claims that in his presence the Appellant made a disclosure statement

stating that he has presented one purse to a Commercial Sex Worker (CSW) and is ready to produce the same. The Appellant then led the police and the panchas to a room in the hotel Rephon Palace, Bombay Central. After reaching there a CSW namely PW-7 Bibha Sarkar, was called there who produced a purse (Article-5) which was allegedly presented to her by the Appellant. The purse was containing a S.T. ticket from Mahad to Panvel dated 8 October 2010 and one ticket from Panvel to CST of the same date, which are at Articles 5/1 to 5/3. PW-7 Bibha Sarkar states that she is working as a CSW in the Nagpada Area. In the year 2010, the flat owner Raju had sent her along with one Majid Khan in Mohrappa Hotel, Bombay Central to a customer whom she identified to be the Appellant before the Court. She states that the person was wearing 5 golden rings and she thought that he must be a rich person. She states that on the following morning the said person paid Rs.1,000/- and presented the purse (Article-5) to her. We are not convinced about the nature of the evidence led. PW-7 Bibha states that she was taken by one Majid Khan to Moharappa Hotel at Bombay Central. It is not known

why she was called at hotel Ripon Palace.

24. The learned counsel for the Appellant submitted that if at all the person who visited PW-7 and presented the purse was seen as a rich person, wearing 5 golden rings and gave Rs.1000/- to PW-7, he is not expected to travel, all the way to Ghatkoper to sale a mobile for Rs.200/-. What is significant is that PW-7 states that the customer (i.e. the Appellant) gave her a purse and also shared his mobile number and he used to call her whenever he used to come to her. She stored his mobile number in her mobile. The Investigating Officer has not collected the CDR record of any such phone calls or the conversation between the Appellant and PW-7.

25. The last recovery is on 4 November 2010 of the knife (Article-6) which is from a public place behind the bus stand Mahad. It is true that it has come on record that the blood group of the deceased was AB and the knife (Article-6) was found having blood stains of the blood group AB. However, the fact

remains that the discovery is from a public place. At the cost of repetition, it is necessary to emphasise that even the evidence of discovery and recovery of incriminating articles is in the nature of corroboration to some substantive circumstance indicating the complicity of the accused in the offence.

26. The learned Sessions Judge in paragraph 25 has referred to seizure of the clothes of the deceased and the blood stains found on the knife, the pillow cover and bed sheet at the spot of the occurrence. The presence of the blood stains at the spot of the occurrence, including the pillow cover and bed sheet of the AB blood group is but natural. What is significant is that the clothes seized from the Appellant have not been shown to be bearing any blood stains, which the learned Sessions Judge also accepts to be of a formal nature.

27. Insofar as the recovery is concerned, it is well settled that the delay in the recovery under Section 27 of the Evidence Act diminishes the probative value to be attached to it. In

Sarvanand @ Soiru Gaonkar the recovery was after six days and it was held that the delay would diminish the value to be attached to it. In *Ahmad alias Ahmad Chakri and Others* a delay of 4 to 5 days was held to be significant. The question albeit would depend upon the facts and circumstances of each case.

28. Before concluding we propose to consider the conduct of PW-2 and the nature of the investigation conducted. PW-2 Purshottam Modi who was serving with the complainant in Gokul Lodge along with one Nathu as a Manager, states that his working hours were from 9.00 p.m. to 10.00 a.m. Thus PW-2 used to be at the lodge during the night shift. He states that on 7 October 2010 he resumed his duty at 9.30 p.m. and took charge from Nimare. At about 11.15 p.m. one Shrinath Keni rang the bell. He opened the door Shrinath handed over the umbrella of the deceased to him. Therefore, PW-2 went to first floor and called deceased. However, there was no response and therefore he kept the umbrella on cot and went on the second floor and Keni went to room No.6. At 3.00 a.m. again the bell rang when

PW-1 Nandakumar had arrived. He went down stairs, Nandkumar went to his house and he went to the second floor. Within a short time he heard shouts calling him down stairs. Nandkumar told him to call his brother Santosh, informing that somebody has killed his wife Alka.

29. The evidence of PW-2 also does not appeal to us, as being natural. If at all there was no response from the deceased at about 11.15 p.m. when PW-2 went to give the umbrella to the deceased, normally he should have been alarmed. PW-2 also does not state that he informed the said fact to PW-1 when he arrived at 3.00 a.m. which was the normal conduct expected.

30. PW-1 states that he was staying along with his wife and old and aged mother-in-law who is bedridden. On 5 October 2010 he had been to Mumbai for purchase of goods and cutlery and returned on 8 October 2010 at about 3.00 a.m. He rang the bell when PW-2 came down along with him he went upstairs. He opened the lock and went inside while Purshottam

went on the second floor. He crossed two rooms which were being used for storage of cutlery articles and he noticed that the door of the stair case leading to the lane on the western side (used for operating the bore-well) was open and the door on the ground floor was also open and thereafter he noticed that the door of the room where the mother-in-law was staying was locked from outside. After crossing the passage, he went to the bed room when he saw his wife lying in a pool of blood and tied to the wheel chair gagged with the flowers.

31. We find that there were other occupants including PW-2 and Keni who were staying during the night. There is also no investigation as to the inmates of the hotel. Not even the register of the hotel is seized by the Investigating Officer. We are conscious that the lapses in the investigation are not by themselves sufficient to disbelieve the prosecution case. However, in the absence of any evidence to show the involvement of the Appellant, these circumstances also assume significance.

32. Considering the circumstances taken together, we are unable to hold that they are either individually established or they form a complete chain, unerringly pointing to the guilt of the Appellant. It is now well settled that the inference arising out of the chain of circumstances, is not only to be consistent with the hypothesis of guilt, but should be inconsistent with the hypothesis of innocence. It is trite that suspicion, however strong cannot take place of the proof. Considering the overall circumstances, we are unable to hold that the prosecution has established the guilt of the Appellant beyond reasonable doubt. Hence, the following order.

ORDER

- (i) The Appeal is allowed.
- (ii) The impugned Judgment and Order dated 19 December 2012 passed by the learned Additional Sessions Judge at Mangaon, District Raigad in Sessions Case No. 2 of 2011, is hereby set aside.
- (iii) The Appellant/accused is acquitted of the offence under Section 302, 394 and 397 of the Indian Penal Code.

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

(v) Fine, if paid be refunded.

(v) The part of the impugned judgment relating to the disposal of the Muddemal property, is hereby maintained.

(C. V. BHADANG, J.)

(NITIN JAMDAR, J.)

NILAM
SANTOSH
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