

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 700 OF 2016

Sakhubai Bhairu Kajale
age 47 years, occ. Housewife,
R/o Khed, Tq. Lohara, Dist. Osmanabad. Appellant

Versus

State of Maharashtra Respondent

Mr. H. F. Pawar, Advocate for the appellant.
Mr. S. P. Deshmukh, APP for the respondent/State.

WITH
CRIMINAL APPEAL NO. 934 OF 2022

The State of Maharashtra Appellant

Versus

1. Suresh Laxman Jadhav
Age 45 years, occ. Labour.
2. Pintu Jaising Rathod
Age 27 years, occ. Labour
3. Babu Vinayak Rathod
Age 22 years, occ. Labour

All r/o Khed, Tq. Lohara,
Dist. Osmanabad. Respondents

Mr. S. P. Deshmukh, APP for the applicant/State.
Mr. Abhay Ostwal, Advocate for respondent No. 1.
Mr. K. D. Jadhav, Advocate for respondent No. 2.
Mr. M. L. Deoda, Advocate for respondent No. 3.

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

**RESERVED ON : 30th NOVEMBER, 2022.
PRONOUNCED ON : 8th DECEMBER, 2022.**

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

1. Appellant/accused in Criminal Appeal No. 700/2016 being aggrieved by impugned judgment and order dated 26th October, 2016 in Sessions Case No. 45/2014 thereby convicting her for the offences punishable under Sections 364, 302 and 201 read with Section 34 of the Indian Penal Code has preferred this appeal under Section 374 of the Code of Criminal Procedure.

2. The State has preferred appeal being Criminal Appeal No. 934/2022 against acquittal of accused No. 2 to 4/respondents No. 1 to 3 herein by passing the impugned judgment. Both the appeals are taken up for hearing together.

3. In short, prosecution case is as follows :-

On 8th September, 2014, Dattu, son of appellant/accused lodged report with Lohara Police Station stating that after death of his father, his mother, Sakhubai is having relations with Suresh Jadhav which was not liked by him as well as his brother Pappu

(deceased). It is further reported that since Pappu was obstructing to the said relationship, in order to remove the said obstruction, his mother i.e. appellant/accused along with Suresh Jadhav, Pintu Rathod and Babu Rathod took Pappu in the jeep in the evening of 6th September, 2014. On the next day, the mother of the informant came home alone and Pappu did not return. Later on, number of villagers made enquiry with mother of the informant about Pappu but she did not disclose anything to them. In the night, in front of number of people from village, she confessed about taking Pappu with the help of co-accused in the jurisdiction of Manthala Police Station, Karnataka State and having killed him by hanging and also assaulting by stone and that the dead body is thrown in the woods. Report came to be lodged at about 10.15 pm on 8th September, 2014. Pursuant thereto, Crime No. 251/2014 came to be registered.

4. As per the case of prosecution, appellant/accused as well as co-accused were taken into custody by police and pursuant to the statement made by appellant and co-accused Pintu, they took police to the place where the dead body was thrown and consequent to their disclosure statement, dead body was recovered from the said spot. Corpse was sent to Rural hospital Basavkalyan, Dist. Bidar,

Karnataka State and after conducting autopsy, the dead body was brought to Lohara Police Station. After registration of crime, further investigation was conducted wherein statements of accused were recorded leading to discovery and recovery of clothes of deceased and blade used for commission of crime. Statements of witnesses were recorded, spot panchanama was done and on conclusion of investigation, charge-sheet is filed. Sessions Case No. 45/2014 came to be registered after committal of case to Additional Sessions Judge, Omerga. Since accused abjured the charge, they were put on trial. Prosecution examined five witnesses to prove guilt of the accused. Defence on the other hand, placed on record version of two witnesses.

5. Learned advocate for the appellant/accused submitted that the entire investigation carried out in the present case is doubtful and on the basis of such investigation, no conviction can be sustained. It is submitted that there is no consistent and reliable evidence to hold that the dead body was recovered pursuant to the disclosure statement made by present appellant. It is further argued that even in the First Information Report, informant has not made reference about any alleged illicit relationship of his mother with Suresh. Thus, according to him, prosecution has failed to prove

motive for the accused to commit crime in question. As far as alleged recoveries of blade and clothes of the deceased are concerned, it is submitted that the said place was already visited by the police, hence said recoveries cannot be attributed to the exclusive knowledge of the accused in order to consider it as an incriminating circumstance against her. To support his contention, reliance is placed on following judgments :-

i) Aghnoo Nagesia vs. State of Bihar reported in AIR 1966 Supreme Court 119

ii) Mohd. Abdul Hafeez vs. State of Andhra Pradesh reported in (1983) 1 Supreme Court Cases 143.

6. Learned APP submitted that the trial Court has rightly convicted present appellant as on the basis of evidence of Dattu (PW 2) prosecution has proved the facts about appellant having illicit relationship with co-accused Suresh and they having taken Pappu on 6th September, 2014, from the house and thereafter he did not return home. According to him, from evidence on record it is clear that pursuant to the information of this accused as well as co-accused Suresh, the dead body was recovered, which circumstance conclusively proves their participation in crime. He also relied upon evidence of the recovery of clothes of deceased as well as the blade

found at the spot which were made pursuant to the statement made by appellant and Pintu. It is his contention that the possibility of deceased having died for any other reason except homicidal death is completely ruled out from the circumstances in which the dead body was recovered. According to him, the learned trial Court has committed error in acquitting the co-accused for the offence in question and on the basis of material on record, the order of acquittal deserves to be reversed and he seeks conviction of co-accused and dismissal of appeal by convicted one.

7. In response to the said arguments, learned advocate for the acquitted accused drew attention of this Court to the cross-examination of Umesh Jadhav (PW 3) and Investigation Officer (PW 5) in order to point out that there is no consistency in their version as to which accused has made disclosure statement and at whose instance the dead body was recovered from the spot of incident. It is also submitted that there is no panchanama drawn by the police with regard to finding of the dead body at the spot and which according to him, is a serious lapse in the case of prosecution. It is also submitted that the mode adopted by the Investigating Officer in going to different State without seeking prior permission of the superior is

contrary to the rules and hence the entire investigation of prosecution carried on such irregularity must fail.

8. The case in hand is one, where no one has witnessed the incident in which deceased Pappu died. The prosecution, therefore, is relying upon the following circumstances in order to bring home guilt of the accused :-

- i) Homicidal death of deceased.
- ii) Motive for appellant/accused and accused Suresh in eliminating Pappu on account of their illicit relationship being opposed by deceased.
- iii) Accused having taken Pappu from house on 6th September, 2014 and thereafter he is not seen alive by anyone else. Thus, last seen theory is sought to be pressed in service.
- iv) Recovery of the dead body of Pappu pursuant to the disclosure statement of appellant/accused and co-accused Pintu.
- v) Recovery of blade and clothes at the instance of these two accused persons.
- vi) Extra judicial confession made by Sakhubai to villagers in presence of Dattu.

9. Dr. Bhurle (PW 1) attached to General Hospital, Basvakalyan, Dist. Bidar had conducted autopsy on the dead body of Digambar @ Pappu on 8th September, 2014. According to him, the said dead body was brought to the hospital by police Nike B. No. 23 of Lohara Police Station, Maharashtra with history of murder of deceased by his mother. During autopsy, he found following three contusion marks on the neck of the deceased :

- 1) Around neck near mandible to the nape of neck (back side)
- 2) Front of neck to left side of the neck.
- 3) Just below second one – front of neck upto left side of neck.

He also found peeling of skin on right forearm on palmer side which according to him, was post mortem injury. He also found internal injuries such as :-

- 1) Subcutaneous conjesion on forehead, black blood, bone crept fell on pressure.
- 2) Laceration of membrane with conjesion and laceration of brain tissue with hematoma present.
- 3) Fracture of hip of hyoid bone right side.

According to him, injuries except one on the forearm on palmer side were ante mortem injuries. He opined that the head injury of the deceased was possible by hit with stone (Article No. 4). It is further opined that the death of the deceased might have caused firstly due to head injury also supported by hanging of neck by rope.

Considering the nature of injuries on head and neck, it is opined that there is rare possibility of death by suicide and according to him, there is more chance of this being homicidal death.

10. Defence by cross-examining Dattu (PW 2) has tried to bring on record that the marriage of Pappu was not getting settled and on that count, he had become irritating. It is, therefore, sought to be indicated that the possibility of he committing suicide is not ruled out. It is, however, pertinent to note that the person who wants to commit suicide why will travel more than 100 kms from his house to end his life. It is case of prosecution that his name inscribed on forearm was removed by peeling of skin on forearm after his death. By doing so, attempt was made to make dead body unidentifiable. Considering this aspect coupled with the nature of injuries caused to the deceased and the dead body being found kept in gunny bag, possibility of suicidal death is totally ruled out. On the basis of material evidence on record, it is held that the deceased died homicidal death.

11. Prosecution, in order to prove motive of appellant and co-accused Suresh, has relied upon testimony of Dattu (PW 2) who

deposed about their love relationship. In the cross-examination, it is brought on record that there is no specific mention in the First Information Report about any love/illicit relationship between them. Thus, it is sought to be argued on behalf of the appellant that this amounts to material omission and improvement in his testimony before the Court. In this regard it is material to take note that First Information Report (Exhibit 64) specifically states that since the time of death of his father his mother is having relationship with Suresh which was not liked by informant and his brother. Mention of word (संबंध) in common parlance always refers to illicit relationship while indicating relationship of a married woman. Considering the fact that informant is real/biological son of appellant, his mentioning only to that extent is also fully justified. Said statement in the First Information Report is indicative of the fact that there was illicit relationship between them. Thus, there is no omission or improvement made in this regard by the said witness. Moreover, it also does not stand to any reason as to why the son will make such allegation against his own mother, for having no other reason to make false insinuation against her. In the circumstances, prosecution was able to establish that relationship between appellant and Suresh was

disliked by her son and there used to occur quarrels on that count with deceased Pappu.

12. In order to prove theory of last seen, prosecution has relied upon evidence of Dattu (PW 2) who has deposed about appellant and Suresh taking Pappu on motorcycle on 6th September, 2014 at around 6.00 pm. In the First Information Report however, it is stated that appellant, Suresh and two others took Pappu in a jeep. Thus, there is no consistency in the evidence of this witness as to the taking away of Pappu from house. It is argued on behalf of appellant that the admission of Dattu in the cross-examination that he came back home at 7.00 pm is sufficient to discard his claim about having seen deceased with the accused. It is relevant to note that this witness is agricultural labour and hence, mentioning of exact time is not expected of him. Therefore, inconsistency in time may not become sufficient reason to disbelieve his testimony. In this connection Umesh Jadhav (PW 3) who is employer of deceased Pappu claims that at about 6.00 pm, Pappu came to him and told that he is going to village Hipparga to see his ailing grand mother and thereafter he went away. Defence is seeking to take advantage of this statement to claim that as per the evidence of this witness, Pappu

alone went to village Hipparga. First of all, there is nothing in the said statement to show that Pappu told this witness about going to his grand mother's place alone and hence it is not permissible to read the said statement accordingly. Evidence of Dattu (PW 2) to the extent of his mother taking Pappu out of house and returning home alone on the next day is found consistent, though not against co-accused.

13. It is testified by Dattu that on the next day, when his mother came back home, he made enquiry with her about Pappu but she did not disclose anything for whole day. According to him, when villagers asked her about Pappu, she told them about Pappu being killed by her along with co-accused Suresh. Prosecution is seeking to place reliance on the said extra judicial confession made by appellant to the villagers. Extra judicial confession even otherwise is weak piece of evidence and before accepting the same the Court must ensure that it is made voluntarily. Evidence of Umesh Jadhav (PW 3) indicates that appellant was pressurised by the villagers and pursuant to pressure so extended she made some statement. It is thus clear that the said statement made by appellant is not on free will or voluntary but is obtained under pressure. We, therefore, do

not find the same to be reliable and hence it deserves to be kept out of consideration.

14. As per evidence of Investigating Officer, he received information on phone from police station that one woman of village Khed, Tq. Lohara has committed murder of her son. At that time, he was on patrolling duty and on getting said information, he went to the house of appellant/accused. At the said place, he found mob of about 150 to 200 persons gathered. He made enquiry with appellant about the incident and she agreed to show the place where the dead body of her son is. He thereafter asked some persons present to make arrangement of two vehicles. He went back to the police station by taking appellant in custody. Other accused were also accosted and brought to police station. At that time, at about 11.00 pm, two four wheelers were brought to the police station and he took accused with them. According to him, he took only appellant and Pintu as they expressed desire to show the place where the dead body is kept. As per the version of this witness, as per the directions shown by Pintu, they went firstly to Zahirabad and Pintu tried to mislead them. However, according to him, appellant disclosed that the said place being hilly area with no traffic on the road.

Accordingly, thereafter, Pintu showed the place where the dead body was kept. After getting down from jeep, Pintu pointed out the place wherein dead body was found in a gunny bag kept to the side of the woods.

15. Umesh (PW 3), on the other hand, deposed that after initial disclosure, Sakhubai took them towards Algud road and after reaching to the particular spot, she asked to stop the vehicle. Thereafter, they all got down from the vehicle and appellant went by walk towards some trees and pointed out her finger to the place where the dead body is thrown. Police found one tied gunny bag wherein dead body of Pappu was found.

16. The disclosure statements of accused are sought to be challenged on the ground that it is not in writing and no memorandum panchanama is drawn of the same. In this regard, reference can be made to the judgment of the Hon'ble Apex Court in the case of **Suresh Chandra Bahri vs. State of Bihar** reported in 1995 Supp (1) Supreme Court Cases 80, wherein it is held that the information whether oral or written or no information at all does not matter as long as evidence of physical leading to point out discovery

and recovery at the instance of accused is established. This shows that it is not the rule that the disclosure statement can be accepted only if it is reduced in writing. The recovery of dead body in this case if is found to be reliable on the basis of such oral disclosure, the same statement cannot be discarded for the reason it is not in writing.

17. In the present case, the recovery of dead body is absolutely vital piece of evidence on the basis of which success of case of the prosecution depends. Surprisingly however, there is no panchanama drawn with regard to the finding of dead body. The panchanama (Exhibit 66) indicates the place where the dead body was found was shown by appellant and thereafter the dead body was removed from the said place and inquest panchanama was done. It is thus clear that said panchanama does not pertain to the recovery of dead body from the said spot. Aforesaid evidence of Umesh Jadhav (PW 3) and Investigating Officer (PW 5) materially contradicts each others claim about at whose instance the dead body of deceased was found. According to Umesh, dead body was shown by appellant whereas Investigating Officer claims it to have been shown by Pintu. Umesh Jadhav (PW 3) in his deposition before the Court has candidly

stated that in the police station, appellant's statement about the incident as narrated by her was recorded by police and it was readover to her. Meaning thereby, there was statement recorded by the police pursuant to which leading to the discovery of the spot where the dead body was found. There is no explanation forthcoming from the Investigating Officer as to the reason for which the said statement is not placed on record. In case where such disclosure statement is oral and not reduced in writing, it can be considered if found reliable but when witness of prosecution claims that the disclosure statement was reduced in writing it must have been brought on record to lend authenticity to the ocular evidence. Absence of such statement on record makes the claim of prosecution of oral disclosure, more vulnerable.

18. The statement of accused is also sought to be challenged on the ground that joint disclosure statement is not admissible in evidence. In support of the said submission, reliance is placed on the case of Mohd. Abdul Hafeez (supra). Perusal of said judgment, however, does not show that the statement was discarded by the Hon'ble Apex Court only on the ground that it is jointly made by

more than one accused. In the said case, the said statement was not found reliable for the reason that it was silent as to at whose instance the recoveries were made consequent thereto. Infact, in case of State (NCT Delhi) vs. Navjyot Sandhu reported in (2005) 11 Supreme Court Cases 600, recording of joint disclosure or simultaneous disclosure statement *per se* is held to be not inadmissible under Section 27 of the Evidence Act. Thus, there is no substance in the contention that the statement of appellant and Pintu being joint cannot be relied upon. It is a different question whether their statement is found reliable and sufficient to base conviction thereupon, which in this case we do not find so.

19. As discussed above, there is complete variance in the version of Umesh Jadhav (PW 3) and Investigating Officer (PW 5) as to at whose instance the dead body was found by police. Apart from this, there is inconsistency in their testimony to the extent as to how police went to the said place. According to Umesh, after going to the State of Karnataka, police took search for the dead body overnight and in the next morning, the dead body was found. This version of the witness cannot be discarded because there is no evidence on record in the form of any panchanama about finding out the place

where the dead body was found and at whose instance. Apart from this, as per Umesh, after starting from Lohara Police Station, they went in a police jeep and were accompanied by another private vehicle. They went to Manthala Police Station and made enquiry about any information about the deceased. Investigating Officer, however, claims to have taken two private vehicles to the spot and does not say anything about going to any Police Station in the State of Karnataka before the dead body was found. All these circumstances, create serious doubt about the evidence of prosecution that in what circumstances the dead body was found by the police. We are, therefore, of the view that there is no satisfactory evidence which conclusively establishes as to at whose instance the dead body was found.

20. As far as recovery of clothes of the deceased as well as seizure of blade from the spot is concerned, admittedly, police had already visited the spot and hence as rightly held by the learned trial Court, recovery of blade cannot be attributed to the exclusive knowledge of the accused. Similarly, the seized clothes of the deceased are not identified to be that of deceased nor there are any blood stains of the group of deceased in order to connect them with

the crime in question. The said evidence, therefore, is not relevant to indicate involvement of accused in crime.

21. Merely because prosecution was able to prove that the appellant herein had motive to eliminate deceased, it is not sufficient to convict accused in absence of any corroborating evidence to connect the appellant/accused and co-accused with this crime. It is cardinal principle of criminal jurisprudence that the guilt of accused must be proved beyond shadow of reasonable doubt and any benefit of reasonable doubt shall go to the accused. In the facts and circumstances of the case and on appreciation of material evidence of record, no order of conviction can sustain against the appellant/accused. Consequently, this Court finds no perversity in the findings recorded by the trial Court acquitting the co-accused and hence their acquittal calls for no interference. Hence the following order :

ORDER

- i) Criminal Appeal No. 700/2016 stands allowed.
- ii) Impugned judgment to the extent of conviction of appellant Sakhubai Bhairu Kajale is set aside. She

is acquitted for offence punishable under Sections 364, 302, 201 read with Section 34 of the Indian Penal Code.

iii) Appellant Sakhubai Bhairu Kajale be released forthwith, if not required in connection with any other crime.

iv) Her bail bonds stand cancelled.

v) Refund of fine amount paid, if any.

vi) Criminal Appeal No. 934/2022 challenging acquittal of co-accused is dismissed.

vii) Pending application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

(R. G. AVACHAT)
Judge

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