

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

CRIMINAL APPEAL NO.218 OF 2015

1. Sarjerao s/o Kisan Kale
Age: 64 years, Occu.: Agriculture,
R/o. Bhambarda,
Taluka and District – Aurangabad. Appellants
(Appeal is abated against appellant No.1 (Original Accused)
vide order dated 09-03-2021)
2. Laxman s/o Sarjerao Kale
Age: 26 years, Occu.: Agriculture,
R/o. Bhambarda,
Taluka and District – Aurangabad. (Original Accused)
3. Phulabai w/o Sarjerao Kale
Age – 58 years, Occu.: Household,
R/o. Bhambarda,
Taluka and District – Aurangabad. (Original Accused)

Versus

The State of Maharashtra

.. Respondent

...

Advocate for Appellants : Mr. Santosh S. Jadhavar

APP for Respondent - State : Mrs. Preeti Diggikar

...

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

RESERVED ON : 16th February, 2023

PRONOUNCED ON : 23rd February, 2023

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. Original accused nos. 1, 2 and 3, who stood convicted by learned Additional Sessions Judge-4, Aurangabad in Sessions Case No. 375 of 2011 for commission of offence punishable under Section 302 r/w 34 of the Indian

Penal code (IPC), are hereby assailing the said judgment and order of conviction dated 19.09.2014 by invoking Section 374 of the Code of Criminal Procedure (Cr.P.C.). During pendency of this appeal, accused-appellant no.1 Sarjerao died. Hence, vide order dated 09.03.2021, the appeal stood abated to his extent.

PROSECUTION CASE

2. Accused no.1 Sarjerao and his wife accused no.3 Phulabai had two sons, namely, Laxman (accused no.2) and deceased Dnyaneshwar. Wife of deceased Dnyaneshwar stayed with accused persons and her husband for six to seven months only. Thereafter she left deceased and went to her parents' house. Wife of accused had instituted proceedings and she wanted her husband to have distinct share in the land. Therefore she had left company of husband Dnyaneshwar and was put up with her parents. Dnyaneshwar was keen in bringing her back for cohabitation and this was precisely opposed by accused persons.

3. In the above backdrop, on 30.06.2011 accused nos. 1 to 3, i.e. parents and brother, beat Dnyaneshwar in their own house and all three of them strangled him with a rope and committed his murder. Neighbour PW1 Bhimrao Kale set law in motion alleging that he heard shouts and cries of deceased from the house of accused. Deceased was screaming for help. Door

of the house of accused persons was closed from inside. After short time, accused appellants only came out of the house. Informant and neighbours entered the house and saw Dnyaneshwar lying on the cot with strangulation mark and blood oozing from his ear. On the strength of above information, FIR was lodged and investigation was entrusted to PW8 API Budhwant, who carried out investigation which included arrest of accused, drawing spot panchanama, inquest panchanama and causing seizure under Section 27 of the Evidence Act. After gathering sufficient evidence, PW8 API Budhwant chargesheeted accused persons for commission of offence under Section 302 r/w 34 of IPC.

4. Case was on the file of learned Additional Sessions Judge-4, Aurangabad, who after framing charge and recording plea of the accused, proceeded to record evidence adduced by prosecution. Defence denied leading evidence. Learned trial Judge scrutinized the entire oral and documentary evidence and after hearing both sides, held that prosecution has succeeded in bringing home the charge and thereby convicted accused and sentenced them to suffer life imprisonment and to pay fine.

5. Above judgment is impugned herein by all accused by raising various grounds mentioned in the appeal memo.

SUBMISSIONS

6. The sum and substance of arguments advanced by learned counsel for the appellants is that there is no cogent evidence about involvement of accused persons in alleged death of Dnyaneshwar. It is pointed out that merely on the evidence of neighbours, FIR is entertained and only relying on their testimonies, conviction has been recorded. According to learned counsel, nobody had seen accused persons coming out of the house and the versions of witnesses to that extent are not sufficiently corroborated. According to him, testimonies of all neighbours are not only inconsistent, but also full of material contradictions, omissions and there are lot of improvements which are brought in their cross-examination rendering their testimonies doubtful and unreliable.

7. Learned Advocate for the appellants pointed out that here, there is allegation of strangulation, but said charge is attributed to all three accused. There is no evidence as to who played which role and therefore, according to him, learned trial court ought to have appreciated this aspect and ought not to have accepted prosecution case. Learned counsel emphasized that infact there is no evidence to show that accused no.3 Phulabai was also involved in alleged strangulation. He pointed out that though prosecution claims that there is recovery of a rope, it is only against accused no.1 Sarjerao. Said recovery ought not to have been applied against all accused. Learned trial Judge failed to appreciate the legal position and has erred in holding all accused persons

guilty. He also emphasized that here prosecution has also not established motive behind the occurrence and this infact turns out to be fatal for prosecution, more particularly when the case is based entirely on circumstantial evidence. That, it was responsibility of prosecution to prove their case beyond reasonable doubt, but in this case prosecution has failed to do so. However, still learned trial court has misconstrued the evidence on record and erred in convicting the accused persons. Lastly, it is submitted that so-called findings reached at by the trial court are not based on sound reasons and therefore, judgment being perverse and illegal, is liable to be set aside by allowing the appeal.

8. Per contra, learned APP would strenuously submit that there is voluminous evidence of immediate neighbours who had no animosity whatsoever against the accused to falsely implicate them. Taking us through the testimonies of prosecution witnesses, more particularly PW1 Bhimrao Kale (informant), PW3 Baliram, PW4 Dattu and PW5 Shahdeo, she would strenuously submit that their evidence is consistent about shouts and cries of Dnyaneshwar being heard around 9.00 p.m. from the house of accused. They had all rushed to the scene of occurrence i.e. house of accused. She pointed out that attempt was also made to open the door and call was given to accused no.1 Sarjerao, but accused persons did not open the door and after a short while, when it was opened, only accused persons came out of the house

whereas Dnyaneshwar did not come out and therefore, these witnesses entered the house of accused and they had seen deceased Dnyaneshwar lying on the cot. Therefore, she vehemently pointed out that none other than accused are responsible for death of Dnyaneshwar. According to her, by examining PW7 Dr. Girish in the trial court, prosecution has established death of Dnyaneshwar to be homicidal one. Land dispute was the motive behind the occurrence. There is evidence to that extent in the record. Resultantly, while summing up, she would submit that there being trustworthy, cogent and reliable evidence, learned trial Judge has committed no error whatsoever in holding accused persons guilty. According to her, the judgment is reasoned one. Legal position has also been applied in appreciating the evidence and therefore, she prays that, such judgment need not be interfered or disturbed.

EVIDENCE BEFORE THE TRIAL COURT

9. **PW1** Bhimrao Kale is the informant and he is immediate neighbour of accused persons. **PW2** Bhimrao Pathade is also a resident of the same locality and he has acted as pancha to spot panchanama Exhibit 55 and inquest panchanama Exhibit 31. **PW3** Baliram is the Sarpanch of the village. **PW4** Dattu and **PW5** Shahdeo both are neighbours of accused. **PW6** Ganesh is the pancha to seizure panchanama, **PW7** Dr. Ganesh is the autopsy doctor and **PW8** API Budhwant is the Investigating Officer.

10. On the strength of testimonies of above witnesses, prosecution has succeeded in the trial court and the judgment and order of trial court now being impugned herein, we, as the first appellate Court, are called upon to test the legality and maintainability of the judgment and order of conviction passed by learned Additional Sessions Judge.

11. Here, admittedly there is no eye witness account and the entire case of prosecution is rested on circumstantial evidence. Whenever case of prosecution is based on circumstantial evidence, there are certain settled cardinal principles and canons of law which are to be borne in mind while appreciating the case. Few landmark Judgments from which the settled legal position can be culled out are as under:

- a) *Hanuman Govind Nargundkar and Another vs. State of M.P.*; AIR 1952 SC 343;
- b) *Sharad Birdhichand Sarda vs. State of Maharashtra*; (1984) 4 SCC 116.
- c) *Dhananajoy Chatterjee @ Dhana vs. State of W.B.*; 1994 (2) SCC 220.
- d) *Shyamal Ghosh vs. State of West Bengal*; (2012) 7 SCC 646;
- e) *State of U.P vs Satish*; (2005) 3 SCC 114;
- f) *Mohd. Mannan @ Abdul Mannan vs. State of Bihar*; (2011) 5 SCC 317.
- g) *Gambhir v. State of Maharashtra* (1982) 2 SCC 351.
- h) *Earabhadrapa alias Krishnappa v. State of Karnataka* (1983) 2 SCC 330.

12. The ratio that is settled by way of above rulings is that to prove guilt of the accused persons by adducing circumstantial evidence, it is essential for prosecution to demonstrate and establish the following aspects :

1. The circumstances from which conclusion is drawn should be fully proved.
2. The circumstances should be conclusive in nature.
3. All the facts so established should be consistent **only** with the hypothesis of guilt and inconsistent with the innocence.
4. The circumstances should, to the moral certainty, exclude the possibility of guilt of any person other than accused.

13. Equally, in administration of criminal justice, Courts are expected to always borne in mind the following cardinal principles :

1. The accused is presumed to be innocent unless such a presumption is rebutted by the prosecution by producing the evidence to show him guilty of offence with which he is charged.
2. If two views are possible on the basis of evidence produced in the case, one indicating to the guilt of the accused and the other to his innocence, the view favourable to the accused is to be accepted.
3. Where the court entertains reasonable doubt regarding the guilt of the accused, the benefit of such doubt should go in favour of the accused.

4. The court must not reject the evidence of the prosecution taking it as false, untrustworthy or unreliable on the ground or on the basis of conjectures and surmises.
5. The case of the prosecution must be judged as a whole having regard to the totality of the evidence.
6. In appreciating the evidence the approach of the court must be integrated and not truncated or isolated. In other words, the impact of evidence in totality on the prosecution case or innocence of accused has to be kept in mind in coming to the conclusion as to the guilt or innocence of the accused.
7. In reaching to the conclusion about the guilt of the accused, the court has to appreciate, analyze and assess the evidence placed before it by yardstick of probabilities, it's intrinsic and animus of witnesses.
8. The court has to keep in mind that the accused 'must be' and not merely 'may be' of guilty of an offence. The mainly distance between 'must be' and 'may be' is long and divides vague conjectures from sure conclusions.
9. Suspicion, however grave it may be, cannot take the place of legal proof.
10. The court must ensure that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, the benefit of doubt must be given to the accused. However, the Court must borne in mind that the reasons of doubt should not be trivial or merely a probable. It must be fair doubt i.e. based upon the reasons and common sense.

14. Keeping the above legal requirements and settled position in mind, we propose to re-examine, re-evaluate and re-assess the oral accounts and circumstances pressed into service by prosecution by formulating impelling circumstances attending the case and then examine whether the cumulative effect of those circumstances negatives the innocence of the accused and serves as a definite pointer towards their guilt thereby unerringly leading to the only conclusion that within all probabilities crime was committed by appellants and none other. On hearing prosecution, following are the circumstances which seem to be relied by prosecution:

- i) Homicidal death.
- ii) Deceased in custody of accused persons.
- iii) Motive.
- iv) Recovery under Section 27 of the Evidence Act.

FIRST CIRCUMSTANCE

i) Homicidal Death.

15. As in this case there is charge under Section 302 of IPC, it is incumbent upon the prosecution, at the threshold to establish that death of Dnyaneshwar was homicidal one and not otherwise. Therefore, we visit the prosecution evidence to ascertain whether burden has been discharged by prosecution to establish death of Dnyaneshwar to be homicidal one. To ascertain the same, it

is desirable to visit inquest panchanama and then, testimony of PW7 Dr. Girish who conducted postmortem.

16. We have come across inquest panchanama drawn in presence of PW2 Bhimrao Pathade. The said panchanama is at Exhibit 31. It seems that in the trial court defence has fairly admitted inquest panchanama Exhibit 31. On going through the same, it is emerging that dead body of Dnyaneshwar was lying on the cot in the house of the accused and there is noting about black mark on the neck of his dead body.

17. Prosecution has also examined **PW7** Dr. Girish at Exhibit 63 and this autopsy doctor testified about receiving dead body of Dnyaneshwar Sarjerao Kale along with inquest. He claims that on external examination, he came across following features :

Face - Congested.

Eye - Partly open, petechial haemorrhages in conjunctivae on both sides.

Mouth-Partly open, tongue present inside the oral cavity.

Oozing of reddish fluid from nose and mouth. Evidence of dry blood stains in right ear.

Column No.16: Evidence of bluish purple discolouration of nail beds of both the hands.

He further claims to have come across following external injuries:

1. Two ligature marks around neck.
2. Abrasion on neck.
3. Abrasion of left shin.
4. Abrasion on left knee.
5. Abrasion of left wrist, dorsal aspect.
6. Abrasion on left arm, lower 1/3rd lateral aspect.
7. Three abrasions parallel to each other, situated above and medial to injury No.6.

On internal examination, he claims to have found following internal injuries:

1. Brain – Congested and Oedematous. Patechial haemorrhages in white brain matter. On neck dissection- Contusion on right side strap muscles of size 5x4 cm, and on left side strap muscles of 3x2 cm, dark reddish in colour alongwith contusion of subcutaneous tissue beneath the ligature mark. No evidence of fracture of thyroid, cricoid cartilages or hyoid bone. And there is evidence of submucosal petechial haemorrhages in larynx, epiglottis and trachea.

In para 5 of his examination-in-chief, Doctor has opined that probable cause of death is “strangulation”. He has identified the provisional postmortem report as well as postmortem report authored by him at Exhibits 65 and 66 respectively.

Here, though defence has cross-examined Doctor, the same does not seem to be on the medico legal aspect, Doctor has flatly denied that he cannot state whether death was due to strangulation or suicidal strangulation. He has completely ruled out possibility of suicidal strangulation. Considering the nature and location of mark coupled with sign of bleeding from ear, opinion reached at by autopsy doctor is supported by sound reasons and has scientific base. Moreover, he has admitted that the rope which was shown to him can be used for self strangulation resulting in death. However, as stated above, in trial court, defence has already admitted the postmortem report. Taking into account the medico legal expert's evidence and the inquest panchanama, we are of the opinion that here, death of Dnyaneshwar is proved to be due to strangulation and hence homicidal.

18. The another aspect which confirms death to be homicidal is that here, on visiting the scene of occurrence panchanama at Exhibit 55, it is apparent that there are no circumstances suggesting suicidal hanging resulting into ligature mark. There is no material in the spot panchanama suggesting deceased Dnyaneshwar hanging himself or there is any possibility, taking the spot panchanama into consideration, that deceased might have met accidental strangulation or accidental suicide or deceased himself committed suicide and thereafter accused persons took down the dead body. Therefore, possibility of

suicidal or accidental hanging being completely ruled out by the circumstances, the only conclusion that gets drawn is that death is only and only homicidal.

SECOND CIRCUMSTANCE

ii) Deceased in custody of accused persons.

19. Prosecution having proved death to be homicidal, it is now required to be seen as to whether, as alleged by prosecution, accused persons are responsible for strangulation and whether their culpability has been established by prosecution.

In support of such second circumstance, it is necessary to visit the testimony of prosecution witnesses.

20. **PW1** Bhimrao Kale, i.e. the informant, testified that house of accused no.1 Sarjerao is situated adjacent to his house. Regarding the occurrence it is his testimony that around 11.00 a.m. he had been to bazar for purchasing bullock and he returned home by 06.00 p.m. and after taking dinner, around 8.30 p.m. to 09.00 p.m., he was watching television. He claims that he heard shouts as “*vachwa vachwa*” from the house of accused. He testified that he and

his wife immediately rushed towards the house of accused. Many people had also gathered there. He saw doors and windows of house of accused in closed condition and after some time, accused nos. 1, 2 and 3 came out of their house. Dnyaneshwar did not come outside the house. He stated that all three accused came and sat on the *oota*. PW3 Baliram became suspicious and called police, who came and directed accused Sarjerao to open the door and accordingly Sarjerao opened it. Thereafter, this witness claims that he entered the house along with police and they saw Dnyaneshwar lying on the cot and there were strangulation marks on his neck and blood was oozing from his ears. Therefore, he lodged report which he identified at Exhibit 50.

While under cross-examination, he answered that Dnyaneshwar was married to Rukhminibai, but she left home and started residing with her parents. This witness denied the suggestion that there was sound of television and as such he did not hear any shouts. He answered that his house is just adjacent to the house of accused and he volunteered that there is mere common wall between their houses and after hearing voice, he immediately went to the house of accused. He admitted that there are two doors to the house of accused i.e. one at front side and one at the backside. He admitted that entry was not attempted to be made by using rear door. Then he was questioned about court cases filed by wife of deceased Dnyaneshwar. There is clear suggestion that there was dispute between Dnyaneshwar and accused on

account of share in the agricultural land. He was questioned about distance between house of Baliram and house of accused. Omissions are brought about accused persons sitting on *oota*, about he and his wife immediately running towards house of accused. Rest is all denial.

21. **PW3** Baliram seems to be Sarpanch of village. He seems to be acquainted with deceased and accused being residents of the village. He stated that on 30.06.2011 around 08.30 p.m. while he was taking dinner, PW4 Dattu came to him and informed him about quarrel going on in the house of accused no.1. PW4 Dattu also told him that there was fight in the house of accused Sarjerao and asked him to immediately come there. Therefore he and Dattu went to the house of Sarjerao. This witness stated that door of the house of Sarjerao was closed. Many people had gathered. He stated that he gave call to Sarjerao to open the door but he did not respond and put off the lights of the house. This witness stated that he gave call to police and he remained present there. After some time, Sarjerao opened the door. Only Sarjerao, Laxman and Phulabai came out of the house. This witness stated that he asked Sarjerao where Dnyaneshwar was and accused allegedly told him that they had killed Dnyaneshwar. He gave call to police who reached at the spot and made Sarjerao open the door. This witness went inside the house alongwith police and saw Dnyaneshwar lying on the cot. There was blood oozing from his ear and mark of strangulation on his neck. In the presence of this witness police

prepared spot panchanama and referred the body for postmortem.

In cross-examination, this witness was asked since when he is Sarpanch and he answered that he is Sarpanch of village Bhambharda since last three years. He gave distance between his house and house of accused as 100 to 150 ft. Then he was asked as to whether he indulges in disputes in the village, to which he answered in affirmative by saying that he tries to solve their disputes. He was unable to state about cases filed by wife of deceased against deceased and other accused and he stated that Bhimrao never told him about it. He stated that house of Bhimrao is approximately at 1000 ft. away from the house of accused. He stated that when PW4 Dattu came to his house, he immediately made call to PW2 Bhimrao. He also was asked about two doors to the house of accused. He answered in cross-examination that when he asked accused to open the door of the house, at that time police officer Budhwant was not present there. He answered that he did not feel it necessary to use the backside door to enter the house of accused. He answered that he had asked Sarjerao to open the door and he accordingly opened it. He further answered that he made call to police twice and then stated that first time accused did not open the door and therefore he made phone call to police. Thereafter, Sarjerao opened the door and that time he again made phone call to police.

22. **PW4** Dattu also is a resident of the village and a neighbour of accused. He stated in his testimony that he was residing near the house of accused who had two sons by name Dnyaneshwar and Laxman. He stated that wife of Dnyaneshwar was not residing with Dnyaneshwar but was residing at her maternal house. **He stated that Dnyaneshwar was residing along with his father Sarjerao, mother Phulabai and brother Laxman.** He too stated that on 30.06.2011 around 9.00 p.m. to 9.30 p.m. he heard shouts from the house of accused and therefore, he and one Shamrao went towards the house of accused. They saw front door to be closed and therefore he immediately went to Baliram (PW3) who was Sarpanch of their village. Thereafter he and Baliram came towards the house of accused. He stated that Baliram asked Sarjerao to open the door. He stated that before opening door of the house, they heard voice of Dnyaneshwar as “*sodva sodva*”. After some time, on the say of Baliram, accused Sarjerao opened the door and at that time, Sarjerao, Phulabai and Laxman came out of the house and Sarjerao again locked the door of the house and while they were about to leave, villagers stopped them and Baliram informed police on phone to come and thereafter Sarjerao was made to open the door and all villagers, including the Sarpanch, went inside the house. He Stated that he saw marks of hanging on the neck of Dnyaneshwar and blood oozing from his ear. He stated about his statement being recorded by Magistrate under Section 164 of Cr.PC.

In cross-examination, he answered that his house is 25 to 30 ft. away from the house of accused. This witness was questioned about marriage of Dnyaneshwar and whether there was dispute between him and his wife and this witness admitted about it and that wife of Dnyaneshwar had left matrimonial house and was staying with her parents. Omission is brought about Baliram telling Sarjerao to open the door of house and then Sarjerao opened it, about uttering "*sodva sodva*".

23. **PW5** Shahdeo also stated that accused persons were residing jointly with deceased Dnyaneshwar. On 30.06.2011, he claims to have heard sound of something falling in the house of accused and so he went there. He stated that he heard voice "*bhau mala yeodhya veli soda, me gao sodun jato*" and according to him, the voice was of Dnyaneshwar. People had gathered in front of house of accused and after five minutes, accused Sarjerao, Phulabai and Laxman came out of the house and Sarjerao locked the door and while accused were leaving, people restrained them and after short time police came. He stated that thereafter, they all went in the house and saw Dnyaneshwar lying on the cot on his back and he saw blackish mark on the neck of Dnyaneshwar and blood oozing from his ear.

In cross-examination he answered that when he went to the spot, at that time Baliram was not present there. He came subsequently. He claims that once he knocked the door but it was closed from inside. He was questioned about his statement to police and he denied about giving false statement.

ANALYSIS OF THE ABOVE TESTIMONIES

24. From the above discussed oral accounts of above named witnesses, it is emerging that accused and deceased were residing in one house. Exhibits 80 to 83 confirm that they all resided in one house. All witnesses are found to be consistent about occurrence taking place on 30.06.2011 between 8.30 p.m. to 09.00 p.m. They are all consistent about hearing shouts and cries from the house of accused. All of them speak about door of the house of accused to be closed from inside. On arrival of villagers and Sarpanch, accused persons were called upon to open the door and after short time, all above witnesses claim to have seen accused nos. 1, 2 and 3 coming out of house. They are also unanimous about accused Sarjerao locking the door from outside and on arrival of police he being made to open the door and thereafter these witnesses entering the house and seeing Dnyaneshwar lying on the cot with mark on his neck and blood oozing from his ear. Though all above witnesses are cross-examined at length, they have withstood and remained steadfast about the shouts and cries coming from the house of accused, about only

accused nos. 1, 2 and 3 emerging and later on, when all others entered the house of accused, deceased was found dead. None of them had reason to implicate the accused persons. Therefore, their testimonies are trustworthy.

25. Therefore, in our considered opinion, it is apparent that accused and deceased were together in the house that night. No doubt what happened within the closed house is not known to anyone as there is no direct evidence. Under such circumstances, infact, there cannot be direct evidence because whatever events took place were in the closed house. However, aspect of presence of all the three accused in the house has clearly come on record. Independent witnesses, who are neighbours, are speaking about accused as well as deceased residing and sharing the same house and deceased being found dead in suspicious circumstances. Admittedly, it is also not defence of accused that they were elsewhere and thereby even none of them have taken plea of alibi. Consequently, there does not seem to be any dispute that accused were not incumbents of the house that day.

26. Therefore, in the light of above circumstances, law demands explanation from incumbents of the house as to how unnatural death of the deceased has taken place while he was in their company.

27. Section 106 of the Evidence Act, which comes into play, is reproduced as below:

“106. Burden of proving fact especially within knowledge.-

When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

28. Application of above provision is an important aspect. By series of pronouncements, the Hon’ble Apex Court has examined the scope of said provision in landmark cases like *Shambu Nath Mehra v. State of Ajmer* [AIR 1956 SC 404]; *State of W.B. v. Mir Mohammad Omar* [(2000) SCC (Cri) 1516]; *Sucha Singh v. State of Punjab* [(2001) SCC (Cri) 717]; *Munawwar v. State of Uttar Pradesh* [(2019) 3 SCC (Cri) 314]; *Rajender v. State (NCT of Delhi)* [(2020) 1 SCC (Cri) 63];

29. In *Shambu Nath Mehra* (supra) the Hon’ble Apex Court has observed as under :

“Section 106 must be considered in a commonsense way; and the balance of convenience and the disproportion of labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to

undermine the well-established rule of law that, save in a very exceptional class of cases, the burden is on prosecution and never shifts.”

In para 11 it is elaborated as under:

“11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word “especially” stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to a very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder, because who could know better than he whether he did it or did not. It is evident that, that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried”. Emphasis laid.

30. Likewise in the case of ***State of W.B. v. Mir Mohammad Omar*** (supra) it is observed in para 31 as under:

“31. that the pristine rule, that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning . The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.”

31. In the case of ***Sucha Singh*** (supra), the Hon’ble Apex Court observed in para 19 as under:

“19. We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference.”

32. Very recently the Hon’ble Apex Court in the case of ***Ram Gopal S/o Mansharam v. State of Madhya Pradesh*** [2023 LiveLaw (SC) 120] reiterated

that, “once theory of last scene together was established, the accused was expected to offer some explanation as to when under what circumstance he had parted the company of the deceased. If the accused offers no explanation or furnishes a wrong explanation, absconds, motive is established and some other corroborative evidence in the form of recovery etc. forming a chain of circumstance is established, conviction is based on such evidence”.

It is further observed that it is true that burden to prove to the guilt of accused is always on prosecution, however, in view of Section 106 of the Evidence Act, when any fact is within the knowledge of any person, the burden of proving that fact is upon accused.

33. In the light of above discussion, the ratio of above provision that is culled is that initial burden of proving the case is always on prosecution, but when certain circumstances are attributable exclusively to the knowledge of accused, then onus shifts on him to discharge the same by offering plausible explanation and law does not permit him to escape without offering explanation. In the light of such legal requirements, here, we have already examined the prosecution evidence in *toto* and have already reached to a conclusion that undisputedly deceased, who was son of accused nos.1 and 3 and brother of accused no. 2, is demonstrated to be jointly residing with accused persons under one roof. Unfortunately, deceased had met homicidal

death in the very house jointly occupied by accused persons. Therefore, it falls upon the accused persons to offer an explanation for the homicidal death met in the house. We have gone through the answers given by accused while facing questions under Section 313 of Cr.P.C. There is simplicitor denial. Under such circumstances it is open for this Court to draw adverse inference. Opportunity to explain incriminating material has been lost by the accused persons. Resultantly, there is no hesitation on our part to hold that accused are solely responsible for death of Dnyaneshwar. Hence even this circumstance can be accepted as proved.

THIRD CIRCUMSTANCE

iii) Motive.

34. Learned counsel for the appellants criticized the evidence of prosecution by submitting that here prosecution has utterly failed to prove the very motive behind the occurrence. However, while cross-examining PW1 Bhimrao Kale (informant), there is suggestion from defence itself and it is admitted by this witness in para 7 of his cross-examination that there were always disputes between Dnyaneshwar and the accused on account of share in the agricultural land. Even wife of Dnyaneshwar had left his company in the backdrop of civil dispute and Dnyaneshwar was eager to bring her and cohabit with her in the house, to which there was said to be resistance by accused persons. Here,

during cross-examination, Investing Officer seems to have admitted that wife of deceased had filed complaint against Dnyaneshwar as well as his parents and brother for commission of offence under Section 498-A of IPC. PW1 Bhimrao Kale (informant) has also answered in cross that wife of Dnyaneshwar had filed suite for getting share in agricultural land which was in the name of Sarjerao. With such material on record, it does not lie in the mouth of accused to put forth a case about failure of prosecution to prove motive.

35. Our own Hon'ble High Court in the case of *Sheikh Jahangir Ali v. State of Maharashtra* [2001 (2) Mh.L.J. 67], while invoking Section 8 of the Indian Evidence Act, held that motive is always locked in the heart of the accused and it is well known dictum that even devil may not know the thoughts of man. Motive, no doubt, assumes importance in a case resting of circumstantial evidence, yet the absence of motive is not fatal if circumstantial evidence is established with cogent evidence.

FOURTH CIRCUMSTANCE

iv) Recovery under Section 27 of the Evidence Act.

36. The Investigating Officer PW8 API Budhwant in his testimony speaks about accused Sarjerao, while in custody, making memorandum of disclosure

and in presence of pancha, the same to be noted and thereafter accused Sarjerao taking them and handing over rope. Prosecution has examined the pancha to said memorandum and disclosure i.e. **PW6** Ganesh who in his testimony at Exhibit 62 stated that on 01.07.2011 he was called by Karmad Police Station. His friend Raju Kulkarni was also present there. Then he stated that police read over panchanama and showed one rope. Then he stated that accused were in the lockup and that he had not seen the accused. He denied that accused Sarjerao gave any memorandum in his presence. Therefore, finding him not supporting, learned APP sought permission of the court to cross-examine its own witness and while crossed at the hands of learned APP, this witness stuck up to his earlier version about accused Sarjerao giving statement showing his readiness to produce one rope. However, this witness has admitted his own signature on the memorandum. Then he answered that he read the panchanama and then signed it. He also is found to be giving measurement and colour of rope and he has also identified the said rope. The Investigating Officer PW8 API Budhwant has also reiterated about accused giving memorandum of disclosure and recovery of rope being caused in pursuance to it. It needs to be noted that occurrence is of the night of 30.06.2011 and immediately on the next day after arrest, accused seems to have given memorandum and the rope is before the court.

37. It is true that as put forth by defence, pancha witness PW6 Ganesh has at one point of time denied that accused Sarjerao gave memorandum in his presence and thereby having resiled and not supported prosecution and therefore declared hostile, his entire evidence need not be discarded. It is settled law that so much of the statement on oath which is found to be worthy of credence, that much part can be relied and taken into consideration. In the light of such legal position, here, the initial part of testimony of this witness about his visit to police station on 01.07.2011 and he going there along with another pancha whose name he supplies, and about drawing of panchanama and seeing a rope, and subsequently in cross-examination admitting that accused showed his readiness to produce rope and accordingly he took police and panchas to a place and thereby recovery of rope being caused, can very well be taken into consideration and applied in evidence.

38. Much emphasis was laid by learned defence counsel in questioning recovery under Section 27 of the Evidence Act by attacking prosecution case and submitting that here, there are three accused and when it is not clear as to who amongst three strangled, according to him, it is unsafe to attribute recovery to any of the accused persons, more particularly, no role having being defined. The above submission do not impress us for the simple reason that there is evidence suggesting all three accused persons to be present in the

closed house wherein deceased was found dead with strangulation marks. Learned APP has already invited our attention to the scene of occurrence panchanama wherein there are pieces of bangle lying in the house at the spot. These circumstances clearly indicate that there was manhandling and scuffle prior to strangulation. Deceased was moderately built. Strangulation is impossible in that view by only one person. Accused no.3 also had suffered abrasions. Therefore, such material clearly indicates that deceased was initially either incapacitated, held by two persons facilitating strangulation at the hands of one person. It is not handy work of one person. Only joint efforts would yield such strangulation. Therefore above objection raised by learned defence counsel has no substance. On the contrary, even if there is recovery at the instance of only accused no.1, in the light of above discussion, the said recovery can very well be used against all accused persons. When there recovery of article like rope, there is no need for each of the accused to go together to hide it. Hence, even this circumstance is established by prosecution.

SUMMATION

39. In the light of above discussion, we are convinced that deceased Dnyaneshwar was son of accused nos. 1 and 3 and brother of accused no.2. Death of Dnyaneshwar has taken place in the house which was shared by all

accused as well as deceased. Villagers, who are immediate neighbours, are witness to the episode of hearing shouts and cries from the closed house of accused. Some of the villagers, who are immediate neighbours, are made to step into the witness-box. They are unanimous about accused persons emerging from their closed house and thereafter, in presence of police, when entry was made in the house of accused, deceased Dnyaneshwar was found dead with strangulation mark and blood oozing from his ear. The autopsy doctor PW7 Dr. Girish has confirmed death to be due to strangulation. Possibility of any outsider entering the house is ruled out. Rather, presence of accused persons is confirmed by almost all prosecution witnesses. Resultantly, finger of guilt is rightly pointed towards accused persons and they are solely responsible for homicidal death of Dnyaneshwar. Motive about share in the agricultural land has also surfaced in the evidence of witnesses. Therefore, according to us, prosecution has proved beyond reasonable doubt that accused strangled deceased and are solely responsible for committing his murder.

40. We have carefully gone through the impugned judgment and order passed by learned Additional Sessions Judge. It seems that there is proper appreciation of prosecution evidence. The answers given by witnesses in cross-examination are also taken into account before reaching to the findings which are supported by sound reasons. In appeal before us, no illegality, perversity or

error at the hands of trial Judge in appreciating the evidence is brought to our notice. No case being made out on merits for interfering in the judgment and order of conviction, we proceed to pass the following order:

ORDER

The appeal is hereby dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

VRE