

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO. 689 OF 2008

Siddharth S/o Nanaji Tembhurne,
Aged about : 35 year,
R/o :- Baba Buddhanagar Zopadpatti,
Panchpaoli, Nagpur

.... **APPELLANT**

// **VERSUS** //

The State of Maharashtra,
through the P.S.O. Jaripatka, Nagpur

.... **RESPONDENT**

Shri R.M. Daga, Advocate for appellant
Ms Samshi Haider, A.P.P for respondent

CORAM : **N.B. SURYAWANSHI, J.**

DATE OF RESERVING THE JUDGMENT : **04/03/2021.**

DATE OF PRONOUNCING THE JUDGMENT : **23/03/2021.**

ORAL JUDGMENT

1. This appeal takes exception to the judgment passed by the learned Additional Sessions Judge, Nagpur in Session Trial No. 13 of 2007, thereby convicting the appellant for an offence punishable under Section 304-I of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.1000/-, in default to undergo simple imprisonment for six months.

2. Prosecution case in short is that, accused and Sunanda were married in 1996. They used to do labour work to earn their livelihood. Three children were born to them out of the wedlock. Initially, the family was residing at Panchasheel Nagar. Thereafter, from last three years they are residing at Kasturba Nagar in the house of parents of Sunanda. Accused was suspecting the character of Sunanda. He was under impression that Sunanda had extramarital relation with one Prafulla Ilamkar. On that ground, he used to frequently assault Sunanda. Four to five days before the incident, accused had beaten Sunanda on that ground. He was in search of an opportunity to finish her at any cost. She used to go for doing labour work at 8.00 a.m. in the morning. On 29/09/2006, accused left the house and waited for Sunanda on her way to work. On that day, Sunanda did not go for work. On the next day, that is on 30.09.2006, Sunanda left for the work at 8 a.m. Accused was already waiting for her near the bank colony area. When Sunanda approached near the bank colony area, the accused followed her. He stopped her on the way and gave her two slaps. She fell on the ground. Immediately, the accused took out a weapon and gave numerous blows by Gupti on her person and killed her on the spot. After that the accused started running away. But people chased him.

Intimation was given to the police. Head Constable Sandeep Sharma along with other staff, arrived at the spot and apprehended the accused at 8.50 a.m. near the Bank of Maharashtra. The accused was found in possession of 19 ½ inches long blood stained Gupti. His clothes were also stained with blood. One girl Seema gave intimation to the brother of the deceased, who immediately arrived on the spot. At that time, Sunanda was alive. He shifted her to the hospital however she succumbed to the injuries. At 9.15 a.m., the doctor declared her dead. Jitendra, brother of Sunanda then lodged report (Exhibit 36) at Jaripatka police station. Accordingly, offence at crime register No.565/2005 was registered. Spot panchnama (Exhibit 45) was conducted. One bicycle belonging to the accused was found lying on the spot. There was a bag hanging on the handle of the bicycle. A big knife was found in the said bag. After conducting investigation, charge-sheet came to be filed.

3. The learned Sessions Court framed charge under Section 302 of IPC against the accused. He denied the charge. After recording evidence, the learned Trial Court convicted the accused under Section 304-I of the Indian Penal Code. Hence the present appeal.

4. Heard learned advocate for the appellant and the learner additional public prosecutor for the State. The learned Advocate for the appellant submitted that there is no evidence on record to warrant conviction of the appellant. The learned Trial Court has erred in placing reliance on the statements under section 164 of Code of Criminal Procedure while convicting the appellant. He further submitted that there is no eyewitness to the incident and all the eyewitnesses examined by the prosecution have turned hostile and/or have not supported the prosecution case. The alleged weapon; article 11 and the clothes of the accused were seized on 30/09/2006. However they were sent for chemical analysis only on 5/12/2006. The prosecution has failed to explain the delay of two months in forwarding the articles for chemical analysis. He further submitted that one big knife was found in a bag hanging on the handle of cycle found on the spot, which is reflected in the spot panchnama. However, that big knife was not forwarded for chemical analysis, for the reasons best known to the investigation officer. He further urged that the ownership of cycle found on the spot was not established by the prosecution. The learned Magistrate, who recorded the statements under section 164 of the Code of Criminal Procedure was not examined by the prosecution, which has caused

serious prejudice to the defence as the omissions and contradictions in the evidence of prosecution witnesses could not be proved on record. He therefore submitted that the prosecution has failed to prove the offence beyond reasonable doubt. Hence the appellant is entitled for acquittal.

In support of the submissions learned Advocate for the appellant relied upon judgment in *Audumbar Digamber Jagdane Vs The State Of Maharashtra* reported in *1998 ALL MR (Cri) 1363*.

5. On the other hand, learned Additional Public Prosecutor submitted that the Trial Court has rightly convicted the appellant by relying upon the statements of PW8 and PW12, recorded under Section 164 of the Code of Criminal Procedure. She further submitted that the accused-appellant was caught on the spot. The clothes of the accused-appellant were found stained with blood. 21 injuries were found on the body of the deceased. The motive behind murder was that the accused was suspecting the character of the deceased. Therefore, according to her, there was sufficient evidence to warrant conviction of the appellant. She submitted that the learned Trial Court was justified in convicting the

appellant-accused. There is no merit in the appeal and the same deserves to be dismissed.

6. Heard the learned advocate for the appellant and the learned additional public prosecutor at length. I have gone through the record.

7. The prosecution, in support of its case, has examined 13 witnesses. PW1 Jitendra Bhaisare is the informant who lodged the report (Exhibit 36). He deposed that deceased Sunanda was his sister. She married with the accused in the year 1996. A son and a daughter were born out of the wedlock. They were residing at Kasturba Nagar. On the day of incident, when he was brushing his teeth, at 8.30 a.m., one girl by name Seema came to him and informed that his sister was being assaulted by his brother-in-law. He therefore rushed to the spot. He found Sunanda lying on the ground. She had sustained several injuries on her person. He saw accused running away from the spot. The accused was caught by other persons. Bicycle of the accused was also found at a short distance from Sunanda. One bag was hanging on the handle of the bicycle. The bag was containing knife. He then shifted Sunanda to

hospital. Sunanda died thereafter. He lodged the report of the incident (Exhibit 36).

8. In the cross-examination he admitted that he had specifically told the police that, “Seema told me that my sister was being beaten by accused”, “cycle was belonging to accused”. He admitted that he did not state before the police to have seen accused running away from the spot.

9. PW2 Akash Landge was, at the relevant time, detained at the lock-up in Jaripatka police station. The accused was also kept in the same lock-up. The accused allegedly made extrajudicial confession to this witness. He has not supported the prosecution case and therefore was declared hostile. In spite of searching cross-examination, nothing helpful to the case of prosecution could be brought on record.

10. PW3 Mangesh is pancha to the spot panchnama (Exhibit 45). During spot panchnama bicycle and a bag on its handle containing Gupti was seized.

11. PW4 is the mother of deceased Sunanda. She deposed that the accused was ill treating Sunanda. He was suspecting her

character. On the date of incident, she was informed by the girl Seema that that the accused was beating Sunanda. Therefore, they rushed to the spot. Sunanda was found in a pool of blood. She was shifted in Janata hospital.

12. In the cross-examination, omissions that, 'Seema told me that accused was beating Sunanda' and that, 'Sunanda was alive and she had stated to Doctor that accused stabbed her', were brought on record. She was unable to explain as to why those statements were not there in her police statement. She denied the suggestion that subsequently she came to know that Prafulla Ilamkar killed her daughter.

13. PW5 is the medical officer. He performed post-mortem on the dead body of the deceased and proved post-mortem report (Exhibit 50). He found total 21 injuries on deceased.

14. PW6 Sanjay is the Police Sub Inspector who was attached to the Jaripatka police station. He registered the offence on the basis of report lodged by PW1. In his cross-examination, omissions from the evidence of PW1 were proved on record.

15. PW7 A.P.I. Donkalwar conducted the spot panchnama (Exhibit 45) and seized bicycle and a bag containing big knife.

16. PW8 Usha Walde is an eye witness. However she has not supported the prosecution case. She was declared hostile and was cross-examined by learned Additional Public Prosecutor. However, nothing helpful to prosecution could be elicited in the cross-examination.

During cross-examination, she admitted that on the day of deposition, she came in the court along with the brother of deceased.

17. PW9 Bunt alias Kailash was also eyewitness who has not supported the prosecution.

18. PW 10 Vishal was pancha to the seizure panchnama (Exhibit 62) of cycle and bag. But, he has not supported the prosecution. In the cross-examination he deposed that the clothes were seized in the hospital at 01.00 p.m. but the seizure was shown in the police station.

19. PW 11 Sumet is pancha to the panchnama of seizure of clothes of the accused. He has not supported the prosecution case.

20. PW 12 Roshan is also an eyewitness, who has not supported the prosecution case. His statement under section 164 of the Code of Criminal Procedure was also recorded.

In the cross-examination, he categorically admitted that he had not seen the event personally. He further admitted that he had specifically stated to the Magistrate that he was not aware of the incident. Then he answered all the questions as per the instructions. He also admitted that though he was cited as an eye witness, he had not seen the incident.

21. PW 13 Rajendra Ingale is the investigating officer who has conducted the investigation. In his evidence, the contradictions in the evidence of prosecution witnesses who resiled from their statements were proved. He also proved on record C.A. reports Exhibits 39 to 42.

22. PW14 is Sandeep Sharma, Head Constable who deposed that, he was attached to Jaripataka Police station. On 30/09/2006, at about 8.30 a.m., a telephonic message was received that one man carrying Gupti in his hand was running away near Maharashtra Bank at Jaripataka, and people were chasing him. He was directed to proceed to the spot immediately. Accordingly, he

went to the spot and saw some people were chasing one person. He arrested the person who was armed with Gupti. On asking, he disclosed his name as Siddharth Nanaji Tembhurne. Gupti was seized on the spot, vide seizure panchnama (Exhibit 98). He brought the accused to the police station. The accused was wearing a T-shirt which was stained with blood. He handed over the custody of accused to PSI Narawane. The entry of the telephonic intimation was taken in the Station Diary at entry No.18, at 8.45 a.m. on 30/09/2006. He proved the said extract (Exhibit 99).

In the cross-examination he deposed that incident occurred near bank Colony. PSI Rathod had gone to the main spot. He was not aware whether the relatives of the deceased had assembled on the spot. He denied the suggestion that he saw the accused running away and he seized the Gupti. He admitted that the arrest memo (Exhibit 55) shows address of the accused as near the house of Santosh Sangole, Pachpaoli. He denied the suggestion that the arrest memo and other seizure panchnamas were fabricated.

23. Admittedly, the conviction is based on circumstantial evidence. None of the eye witnesses examined by the prosecution have supported the prosecution case. They have resiled from their

police statement as well as statements recorded under Section 164 of the Code of Criminal Procedure.

24. The learned Trial Court has relied upon the statements of the prosecution witnesses recorded under Section 164 of the Criminal Procedure Code, observing that, "*in short merely because witness has resiled from statement under Section 164 of the Code of Criminal Procedure, it need not be discarded outrightly, it can be used for corroboration and can be relied upon, if Court finds it reliable otherwise.*" By observing this, the learned Trial Court proceeded to consider other circumstances proved on record.

25. The learned Trial Court has relied upon the circumstance that the appellant was arrested immediately after the incident and the weapon Gupti was seized from him on the spot. In this behalf the learned Trial Court has relied upon the evidence of PW14, Head Constable Sharma, who was directed by the Police Station Officer to go to the spot. Accordingly, he went to the spot and arrested the accused who was armed with Gupti. He disclosed his name as Siddharth Nanaji Tembhone. The Gupti was seized on the spot vide Seizure Panchanama (Exh.98). He brought the

accused to the Police Station. That time, the accused was wearing T-Shirt which was stained with blood.

26. It is pertinent to note here that the learned Trial Court has relied upon this circumstance to base conviction of the appellant in the matter. However, this circumstance was not put to the appellant while recording his statement under Section 313 of the Code of Criminal Procedure. It was the most important circumstance against the appellant and the learned Trial Court intended to base the conviction upon it. Therefore, the appellant ought to have been questioned on that point and ought to have been given an opportunity to explain it. Since this was not done by the learned Trial Court, the said circumstance can not be used against the appellant.

27. In *Asraf Ali Vs. State of Assam (2008) 16 SCC 328*, the Hon'ble Apex Court held thus:

"The object of Section 313 CrPC is to establish a direct dialogue between the court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it."

"It follows as a necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Non-indication of inculpatory material in its relevant facts by the trial court to the accused adds to the vulnerability of the prosecution case."

28. The next circumstance relied upon by the learned Trial Court is that, immediately after the incident, blood stained Gupti was seized from the appellant and his cloths were also found stained with blood and as per Chemical Analysis Report (Exh. 41) human blood was found on cloths of the accused as well as on the Gupti.

29. The appellant was arrested from near the spot vide arrest panchanama Exh.55 on 30/09/2006 at 9.45 a.m. However, the blood stained clothes of appellant were seized on 01/10/2006 at 21.15 hours, as per panchanama Exh. 71. Thus, the cloths worn by the appellant at the time of incident were seized after 36 hours after his arrest and/or incident. No explanation is offered by the prosecution as to why there was delay of more that 36 hours after the arrest of the appellant in seizure of the cloths of the appellant.

The unexplained delay in seizure of the cloths of the appellant casts serious doubt on the prosecution version.

30. The Gupti was seized on 30/09/2006 and the cloths of the appellant were seized on 01/10/2006, however, these articles were forwarded to the Chemical Analyser only on 05/12/2006 as is clear from the C.A. report Exh.41. No carrier, who carried those article to the forensic laboratory, was examined by the prosecution. The prosecution has failed to give any explanation for the delay of more than two months caused in sending the articles to the forensic laboratory. This delay creates serious doubt about the prosecution version that blood stained Gupti and clothes were seized from the accused on 30/09/2006 and 01/10/2006. Because of unexplained delay, the C.A. reports are not reliable and this circumstance, therefore, cannot be used against the appellant.

31. The learned Trial Court has also held that motive is proved by the prosecution in the evidence of Jitendra and Kalabai. Infidelity of Sunanda was the motive behind the attack by the appellant on Sunanda. The learned Trial Court has held that mother Kalabai has proved that the appellant has been suspecting her

character and was blaming that she was having illicit relations with Praful Ilankar. But, this sole circumstance cannot be a basis for conviction of the appellant.

32. The learned Trial Court has failed to appreciate the defence argument that in view of the admission of the Medical Officer that there was possibility of use of two different weapons as wounds were of different sizes, in the proper perspective. The learned Trial Court has erroneously held that one weapon was seized from the accused and other was found in a bag but that was never used in the offence. It is not clear from the judgment as to on what basis this finding was arrived at.

33. In view of ratio in *Audumbar Digamber Jagdane Vs. State Of Maharashtra, 1998 ALL MR (Cri) 1363 (supra)* statement under Section 164 of the Code of Criminal Procedure of a witness, who has turned hostile, is not a substantive evidence.

34. It is therefore, clear that the circumstances relied upon by the learned Trial Court while convicting the appellant were not established by prosecution and the learned Trial Court ought not to

have relied upon them. The important links in the chain of circumstances were missing. The learned Trial Court has relied upon inadmissible evidence while convicting the appellant. The conviction of the appellant therefore is unsustainable and the appeal deserves to be allowed. Hence, the following order:

- (i) Criminal Appeal No. 689/2008 is hereby allowed.
- (ii) Judgment and order conviction dated 14/08/2008 passed by the learned Sessions Court in Sessions Trial No.13/2007 is hereby quashed and set aside.
- (ii) The appellant is acquitted of the charge under Section 304 –I of Indian Penal Code.
- (iii) Bail bonds of the appellant stand cancelled.
- (iv) Fine amount, if any, deposited by the appellant be refunded to him.
- (v) The appellant shall execute personal bond of Rs.15,000/- with one surety in the like amount, in terms of Section 437-A of Code of Criminal Procedure, 1973.

JUDGE