

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

CRIMINAL APPEAL NO.54 OF 2020

**BHANUDAS KARBHARI ROTHE
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS**

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Advocate for Appellant : Mr. Vikram R. Dhorde
APP for Respondents/State : Mr. R.V. Dasalkar

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**CORAM : SMT. VIBHA KANKANWADI &
Y.G. KHOBRADE, JJ.
DATE : 9th March, 2023**

ORDER :- (Per: Y.G. Khobragade, J.)

1. The appellant-original informant, by exercising his right under Section 372 of the Cr.P.C., is challenging the judgment and order dated 07.12.2019 passed by the learned Additional Sessions Judge, Vaijapur in Sessions Case No.43 of 2015; thereby acquitting accused-respondent nos.1 and 2 of the offence punishable under Section 302 read with Section 34 of the I.P.C.

2. In nutshell the prosecution case is that, the appellant-informant lodged a report with Veergaon Police Station on 22.03.2015 stating that he has two married sons namely, Appasaheb and Vijay. His elder son deceased-Appasaheb was working as LIC agent since past ten years. In connection with business, his son used to visit other villages. The present respondent no.1-

Kishor Rothe had purchased insurance policy of his family members from Appasaheb. Appasaheb used to visit the house of accused no.1 for collection of policy premium. Appasaheb received a phone call from accused no.2-Anjali Rothe, at about 6.30 pm on 21.03.2015. She asked Appasaheb to come to her house at Jategaon for collection of policy premium. Thereafter, Appasaheb informed informant about the said fact and left his house for village Jategaon on his motorcycle. On the next day i.e. 22.03.2015 informant received a phone call at about 8.30 a.m. from one Shri Namdeo Ashok Mulmule, who informed him that both the accused have murdered Appasaheb in their field. Thereafter, informant with his relatives visited Civil Hospital, Vaijapur. He saw the dead body of his son and noticed injuries on the dead body. There were injuries below eyes, right ear, right leg and other parts of the body. Then he lodged the report against the accused nos.1 and 2.

3. The Investigating Officer has drawn inquest panchanama, spot panchanama. The dead body was sent for autopsy. The preserved viscera was sent for chemical analysis. The Investigating Officer recorded statements of the witnesses and arrested both the accused. The Investigating Officer collected post mortem report and on completion of investigation the charge-sheet came to be filed against the respondent nos.1 and 2 before the learned J.M.F.C, Vaijapur. On compliance of Section 207 of Cr.P.C., the learned J.M.F.C. Vaijapur passed an order under Section 209 of Cr.P.C., and

committed trial to the Court of Sessions as the offence is exclusively triable by the Court of Sessions.

4. The learned trial Court framed charge at Exhibit-9 against the accused for the offence punishable under Section 302 read with Section 34 Indian Penal Code. The plea of both accused was recorded. They pleaded not guilty and claimed for trial. In order to prove the charge, prosecution examined in all total nine witnesses viz.

1. PW1 - Dilip Dagu Mulmule (Exh.-32)
2. PW2- Bhanudas Karbhari Rothe(Exh.-35)
3. PW3-Vijay Bhanudas Rothe (Exh.-44)
4. PW4-Syed Dagu Syed Hameed (Exh.-52)
5. PW5-Kamalbai Bhanudas Rothe (Exh.-67)
6. PW6-Ramchandra Murlidhar Shelke (Exh.-70)
7. PW7-Baburao Haribhau Gore (Exh.-74)
8. PW8-Kishor Dattaji Ubale (Exh.-77)
9. PW9-Bomanna Narsu Rayatuwar (Exh.-83)

5. After conclusion of the evidence, statements of the accused under Section 313 of the Cr.P.C., recorded at Exhibit-93 and 94. The defence of accused is of total denial. Both the accused claimed that they have been falsely implicated in the crime. Upon hearing both sides, the learned trial Court acquitted both the respondents-accused for the offence punishable under Section 302 read with Section 34 of I.P.C on 07.12.2019, which is under challenge under Section 372 of Cr.P.C. in this appeal.

6. The learned advocate appearing for the appellant-informant canvassed that, PW2 deposed as per his FIR in his examination-in-chief. His testimony stood supported by other evidence. The fact of death of informant's son is homicidal in nature is not disputed by the respondents-accused persons. The respondents have failed to cross examine PW1-Dilip Mulmule to disprove the spot panchanama (Exhibit-33) and seizure panchanama (Exhibit-78) in respect of clothes of deceased. The prosecution has proved the recovery of weapon i.e. Gupti Article 15 - Stick Article 16 under Section 27 of Evidence Act as per recovery panchanama Exhibit-53A at the instance of respondent no.1. The testimony of PW4-Syed Dagdu Syed Hameed proves recovery of weapon from the house of accused no.1 upon his disclosure. However, the learned trial Court discarded recovery of weapon under Section 27 of the Evidence Act on the ground that, the house of accused was not locked even on the day of arrest of accused no.1 i.e. 22.02.2015. It is wrongly observed that the house of accused no.1 cannot be treated as secret and unknown place beyond access to the public including that to his family members, relatives, neighbours. Therefore, findings recorded by the learned trial Court are perverse.

7. The learned counsel for appellant further submits that, though the learned trial Court accepted the prosecution's case and held that the

prosecution succeeded to prove that, on 21.03.2015, the deceased Appasaheb was present in his house around 06.30 p.m. and he had received a phone call before he left house, yet, the learned trial Court erroneously discarded testimony of prosecution's witnesses and the Investigating Officer failed to collect call details record (CDR) in respect of phone call between the deceased and respondent no.2. In fact, the prosecution has proved chain of circumstantial evidence beyond reasonable doubt. However, the learned trial Court wrongly held that the prosecution failed to establish nexus of accused with the crime beyond doubt. Therefore, the impugned judgment and order of acquittal is illegal, bad in law and prayed for quashing and setting aside the same.

8. Since the appeal has been filed under Section 372 of the Cr.P.C.; it is necessary to consider the powers of Appellate Court under this provision. It is well settled principle of law that the Appellate Court is having full powers to review and re-appreciate the evidence upon which the order of acquittal is founded, however, while exercising such powers, the Appellate Court should not only consider every piece of evidence on record but also the reasons elaborated by the Trial Court below while acquitting the accused. The Appellate Court should be slow in reversing the order of acquittal. Unless there are strong and good grounds, the order of acquittal passed by the trial

Court should not be interfered with. Therefore, taking into consideration these principles we have gone through the record.

9. PW1-Dilip Mulmule and PW9-Investigating Officer have deposed that the dead body of Appasaheb was found on 22.03.2015 in field gut no.121. The inquest panchanama Ex. 46 was drawn and dead body was sent for autopsy. Exh.47 is the post mortem report. During the course of post mortem the Medical Officer found following injuries:

01. Incised wound, nose right side, 1" x ½" x ½" verticle.
02. Incised wound, below right eye, 1" x ½" x ½" .
03. Incised wound maxillary area right side, 1" x ½" x ½" transverse.
04. Incised wound below left eye, 1" x ½" x ½" transverse.
05. Incised wound near left eye involving lateral contuse, 1" x ½" x ½" .
06. CLW forehead left side, 2" x ½" x ½"
07. Contusion abrasion forehead, 1" x 1" left side.
08. CLW right parietal area 2½" x ½" x ½" .
09. CLW occipital area, 1" x ½" x ½" .
10. Incised wound right ear Pinna, 1" x ½" x ½"
11. Ligature mark front side of head e/o # right proximal phalanx of right finger 8" x ½" bone he level of thyroid certifies.
12. Multiple contusion abrasions over lateral and poster aspects of both upper extremities irregular.
13. Contusion abrasion over both knees and shin area. multiple irregular.
14. Multiple contusion abrasions Ante Mortem injuries over scapular and inter-scapular area.

10. The Medical Officer opined that probable cause of death of deceased was due to “hemorrhage shock due to multiple injuries with contusion on brain and intra cranial hemorrhage”. The respondents-accused have not seriously challenged post mortem report (Exh.47). Therefore, it can be said that the prosecution has proved that death of Appasaheb was homicidal. Hemorrhagic shock and multiple injuries with contusion on brain and intra cranial hemorrhage cannot be accidental or self-inflicted.

11. The prosecution’s case is solely dependent upon the circumstantial evidence. In order to complete the chain of circumstances, the prosecution examined the informant-appellant / Bhanudas Rothe (PW2) at Exhibit-35, Vijay Rothe-PW3 at Exhibit-44, Smt. Kamalbai Rothe-PW5 at Exhibit-67 and Shri Baburao Gore-PW7 at Exhibit-74. As per the evidence of these witnesses it appears that, deceased-Appasaheb was a LIC Agent since last ten years and he was visiting various villages on his motorcycle to collect premium of policies as well for getting new policies. The evidence of the prosecution witnesses show that the accused persons obtained Insurance policy from the deceased, therefore, the deceased was on visiting terms at the house of the accused persons for collecting premium of policy. As per the evidence of PW2, Appasaheb had received a phone call from the accused no.2-Anjali at about 06.30 pm on 21.03.2015. According to him, she had asked the

deceased to visit at her house for collection of policy premium. Appasaheb left his house on his motorcycle for Jategaon after informing it to father. Deceased did not return to his home. PW2 along with his relatives visited hospital after receiving information about murder of Appasaheb. He had seen the injuries on his person. Here there was no supporting evidence collected to show that the said phone call was that of accused No. 2. It could have been proved through CDR and SDR of both the mobile phones. Without any supporting evidence, it can be held that accused No. 2 had given the phone call and then deceased left. Evidence of the informant is to that extent only.

12. As per the evidence of spot panch witness, PW1-Dilip Mulmule, the spot was the agricultural land bearing gut no.121 and it was shown by Bhanudas Rothe (informant-PW2). The Investigating Officer had seized blood stained jeans pant (article 2), shirt (article 1), jacket (article 3), blood stained soil (article 5), ordinary soil (article 6), wheat crop stick (article 7), blood stained wheat crop sticks (article 8), two election cards (article 9/1 and 9/2), two registration cards of motorcycle (article 10/1 and 10/2), blue colour SBI card (article 11), election card of deceased (article 12), eight pieces of bangles (article 13), pair of slippers (article 14) under seizure panchanama (Exhibit-33). Though, the eight pieces of bangles (article 13) and pair of slippers (article 14) were seized from the spot of incident, prosecution has failed to establish the nexus between the same with accused persons. Further, the

prosecution failed to prove as to whether the pair of slippers (article 14) were of either accused no.1 or 2. Evidence of PW8-Kishor Ubale at Exhibit-77, the panch to the seizure panchnama of underpant of accused No. 1 Kishor does not inspire confidence as he has admitted in his cross-examination that he had not gone through the contents of panchnama (Exhibit-78) while signing on Exh.79. Why the accused would leave his underpant at the spot is a question, which has been left unanswered. Investigating Officer-PW9 has not explained as to why clothes of other accused were not seized. Such seizure creates doubt.

13. It appears that, the Investigating Officer has seized Article No. 1 to 14 from the spot of incident, Article 15 Gupti and Article 16 Stick under Section 27 of Evidence Act; however, prosecution has failed to establish the connection between them. PW4-Syed Dagdu Syed Hameed is the panch to the memorandum panchnama. He has deposed that the memorandum statement of accused no.1 was recorded on 24.03.2015 and in pursuance of said memorandum statement the weapons Gupti and Stick (Articles 15 and 16) were recovered under panchnama (Exhibit-53A) at the instance of accused no.1 from his house. However, PW4 admitted in his cross-examination that when he went to police station, the police officer told him that one Gupti and one Stick is to be seized. It has come in evidence that accused No. 1 was arrested on 22.03.2015 and he was interrogated by the Investigating Officer

on 23.03.2015. The recovery of weapons is from the house wherein other family members were residing. Unless the said recovery was from a specific place which might be within the knowledge of the accused only, it cannot be accepted. Therefore, alleged recovery of weapon cannot be said to be reliable. Even if for the sake of arguments, we accept that the said recovery under Section 27 of the Indian Evidence Act is proved, yet, it cannot be the sole piece of evidence on which conviction can be based. The nature of such evidence is corroborative and therefore, unless there are other strong pieces of evidence, only recovery cannot be the base for conviction. The findings of the Chemical Analyser as per report (Exhibit-90) in respect of blood stains on weapons seized is inconclusive and therefore they cannot be held to be the weapons used in the murder of Appasaheb. The complete chain of circumstances is not proved beyond reasonable doubt.

14. PW9-Investigating officer in cross-examination admitted that it was revealed during the investigation that accused persons had already paid premium in respect of their insurance policy prior to 20.03.2015. Deceased was allegedly called to collect the premium. There are material omission and contradiction in evidence of prosecution witness about visit of deceased at the house of respondents-accused for collection of policy premium. Therefore, it will have to be concluded that the prosecution has failed to establish the

motive. Establishment of motive is one of the prime considerations in proving chain of circumstantial evidence.

15. Further, as per evidence of the prosecution witness, Appasaheb had left for village Jategaon on 21.03.2015 and his dead body was found in field gut no.121 on 22.03.2015. The Investigating Officer has failed to produce Revenue Record in respect of gut no.121 to prove that, the accused persons are the owners of said field. The medical evidence does not suggest what was the approximate time of death. In order to establish the theory of 'last seen together', there has to be proximity between the incidents i.e. watching the deceased with accused and the finding the dead body. Here there is no such evidence for establishing the said theory.

16. Therefore, after the scrutiny of entire evidence, we are of the view that, the prosecution had failed to lead substantial evidence to complete the chain of circumstances. The learned trial Court was justified in acquitting the accused persons. No case is made to interfere with the findings recorded under the impugned judgment and order.

17. In view of the above discussion, the present appeal is hereby dismissed.

[Y.G. KHOBRADE, J.]

[SMT. VIBHA KANKANWADI, J.]