

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 29 OF 2022

Tukaram s/o Yadvaji Sable,
Age 52 years, Occu. Agricultural,
R/o Nijampurwadi, Tq. Ardhapur,
Dist. Nanded.

... Appellant
[father of deceased]

Versus

- 1] The State of Maharashtra,
Through Police Station Officer,
Purna Police Station,
Tq. Purna, Dist. Parbhani.
- 2] Madhav s/o Shivaji Rajegore,
Age 28 years, Occu. Agricultural,
R/o Nijampurwadi, Tq. Ardhapur,
District Nanded.

... Respondents
[Resp.No.2 orig. accused]

WITH
APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 101 OF 2021

The State of Maharashtra,
Through Police Station Officer,
Police Station, Purna,
District Parbhani.

... Applicant

Versus

Madhav S/o. Shivaji Rajegore,
Age 23 years, Occu. Agril,
R/o. Nijampurwadi, Tq. Ardhapur,
Dist. Nanded.

... Respondent

.....

Mr. Gajanan G. Kadam, Advocate for Appellant.
Mrs. V. S. Choudhari, APP for Respondent State in Appeal and
Applicant in ALS

.....

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

DATED : 14.07.2023

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. Father of deceased has preferred instant appeal, getting dissatisfied by the judgment and order of acquittal dated 04.10.2021 passed by Sessions Judge, Parbhani in Session Case No. 8 of 2017.

Similarly, even State is taking exception to the same judgment and is hereby seeking leave to file appeal.

We have heard it at the stage of admission.

PROSECUTION CASE IN BRIEF

2. Crime was registered bearing no. 210 of 2016 by police official contending that, when he and his colleague had been to investigate crime no. 209 of 2016, at that time around 1.30 p.m. one Pandurang Babarao Kale, an electrician, met them and informed about a motorcycle bearing registration no. MH – 26 – AW – 3605 lying near the field of one Bhimrao Kale and there was blood near the motorcycle. On receipt of such information, he and his

colleague both rushed to the said spot. There they saw dead body of a person between age group of 20 to 25 years lying there. Inquiry was undertaken and it revealed from the vehicle particulars, that the dead body was of Gopinath Tukaram Sable, resident of Nijampurwadi, Taluka Ardhapur, District Nanded. There were several injuries on the person of deceased and therefore, on behalf of State, this police official registered crime bearing no. 210 of 2016 for the offence punishable under Section 302 of IPC.

Investigation was undertaken by PW11 PI Ramrao Gadekar. According to the Investigating Officer, complicity of present respondent was revealed and therefore, he was duly chargesheeted. The case was conducted by learned Sessions Judge, Parbhani, who after framing charge, permitted prosecution to adduce evidence and on appreciating the evidence, by its judgment and order dated 04.10.2021, reached to a finding that prosecution failed to bring home the charges.

The above order of acquittal is now questioned by both, father of deceased as well as the State.

RIVAL CONTENTIONS

3. Learned counsel for the appellant, who is father of deceased, would point out that prosecution had successfully shown that death of Gopinath, son of the appellant, was homicidal. Even learned Sessions Judge has answered this point in affirmative. It is further submitted that investigation revealed that present respondent was in the company of deceased. That, there are CCTV footages which were gathered by investigating machinery which clearly reveal present respondent to be with deceased. It is further pointed out that, that apart, even investigating machinery had collected and gathered hair of respondent from the very hands of deceased. On DNA analysis of the said hair, the same were proved to be hair of respondent. Therefore, there was overwhelming and clinching evidence of involvement of respondent.

4. Learned counsel further submitted that respondent was upset as he was nurturing grudge against deceased Gopinath on the allegation of keeping an evil eye on his sister. Therefore, it is submitted that even motive was strongly established by prosecution. Thus, according to learned counsel, there are strong, cogent and reliable circumstances and evidence which unerringly point to the

involvement of respondent. However, learned trial court has utterly failed to consider and appreciate such quality of evidence.

5. It is further pointed out that apart from above clinching evidence, even there was recovery of blood stained clothes. Weapon is also seized at the instance of respondent and therefore, in the light of recovery of such incriminating material, it is submitted that, learned trial Judge ought to have recorded guilt and ought to have convicted the respondent, but it having failed to do so, it is submitted that appeal deserves to be allowed.

6. Learned counsel for the appellant took us through the testimony of all 12 witnesses and prayed for granting relief of quashing and setting aside the impugned judgment.

7. Likewise, even learned APP for the State would submit that prosecution had established the case against respondent by adducing evidence of 12 witnesses. Their testimonies have remained unshaken on crucial points. That, all circumstances were cogently proved. That, there was strong incriminating evidence in the form of CCTV footages, DNA report analysis, recovery and therefore, guilt was satisfactorily proved by prosecution, but, she submits that, only due to

non-appreciation of evidence in its proper perspective, trial has culminated into acquittal and hence, as State is desirous of preferring appeal, she prays for leave.

8. Being first appellate court and the last fact finding court, this court, as required, undertakes the exercise of re-appreciating, re-analyzing and re-evaluating the entire evidence adduced by prosecution in the trial court.

On doing so, it is emerging that in support of the accusation and charges, prosecution has examined in all 12 witnesses. For the sake of comprehending the evidence and appreciating it, we propose to categorize the witnesses as under:

Police Witnesses :

PW1- Syed Moin, PHC [Informant].

PW10- Rama Mogre, Police Naik, carrier of muddemal.

PW11- Ramrao Gadekar, P.I., Investigating Officer.

Relatives/Acquaintances :

PW2- Nagorao Dhage, an acquaintance of father of deceased and to whom CCTV footage was shown.

PW3- Tukaram Sable, father of deceased.

PW8- Aruna Sable, mother of deceased.

Medical Evidence :

PW4- Dr. Shrikant Kuldeepak, autopsy doctor.

Technical Evidence :

PW5- Shailesh Dagadu, who copies CCTV footage.

PW12- Dattaram Angre, Nodal Officer, Vodafone Idea Ltd.

Pancha witnesses :

PW6- Nageshwar Khandare, pancha to memorandum of disclosure and recovery.

PW7- Gautam Narnavare, pancha to spot panchanama and inquest panchanama.

PW9- Satish Kadam, pancha to recovery of clothes panchanama.

9. Here, there is no dispute that there being no direct evidence, the case is entirely based on circumstantial evidence. Since the landmark case of *Hanumant Govind Nirgudkar and another v. State of M.P.*, AIR 1952 SC 343 followed by water shedding judgments in the case of *Shivaji Sahebrao Bobade v. State of Maharashtra*, AIR 1973 SC 2622; *Sharad B. Sarda v. State of Maharashtra*, AIR 1984 SC 1622; *Padala Veera Reddy v. State of Andhra Pradesh*, 1989 (Suppl.2) SCC 706; *Dhananjay Chatterjee @ Dhana v. State of West Bengal* , 1994 SCC (2) 220 and *State (NCT of Delhi) v. Navjyot Sandhu @ Afsan Guru*, 2005 (11) SCC 600, five golden principles are enunciated which are as follows:

- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. 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”. 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 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 that 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.

10. Bearing in mind the above legal position, we proceed to examine and scrutinize the evidence on record. It seems that prosecution has pressed into service the following circumstances in support of its above case of involvement and guilt of respondent:

1. Motive.
2. Last seen together i.e. CCTV footage.
3. Recovery & discovery of weapon and clothes of accused.
4. DNA analysis report and CDR.

11. Before adverting to the aspect of circumstances to ascertain whether they are cogently and firmly proved, it is necessary to see whether at the outset, prosecution has established that death of Gopinath is homicidal or not.

12. **PW4** Dr. Shrikant Kuldeepak, autopsy doctor at Exhibit 42, has noted the following external injuries:

1. Lacerated wound to right side temporal region on size 11 x 4 x 3 c.m. horizontal bleeding present.
2. Lacerated wound right side temporal region below pinna horizontal 9 x 4 x 3 c.m. bleeding present.
3. C.L.W. to right side angle of mandible to mid chin bleeding 12 x 4 x 3 c.m.
4. Stab injury to right side neck oval shape, 5 x 3 x 3 c.m.
5. Right side cheek C.L.W. vertical 8 x 3 x 3 c.m. fracture or right side mandible 3 x 1 x 2 c.m.
6. C.L.W. right side chin oblique 3 x 2 x 2 c.m.
7. C.L.W. to occipital region right size 10 x 3 x 3 c.m. on fracture of skull under it 5 x 2 x 2 c.m.

8. Left side maxilla C.L.W. horizontal 6 x 3 x 3 c.m. with fracture of maxilla 3 x 2 x 2 c.m.
9. C.L.W. to forehead left side 5 x 2 x 2 c.m. vertical fracture of skull under it 2 x 2 x 2 c.m.

C.L.W. oblique 4 x 2 x 4 c.m. on forehead left side.
C.L.W. oblique 5 x 2 x 2 c.m. forehead left side.
C.L.W. oblique 3 x 2 x 2 c.m. forehead left side.
10. C.L.W. to left parieto temporal region of skull oblique 3 x 3 x 5 c.m.
11. C.L.W. to temporal region parallel wound 5 x 3 x 2 c.m.
12. C.L.W. to left occipital region posterior 3 x 2 x 3 c.m. fracture of skull under occipital region 3 x 2 x 2 c.m.
13. C.L.W. to occipital region horizontal with bleeding 3 x 3 x 3 c.m.

All injuries due to hard and sharp object. All the injuries ante mortem in nature.

He claims to have come across corresponding internal injuries which are as under:

1. Fracture of right side occipital region 5 x 3 x 3 c.m.
2. Fracture of left side, forehead 3 x 3 x 3 c.m.
3. Fracture of left occipital region 3 x 2 x 2 c.m.

On examination of thorax, he found large vessel middle meningeal artery cut totally and bleeding present.

On examination of abdomen, he found semi digested food present in small intestine.

In his opinion, death was due to “hemorrhagic shock due to multiple injuries” and it was within two hours of the last meal. He further opined that the injuries noticed by him are possible by article like *sattur* and injury no.4 is by pointed part of the weapon and other injuries are possible by blunt side of the weapon.

In cross, he admitted that CLWs are mostly possible by hard and blunt object. He admitted that struggle injuries are possible during fight between two persons. He pointed out that in 13 injuries, there was no struggle injury. He denied injury by various blows. He admitted that in scuffle assailant may also sustain resistance injury.

In the light of above chief and cross, and taking note of the site and nature of injuries noticed on external as well as internal examination, death for sure is shown to be homicidal one.

13. Prosecution having succeeded in showing death of Gopinath to be homicidal, it is now further required to be seen whether as alleged by prosecution, respondent herein is responsible for the said injuries and ultimately guilty of homicidal death of Gopinath.

14. Now let us examine the circumstances taken recourse to and relied by prosecution which are as under:

1. Motive.

15. Case being based on circumstantial evidence, as is settled law, prosecution is expected to establish motive as it assumes significance in a case based on circumstantial evidence. Therefore, let us see whether motive has been strongly proved.

16. On taking survey of the status and role of witnesses, in our opinion also, evidence of father of deceased [PW3 Tukaram], mother of deceased [PW8 Aruna], father's relative [PW2 Nagorao] and Investigating Officer [PW11 PI Ramrao Gadekar] seems to be relevant.

17. On scrutinizing the evidence of father of deceased [PW3 Tukaram], it is apparently emerging that, about so called intention of his son i.e. about evil eye on sister of respondent, he received information from police. His wife [PW8 Aruna] deposed about learning about the so called intention from her husband. The Investigating Officer [PW11 P.I. Ramrao Gadekar] seems to have

uttered nothing as to what motive is revealed during investigation. PW2 Nagorao, a distant relative of father PW3 Tukaram, while under cross, seems to have admitted that there was no enmity between respondent and deceased prior to the incident. Therefore, here on the first count, prosecution has not proved the circumstance of motive behind the occurrence.

2. Last seen together i.e. CCTV footage.

18. Taking into account the nature of submissions advanced before us, it seems that much emphasis is laid on electronic evidence i.e. the so called closed circuit television [CCTV] footage which allegedly was gathered by the Investigating Officer [PW11 P.I. Gadekar]. The investigating machinery seems to have obtained the footage from a CCTV camera which was said to be installed on a bus stand. It seems that services of **PW5** Shailesh were extracted by investigating machinery for obtaining the CCTV footage. This witness PW5 Shailesh, at Exhibit 48 gave evidence that he runs a business of selling CCTV units and even repairing the same. According to him, on 12.09.2016, he was called by police officer Gadekar and he was requested to copy the CCTV footages of camera nos. 5 and 6 installed at the Basmath bus stand. According to him, the footages were

retrieved between 10.00 a.m. to 12.00 noon of 11.09.2016. He stated that he suggested police to bring new digital versatile disc [DVD]. Police duly brought DVDs of Sony company. He verified that the said DVDs are empty and thereafter he confirmed the footages from CCTV, downloaded the same in a pen drive which was empty and he connected it to network video recorder [NVR]. Then he copied the relevant data from camera nos. 5 and 6. He gave details of the hard disk installed in the CCTV unit in his chief. He stated that there is no possibility of manipulation or tampering to the CCTV footages. He claims about issuing certificate as per Section 65-B of the Evidence Act. He stated that he copied the same footages in a CD and verified that it was correctly recorded. While recording his evidence, in para 6, learned Sessions Judge seems to have noted that on playing the CD in the court hall, **no recording** was found showing deceased and accused together.

In his cross, this witness has admitted that he is not responsible for taking care of the CCTV units at the bus stand. He answered that he has issued certificate under Section 65-B of the Evidence Act which was prepared by police and he merely signed it. He denied visiting the authorities who were in control of the CCTV units at the bus stand. He is unable to state as to what are the provisions of Section 65-A of

the Evidence Act. He admitted that he did not verify whether NVR was in regular use. He admitted that no digital video recorder [DVR] was available in the police station when he visited the police station. Omissions are brought in cross para 9 about asking police to bring new DVDs, about he verifying it to be empty, about connecting pen drive to NVR, about coping relevant footages from 10.30 a.m. to 12.00 noon and about informing police about there to be no chances of manipulation.

19. It seems that even **PW2** Nagorao and **PW3** Tukaram [father] in their evidence had spoken about seeing footages in the police station. However, while they were in the witness box, so called footages allegedly seen by them at police station were surprisingly not confronted to them.

20. Therefore, on the conjoint reading of testimonies of PW2 Nagorao, PW3 Tukaram and that of PW5 Shailesh, in our opinion, prosecution has miserably failed to establish from the so called CCTV footages about accused and deceased to be in each other's company that day. Answers given by PW5 Shailesh in cross has knocked the prosecution case about availability of CCTV footage at the bottom itself. He is not an expert. He has no control over the CCTV system

from which he allegedly retrieved the very pen drive which he claims to have used for downloading and further preparing CD/DVD from the same pen drive. Nothing was said to be visible in the evidence. Even otherwise, when this witness had admitted that he has merely certified on a certificate already prepared by police, the aspect of availability of electronic evidence gets watered down. Therefore, the so called circumstance of last seen together also gets excluded from consideration for appreciation of the case of prosecution.

3. Recovery and discovery of weapon and clothes of accused.

21. By examining **PW6** Nageshwar, prosecution has attempted to substantiate their case about memorandum of disclosure and seizure of so called article *sattur*. The occurrence came to light on 11.09.2016. Evidence of Investigation Officer [PW11 P.I. Gadekar] shows that involvement of respondent was revealed on 13.09.2016. He is shown to be taken in custody on 16.09.2016 i.e. after three days of the occurrence. According to PW6 Nageshwar, while in custody, in presence of this witness, respondent gave memorandum that he is ready to show the place where he has concealed the weapon and accordingly, disclosure memorandum Exhibit 53 was drawn and

thereafter, accused took police party and the panchas near the spot which was near Zero phata. Respondent allegedly got down and went towards a neem tree and thereafter from the grass beneath the neem tree, accused took out *sattur* and produced it and the same was sealed under panchanama Exhibit 54.

In cross, this witness has stated that said weapon was lying in the grass openly and was not covered in any manner. He stated that accused searched the *sattur* and thereafter took it out. He stated that *sattur* was kept in a paper bag and thereafter, police took it in a carry-bag and it was sealed. Witness in cross has admitted that panchanama is silent about *sattur* being taken in a carry bag.

22. Apparently, the said seizure is from an open place. Therefore, taking into account the manner of recovery and discovery and more particularly, it being from open place, such circumstance cannot be straightway accepted as proved, as it is further expected of prosecution to cogently connect accused with weapon.

23. Similarly, prosecution also claims that clothes of accused were seized at his instance from his house. However, on examining the evidence to that extent, more particularly of **PW9** Satish, it is revealed

that when accused took them to his house, clothes were hanging on a wall to a hook and there were blood stains on the pant and shirt. This witness stated that when police made inquiry with respondent about the clothes, that time, he disclosed that the clothes were his clothes. A mobile was also seized in the personal search. However, as per prosecution itself, accused was already arrested on 16.09.2016 and it is after disclosure he was taken to his house. Therefore, it is apparent that when he was taken in custody and arrested, at that time there was no mobile found in his pocket/personal search.

24. Taking into account the above evidence regarding seizure of clothes, it is surprising that clothes which were said to be blood stained were openly kept hanging in the house to a wall from 11.09.2016 till its seizure on 16.09.2016. Therefore, even the so called seizure of blood stained clothes of accused is not free from doubt. Resultantly, even the circumstance of recovery and discovery is not firmly and cogently established by prosecution.

4. DNA analysis report and CDR.

25. Both appellant as well as State are taking recourse to DNA sample, its analysis, its report and CDR. According to appellant, hair of accused were in the palm and grip of deceased. On analysis of the

same, the hair were established to be of respondent. Therefore, culpability of respondent is strongly established. State also has come up with similar submissions.

26. In the light of above submissions, we have carefully and minutely scrutinized the oral as well as documentary evidence. We wish to note that alleged occurrence has taken place on 11.09.2016 and same day inquest was drawn and thereafter body was referred to postmortem. PW4 Dr. Kuldeepak, autopsy doctor, who conducted postmortem, has retained only viscera of deceased. His evidence does not suggest that while conducting external examination, he found hair in the palms of deceased. Respondent/accused is undisputedly arrested on 16.09.2016. Record shows that on three occasions respondent/accused was subjected to medical examination. Only on last occasion i.e. on 20.09.2016, his hair has been collected for DNA sampling i.e. through medical officer, who admitted in cross that he did not draw distinct panchanama of collection of hair of respondent/accused and he did not append signature or seal of the hospital over the DNA sample kit. While going through the papers, it is also noticed by us that prosecution has attempted to show that there was seizure of hair which were in the palm/hand of deceased on 12.09.2016 between 8.00 to 9.00 hrs. However, PW4 Dr. Kuldeepak has

conducted autopsy on the earlier night itself. Therefore the question that arises is, on the basis of what Exhibit 83 has been drawn. Apparently it is undated. Further, pancha to so called Exhibit 83 i.e. PW7 Gautam merely speaks of seizure of clothes of deceased and he is silent about collection of any hair from the hand/grip of deceased. This witness PW7 Gautam also is found to be admitting in cross about police calling him on the next day and he going there around 11.00 p.m to 12.00 noon. Therefore, hair collection procedure is surrounded by various suspicious circumstances. It is not reconciling with the case of prosecution. The above discussed material clearly shows that evidence is tried to be developed.

27. Another aspect which renders this circumstance unworthy of credence is that there is no link evidence or chain of custody for the reason that, in spite of DNA sample kit available with carrier PW10 Rama Mogre, Police Naik, in view of his deposition about receiving DNA kit on 20.09.2016 itself, the sample has not been deposited with Forensic Laboratory, Kalina immediately but is retained by this witness up to 22.09.2016. Therefore, chain of custody or link evidence is also not free from doubt.

28. True it is that DNA report is confirming said hair to be of respondent no.2, however, in view of above referred discrepancies,

chain of custody/link evidence is coming under shadow of doubt and hence, the report cannot be straightway accepted.

29. By various pronouncements, the Hon'ble Apex Court has dealt with the issue of evidentiary value of DNA evidence. Very recently the Hon'ble Apex Court in the case of ***Rahul v. State of Delhi, Ministry of Home Affairs***; (2023) 1 SCC 83 has held and observed that DNA evidence is in the nature of **opinion evidence** as envisaged under Section 45 of the Evidence Act and like other opinion evidence, its probative value varies from case to case.

In the above judgment, procedure for collection and preservation of evidence is also dealt and discussed. Therein it has been observed;

“If DNA evidence is not properly documented, collected, packaged and preserved, it will not meet the legal and scientific requirements for admissibility in a court of law.....”

30. In the light of above legal requirement, if the evidence in the case in hand is scrutinized, in view of material discussed by us in aforesaid para, that the procedure of collection and preservation of sample of hair is not free from doubt, possibility of contamination or

tampering has not been completely ruled out. Doubt of safe custody of sample is also arising out of unwarranted retention by PW10 Police Naik Rama Mogre in his own custody and this also contributes to the already weak evidence. Therefore, here, though report is claimed to be positive, in the light of above discussion, as like learned trial court, we are also not inclined to accept the circumstance as proved.

31. Though efforts seem to have been done to gather CDR and further efforts are made to examine official of Vodafone company, prosecution has not been successful in establishing that mobile was possessed and also used by respondent herein. Therefore, even this exercise has turned out to be futile. Resultantly, even this circumstance cannot be said to be proved.

SUMMATION

32. To sum up, here on examining the entire oral and documentary evidence of prosecution, in our opinion, prosecution has not proved any of the circumstances relied by it firmly and cogently and beyond reasonable doubt. The chain of circumstances is not complete. Rather it is found to be getting snapped at various places. Therefore, when prosecution has failed to establish the guilt of accused beyond

reasonable doubt, benefit has to go to him. On re-appreciation and re-analysis, we are of the considered opinion that prosecution has miserably failed to bring home the charges by adducing cogent and reliable evidence.

33. On going through the impugned judgment, it is noticed that learned trial Judge has, on hearing both sides, appreciated both oral and documentary evidence in correct perspective. The requisite law and legal position has been applied at required places and thereafter, on correctly appreciating the evidence, conclusion has been drawn. Resultantly, the reasons assigned for rejecting the prosecution case are convincing. With such quality of evidence on record, no other view than that which is taken by learned Sessions Judge can be taken. Consequently, finding no fault in the appreciation of evidence and the impugned judgment, no interference is called for. Hence, the following order is passed:

ORDER

The criminal appeal as well and the application for leave to appeal by state are hereby rejected.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]