

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

CRIMINAL APPEAL NO. 328 OF 2017

Sidharam @ Sidhy Rajkumar Khandekar

..APPELLANT

VERSUS

State of Maharashtra

..RESPONDENT

....
Mr. S.J. Salunke, Advocate for appellant
Mr. R.V. Dasalkar, A.P.P. for respondent - State
....

**CORAM : R.G. AVACHAT AND
R.M. JOSHI, JJ
RESERVED ON : 13th OCTOBER, 2022
PRONOUNCED ON : 10th NOVEMBER, 2022**

JUDGMENT (PER : R.G. AVACHAT, J.) :

1. The challenge in this appeal is to an order of conviction and sentence passed by the learned Additional Sessions Judge, Osmanabad on 25th May, 2017 in Sessions Case No. 74 of 2015. The appellant has thereby been convicted for the offence punishable under Section 302 of the Indian Penal Code ('I.P.C.') and, therefore, sentenced to suffer life imprisonment and fine of Rs.10,000/- with default stipulation.

2. The facts giving rise to the present appeal are as follows :-

P.W.1 – Engineer (informant) was on his way from Ganjewadi to Tamalwadi on his motorbike. It was 06:30 a.m. of 23rd July, 2015. He heard

cries of a child emanating from a road-side field at Tamalwadi. He, therefore, stopped thereat and went to the field. He saw a lady lying in injured state. Her head was smashed with a stone. Brain matter had come out. The informant, therefore, immediately went to Tamalwadi Police Station and lodged the F.I.R. (Exh.19) alleging therein that some unknown person committed murder of unknown lady for unknown reason. A crime vide C.R. No. 67 of 2015, therefore, came to be registered. Scene of offence panchanama (Exh.20) was drawn. Postmortem examination was conducted. Postmortem report (Exh.32) indicates the lady died of hypovolumic shock with crushed head injury and injury to vital organ of brain. Clothes on the person of the deceased came to be taken charge of besides a blood stained stone found at the site of the offence. The child was the daughter of the deceased. She was taken to custody for proper care. A photograph of the deceased was circulated to all the police stations in the State of Maharashtra alongwith photograph of the child. P.W.5 – Shambhukumar (husband of the deceased), therefore, approached Oshiwara Police Station. He, however could not identify his wife from the photograph. One Jayashri Deokar had sent him a photograph of his daughter on his Whatsapp. He rushed to Osmanabad on having realised something amiss to have happened with his wife. He was taken to the hospital. He identified the dead body of his wife in the hospital. He then disclosed that the deceased had come to the village to get back a sum of Rs.2.50 lakhs advanced to the appellant as hand loan. The

appellant thus came to be arrested on suspicion. During investigation, it was found that the appellant had hired an Omni car of P.W.4 – Kalappa Khandekar. He took the deceased and her daughter in the car from the house of his sister under the pretext of collecting the amount from his friend for being paid to the deceased. On way, he quarreled with the deceased. Beat her up in the car itself. He then dragged her out of the car. Took her to a nearby field and smashed her head with a stone. P.W.4 – Kalappa gave graphic details as to how the appellant committed murder of the lady, who was identified as Kalawati. The appellant made a disclosure statement pursuant to which blood stained clothes on his person, curtains of the Omni car, cell phone of the deceased and motorbike chain came to be recovered. All the seized articles were sent to the Regional Forensic Science Laboratory, Aurangabad ('R.F.S.L.') for analysis and report. On completion of investigation, the appellant was proceeded against by filing the charge-sheet.

3. Learned Judicial Magistrate First Class, Tuljapur committed the case to the Court of Sessions, Osmanabad for trial in accordance with law. Learned Additional Sessions Judge, Osmanabad ('trial Court') framed charge for the offence punishable under Sections 302 and 201 of the I.P.C. The appellant pleaded not guilty. His defence is of false implication.

4. The prosecution examined eight witnesses and produced in evidence certain documents to bring home the charge. The trial Court, on

appreciation of the evidence before it, convicted and sentenced the appellant as stated above. The appellant has, however been acquitted of the offence punishable under Section 201 of the I.P.C. State has not preferred appeal against acquittal.

5. Learned counsel for the appellant would submit that the case is mainly based on eye witness account of a sole witness. According to him, statement of the so-called eye witness has been recorded about five days after the incident. The witness had dispute with the appellant herein. Conduct of the eye witness in not approaching the concerned police station at the earliest for reporting the matter materially detract evidentiary value of his testimony. According to learned counsel, evidence of the sole eye witness was not cogent, reliable so as to place implicit reliance thereon. The conduct of eye witness was unnatural. Turning to the evidence as regards recovery of blood stained clothes pursuant to the disclosure statement made by the appellant, learned counsel would submit that there was no evidence to indicate the seized articles to have been placed under a seal the moment they were taken charge of. Evidence in that regard is silent. No evidentiary value, therefore, be given to such material. Nor the C.A. report (Exh.35) in that regard could be relied on. He would further submit that the appellant was handcuffed when he made alleged disclosure statement. The same suggests involuntariness in making alleged disclosure statement. According to learned

counsel, based on such weak evidence and unreliable testimony of a sole eye witness, the trial Court ought not to have convicted the appellant for serious offence like murder. He, therefore, urged for allowing the appeal.

6. Learned counsel has relied on the following authorities :-

(I) Joseph Vs. State of Kerala, 2003 Cr.L.J. 813

When there is a sole witness to the incident, his evidence has to be accepted with an amount of caution. Conviction on the evidence of solitary eye witness is permissible only if the evidence tendered by such witness is cogent, reliable and inspires implicit confidence. He should be wholly reliable.

(II) Ali Mollah and Anr. Vs. State of WB, AIR 1996 SC 347

Conviction can be based on the testimony of a single eye witness provided the Court finds him wholly reliable witness. Delayed statement of such witness without corroboration from independent source, conviction on the testimony of sole eye witness set aside.

(III) Chunthuram Vs. State of Chhatisgarh, 2021 Cr.L.J. 46

Witness did not take any pro-active steps to either report to the police or inform any of the family members. Such conduct of eye witness is contrary to human nature and inconsistent with ordinary course of human nature. It would be unsafe to convict the accused upon the incorroborated testimony of the sole eye witness.

(IV) Mohd. Hanif Mohd. Habib & Anr. Vs. State of Maharashtra, 2017 ALL MR (Cri.) 2980

Unnatural conduct of witness in not informing police or family members about incident casts a serious doubt about the veracity of this witness.

(V) Lalchand Cheddilal Yadav Vs. State of Maharashtra, 2000 ALL MR (Cri.) 1485

Recovery evidence – without evidence of sealing of

recovered/seized articles, it is unsafe to place reliance on such evidence.

(VI) Sanjay Devaji Ramteke Vs. State of Maharashtra, through PSO, 2020 SCC OnLine Bom 431

Evidence is silent in respect of sealing of articles on the spot. Where the evidence shows that after effecting recovery of articles Investigation Officer did not affix the lac seals on them, no evidentiary value can be attached to the said recovery and scientific evidence like CA report shall be discarded

7. Learned A.P.P. would, on the other hand, submit that the eye witness did not have an axe to grind against the appellant. The witness had to keep quiet for 3-4 days as the appellant was his relative and had been threatened as well. According to learned A.P.P., it is not that there is gross delay in recording the statement of the eye witness. It is only during investigation it was realised that he had carried the appellant and the deceased in his Omni car. Learned A.P.P. would further submit that evidence of the sole eye witness gets reinforced in view of his previous statement recorded under Section 164 of the Code of Criminal Procedure and recovery of blood stained clothes of the appellant pursuant to the disclosure statement. According to learned A.P.P., the trial Court has rightly convicted the appellant and there is, therefore, no reason to interfere with the impugned order of conviction.

8. Considered the submissions advanced. Perused the evidence relied on. Also perused the authorities placed on record. Let us appreciate the evidence in the case.

9. The F.I.R. (Exh.19) was lodged by P.W.1 – Engineer. It is in the evidence of P.W.1 that while he was on his way to Tamalwadi, he heard cries of a child emanating from a road-side field. He, therefore, stopped and went to the field. It was 06:30 in the morning of 23rd July, 2015. He noticed a lady lying in an injured state. Her head was smashed with a stone. He, therefore, rushed to Tamalwadi Police Station and lodged F.I.R. stating therein that some unknown person committed murder of an unknown lady for unknown reason. The evidence of P.W.1 is relevant only to the extent of setting the criminal law in motion. He did not speak anything inculpatory against the appellant. It, therefore, appears that he was not subjected to extensive cross-examination.

10. Dead body of the deceased – lady was subjected to autopsy. It was P.W.3–Dr.Archana Surwase, who conducted the same. Postmortem report is at Exhibit 32. The deceased died of hypovolumic shock with crushed head injury and injury to vital organ of brain. We do not propose to refer to the evidence of Dr.Archana since the cause of death of the deceased is not in dispute.

11. P.W.2 – Prabhakar Jadhav was serving as a Physical Education Teacher in Saraswati Vidyalaya, Tamalwadi. On the directions of Head Master of the said school, he went to the police station and consented to act as panch witness. The police seized an Omni car under panchanama

(Exh.28) in his presence. On having appreciated entire evidence in the case, we find the seizure of the Omni car was to be in no way incriminating. We, therefore, also do not propose to dwell at length as regards evidence of seizure of Omni car.

12. Since identity of the deceased was not disclosed, her photograph was circulated to almost all the police stations in the State of Maharashtra. P.W.8 – Suresh Shinde (Investigating Officer) testified in this regard. Identity of the deceased was disclosed only when her husband – Shambhukumar (P.W.5) had first approached the Oshiwara Police Station. He, however could not identify his wife from the photograph. It is in his evidence that he was resident of Mumbai. Deceased - Kalawati @ Pinky was his wife. They were blessed with a daughter – Pooja. The deceased was serving as a waiter in a canteen. It is further in his evidence that the deceased was originally resident of village Valsang, Dist. Solapur. The deceased had informed him that a sum of Rs.2.50 lakhs was due to her from the appellant. It is further in his evidence that he had once met the appellant in Mumbai when he (appellant) had been there for police recruitment training. The witness went on to state that a month before the incident, the deceased had been to the village of the appellant to get back her money. The appellant had only paid her Rs.10,000/- that time. It is further in his evidence that the appellant was avoiding to pay back the money. The deceased alongwith her daughter had, therefore, left Mumbai for village to fetch money from the appellant. It is

further in his evidence that on 22nd July, 2015, the deceased had informed him on phone to have reached Solapur. She also informed him to have been at the house of sister of the appellant. It is further in his evidence that post 07:00 p.m. on 22nd July, 2015, he could not talk to his wife as her cell phone was switched off. During her earlier conversation with the deceased on the same day, she had informed him that she was to go alongwith the appellant to a person of his acquaintance to fetch the money. It is further in his evidence that on the next day i.e. 23rd July, 2015, he talked with the appellant on phone and made enquiry of his wife and daughter. The appellant claimed ignorance about the deceased and her daughter. He assured him of taking search for them. It is further in his evidence that he contacted a lady by name Jayshri of Solapur. Jayshri sent him his daughter's photograph on Whatsapp. There was some blood on the face of his daughter in the photograph. He, therefore, immediately approached Oshiwara Police Station and met Mr. Hugle, Police Officer there. He was shown a photograph of a deceased lady. He, however could not identify the lady in the photograph. He, however told the police officer that on the right arm of his wife, letter 'K' was tattooed. The police officer then brought him to Tamalwadi Police Station. He identified the dead body of his wife in the hospital.

13. P.W.5 – Shambhukumar was subjected to searching cross-examination. If we consider his evidence in the examination-in-chief, there is

nothing to suggest anything incriminating to have been deposed against the appellant. We find his testimony to be cogent and reliable one. What has been deposed to by him goes long way to suggest that his wife had acquaintance with the appellant. She had given a sum of Rs.2.50 lakhs to the appellant. She was asking the appellant to pay back her money. She had, therefore, been to the village alongwith her daughter to fetch the money. Evidence of this witness stating what the deceased had told him would be admissible in evidence in view of Section 32(1) of the Evidence Act as to any of the circumstances of the transaction which resulted in her death.

14. Although this witness was subjected to searching cross-examination, nothing fruitful has come on record. His evidence in cross-examination indicates that the deceased was previously married. His marriage with her was her third marriage. Rest of the questions put to him in the cross-examination were in the nature of suggestions disputing the appellant to have had owed the deceased a sum of Rs.2.50 lakhs. It is reiterated that evidence of this witness undoubtedly establish that the appellant had close acquaintance with the deceased. She had paid the appellant a sum of Rs.2.50 lakhs. The appellant was avoiding to pay back the money. She had, therefore, been to the village twice. On her last such visit, she met with homicidal death.

15. It is only on the statement of husband of the deceased, the appellant came to be nabbed on suspicion. During his interrogation, it was revealed that he had hired an Omni car of P.W.4 – Kalappa. The police, therefore, approached P.W.4 – Kalappa. His statement came to be recorded on 28th July, 2015 i.e. about five days after the incident. P.W.4 – Kalappa is a star witness in this case. It is in his evidence that he knew the appellant. The appellant is from his brotherhood. His father owns an Omni car. He would lend it. The appellant met him in the morning of 21st July, 2015 at a public library in the village. The appellant told him to lend him the car. P.W.4, in turn, told him that he was going to Solapur same day. The appellant started with him in his Omni car for Solapur. On way, they took 4-5 persons as paid passengers in the car. The passengers alighted at a water tank at village Akkalkot. He and the appellant then went to the house of sister of the appellant – Pushpa at village Khed. It was about 06:00 p.m. There was one lady at the house of Pushpa. She was from Mumbai. Pushpa prepared meals including eggs curry. They took dinner at her house. Then they started for their onward journey. That lady (deceased) alongwith her daughter accompanied them. The appellant told him that the lady (deceased) had illicit relation with him. It is further in his evidence that he was driving the car. The appellant, the deceased and her daughter had occupied back seat of the car. The lady and the appellant were talking in Marathi, Hindi and Kannada as well. The appellant had a carry bag with him. They reached

Tamalwadi little past 08:00 p.m. On the way, the appellant asked him to take the car to left side. He obliged. Then the appellant asked him to take car in particular direction. On appellant's direction, he stopped the car. The appellant started beating up that lady. The lady requested the appellant not to beat her, for which she will not make demand of money. It is further in his evidence that the appellant took out a chain of a motorbike from his carry bag and beat up that lady with it. While he requested the appellant not to beat her up, he told him that if he did not pay her money, the lady would come his home. She would spoil his life as he was just married. It is further in his evidence that the appellant dragged the lady to nearby field and hit her head with a stone. The daughter of the lady was crying. The appellant placed that child by the side of that lady. The appellant asked P.W.4 to keep quite. The appellant also threatened him. He, therefore, did not intervene to save the deceased. It is further in his evidence that clothes on the person of the appellant were stained with blood. The deceased was wearing a blue shirt. The appellant changed his clothes in the car and kept them in a carry bag. P.W.4 drove the car ahead on the directions of the appellant. They reached one village. A lady was fetching water with hand pump. That lady directed them to the main road. Thus, they came to Tuljapur highway. The appellant threw bag of that lady under one bridge. Then they went to Solapur via Itkal village. Thereafter they came back to their village Chincholi. It was 12:00 midnight. He parked the car in front of the house of the appellant. He slept

in the appellant's house overnight. The appellant washed the car early morning. P.W.4 then went to his house. On 24th July, 2015 he read the news item about murder of a lady. The appellant came to him and asked not to tell the matter to anyone. He asked him not to take any tension. The appellant also asked him to stay indoors. After 3-4 days, his statement was recorded.

16. P.W.4 – Kalappa was subjected to searching cross-examination. His family was comprised of his father, brothers and sisters as well. The car was registered in the name of his father. He has 10-15 friends in the village. The police station was at 3 kms. from his village. The village had Police Patil as well. He did not disclose the incident to anyone until informed the same to the police. The police had come to his house. He then went to the police station and gave his statement. He denied to have given a false statement as the police had threatened him to implicate in the case if he did not become a witness. There is also omission in his statement to the police to the effect that the appellant had washed car early morning. Rest of the questions put to him during cross-examination are in the nature of suggestions, disputing his evidence in examination-in-chief. At last, he was suggested that he gave false evidence on account of *bhavki* dispute.

17. Statement of P.W.4 – Kalappa has also been recorded under Section 164 of Code of Criminal Procedure. His evidence in examination-in-chief is consistent with his statement under Section 164. Such statement

corroborates/reinforces his testimony before the Court in view of Section 157 of the Evidence Act.

18. There could be no two views over what has been submitted by learned counsel for the appellant on the basis of Apex Court judgments referred to hereinabove. Needless to mention that each case has to be decided on facts and circumstances obtainable therein. It is true that P.W.4 kept mum for about five days. He did not approach the concerned police station to report about the incident, nor did he share with his family members and/or his friends as well. Explanation offered by P.W.4 in that regard however cannot be overlooked. Admittedly, he is relative of the appellant. True, the deceased was also a distant relative. She was, however resident of Mumbai, far way from the appellant's village. The appellant did not bring on record anything to suggest P.W.4 – Kalappa to have an axe to grind against him. It was simply suggested to P.W.4 that he gave a false evidence on account of *bhavki* dispute. It is true that it is for the prosecution to prove guilt of the appellant beyond all the reasonable doubt. In our view, a situation may come when the appellant is expected to offer some explanation to meet the prosecution case. When P.W.4 gave graphic details as to how the incident was happened, the appellant simply denied the same. When according to P.W.4 the appellant had been in his company from 04:00 p.m. of 22nd July, 2022 till early morning of the next day, the appellant had ways and

means to produce some evidence to suggest that he was either at home or had not accompanied P.W.4 in his car. Needless to mention, even a slightest material in that regard could have been sufficient to make out his case on preponderance of probabilities. We are conscious of the fact that the appellant cannot be compelled to produce evidence in his defence, nor can the Court make any comment regarding his failure to give evidence. But, when the prosecution evidence is such that leads the Court to infer involvement of the appellant in the crime, the appellant's keeping silent would go a long way to reinforce the prosecution case.

19. It is not that the prosecution is relying on evidence of P.W.4 alone. On arrest of the appellant, he made a disclosure statement. He stated to have had thrown his blood stained clothes at some particular place. The disclosure statement (Exh.29) was recorded in the presence of P.W.2. This panch witness is none other than a physical education teacher serving with a local school. We have no reason to disbelieve his evidence. He testified that the appellant made disclosure statement in his presence. The police officer recorded the same. It was P.W.8 – Suresh Shinde, who recorded the same. Evidence of P.W.2 and 8 undoubtedly indicate that pursuant to disclosure statement, the appellant took them to a particular place under a bridge. A carry bag was found there containing blood stained clothes. It was a blue colour shirt. The evidence of both these witnesses indicate that those articles

were taken charge of under panchanama (Exh.30). P.W.8 has specifically stated in his evidence that labels bearing signatures of panchas and himself were affixed on the seized articles. It is further in his evidence that all the seized articles were forwarded to the R.F.S.L., Aurangabad. The Constables, who carried those articles to R.F.S.L., Aurangabad have also been examined in proof of the same. The panch witness (P.W.2) has also categorically stated that labels bearing the signatures of the police officials and the panchs were affixed on the seized articles. The evidence indicate that some other articles have also been seized from the house of the appellant. There is, however no further evidence indicating that the cell phone and the chain that were recovered from the appellant's residence had any connection with the crime. The C.A. report indicates that blood group of the deceased and the appellant is 'B'. The clothes, viz. shirt and trouser, seized pursuant to the disclosure statement made by the appellant have blood stains of blood group 'B'. It is not the case of the appellant that he had suffered any bleeding injury and the blood found on those clothes was of him.

20. This Court in case of *Putlabai Bhimashankar Pattan Vs. State of Maharashtra, 2010(2) Bom.C.R.(Cr.) 804*, in paragraph no.23, has observed as under :-

“23. There can be no doubt that when the accused is handcuffed he may not be free from fear of the police or duress or pressure. But, that itself cannot be a reason to discard the

recovery of weapon if it was otherwise found to be supported by evidence of the panch witnesses and the Investigating Officer. Handcuffing of a person by itself cannot be a reason to generalise the hypothesis that such a discovery cannot be reliable. ...”

21. We find the evidence of P.W.4 cogent and reliable. The evidence of husband of the deceased also goes long way to infer the appellant's involvement in the crime. The evidence of sole eye witness gets reinforced by circumstantial evidence in the nature of recovery of blood stained clothes of the appellant pursuant to the disclosure statement made by him. The evidence referred to hereinabove lead us to conclude the appellant to be the author of murder of Kalawati. We find the trial Court to have not committed any error in convicting the appellant. We find no reason to take a different view and interfere with the impugned order of conviction and sentence.

22. In the result, criminal appeal fails. Same stands dismissed.

(R.M. JOSHI, J.)

(R.G. AVACHAT, J.)

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