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

CRIMINAL APPEAL NO.1438 OF 2018

Bharat Ramdas Dhokrat] .. Appellant
Age – 32 years, R/o, Kolgaon Mal] (Org. Accused No.1)
Taluka – Sinnar, District Nashik.]
Presently in Nashik Road Central Prison)

vs.

The State of Maharashtra] .. Respondent
(At the instance of Lasalgaon Police]
Station. Taluka-Niphad, Dist. Nashik)]

**ALONGWITH
CRIMINAL APPEAL NO.511 OF 2017**

Gulab Niwrutti Thakar] .. Appellant
Age – 27 years, R/o, Kolgaon Mal,]
Taluka-Sinnar, District – Nashik.] (Org. Accused No.2)
(Presently in Nashik Road Central Prison)

vs.

The State of Maharashtra] .. Respondent
(At the instance of Lasalgaon Police]
Station. Taluka-Niphad, Dist. Nashik)]

Mr.V.B. Shivarkar for Appellant in Cr. Appeal No.1438/2018.

Mr.Yashpal M. Thakur, Appointed Advocate for Appellant in
Cr. Appeal No.511/2017.

Ms.M.H. Mhatre, APP for State.

**CORAM : SMT.SADHANA S. JADHAV &
N.R.BORKAR, JJ.**

**RESERVED ON : 11th JANUARY,2021.
PRONOUNCED ON : 19th JANUARY,2021.**

COMMON JUDGMENT : (PER : N.R.BORKAR, J)

1] Both these Appeals are filed against one and the same Judgment and order dated 4th October, 2016 passed by learned Additional Sessions Judge, Niphad, Nashik in Sessions Case No.25 of 2014. Both these appeals were, therefore, heard together and are being disposed of by this common Judgment.

2] By the impugned Judgment, Appellant in Criminal Appeal No.1438 of 2018 (accused No.1 before the trial Court) and Appellant in Criminal Appeal No.511 of 2017 (accused no.2 before the trial Court), have been convicted for the offence punishable under Section 302 read with 34 of the Indian Penal Code and sentenced to suffer R.I. for life and to pay fine of Rs.2,000/- each and in default of payment of fine to suffer R.I. for six months. Both the accused have been further convicted for the offences punishable under Section 201 read with 34 of the Indian Penal Code and sentenced to suffer R.I. for 7 years and to pay fine of Rs.1,000/- each and in default of payment of fine to suffer S.I. for 3 months.

3] The deceased Sheetal was the wife of the accused No.1. It is the case of the prosecution that the accused No.1 used to ill-treat the deceased. The

deceased was thus compelled to file a case against accused No.1 and his relatives in the Court at Surat. The matter was, however, settled with the mediation of relatives.

4] It is alleged that accused No.1 had illicit relations with his elder brother's wife. The accused No.1, therefore, hatched the conspiracy with accused No.2 to eliminate the deceased. It is alleged that pursuant to the said conspiracy, accused No.1 alongwith accused No.2 committed murder of the deceased on 2nd February, 2014.

5] It is alleged that accused No.1 after committing the murder of the deceased came to the Police Station and lodged the false report that on the day of incident, while he and the deceased were returning to their village Kolgaon from the village Jalgaon on motorcycle, they were accosted by four robbers near village Satmori. The said robbers snatched valuables from them. They assaulted him. They tied him with his own clothes. The robbers then took the deceased away from him with a view to commit rape on her. He then found the deceased in dead condition.

6] Initially, on the basis of report lodged by the accused No.1 crime was registered vide CR No.19/2014 for the offences punishable under Section 394, 376(g), 302 of the Indian Penal Code, against unknown persons. However, according to the prosecution, during the course of investigation it

transpired that accused No.1 with the help of the accused No.2 committed the murder of the deceased. Accordingly, the charge sheet was filed against them. The trial Court, as stated earlier, convicted both the accused for the offences punishable under Section 302, 201 read with 34 of the Indian Penal Code.

7] We have heard the learned advocate for appellants/accused and the learned APP for State.

8] Admittedly, the present case is based on circumstantial evidence. The Hon'ble Supreme Court in the case of **Sharad Biridhichand Sarda vs. State of Maharashtra** (AIR 1984 SC 1622) has held that falsity or unreliability of the defence set up by the accused cannot be made the basis for ignoring any serious infirmity or lacuna in the case of prosecution. The Hon'ble Supreme Court then proceeded to lay down the following conditions which must be fully established before a conviction can be made on the basis of circumstantial evidence.

- (1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.
- (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explained on any other hypothesis except that the accused is guilty.
- (3) the circumstances should be of a conclusive nature and tendency.

- (4) they should exclude every possible hypothesis except the one to be proved, and
- (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

9] In the backdrop of above legal position, now we will examine the circumstances relied upon by the prosecution to prove its case and whether they are fully established.

10] The incident occurred on 2nd February, 2014 at about 8.30 p.m. On the day of the incident, the accused No.1 and the deceased were returning to their village Kolgaon from village Jalgaon on motorcycle, where they had gone to meet the sister of the deceased. The incident occurred near village Satmori. According to the prosecution the accused No.1, with the help of the accused No.2 committed the murder of the deceased. The prosecution in support of its case has relied upon following circumstances :

- i] Recovery of mobile phone of accused No.1, ornaments of the deceased and weapon of crime i.e. blade of knife, at the instance of accused No.2.
- ii] Call details in relation to phone calls made by accused No.1 to accused No.2.
- iii] D.N.A profile of accused No.2 matched with the D.N.A profile of spit (Gutkha) collected from the place of incident.

11] First we will deal with the recovery of mobile phone of accused No.1, the ornaments of the deceased and blade of knife at the instance of accused No.2.

12] Learned Advocate for accused has submitted that there is no evidence that the ornaments alleged to be recovered at the instance of accused No.2 were in fact that of the deceased. It is submitted that similarly there is no evidence to show that mobile phone alleged to be recovered at the instance of accused No.2 was in fact that of the accused No.1. He accordingly submitted that no reliance can be placed on the alleged recovery of ornaments and mobile phone.

13] We have perused the recovery panchanama at Exhibit 38. Four silver toe rings and two Mangalsutras are shown to be recovered at the instance of accused No.2. However, there is no evidence to show that the said ornaments were in fact that of the deceased. The sister of the deceased, was the best witness to identify the ornaments in question as the deceased had gone to her house one day prior to the incident. However, for the reasons best known to the Investigating Officer, same is not done. In absence of evidence of identification of the ornaments their simplicitor recovery is of no consequence.

14] Similar is the situation with the recovery of mobile phone. We are

saying so because there is no evidence on record to show that the mobile phone alleged to be recovered at the instance of accused No.2 was in fact of accused No.1. The best evidence was IMEI (International Mobile Equipment Identity) number of mobile handset. PW 6 Bajirao Gaikwad, the Panch witness on recovery panchanama, has admitted in his cross-examination that the investigating officer has not mentioned IMEI number of seized mobile phone in recovery panchanama. In absence of such evidence again simplicitor recovery of mobile phone is of no consequence.

15] As regards recovery of blade of knife, from the evidence of PW 6 Bajirao Gaikwad, it appears to be a kitchen knife. PW 9 Dr. Anand Pawar who conducted postmortem has admitted in his cross-examination that injury mentioned in Column No.17 can be caused by any sharp weapon. He has further admitted that it is difficult for him to say that the injury sustained by the deceased can be caused by Article 8- blade of knife or not.

16] Considering the above facts and circumstances, alleged recovery of ornaments , mobile phone and blade of knife, is of no consequence to connect accused no.2 with crime in question.

17] Now we will deal with second incriminating circumstance i.e. call details at Exhibit 81. The learned APP has submitted that call details at Exhibit 81 will show that accused No.1 has made multiple phone calls to the

accused No.2 including on the day of incident. It is submitted that accused No.1 has not given any explanation in his statement under Section 313 of the Cr.P.C. as to for which purpose multiple phone calls were made by him to accused No.2.

18] Admittedly, accused Nos.1 and 2 are resident of same village and they are not strangers. In such situation, it was necessary for the prosecution to bring on record the evidence as to what made the accused No.2 to help the accused No.1 in alleged crime. In absence of such evidence no inference of conspiracy as alleged by the prosecution can be drawn only on the basis of phone calls or not rendering any explanation in respect of the said phone calls.

19] The last incriminating circumstance is D.N.A. profile of accused No.2 which matched with the D.N.A. profile of spit (Gutkha) collected from the place of incident. PW 3 Madhav Jagtap, the Panch witness on Spot Panchanama has admitted in his cross-examination that people from village Kolgaon of which the accused No.2 is resident of, were gathered at the place of incident. Therefore, it would not be safe to connect the accused No.2 with the crime in question only on the basis of the fact that D.N.A. profile of accused No.2 matched with the spit (Gutkha) collected from the place of incident.

20] The learned advocate for the accused No.1 has submitted that in a case based on circumstantial evidence motive plays an important role. It is submitted that the motive attributed to the accused No.1 i.e. he eliminated the deceased due to his illicit relations with the wife of his elder brother cannot be believed in view of evidence on record. It is submitted that the deceased and the accused No.1 were married for 12 years, and were staying together till the date of incident. It is submitted that PW 1 Sunil Gend has unequivocally admitted in his evidence that when the accused No.1 and the deceased came to their house one day prior to the incident, they were happy.

21] We have perused the evidence in relation to alleged motive. Though the mother of the deceased has deposed about ill-treatment to the deceased and illicit relations of accused No.1 with the wife of his elder brother, however, admittedly, the deceased and the accused No.1 were staying together till the date of incident. Apart from it, PW 1 Sunil Gend who is co-brother of accused No.1 (husband of deceased's sister) has admitted in his evidence that when the accused No.1 and the deceased Sheetal came to their house (one day prior to the incident), they were happy.

22] Though the prosecution case can not be discarded on the basis of absence of motive or for non proving the same, however, it is certainly an

important link in the chain of circumstantial evidence, which is missing in the present case.

23] One more circumstance, which according to us was required to be explained by the prosecution i.e. injuries on the person of accused No.1. PW 7 Nilesh Mainkar, the Investigating Officer, has admitted in his evidence that there were injuries on the person of accused No.1.

24] A perusal of injury report of accused No.1 produced on record discloses following injuries :

- (i) C.L.W. on left shoulder.
- (ii) C.L.W. on right shoulder.
- (iii) C.L.W. on right scapula and left scapula.

25] We have also perused the photographs of the said injuries. They are certainly not superficial injuries. In such circumstances, it was necessary for the prosecution to show as to how those injuries were sustained by the accused No.1. In absence of such evidence, it would not be safe to accept the prosecution case.

26] We are, therefore, of the view that based on the evidence led by the prosecution, it is difficult to hold that the prosecution has proved its case against accused Nos.1 and 2 beyond reasonable doubt. Consequently the

impugned Judgment and order passed by the learned Additional Sessions Judge, Niphad Nashik, in Sessions Case No.25 of 2014 will have to be set aside. In the result, following order is passed :

ORDER

- i] Appeals are allowed.
- ii] The impugned judgment and order dated 4th October, 2016 in Sessions Case No.25 of 2014 passed by the learned Additional Sessions Judge, Niphad, Nashik, convicting the accused Nos.1 and 2 for the offences punishable under Section 302, 201 read with 34 of the Indian Penal Code, is set aside.
- iii] Accused Nos.1 and 2 are acquitted of the offences punishable under Section 302, 201 read with 34 of the Indian Penal Code.
- iv] The accused are in jail. They be released forthwith, if not required in any other crime.
- v] The fine, if paid, be refunded.
- vi] The fees of appointed Advocate Mr.Thakur, be paid in accordance with rules.
- vii] The Appeals are disposed of accordingly.

[N.R.BORKAR, J]

[SMT.SADHANA S. JADHAV, J]