

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPEAL NO.62 OF 2021

Mohan s/o Laxman Warthi,
Aged 55 years, Occu. Labour,
R/o. Arvi Naka, Wardha,
District: Wardha. **APPELLANT**

...V E R S U S...

State of Maharashtra, through
Police Station Officer Sewagram,
Tah. & District: Wardha. **RESPONDENT**

Mr. R. A. Bhoyar, Advocate (Appointed) for Appellant.
Mr. M. J. Khan, APP for Respondent/State.

CORAM: **ROHIT B. DEO AND URMILA JOSHI-PHALKE, JJ.**
DATE: **7th DECEMBER, 2022.**

ORAL JUDGMENT: (PER ROHIT B. DEO, J.)

This appeal is preferred by Mohan Laxman Warthi, who shall be hereinafter referred to as the accused, challenging the judgment dated 25.11.2019, rendered by the learned Additional Sessions Judge, Wardha whereby the accused is convicted for offence punishable under section 302 and 201 of the Indian Penal Code (IPC) and is sentenced to suffer imprisonment for life and to payment of fine of

Rs.3000/- and in default of payment of fine to suffer simple imprisonment for six months for the offence punishable under section 302 of IPC and to suffer rigorous imprisonment for five years and to payment of fine of Rs.2000/- and in default of payment of fine to suffer simple imprisonment for three months for the offence punishable under section 201 of IPC.

2. We have heard the learned appointed counsel Mr. R.A. Bhoyar for the accused and the learned APP Mr. M. J. Khan for the respondent/State.

3. The prosecution case is thus:

3.1 PW-10 Parag Bapurao Pote was the Senior Police Inspector attached to the Jaripatka Police Station, Nagpur. On 15.08.2015 he received information from the Control Room that in the bushes adjacent to the road in the vicinity of Anjanamata Mandir one lower limb of human body is lying. PW-10 went to the spot along with two *panchas* at 19:30 hours. He seized the lower limb in the presence of

panchas and prepared *panchnama*. On the next day, PW-10 received information that in Alodi Shivar parts of human body were lying in a bundle of sari. He summoned *panchas* which included one female and seized the human body parts. Further, certain parts of human body were found in Swagat Colony at the plots of Ambadas Wankhede and Gaulkar. One Sushila Vijay Parteki disclosed on the basis of the dilapidated head that the body parts belonged to Mangala Mohan Warthi. The body parts were seized in the presence of *panchas*. On the same day Gajanan Sitaram Masram lodged report alleging that it was the accused who murdered his sister Mangala Warthi. On the basis of the Report (Exh-20) and First Information Report (Exh-21) Crime 272/2015 was registered for offence punishable under section 302 of the Indian Penal Code.

3.2 PW-10 Parag Bapurao Pote investigated further. He prepared the inquest *panchnama* in presence of three *panchas*. The parts of the human body were handed over to the Medical Officer for conducting the autopsy.

The provisional postmortem report was received on 16.08.2015 and the final postmortem report was received during the course of the investigation which is Exh-38 on record. The accused was arrested on 16.08.2015 and his blood sample was obtained. On 17.08.2015 while in custody, clothes of the accused were seized from his residence in presence of *panchas* Gulab Atram and Bandu Kumbhare. Blood stains were visible on the pant, shirt and *baniyan* seized. On 18.08.2015 while the accused was in police custody, he expressed willingness to disclose the place where he had concealed the weapon of offence. However, the accused mislead the police and no discovery was possible. On 19.08.2015 the police seized the bicycle used by the accused while disposing of the dead body. Blood stains were noticed on the back side of the seat cover. According to the prosecution, the son of the accused Amol came to the Police Station on 20.08.2015 and disclosed that one iron *farsa* and axe kept in one iron box are missing. The Investigating Officer (I.O.) went to the house of the accused and did not find the said articles in the iron box. It was during the house

search, that the son of the accused was also produced one receipt of non-cognizable offence which the I.O. seized in the presence of the *panchas*.

3.3 The seized articles were sent for forensic examination. The map of the spot, where the parts of human body were found, was prepared through the office of the Circle Inspector. The accused was sent for psychiatric examination and the Psychiatrist opined that the accused is not suffering from any disorder. The I.O. recorded the statements of the witnesses and after completion of the investigation, the final report was submitted in the court of the jurisdictional Magistrate, who committed the case to the Sessions Court.

4 The learned Sessions Judge framed charge Exh-3 under section 302 and section 201 of IPC. The accused abjured guilt and claimed trial. The prosecution examined ten witnesses to bring home the charge. The accused did not step into the witness box nor was any witness examined in defence. According to the accused, he is falsely implicated.

5. PW-1 Vikrant Kumbhare is a *panch* witness to the spot *panchnama* which was drawn on 15.08.2015 at the place where one lower limb of the body was found. PW-2 Chandrakant Kirtane is the witness to the *panchnama* drawn on 16.08.2015 at Alodi, Wardha where the human body parts were lying, and were subsequently seized. PW-3 Gajanan Masram is the brother of the deceased, who lodged the report Exh-20. PW-4 Bandu Kumbhare is the *panch* to the seizure of the clothes of the accused on 17.08.2015 and the bicycle on 19.08.2015. However, Bandu Kumbhare did not support the prosecution although he admitted his signature on the *panchnama* Exh-24 and Exh-25. PW-5 Amol Bhiwapure is the Constable who carried the *muddemal* to the office of the Chemical Analyzer at Nagpur. PW-6 Mehamuddin Kazi is the *panch* to the seizure of the blood sample, bone sample, clothes of the deceased and plastic bag vide *panchnama* Exh-40. He is also examined as *panch* to the seizure of blood sample of accused Exh-41 and the *panch* to the memorandum under section 27 of the Indian Evidence Act, although it is an admitted position on record that there was no discovery as

such. PW-7 Gajanan Mandade claims to have seen the accused carrying something in the gunny bag on his bicycle at 24:00 hours on 15.08.2015. PW-8 Rambhau Nehare is the *panch* who did not support the prosecution. PW-9 Chetna Tapase is examined on the point of existence of motive and to bring on record that the deceased was ill-treated by the accused. PW-10 Parag Pote is the Investigating Officer.

6. The case of the prosecution is entirely based on circumstantial evidence. Irrefutably, there is no witness to the incident. The learned Sessions Judge was conscious of the well entrenched position of law that the prosecution is obligated to fully establish the circumstances from which the conclusion of guilt is to be drawn and, more importantly, the circumstances established should exclude any possibility of the innocence of the accused. The established circumstances must be such as are consistent only and only with the hypothesis of the guilt of the accused. The circumstantial evidence must form a complete chain as would exclude the possibility of the innocence of the accused and there must not

be missing links.

7. We consider it apposite to broadly note the circumstantial evidence which according to the learned Sessions Judge form such complete chain without any missing link as would exclude any hypothesis other than the guilt of the accused.

8. The first circumstance which is held established is the motive as is manifested by the conduct of the accused. PW-9 Chetna Tapase deposed that deceased Mangala used to disclose that she was physically ill-treated by the accused who suspected her character. PW-9 further deposed that deceased had shown her injuries on her person caused due to the physical assault and disclosed that the accused used to sleep with sickle under his pillow. The learned Sessions Judge then observes that the allegations in the report Exh-20 lodged by the brother of the deceased are duly corroborated by PW-9 Chetna and further by the non-cognizable receipt Exh-61 produced by the son of the accused and NC report Exh-75 with reference to offence punishable under sections 504 and

506 of IPC produced by the I.O.

9. The second circumstance according to the learned Sessions Judge is the fact that Mangala left for work at 09:00 hours on 14.08.2015 and did not return till lodging of the report Exh-20 by her brother PW-3 Gajanan Masram. The third circumstance noted by the learned Sessions Judge is that on 15.08.2015 the lower limb of the body was found at Alodi Shivar and on 16.08.2015 the other parts of the human body were found in Swagat Colony at Alodi Shivar. The next circumstance which according to the learned Sessions Judge which is incriminatory is the detection of human blood of group-B on the seat cover of bicycle and the *baniyan* seized from the accused. The learned Sessions Judge has held that the evidence of PW-7 Gajanan Mandade completes the chain of circumstances since he saw the accused at 24:00 hours on 15.08.2015 carrying something in the gunny bag. Reverting to motive and conduct, the learned Sessions Judge finds that the silence of the accused notwithstanding that his wife Mangala did not return from work on 14.08.2015 and

his failure to lodge missing report is relevant and incriminating. The learned Sessions Judge has, on occasions more than one, referred to the duty of the accused and his failure to explain circumstances within his special knowledge. We note that it is not even the case of the prosecution that Mangala was done to death at her matrimonial home. The prosecution case is that Mangala left for work at 09:00 a.m. on 14.08.2015 and she did not return home. The body parts were found on 15.08.2015 and 16.08.2015 in the vicinity of Anjanamata Mandir and in the plots owned by Ambadas Wankhede and Gaulkar situated in Swagat Colony. The prosecution is not invoking the principle or theory of last seen. We, as such, find it difficult to appreciate the emphasis placed by the learned Sessions Judge on the duty of the accused to explain the circumstances within the special knowledge.

10. PW-1 Vikrant Kumbhare and PW-2 Chandrakant Kirtane are witnesses to the discovery and seizure of the human body parts, and their testimony is not seriously

questioned. PW-3 Gajanan Masram is the brother of the deceased and the first informant who deposed that Mangala married the accused prior to 23 years and the couple had two sons Amol and Roshan from the wedlock. PW-3 has deposed that he lodged report against the accused as he suspected the accused to be the killer since there were quarrels between the couple. In the cross-examination it is extracted that PW-3 was not visitor to the house of Mangala and he did not know whether Mangala and the accused used to quarrel. It is further extracted in the cross-examination that when PW-3 went to the Police Station, the members of the Mahila Mandal and other people were present and the police made inquiries with the women of Mahila Mandal and other people and not with PW-3. PW-3 admits that his signature was obtained by the police on a report already prepared although he denied the suggestion that he is falsely implicating the accused. PW-4 Bandu Kumbhare has not supported the prosecution case and all that is brought out in the cross-examination is that seizure *panchnamas* Exh-24 and Exh-25 bears his signature. Bandu disclaims knowledge of

the contents of Exh-24 and Exh-25 and asserts that nothing was seized in his presence. The *panch* witness has therefore, not proved the seizure either of the clothes of the accused or the bicycle. PW-5 Amol Bhiwapure is the Constable who carried the *muddemal* to the office of the Chemical Analyzer and his testimony is not seriously assailed. PW-6 is the *panch* who is examined to prove that the police seized the blood sample, bone sample and clothes of deceased Mangala and plastic bag vide *panchnama* Exh-40, and the blood sample of the accused vide *panchnama* Exh-41. PW-6 is also examined to prove that on 18.08.2015 the accused expressed willingness to show the place where he had concealed the weapon of offence. However, as noted earlier, as a fact nothing is discovered.

11. The learned Prosecutor Mr. Khan is heavily relying on the testimony of PW-7 Gajanan Mandade. PW-7 has deposed that at 24:00 hours on 15.08.2015 he saw the accused carrying something in the gunny bag on his bicycle and when PW-7 inquired, the accused disclosed that he was

going towards the house of “Madam”. The said witness was questioned as to why he did not think it necessary to immediately disclose to the police that he saw the accused with a gunny bag, despite he becoming aware on the next day that Mangala was murdered. In response PW-7 stated that the family members had lodged the report immediately. An attempt is made in the cross-examination to bring on record motive to falsely implicate the accused. It is extracted that PW-7 knows Mainabai Masram and Gaju Masram, and that he was prosecuted on the charge of having assaulted Mainabai. It is further extracted that Mainabai is the mother-in-law of the accused. The witness disclaims knowledge that the prosecution was on the basis of the report lodged by deceased Mangala. The witness further denies the suggestion that after he was released from jail he had threatened the accused and deceased Mangala with dire consequences.

12. Apart from what is extracted in the cross-examination, even if we believe the testimony of PW-7

without any reservation, what is established is that the accused was carrying something in a gunny bag on his bicycle. The gunny bag is not seized. Were the gunny bag seized and subjected to forensic examination, light would have been shed on the contents thereof. In our considered view, since the prosecution has failed to establish that the seizure of the bicycle and the clothes is an important incriminatory circumstance against the accused, and we would spell out our reasons at a later stage in the judgment, the circumstance that PW-6 saw the accused carrying something on his bicycle is not clinching.

13. While we are on the testimony of PW-7 who speaks of the accused carrying something in gunny bag on his bicycle, we must note that PW-4 Bandu Kumbhare has not supported the prosecution on the point of seizure of the clothes of the accused on 17.08.2015 and his bicycle on 19.08.2015. The Investigating Officer Parag Pote has deposed that on 19.08.2015, the bicycle used by the accused in the commission of the offence was seized in the presence

of witnesses Gulab Atram and Bandu Kumbhare. While Bandu Kumbhare did not support the prosecution, Gulab Atram is not examined or was not available. PW-10 Parag Pote claims that there were blood stains on the back side of the seat cover and he identifies the seat cover Article-4. We have given our anxious consideration to the record to satisfy ourselves whether there is any material to indicate that the bicycle allegedly seized was exclusively used by the accused. Even according to the prosecution, the accused was residing with his two sons. No attempt is made by the prosecution to bring out in the evidence of PW-7 that the cycle which the accused was riding is the cycle allegedly seized. The seizure is not pursuant to memorandum recorded under section 27 of the Indian Evidence Act. In the absence of clinching evidence to show that the cycle seized was in the exclusive possession and user of the accused, who was residing with two grown up sons, it is difficult to consider the detection of blood of group-B on the back side of the cycle seat as a significant incriminatory material. We further notice, that in the examination under section 313 of the

Criminal Procedure Code. CA reports Exh.72 to 80 are put to the accused as incriminatory material. However, the incriminating contents of the CA report which is that blood of group-B is detected on the bicycle seat and the *baniyan* is not specifically put to the accused. Considering that even according to the prosecution the blood group of the accused and the deceased is the same i.e. group-B, the attention of the accused ought to have been specifically invited to the contents of the CA report. Opportunity to explain incriminatory circumstances is a valuable right and the significance is all the more in cases where the blood group of the deceased and the accused is the same.

14. We are further not inclined to attach great weight to the detection of blood of group-B on the *baniyan* seized by the I.O. from the residence of the accused on 17.08.2015. Apart from the fact, and which we have noted *supra*, that PW-4 did not support the prosecution on the point of seizure of the clothes of the accused on 17.08.2015, all that is deposed by the I.O. is that in the presence of *panch* witnesses

the black pant, shirt and white *baniyan* having stains of blood came to be seized. The prosecution has made no attempt whatsoever to establish that the clothes allegedly seized from the residence of the accused did belong to the accused in as much as the clothes may as well have belonged to the two grown up sons. While the I.O. states that the clothes were seized when the accused was in custody, nothing is brought on record to show that it was pursuant to any disclosure made while in custody, may be a disclosure not recorded in writing, that the seizure was effected. Seizure *panchnama* Exh-24 does not shed any light on the circumstances in which the seizure was effected and all that is recorded is that the clothes were seized from the accused in presence of witnesses.

15. The prosecution has indeed established that not all was well in the matrimonial relationship. While in view of the admissions extracted in the cross-examination of the first informant who is the brother of the deceased Mangala, his testimony is not helpful to the prosecution to establish the

matrimonial discord, the testimony of PW-9 Chetna Tapase who is the employer of the deceased and the fact that the deceased did lodge report/s against the accused complaining of ill-treatment, do adversely reflect on the conduct of the accused. But then, according to us, assuming that the conduct of the accused is sufficient to establish motive, the chain of circumstances is not complete as would exclude every hypothesis other than the guilt of the accused. We have noted several missing links. The motive, assuming that the motive is not slender, and the conduct of the accused in not lodging missing report may at the most raise suspicion. It is trite law that suspicion, even a grave suspicion is not a substitute for proof. We are not persuaded to hold, and indeed it would be extremely hazardous to hold, that the circumstances which are established form such complete chain as would render the innocence of the accused a human improbability.

16. We are inclined to grant the benefit of the doubt to the accused.

17. The accused is entitled to be acquitted of offence punishable under sections 302 and 201 of the Indian Penal Code.

18. The judgment impugned is set aside.

19. The accused be released from custody, unless required in some other case.

20. Fine paid by the accused, if any, shall be refunded.

21. The appeal is allowed in the aforestated terms.

22. The fees of the learned appointed counsel Mr. Bhoyar be quantified and paid in accordance with rules.

(URMILA JOSHI-PHALKE, J.)

(ROHIT B. DEO, J.)

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