

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

CRIMINAL APPEAL NO.564 OF 2015

Kishor s/o Bankatlal Warma,
Age 42 years, Occu. Business,
R/o Balapur, Tq. Kalamnuri,
District Hingoli

... APPELLANT

VERSUS

The State of Maharashtra
(Copy is served on the
Public Prosecutor, High Court of
Bombay, Bench at Aurangabad)

... RESPONDENT

.....
Mr. R.N. Chavan, Advocate for appellant
Mr. A.A. Jagatkar, A.P.P. for respondent – State
.....

WITH

CRIMINAL APPEAL NO.689 OF 2015

Ajij Khan Mohammad Khan Pathan
Age 43 years, Occu. Nil,
R/o Nagapur (rupala), Tq. Omarkhed,
District Yeotmal

At present – Nanded District Prison

Class-2, Nanded, Tq. and Dist. Nanded **... APPELLANT**

VERSUS

The State of Maharashtra
(Copy is served on the
Public Prosecutor, High Court of
Bombay, Bench at Aurangabad)

... RESPONDENT

.....
Mrs. Vaishali A. Shinde, Advocate for appellant
Mr. A.A. Jagatkar, A.P.P. for respondent – State
.....

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

Date of reserving judgment : 19th October, 2022

Date of pronouncing judgment : 10th November, 2022

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

Both These appeals are being decided by this common judgment since they are interconnected. Both the appeals arise from an order of conviction and sentence dated 10/7/2015, passed by learned Additional Sessions Judge, Hingoli in Sessions Trial No.59/2011. Vide judgment and order, the appellant Kishor (in Criminal Appeal No.564/2015) was convicted for offences punishable under Section 411 of the Indian Penal Code and, therefore, sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.2000/-, with default stipulation. While the appellant Ajij Khan Pathan (in Criminal Appeal No.689/2015) was convicted for the offences punishable under Sections 302 and 394 of the Indian Penal Code and, therefore, sentenced to suffer imprisonment for life and to pay fine of Rs.1000/-, and rigorous imprisonment for ten years and to pay fine of Rs.500/-, with default stipulation.

For the sake of convenience, the appellant

Ajij Khan Pathan (in Criminal Appeal No.689/2015) is referred to as appellant No.1 and the appellant Kishor (in Criminal Appeal No.564/2015) is referred to as appellant No.2.

2. Facts giving rise to the present appeals are as follows:-

Shri Bhujang (P.W.6) was resident of village Chuncha, Taluka Kalamnuri in District Hingoli. Sumanbai (deceased) was his wife. The couple was blessed with three married sons and a daughter. Bhujang (P.W.6) has an agricultural field. On the fateful day i.e. on 17/9/2010, by 10.00 in the morning, Sumanbai left the house for agricultural operations in the field. Similarly, all the three daughters-in-law and the daughter of Bhujang (P.W.6) left for agricultural operations to be performed in the neighbouring field of one Saraswatibai Lomte. Bhujang (P.W.6) went to his field by 12.30 p.m. He noticed Sumanbai lying injured on a bundh. He found Sumanbai to have been strangled. Her ear-lobes were injured. Ornaments on her person were missing. He raised cries. His daughters-in-law and the daughter arrived at the scene. Bhujang (P.W.6) found Sumanbai had some life in her. She was, therefore, shifted to hospital. She, however, succumbed to her injuries.

3. Bhujang (P.W.6) lodged F.I.R. (Exh.31) at Akhada Balapur Police Station. A crime vide C.R. No.84/2010 came to be registered. Similar incidents had happened in the month of September – October in the districts of Parbhani, Hingoli and Nanded. A team of police officials was, therefore, formed for investigation. A cell phone of a particular number was under surveillance. Statements of persons acquainted with the facts and circumstances of the case were recorded. Scene of offence panchanama was drawn. Post mortem examination was conducted on the mortal remains of Sumanbai. The daughters-in-law of Bhujang (P.W.6) gave description of a person who was seen by them to have been following the deceased Sumanbai at the relevant time. Based on Call Data Records (C.D.Rs.), the appellant No.1 Ajikhan was arrested. On arrest of the appellant No.1, he made a disclosure statement, pursuant to which the ornaments of the deceased came to be recovered from appellant No.2. The appellant No.2 is a jeweller by profession. He was found to have purchased those ornaments, knowing them to have been stolen property. Section 411 of the Indian Penal Code, therefore, came to be invoked against him. On investigation of the crime, both the appellants were proceeded against by

filing a charge sheet. Learned Judicial Magistrate, First Class committed the case to the Court of Sessions for trial in accordance with law. The learned Additional Sessions Judge (trial Court) framed the charge (Exh.7) against both the appellants. The appellants pleaded not guilty.

4. The prosecution examined 19 witnesses and produced in evidence certain documents to bring home the charge. The trial Court, on appreciation of the evidence before it, convicted the appellants and consequently sentenced them to imprisonment as stated above.

5. Heard learned counsel for the appellants and the learned A.P.P. for the respondent/ State. It was submitted on behalf of the appellant No.1 that, description of the suspect, given by the daughters-in-law of Bhujang (P.W.6) did not match with the appellant No.1. Similar incidents had happened in the three districts of Parbhani, Hingoli and Nanded in those days. The police machinery was under pressure. A reward was offered for arrest of culprits. The appellant No.1, therefore, came to be arrested without there being any material against him. Even post his arrest, similar incidents did take place. The ornaments recovered pursuant to the disclosure statement made by him were new one. On

seizure of the ornaments, no test identification parade thereof was held. The test identification parade of appellant No.1 has not been properly conducted. All the mandatory rules in that regard have been breached. The learned counsel, therefore, urged for allowing the appeal.

6. The learned counsel for appellant No.2 would submit that, the ornaments belonging to the deceased Sumanbai were old one, whereas the ornaments which are shown to have been recovered from the appellant No.2 are admittedly new one. As such, the seized ornaments could not be termed to be the stolen property. Even for the sake of prosecution case it is assumed that the ornaments recovered from the appellant No.2 were the stolen property, there is nothing to indicate him to have had received them dishonestly or knowing or having reason to believe the same to be stolen property. According to the learned counsel, ingredients of offence punishable under Section 411 of the Indian Penal Code have not been proved. He, therefore, urged for allowing the appeal.

7. The learned A.P.P. would, on the other hand, reiterate the reasons given by the trial Court to ultimately submit for dismissal of the appeals.

8. Considered the submissions advanced. Perused the evidence relied on. Let us appreciate the same.

Although the prosecution has examined 19 witnesses and produced in evidence number of documents, we propose to refer to the evidence which is relevant for deciding the present appeals. We would, however, take a brief survey of all the witnesses examined by the prosecution. The same is as under:-

9. P.W.1 Parasram Jadhav is a panch witness to the inquest panchanama (Exh.20). P.W.2 Subhash Khillare is a panch witness to the seizure of clothes on the person of the deceased (panchanama Exh.22). P.W.3 Vijay Shivankar was a Circle Officer who prepared the sketch (Exh.24) of situs of the offence. P.W.4 Shyamrao Kadam was a driver, in whose vehicle deceased Sumanbai was moved from the scene of offence. The scene of offence panchanma (Exh.28) has been admitted in evidence based on testimony of P.W.5 Bhagwan Rathod, a panch witness thereto. P.W.6 Bhujang Khillare is husband of the deceased. He lodged the F.I.R. (Exh.31). P.W.9 Ramabai Khillare and P.W.10 Ranjana Khillare are his daughters-in-law, who claimed to have had seen the appellant

No.1 followed the deceased at the relevant time. P.W.11 Ramrao Lomte is a witness in whose presence test identification parade was held. P.W.12 Dr. Avinash Kannamwar is Medical Officer who conducted post mortem examination. P.W.13 Mohd. Majid carried viscera to forensic science laboratory. P.W.14 Avinash Singte is a Tahsildar who conducted the test identification parade. P.W.15 Ashok Ghorband, P.W.16 Mudasirkhan Pathan, P.W.17 Syed Fahim, P.W.18 Praphulla Ankushkar and P.W.19 Shaikh Abdul Rauf are the police officials who played one or the other role in the investigation of the crime.

10. The case is based on circumstantial evidence. In case of Sharad Birdhichand Sarda Vs. State of Maharashtra reported in AIR 1984 SC 1622, the Hon'ble Supreme Court observed :

“ following conditions must be fulfilled before a case against an accused can be said to be fully established.

- 1) the circumstances from which the conclusion of guilt is to be drawn should be fully 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 explainable 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.

11. We have to appreciate the evidence to find whether the prosecution has proved each and every circumstances.

12. The prosecution strongly relies on the following circumstances:-

- (1) The appellant No.1 was last seen at the material time following the deceased.
- (2) On his arrest, he was subjected to test identification parade.
- (3) The daughters-in-law of the informant identified him

in the test identification parade.

- (4) Recovery of the ornaments of the deceased pursuant to the disclosure statement made by the appellant No.1.

13. It is not in dispute that, Sumanbai was murdered on 17/9/2010 by 12.00 noon in her field. The culprit robbed the deceased of ornaments on her person. The post mortem report (Exh.57) indicates the deceased Sumanbai died of cardio respiratory arrest due to asphyxia due to strangulation.

14. The evidence of P.W.6 Bhujang is relevant only to the extent as to setting a criminal law in motion as he lodged the F.I.R. (Exh.31). He arrived at the scene of offence post incident. It is in his evidence that, the ornaments namely arm and wrist silver bracelets of the deceased were missing. Her Mangalsutra and seven-piece ornaments of gold besides nose-stud and ear rings were also found missing. He gave the details thereof in the F.I.R. and in oral evidence as well.

15. P.W.9 Ramabai and P.W. 10 Ranjana, daughters-in-law of the deceased testified that, both of them along with their co-sister and sister-in-law as well had left the house to work in the field of one Saraswatibai Lomte. Saraswatibai's field adjoins the land of the deceased. It is further in their

evidence that the deceased had left her house some time before both of them had left their respective houses for the field. It is further in the evidence of both these witnesses that, they had seen one unknown person followed their mother-in-law. That person spoke with Saraswatibai while he was on his way. According to these witnesses, that person had long hair, resting on his back. He was sporting orange colour shirt and blackish trouser. He was of dark complexion. His nose was straight and pointed. Both these witnesses identified the appellant No.1 before the Court as the person whom they had seen followed the deceased. Both these witnesses also identified him in the test identification parade.

16. P.W.14 Avinash, the then Tahsildar conducted the test identification parade. The memorandum of test identification parade is at Exh.44. It is in his evidence that he conducted the test identification parade observing all the rules in that regard. He was, however, candid enough to admit that, ages of dummy persons in the test identification parade were different. He conducted three rounds of test identification parade. The memorandums of test identification parade are shown to have been prepared at one and the same time.

17. P.W.11 Ramrao is a person in whose presence the test identification parade was conducted. It is not known as to why the Tahsildar availed his services as a panch witness, since he is admittedly resident of the village Chuncha, whereat the incident took place. It is not the case of the Tahsildar that no person who visited Tahsil Office at the given time was available to act as panch. Be that as it may. P.W.11 Ramrao admitted in his cross-examination that while appellant No.1 was brought in a vehicle for test identification parade, the witnesses were present outside the Tahsil Office. The same suggests, the witnesses had an opportunity to see the appellant No.1 before he was put in the test identification parade.

18. P.W.19 Shaikh Abdul Rauf did the major role in the investigation of the crime. It is in his evidence that, he was attached to Local Crime Branch (L.C.B.), Hingoli in 2010. In those days, incidents like one in question were on rise in the districts of Hingoli, Parbhani and Nanded. It was not safe for women to go in field. The Inspector General of Police had called a meeting of Superintendents of Police of all the three districts. Police Inspectors of L.C.B. of all the three districts were also called. A team of police officials was formed. He

(P.W.19) was the head of the team formed for investigation of the crime. It is further in his evidence that, he found a cell phone bearing Number 8983280781 was frequently in use. Based on the same, he got the appellant No.1 arrested. On arrest of the appellant No.1, he made a disclosure statement (Exh.112), pursuant to which the robbed ornaments came to be recovered from appellant No.2. It is to be mentioned here itself that the panch witness to the disclosure statement and consequential recovery did not stand by the prosecution. It is in his evidence that, police obtained his signatures on readymade document. True, if the evidence of the investigating officer is found to be cogent and reliable, the disclosure statement and consequential recovery can be relied on, pursuant to which the ornaments namely (silver armlet, silver ring, golden seven piece, golden Mangalsutra, golden ear-rings, nose-stud and ear-stud as well came to be recovered.

19. The question is whether the aforesaid evidence could establish the charge. In our view, the answer is big 'No'. The reasons therefore are as follows :-

Description of the person who was seen to have followed the deceased at the relevant time does not match

with the appellant No.1. It is not that the appellant No.1 was last seen in the company of the deceased. He was alleged to have been seen following the deceased. The daughters-in-law of the deceased, therefore, suspected the appellant to be the author of the murder of Sumanbai and robbery of her ornaments.

20. It needs no mention that, suspicion, however strong, cannot take place of proof. As per the evidence of both the witnesses P.W.9 Ramabai and P.W.10 Ranjana (daughters-in-law), the suspect was sporting long hair, resting on his back. He was clad in orange shirt and blackish trouser. His nose was straight and pointed. Whereas the appellant No.1 is semi-bald. As such, the description given by the daughters-in-law of the deceased does not match with that of the appellant No.1. Even for the sake of assumption it is accepted that the appellant was seen to have followed the deceased, there is nothing to indicate him to have any interaction with the deceased. The evidence of P.W.9 Ramabai and P.W.10 Ranjana (daughters-in-law) is silent to state as to whether there was a very narrow gap of distance while the appellant was following the deceased or whether the deceased had already reached the field and after a while the appellant

was seen proceeding towards the way by which the deceased had already reached the field. As such, in our view, this circumstance cannot be termed to be conclusive in nature. Moreover, it is very much doubtful as to whether it was the appellant or someone else was seen by the daughters-in-law of the deceased. The so called identification of the appellant No.1 by the daughters-in-law of the deceased in test identification parade is, therefore, of little consequence.

21. Admittedly, such incidents were on rise in those days. The police machinery appears to have been under pressure P.W.19 Shaikh Abdul Rauf has admitted to have had interrogated not less than 450 suspects in that regard. A sketch of the suspect was prepared and circulated as well. The same is not made part of the police papers. The learned counsel for the appellant No.1 has, therefore, every reason to contend that, with a view to subside a public outcry, an innocent person was arrested. According to P.W.19 Shaikh Abdul Rauf, a particular cell phone number was under surveillance and based on C.D.R. thereof, the appellant came to be arrested. Nothing of that sort has, however, been relied on to connect the appellant with the offence in question. On arrest of the appellant No.1, he is said to have made a

disclosure statement, pursuant to which the aforementioned ornaments came to be recovered from the appellant No.2. Admittedly, on seizure of those ornaments, neither the husband nor the daughters-in-law of the deceased were called upon to identify those ornaments during investigation. The evidence of the husband of the deceased indicate that, ornaments on the person of the deceased were old one. Two of them were 40 years old. While the recovered articles were found to be new one. As such, whatever articles are shown to have been recovered from the appellant No.2 pursuant to the disclosure statement made by the appellant No.1, could not be said to be the stolen property, the deceased was robbed of. Assuming those articles to be stolen property, there is nothing in the evidence to suggest the appellant No.2 to have had received the same dishonestly and knowing them or reason to believe the same to be the stolen property.

22. For all the aforesaid reasons, we are not in agreement with the findings recorded by the trial Court. Interference with the impugned order is, therefore, called for. In the result, the appeals succeed. Hence the order :

ORDER

- (i) Both the Criminal Appeals are allowed.
- (ii) The order of conviction dated 10/7/2015, passed by learned Additional Sessions Judge, Hingoli in Sessions Trial No.59/2011 is hereby set aside.
- (iii) The appellant Kishor Bankatlal Warma is acquitted of the offence punishable under Section 411 of the Indian Penal Code. His bail bonds stand cancelled. Fine amount, if paid, be refunded to him immediately.
- (iv) The appellant Ajijkhan Mohamadkhan Pathan is acquitted of the offences punishable under Sections 302 and 394 of the Indian Penal Code. He be set at liberty forthwith if not required in any other case. Fine amount, if paid, be refunded to him.

(R. M. JOSHI, J.)

(R. G. AVACHAT, J.)

It is informed that, the appellant Ajijkhan Mohamadkhan Pathan was convicted in number of Criminal Cases. He, however, could not prefer appeal/s against his

convictions in most of the cases. Learned counsel Mrs. Vaishali Shinde is, therefore, requested to get information from the concerned jail Superintendent/s in how many cases the appellant Ajijkhan Pathan has been convicted and he could not prefer appeal. If he has really not preferred such appeal/s, the learned counsel Mrs. Vaishali Shinde is appointed to prefer appeal/s, if any, against his conviction in all such cases.

(R. M. JOSHI, J.)

(R. G. AVACHAT, J.)

fmp/-