

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 495 OF 2015

Datta Pandurang Aadagale,
Age. 20 years, Occ : Labour Work
Residing at Bori, Tq. Shrigonda,
District Ahmednagar.

... APPELLANT
(Orig. Accused)

VERSUS

The State of Maharashtra
(Balewadi Police Station,
C.R. No. I-42/2013)

... Respondent

Mr. A. A. Khande, Advocate for the appellant
(appointed through Legal AID)
Mr. A. A. Jagatkar, APP for the respondent/State

**CORAM : R. G. AVACHAT &
R. M. JOSHI, JJ.**

**RESERVED ON : 17th OCTOBER, 2022
PRONOUNCED ON: 19th OCTOBER, 2022**

JUDGMENT (PER- R. M. JOSHI, J.):-

1. This appeal is filed under Section 374 of the Code of Criminal Procedure by appellant/accused being aggrieved by the judgment and order dated 3rd November, 2014 passed in Sessions Case No. 247 of 2013 convicting him for the offences punishable under Sections 302 and 201 of the Indian Penal Code in connection with C.R. No. I-42/2013 registered with

Belwandi Police Station, Tal. Shrigonda, Dist. Ahmedangar.

2. From record in short case of prosecution appears as follows:

. On 29th April, 2013 information was given to the police about death of Pandurang (deceased) by his son, Prakash as dead body was found in the ditch. On the basis of the said report A.D. came to be registered under Section 174 of the Code of Criminal Procedure. Thereafter on 5th May, 2013 Prakash lodged FIR stating that witnesses Pandurang, Popat, Aaba Sonawane and Pandurang Kolpe had informed him about occurrence of quarrel and abusing between deceased and accused on 28th April, 2013. On the basis of the said information FIR came to be lodged and offence was registered vide CR No. I-42/2013. During investigation statements of witnesses were recorded who had seen accused and deceased together on 28th April, 2013 at 9.30 pm to 10.00 pm. Autopsy on the dead body was conducted wherein number of injuries including skull fracture were found on the person of deceased. According to the prosecution accused expressed his willingness

to give confession of the crime and hence his statement came to be recorded through Special Executive Magistrate. Clothes of deceased and accused were seized and sent to Chemical Analyzer for examination and report thereof is received, which is part of record before Trial Court. After completion of investigation charge-sheet came to be filed against accused and he was tried. Prosecution has examined in all 8 witnesses and trial culminated into the conviction of the accused.

3. This case is based on circumstantial evidence and prosecution is relying upon circumstance of accused being last seen together with deceased on 28th April, 2013 up to 10.00 pm and thereafter his dead body is found. In order to prove the said circumstance Prakash (PW-1), son of the deceased deposed about Pandurang leaving home for grazing she-goats on 28th April, 2013 and did not return home till next day. On 29th April, 2013 at about 7.00 p.m. he received phone call from Narayan Sonawane who told him about dead body of a male lying in the ditch in the field of Sarjerao Sonawane. He, therefore, rushed to the spot and found dead body of his

father lying there. He also claimed that on 28th April, 2013 at 6.30 pm Pandurang Kolpe told him about deceased and accused consuming liquor together. Similarly, after performance of the funeral of the deceased he was informed by Popat Chormale about occurrence of quarrel and scuffle between deceased and accused near liquor shop and Pappu Keskar telling him about the scuffle between them at 9.30 to 10.00 pm near bungalow of Aaba Sonawane. Due to this information received by him he felt that accused committed murder of his father.

4. Sarjerao Sonawane (PW-2) gives details as to how the dead body was found in the ditch in his land. According to him the dead body was found where the work of levelling with the help of JCB was going on. He further confirmed that the dead body was identified by son of the deceased. Testimonies of these two witnesses confirm the fact that dead body was found in the ditch which is approximately 8-10 feet deep formed by the excavation of soil to be used for levelling of the land. It has also come on record that there were stones and

murum in the said ditch. Bapurao Virkar (PW-5) acted as panch witness for spot panchnama and panchnama of seizure of clothes of accused and deceased. At the spot of the incident he noticed two stones stained with blood and hair and also a cap stained with blood and soil. Thus, the spot panchnama (Exhibit 24) is proved by the prosecution and situation about dead body lying therein is brought on record.

5. Popat Chormale (PW-3) deposed that on 28th April, 2013 when he was coming towards Shelke Vasti he saw scuffle between accused and deceased and he advised them not to quarrel and to go to their respective home. He also stated about having seen both proceeding towards Shelke Vasti at about 8.00 to 8.30 pm. Similarly Pappu Keskar (PW-4) claimed that at about 9.30 to 10.00 pm when he was proceeding with his mother and aunt he saw accused and deceased scuffling and abusing.

6. At the out set prosecution must prove conclusively that the death of the deceased is homicidal. Secondly, when

prosecution is seeking to prove circumstance of last seen against the accused in order to seek conviction against him and hence it must be proved beyond doubt that the possibility of any other person committing crime in question is ruled out owing to short time lapsed between accused being last seen with deceased and his death.

7. Exact time of occurrence of incident of death of deceased is not brought on record. Going by story of prosecution, prosecution witnesses have informed to the son of deceased about having seen accused and deceased together on 28th April, 2013 as informed by Pandurang Kolpe as well as after performance of funeral of his father on 30th April, 2013 by other witnesses. He lodged report with police on 29th April, 2013 (Exhibit 19). However, no suspicion was raised against any one. In FIR, however, which came to be lodged on 5th May, 2013 suspicion is expressed against accused. If informant had knowledge about accused and deceased seen together, scuffling and abusing on 28th April, 2013 and knowledge of the same came immediately after the performance of the funeral

on the dead body, it does not stand to any reason as to why no report was lodged against present accused. It is not the case of the prosecution that there was any dispute or enmity between accused and deceased. From the tenor of evidence on record it is clear that accused and deceased were consuming liquor together and occurrence scuffling and abusing under influence of liquor was not found abnormal by the son of deceased and therefore, no doubt was raised against the accused. Not only there is delay in lodging FIR but statements of witnesses who claimed to have seen both together are also not recorded immediately. No doubt every delay in recording the statement of witnesses does not create doubt about his veracity, however, it is incumbent on the part of the investigating agency to explain about the same. No such explanation is forthcoming in this case from prosecution.

8. As far as cause of death of deceased, Dr. Pawar (PW-6) attached to PHC Belwandi as Medical Officer conducted autopsy on the dead body of the deceased on 30th April, 2013 from 9.30 am to 10.30 am and found nine injuries including

four CLWs as recorded in PM notes (Exhibit 27). In the cross-examination Medical Officer has admitted that if a drunken person falls in a ditch with depth of 9 to 10 feet, such kind of injuries are possible to cause. There is evidence to show that the ditch in which the dead body was found is 10 feet in depth with stones therein. Similarly, there is evidence on record to show that deceased was drunk at the relevant time. Thus, the possibility of causing of the death of deceased by fall in the ditch, cannot be ruled out. Hence it cannot be said with certainty that the death of deceased is homicidal.

9. Prosecution has also relied upon confessional statement of accused and in order to prove the same examined Bhaskar Bhos (PW-7) Special Judicial Magistrate. In this regard it is material to note that there is, however, no evidence on record to show as to why, when and in which circumstances accused expressed his desire to make confessional statement and to whom. At the relevant time accused was in judicial custody and therefore, it is incumbent on the part of the prosecution to lead evidence in order to

establish the circumstances in which accused has expressed his desire to make confessional statement. Evidence of Vishwas Nimbalkar (PW-8) Investigating Officer is silent in this regard. Though Special Judicial Magistrate claims compliance of rules, while recording confessional statement, perusal of Exhibit 30 does not show compliance of Section 164(4) of the Code of Criminal Procedure. No certificate is appended at the foot of the statement of the accused as contemplated by the said provision. For want of establishing circumstances leading to record confessional statement and failure to comply mandatory requirement of Section 164(4) of the Code of Criminal Procedure for valid confession, the confession (Exhibit 30) deserves to be discarded.

10. Even otherwise it is settled position of law that the confessional statement of the accused is the weak piece of evidence and unless corroborated on material aspect cannot become basis of conviction of the accused.

11. For seeking conviction on the basis of last seen

theory, it is necessary for the prosecution to prove approximate time of death of the deceased in order to show that there was no possibility of any other person committing crime charged. As per the evidence of Pappu Keskar (PW-4) both were seen together at 9.30 to 10.00 pm. Medical Officer does not give exact time of death nor such time was sought by the investigating agency. No doubt in the cross-examination it is stated by him that death of the deceased might have caused 36 to 48 hours before autopsy. However, going by the said opinion of the Medical Officer there is gap of twelve hours in determination of time of death. Needless to state that such time could be always sufficient for the deceased to part from the company of the accused.

12. In view of the possibility of death of the deceased by accidental fall in the ditch, failure on the part of prosecution to rule out possibility of commission of crime by someone else than accused and unreliability of the confessional statement, it is a fit case wherein accused deserves to be acquitted by giving benefit of doubt. Hence following order is passed.

ORDER

- (i) Appeal stands allowed.
- (ii) Impugned judgment and order dated 3rd November, 2014 is set aside.
- (iii) Accused stands acquitted. Accused be set free if not required for any other crime.
- (iv) Fees of the appointed counsel is quantified Rs. 10,000/- and it is to be paid by the High Court Legal Services Authority, Sub Committee, Aurangabad.

(R. M. JOSHI, J.)

(R. G. AVACHAT, J.)

SSP/