

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

CRIMINAL APPEAL NO.1158 OF 2012

Gopal Shivram Krishnan

Age – 48 yrs.

R/o. – K-8 Navjyothi C.H.S

Sainath Nagar Road,

Ghatkopar (W)

Mumbai.

Presently in custody

In Kolhapur Central Prison, Kolhapur.

...Appellant

Versus

The State of Maharashtra

...Respondent

Mr. Vijay Hiremath, for the Appellant.

Mr. A. R. Kapadnis, A.P.P for the Respondent – State.

***CORAM : REVATI MOHITE DERE &
SHARMILA U. DESHMUKH, JJ.***

DATE : 17th AUGUST 2022

JUDGMENT (Per Revati Mohite Dere, J.):

1. By this appeal, the appellant has impugned the Judgment and Order dated 18th July 2012, passed by the learned Additional Sessions Judge, Sewree, Mumbai, in Sessions Case No.592 of 2011,

convicting and sentencing him, as under:-

- for the offence punishable under Section 302 of the Indian Penal Code to suffer 'Life Imprisonment' and to pay a fine of Rs.10,000/- in default, to suffer rigorous imprisonment for one year, for the murder of his mother and brother.

2. The factual matrix of the prosecution case in short, is as under :-

On 19th April 2011, PW7 – API, Dinkar Krushnath Chandarkar, PSO at the relevant time, attached to the Ghatkopar Police Station received a call at about 8:45 p.m. from Karan Cheda, disclosing that the appellant's mother and brother were murdered in their house by unknown persons. Accordingly, PW7 – API, Dinkar Chandarkar, apprised his senior about the said information as well as the duty inspector. After making entry in the diary, PW7 – API, Dinkar Chandarkar visited the spot. On entering the house i.e. in the hall, PW7 – API, Dinkar Chandarkar noticed one dead body of an old lady on the bed and that she was strangulated by an 'uparna'. He

has stated that on going to the bathroom, he noticed the dead body of the appellant's brother and found that he had sustained an injury on his head. Pursuant thereto, inquest panchanama was drawn. Thereafter, the appellant's complaint was taken down as an FIR. The said FIR is at Exhibit – 20. It appears that at the time of inquest, the dog-squad, the photographer as well as the person taking the finger prints were called and spot panchanama of the scene of offence was also prepared. Thereafter, both the dead bodies were sent for postmortem.

During the course of investigation, the police arrested the appellant and after investigation filed charge-sheet as against him in the Court of the learned Magistrate. Since the offence was one under Section 302 of the Indian Penal Code, the case was committed to the Court of Sessions for trial.

The learned Additional Sessions Judge, framed charge (Exhibit – 2), as against the appellant for the offence punishable under Section 302 of the Indian Penal Code.

The accused pleaded not guilty to the charge and claimed

to be tried, after which the prosecution examined 10 witnesses in support of its case i.e. PW1 – Sunil Bhalchandra Prabhu, neighbour of the appellant; PW2 – Mukesh Chandrappa Naik, friend of the appellant; PW3 – Niraj Sunilkumar Pandey, the person who delivered milk to the house of the appellant on the day of the incident; PW4 – Salim Ahmed Mustaq Shaikh, panch to the spot panchanama; PW5 – Rajeshkumar Subramaniam Iyyer, cousin of the appellant; PW6 – Munna Ismail Hussain Chowdhary, panch to the alleged recovery of an iron rod, at the instance of the appellant; PW7 – API, Dinkar Krushnath Chandarkar, the first officer who investigated the case and recorded the FIR lodged by the appellant; PW8 – Karan Girish Cheda, neighbour of the appellant; PW9 – Dr. Baban Shavaka Tadvi, the doctor who conducted the autopsy on the dead bodies and PW10 – Rajkumar Vishnu Kothmire, also an investigating officer.

The defence of the appellant was that of total denial and false implication.

After recording of the 313 statement of the appellant and after hearing the parties, the learned Additional Sessions Judge, was

pleased to convict and sentence the appellant as aforesaid in paragraph 1 of this judgment.

3. Mr. Hiremath, learned counsel for the appellant submitted that there is absolutely no evidence to connect the appellant with the offence. He submitted that the prosecution has not proved its case beyond reasonable doubt as against the appellant and that the learned trial Judge has convicted the appellant, only on the basis of the timings mentioned by the doctor i.e PW9 – Dr. Baban Tadvi, with respect to the probable time of death of the deceased and by relying on Section 106 of the Indian Evidence Act. He further submitted that the prosecution has not brought on record, evidence of last seen or motive for the appellant to cause the death of his mother and brother. He submitted that the trial Court has convicted the appellant on the basis of conjectures and surmises, despite there being no evidence to connect the appellant with the offence. He further submitted that the prosecution has failed to conclusively prove the time of death of the deceased. He further submitted that Exhibit – 28 cannot be relied

upon in the absence of any substantive evidence having come on record with respect to the contents of Exhibit – 28. He submitted that it is not disputed by the prosecution, that the appellant had gone to work on 19th April 2011 at about 9:00 a.m. and had returned home at about 8:15 p.m. and as such having regard to the same, the possibility of somebody else committing the murders could not be ruled out.

4. Per contra, Mr. Kapadnis, learned APP supported the impugned Judgment and Order of conviction and sentence passed by the trial Court and submitted that no interference was warranted in the same.

5. Perused the evidence with the assistance of the learned counsel for the respective parties. It is not in dispute that the prosecution case rests entirely on circumstantial evidence. The deceased were the mother and brother of the appellant. It is not in dispute that the appellant was an employee of the University of Mumbai, prior to his arrest. It is also not in dispute that the appellant

was residing with his mother – Radhabai and brother – Jayram (both deceased). It is also not in dispute that the appellant was looking after his aged mother and younger brother, who was unemployed. It is also not in dispute that the appellant on 19th April 2011 had gone to the University of Mumbai, where he was working at about 9:00 a.m. and after finishing his work had left the University and reached home at about 8:15 p.m. It is the prosecution case, that the appellant prior to leaving for his work had murdered his mother and brother.

6. The question that arises for consideration in the aforesaid appeal is, whether the prosecution has proved beyond reasonable doubt, that it is the appellant and the appellant alone, who had murdered his mother and brother.

7. As noted above, the prosecution case rests entirely on circumstantial evidence. The prosecution has examined PW1 – Sunil Prabhu, the neighbour of the appellant. PW1 – Sunil Prabhu has stated that he was knowing the appellant since his childhood, as the

appellant was his neighbour. He has stated that the appellant was living with his aged mother and younger brother and that the appellant's brother was mentally retarded; that the appellant was unmarried, however, he did not know the reason for the same; and that the appellant used to prepare meals for his mother and brother. According to PW1 – Sunil Prabhu, the incident took place on 19th April 2011. He has stated that the appellant would regularly send him SMSs' on his cell phone and that on the day of the incident, had sent him about five SMS, the last SMS being at 7:30 p.m; and that the said SMSs' were all jokes. He has further stated that when he was returning from work at about 10:00 p.m., his friend Ramesh Shirke contacted him on phone and disclosed that somebody was murdered in his area. Pursuant to the said information, PW1 – Sunil Prabhu contacted his next door neighbour – Sandip Tambe, who disclosed that the appellant's brother and mother were murdered by unknown person. He has stated that when he returned home, he saw police in the area and from a distance saw two dead bodies being kept in an ambulance.

8. The said evidence of PW1 – Sunil Prabhu does not throw any light with respect to the motive for the appellant to murder his mother and brother or that the appellant was last seen in the company of his mother and brother.

9. As far as PW2 – Mukesh Naik is concerned, the said witness was examined by the prosecution, to prove an alleged extra-judicial-confession made by the appellant to him. As the said witness did not support the prosecution, he was declared hostile. Hence, no reliance can be placed on this witness.

10. The prosecution examined another neighbour of the appellant, i.e. PW8 – Karan Cheda. The said witness has stated that when he returned from his work, he heard the appellant saying that his mother was murdered, pursuant to which, he went to the appellant's flat. He has stated that he informed the police accordingly. He has further stated that the mother of the appellant was bed-ridden and that the appellant's brother used to hardly go out. He has further stated

that the jewellery found in the house was seized by the police. Nothing substantial has been brought on record by the prosecution with respect to motive or any other circumstance through the evidence of the said witness.

11. PW5 – Rajeshkumar Iyyer, cousin of the appellant was examined by the prosecution to show motive for the appellant to commit the murder of his brother and mother. According to PW5 – Rajeshkumar Iyyer, the appellant is his cousin and that the appellant was staying with his mother and younger brother (both deceased). He has stated that mother of the appellant could not walk due to old age and that the brother of the appellant was mentally fit, however, was doing nothing. He has stated that the appellant was maintaining his mother and brother; that he did not know the reason why the appellant had not performed his marriage; and that the relations of the appellant with his brother were neither cordial nor strained. In his cross-examination, PW5 – Rajeshkumar Iyyer has admitted that the appellant's younger brother used to do all his ordinary pursuits and

that he would attend Mandir and would even give astrological opinion. He has also admitted that he had not heard about any dispute *inter se* between the appellant and his brother and mother.

12. A perusal of the evidence of all the aforesaid witnesses as has come on record does not throw any light on the motive for the appellant to cause the death of his mother and brother. None of the witnesses have deposed with respect to the motive, as alleged by the prosecution i.e. that the appellant had a love affair with a girl, and hence he caused the death of his mother and brother. Not a single witness has deposed about the said motive as alleged by the prosecution.

13. As far as evidence of last seen is concerned, the prosecution in support of its case has examined PW3 – Niraj Pandey. According to PW3 – Niraj Pandey, he was working in a C.A. Firm at Ghatkopar and in addition to the said service, he was also supplying milk. He has stated that at about 7:00 to 7:15 a.m. he would go to the

appellant's house for supplying milk. He has further stated that on 19th April 2011, he had been to the appellant's house at about 7:00 to 7:15 a.m; that after ringing the bell, the appellant opened the door; that at the time of giving half a litre of milk, he noticed that the appellant's mother was sleeping on a sofa with a '*chaddar*' on herself and that he did not see the appellant's brother.

14. In his cross-examination, PW3 – Niraj Pandey, has stated that on account of shortage of labour occasionally, he extended help to his father in supplying milk and hence on 19th April 2011, had gone to the appellant's house to deliver milk. The said witness has not stated that he noticed anything suspicious or unusual, with respect to what was seen by him. The evidence of this witness does not inspire confidence and as such we cannot place implicit reliance on his evidence. The prosecution has failed to establish beyond reasonable doubt, that it is the appellant and the appellant alone who was last seen in the company of the deceased, having regard to the fact, that the dead bodies were seen at 8:15 p.m. after more than 12 hours after the

said witness had noticed the appellant's mother sleeping on the sofa, when he went to deliver milk at about 7:00 to 7:15 a.m. The prosecution has failed to rule out the possibility of somebody else entering the house, after the appellant left for work at 9:00 a.m.

15. As far as recovery of iron rod, at the instance of the appellant is concerned, the prosecution in support of its case has examined PW6 – Munna Chowdhary. It is pertinent to note, that the iron rod was recovered from the bathroom, 3 days after the dead body of the appellant's brother was found and the spot panchanama was done. It is the prosecution case that the iron rod was recovered from under the basin. First and foremost, it is difficult to believe that the police had not seen the iron rod at the time when the dead body of the appellant's brother was found in the bathroom. There is no mention of any iron rod being seen at the spot in the spot panchanama. Neither any blood stains were found on the iron rod and as such mere finding of an iron rod by itself, would not connect the appellant with the alleged offence.

16. As far as the evidence of PW9 – Dr. Baban Tadvī, i.e. the doctor who conducted the autopsy on both the dead bodies is concerned, it is pertinent to note, that in the substantive evidence of this witness, no timing as to when the incident has taken place has come on record. There is nothing in the substantive evidence of PW9 – Dr. Baban Tadvī, to show that the deceased had died 12 to 18 hours prior to the postmortem being conducted.

17. With respect to rigor mortis have being set in, no evidence has come on record, to conclude, the approximate time of death of the deceased. Infact, Exhibit – 28 which are the queries put by the police to the doctor and answers given to the police, there is no substantive evidence to show that the deceased died 12 to 18 hours, prior to the conduct of the postmortem.

18. Considering the overall evidence as stated aforesaid, the prosecution has not proved its case beyond reasonable doubt i.e. it is the appellant and the appellant alone who committed the murder of

his mother and brother. It is settled law, that suspicion, however strong it may be, cannot take the place of proof beyond reasonable doubt.

19. In *Sharad Birdhichand Sarda v/s State of Maharashtra*¹ the Apex Court has laid down the five golden principles (Panchsheel) which govern a case based only on circumstantial evidence. Para 153 of the said judgment is reproduced hereinunder:-

“153. A close analysis of this decision would show that the 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.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra² where the following observations were made: [SCC para 19, p. 807 : SCC (Cri) p. 1047]

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the

1 (1984) 4 SCC 116

2 (1973) 2 SCC 793

- 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.”*

20. We are afraid, that in the present case, we find that the prosecution has neither established the circumstances by legal and cogent evidence nor do we find the chain of evidence complete. In the absence of cogent, reliable and legal evidence, adduced by the prosecution, the appellant is entitled to the benefit of doubt.

21. Having regard to what is stated aforesaid, we pass the following order:-

ORDER

- i) The Appeal is allowed;
- ii) The Judgment and Order dated 18th July 2012, passed by

learned Additional Sessions Judge, Sewree, Mumbai, in Sessions Case No.592 of 2011, convicting and sentencing the Appellant, is quashed and set aside;

iii) The appellant is acquitted of the offence, with which he is charged. The appellant is set at liberty forthwith, if not required in any other case. Fine amount, if paid, be refunded to the appellant.

22. Appeal is allowed and accordingly disposed of.

23. All concerned to act on the authenticated copy of this judgment.

SHARMILA U. DESHMUKH, J.

REVATI MOHITE DERE, J.