

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.90 OF 2017

Ashok Vilas Bargal,
Age 28 yrs., Occ. Labour,
R/o Rastapur, Tq. Newasa,
Dist. Ahmednagar.

... Appellant

... **Versus** ...

- 1 The State of Maharashtra
- 2 Sanjay Sitaram Jadhav,
Age Major, Occ. Agri.,
R/o Rastapur, Tq. Newasa,
Dist. Ahmednagar.

... Respondents

...

Mr. A.M. Gaikwad, Advocate for appellant

Mr. A.M. Phule, APP for respondent No.1

Mr. S.B. Tarde, Advocate for respondent No.2

...

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

DATE : 10th OCTOBER, 2023

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 The original accused in Sessions Case No.43/2015 takes

exception to challenge his conviction for the offence punishable under Sections 302, 201 of the Indian Penal Code, 1860 by learned Additional Sessions Judge, Newasa, Dist. Ahmednagar on 30.01.2017.

2 The facts leading to the prosecution of the appellant are that – one Sanjay Sitaram Jadhav, r/o Rastapur, Tq. Newasa lodged a missing report on 08.08.2015 in respect of his wife Seema around 9.15 a.m. He disclosed that he resides with his wife Seema, two daughters and one son. Around 8.30 a.m. on 07.08.2015 he along with his wife Seema and cousin brother Ramesh went to Ghodegaon as there was weekly market. Seema was not well and, therefore, appointment of Dr. Bhalerao at Ghodegaon was taken. He left Seema in the dispensary of the Doctor and then went to Ahmednagar. His wife and Ramesh stayed at Ghodegaon. Around 10.00 a.m. Seema informed from a mobile phone that she has gone to Bazaar for purchasing bangles. Sanjay came to Ghodegaon around 12.00 noon and made inquiry with the dispensary of Dr. Bhalerao. He could not find Seema. Thereafter he made inquiry with Ramesh. He told that Seema did not return to dispensary and, therefore, the missing report was lodged.

3 Further prosecution story is that – one Police Naik Santosh Phalke attached to Newasa Police Station lodged First Information Report on

10.08.2015. He informed that one Shende, who is Police Patil of village Mali Chinchora, gave information around 18.40 hours on 10.08.2015 stating that Forest Ranger Mr. Karale has informed that there is a dead body of a lady lying in Lakhephal area in the forest. Informant Santosh went around 19.30 hours to the spot and found that dead body of a lady aged 30-32 was found in the bushes. He then informed the said fact to Police Inspector Mr. Shinde. After sometime PI. Mr. Shinde along with other staff came to the spot. They made inspection of the dead body. The deceased lady was wearing 6 yard white colour sari having floral print. There were three stones near the body which were blood stains. There were injuries on the person of the deceased and the dead body was decomposed. Hence, the First Information Report was lodged against unknown person stating that the lady has been murdered. After the First Information Report, the inquest panchnama was carried out and dead body was sent for postmortem. Certain articles were seized from the spot. The Investigating Officer had then verified the missing reports and found that a complaint of missing was filed with Police Station, Sonai. The description was synonymous and, therefore, Sanjay Sitaram Jadhav was called. His statement was recorded. He tried to collect the CDR of mobile phone of Sanjay. He also received information about one mobile number and the sim card of the same was said to be in the name of one Chandabai Kale,

R/o Devgaon, Tq. Newasa. She was called and her statement was recorded. It was revealed that the accused is her nephew and had taken the said sim card from her house. From the father of the accused it could be revealed that the accused has fled away with his cousin sister-in-law to Gujarat since July, 2015, but accused was in continuous contact with the Police Patil and one Bhakad from village Rastapur. The statement of said cousin sister-in-law of the accused was recorded. Further it was revealed that the accused was in his village on 06.08.2015 and 07.08.2015 and, therefore, accused came to be arrested on 18.08.2015. He gave disclosure statement on 22.08.2015 and produced the sim cards and mobile phones. He also discovered clothes. All the seized articles were sent to chemical analysis. After completing the investigation charge sheet was filed.

4 After the committal of the case the prosecution has examined in all 19 witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides the learned trial Judge has concluded that prosecution has proved offence punishable under Section 302 of the Indian Penal Code. He was sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.50,000/- (Rupees Fifty Thousand only), in default to suffer simple imprisonment for one year. He has been further convicted for the offence punishable under Section 201 of the India Penal

Code and has been sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.10,000/- (Rupees Ten Thousand only), in default to suffer simple imprisonment for three months. The substantive sentences were directed to be run concurrently. The fine amount of Rs.60,000/- was directed to be paid to husband of the deceased viz. Sanjay Sitaram Jadhav under Section 357(1) of the Code of Criminal Procedure. This conviction is challenged here.

5 Heard learned Advocate Mr. A.M. Gaikwad for the appellant, learned APP Mr. A.M. Phule for respondent No.1 and learned Advocate Mr. S.B. Tarde for respondent No.2. Perused the record.

6 Learned Advocate appearing for the appellant has fairly submitted that the accused has admitted the inquest panchnama Exh.11 and spot panchnama Exh.13. Though postmortem report Exh.47 was not admitted, the fact remains is that the death of the lady, whose postmortem has been conducted, appears to be homicidal in nature. In the postmortem report the probable cause of death is said to be 'Head Injury'. There was no cross on behalf of the accused to PW 8 Dr. Sachin Darandale, who conducted the autopsy. By separate letter Exh.48 he had opined that the probable time of death of the deceased was 03 days to 05 days before the commencement

of the autopsy. The autopsy has been conducted between 2.15 p.m. to 3.45 p.m. on 11.08.2015 and the missing report, which came to be proved through PW 1 Sanjay, would show that Seema went missing on 07.08.2015. In fact, there was no evidence adduced by the prosecution showing that anybody had seen deceased Seema in the company of accused. PW 1 Sanjay has not stated what could have been the reason for murder of his wife by the accused. That means, the motive has not been stated by him. He was the best person to say about the same. Even if we do not give much attention to the testimony of the formal informant PW 2 Santosh and the other panch witnesses regarding seizure of the articles like clothes; yet, there was absolutely no document which would clarify that deceased and accused were together for any moment of time. The prosecution has produced CDR and proved it also; yet, the testimony of PW 6 Chandabai, in whose name the sim card is appearing, will not be sufficient to prove that the accused was using the said sim card and the mobile handset on the relevant day. Prosecution has also examined certain witnesses to say that there was illicit relations between Seema and Ashok, but they are the neighbours. PW 1 Sanjay – husband is not saying anything. Testimony of the employee from Dr. Bhalerao's Hospital would show that deceased had gone to the dispensary. Testimony of PW 16 Sanjay Baban Gaikwad would show that his mobile

phone was used by Seema to contact her husband on the day of incident, but he does not say that accused was with her at the relevant time. The alleged discovery also cannot be said to be proved when the voluntary statement has not been proved. Even if for the sake of argument it is accepted that there is discovery at the instance of the appellant; yet, only on that count there could not have been conviction. There was absolutely no evidence against the appellant, still he has been convicted. Therefore, the said conviction cannot be allowed to be sustained. The conviction in its entirety deserves to be set aside.

7 Per contra, the learned APP as well as learned Advocate appearing for respondent No.2 i.e. PW 1 Sanjay Jadhav have objected to the appeal on the ground that there was ample evidence against the appellant for convicting him. No doubt, the case is based on circumstantial evidence, but the fact remains is that there was evidence to show that there were circumstances going against the accused. The neighbour has said that there were illicit relations between Seema and accused and then the accused had taken his cousin sister-in-law in Gujarat. It appears that deceased had objected to the new relationship of the accused which prompted him to commit the murder. The husband might not be aware about the relationship but the neighbour says about the same. As regards the presence of accused

at Rastapur is concerned, evidence of PW 7 Balasaheb Ambade shows that he had received phone call from accused on 07.08.2015 stating that he is at Panvel and he would bring the girl i.e. his cousin sister-in-law to Rastapur. He had seen accused and the girl in the house of said Bhakad Sir around 9.30 p.m. on 08.08.2015. The said testimony stood supported by tower location of the mobile which is said to be used by the accused. The accused has then discovered his clothes and other articles under Section 27 of the Indian Evidence Act. Therefore, the circumstances have led the learned trial Judge to come to a conclusion that accused has committed the crime. There is no merit in the appeal.

8 Learned Advocate for respondent No.2 further submitted that the evidence would further show that the trial Judge has considered as to why a case is made out for grant of compensation under Section 357(1) of the Code of Criminal Procedure. The said amount has been rightly awarded, which need not be disturbed at all.

9 Here, it is the fact on record that PW 1 Sanjay Jadhav had lodged missing report in respect of his wife on the next day. She went missing on 07.08.2015 after she was allegedly left in the dispensary of Dr. Bhalerao around 8.30 a.m. Around 10.00 a.m. he alleges that phone call was

given. Thereafter the dead body was found on 10.08.2015. PW 2 Santosh Phalke deposed that he had received phone call from Police Patil Mr. Shende around 18.40 hours of 10.08.2015. Police Patil Mr. Shende has not been examined by the prosecution, but Forest Ranger Mr. Jalindar Kachru Karale is examined as PW 10. PW 2 Santosh had lodged the First Information Report in respect of murder of an unknown lady by an unknown person, after he had seen the dead body around 19.30 hours. PW 1 Sanjay Jadhav – the husband has deposed in chief that after four days of missing report he had received phone call from police and then learnt that Seema is dead. That means, before he could identify the dead body it appears that the police had already concluded that the dead body is of Seema. He then says that he saw the dead body in Rural Hospital, Newasa and identified it from the clothes and chappals. Here, in the missing report Exh.19 he has given that the deceased was wearing a pink colour sari and pink colour blouse. The inquest panchnama Exh.11 executed on 10.08.2015 and admitted by accused says that it was white colour sari having pink colour floral prints. The blouse was of white colour. Further the height of Seema stated in missing report Exh.19 is 5 feet 3 inches, whereas the inquest panchnama Exh.11 says that the height of the lady was 5 feet. The complexion of Seema as per Exh.19 was fair (गोरा), whereas in missing report Exh.19 it is black shadow (काळा सावळा).

Further, in missing report it was stated that she was wearing Mangalsutra, gold ear rings, whereas in inquest panchnama Exh.11 there is no mention of Mangalsutra, but there is mention of 5 yellow metal bangles in both hands each, white metal anklet (पैंजन) and toe ring (जोडवे) on both the legs, which were not mentioned in the missing report. The postmortem report Exh.47 says that the colour of the sari was whitish with reddish, greenish, purple coloured flower design and whitish blouse. It was noted that two yellow coloured beaded metal ornaments were there. One yellow coloured metal ornament pricked in the each ear lobule. One yellow coloured metal pricked in the left nasal ala. Then, there is nothing of the bangles, toe rings and anklets. But there is also mention of one yellowish metal ring around left index finger. Thus, all these descriptions are not matching with each other. The postmortem report also shows that there is signs of advanced decomposition. The inquest panchnama shows the advanced signs of decomposition with insects. Under the said circumstance, a doubt has been created, as to whether the dead body was that of Seema or not, because it is not simply identified because of the features by PW 1 Sanjay. He says that he identified it on the basis of clothes and chappals and the discrepancy of the clothes has been noted. Even then there is no much cross-examination on the said point on behalf of the accused and, therefore, we may take that the dead

body was that of Seema.

10 The testimony of PW 8 Dr. Sachin Darandale would show that after noting the internal and external injuries he has come to the conclusion that the probable cause of death was 'Head Injury' and he has also opined that the possibilities of the injuries sustained by the deceased might have been caused by the stones which were seized from the spot in his letter Exh.48. Therefore, there is no hurdle in accepting that death of Seema was homicidal in nature.

11 Now, turning towards the main fact that is required to be assessed is, whether accused is the author of the crime. We will have to go back to testimony of PW 1 Sanjay Jadhav and from his evidence it is certain that he had neither having knowledge that Seema was knowing accused or there was any relationship between them. There was no question of expressing suspicion about her death and arraying accused as the perpetrator of the crime. In his examination-in-chief also he has clearly stated that he had no knowledge that there was illicit relationship between Seema and Ashok. He said that he knew the girl to whom the accused had allegedly taken away and then says that he has no idea whether there was any quarrel between accused and deceased on account of the said girl. Thus, the motive

is not coming forward in this case. The case of the prosecution is based on circumstantial evidence and, therefore, it should pass through the golden principles laid down in **Sharad Birdhichand Sarda vs. State of Maharashtra** reported in (1984) 4 SCC 116 :

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade vs. State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri. L.J. 1783] where the observations were made : [SCC para 19, p.807 : SCC (Cri) p. 1047]

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

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”

Therefore, it is required to be seen, as to whether the said five golden principles i.e. panchsheel have been fulfilled by the prosecution in this case.

12 PW 3 is the said girl to whom the accused had allegedly taken with him. On the date of her deposition she has given her age as 20 years. It appears that the learned trial Judge has taken all the precautions which were expected while taking testimony of a victim under the POCSO Act. Here, this witness was not the victim. She has not lodged any report against the accused nor her relatives had lodged. She has turned hostile. She has admitted that she was using mobile since 2012 and she used to talk with accused and his wife. Wife of accused is her cousin sister. After taking

permission from the trial Judge the prosecution has put questions in the nature of cross to this girl in order to extract that the accused had taken her to Gujarat around the date of incident, but she has denied those suggestions. She admitted that her maternal aunt has lodged missing report in respect of her with Police Station, but admitted that she had left her house without informing her. She then admitted that on 11.08.2015 she herself with mother started to proceed to Shevgaon from Khutbav to get the complaint withdrawn which was filed by the maternal aunt. But then she changed her statement and said that they wanted to go but they cancelled it. Thus, there is no support to the prosecution story that accused was with her on 06.08.2015 and 07.08.2015 or she was at Gujarat and accused had come to Rastapur around 07.08.2015. PW 6 Chandabai is the relative of accused and she has stated that accused had taken away her sim card about a year prior to the incident. She has tried to contend that it was the theft that was committed by the accused of the handset as well as sim card. She has not given the date and has also not given the reason as to why no offence was registered against accused. The conduct would have been either to ask at least to the accused as to whether he has taken the said mobile. She has not even done the said act. Merely because now the mobile number has been traced out by police, in order to save herself she might have come with a

story that it is the accused who has committed the theft. At this stage itself if we consider the testimony of the nodal officer PW 13 Chetan Patil, who has given the call details of the said mobile and also the location tower; yet, in whose name the other phone was standing is only by way of Exh.57. There are in all three mobile numbers and they were standing in the name of one Sitaram Namdeo Jadhav, Chandabai and Balasaheb Sambhaji Motkar. Prosecution has examined only Chandabai Kale as PW 6 and Balasaheb Sambhaji Motkar as PW 18. However, at the most it can be said that PW 1 Sanjay Jadhav was using the mobile i.e. sim card which was standing in the name of Sitaram Namdeo Jadhav i.e. his father. It has not been stated by PW 1 Sanjay that even his wife was having mobile or from the said mobile which he was using Seema used to talk or give phone calls to others. In connection with the same piece of evidence prosecution has examined PW 9 Dnyaneshwar Patange, who has sold the sim cards but in isolation his testimony is of no help. Prosecution story is that from his mobile Seema had given call to PW 1 Sanjay around 10.00 a.m. on 07.08.2015. But if we consider testimony of PW 16 Sanjay Baban Gaikwad, he says that he had come to Ghodegaon weekly bazaar on 07.08.2015. Around 8.15 a.m. Seema met him in front of dispensary of Dr. Bhalerao. He says that PW 1 Sanjay is his distant relative and, therefore, he asked Seema as to why she is there.

Seema told him that she is not well and, therefore, came to consult the Doctor. Then Seema asked him to give mobile, so that she can talk to her husband. Accordingly, he gave the mobile phone to the Seema. Seema gave missed call and within a while she received the call. She went aside and talked and gave mobile phone back to PW 16 Sanjay Gaikwad. It is to be noted that this witness has not given the number on which Seema had contacted/given missed call. Even as per his testimony that call was given by Seema around 8.15 a.m. and not at 10.00 a.m. as per the testimony of PW 1 Sanjay. The prosecution has not come with a case that around 8.15 a.m. Seema had given missed call to accused by saying to PW 16 that she is talking to her husband. When PW 16 Sanjay Gaikwad saying that he is the relative of PW 1 Sanjay, then there would not have been hurdle in smooth contact and even talk on phone by him and PW 1 Sanjay. If that call was given by Seema to accused around 8.15 a.m. and she would have gone with accused, then from whose mobile Seema gave call to PW 1 Sanjay around 10.00 a.m., is a question. PW 16 Sanjay Gaikwad has also not stated that he had seen accused around Seema at the relevant time.

13 Prosecution has also examined PW 17 Rambhau Bargal and PW 18 Balasaheb Motkar, but their testimony does not show that in any way they had come in contact with accused and had given their mobiles or sim cards to

be used by the accused. Thus, the prosecution has failed to prove which mobile phones the accused was using and how he came in possession of those mobiles.

14 PW 12 Seema Vairagar is a Sweeper with Dr. Bhalerao Hospital. She had noted the name of Seema around 8.00 a.m. on 07.08.2015 as patients used to be in queue or wait list. The said procedure was adopted. She has stated that after Seema's name was noted, a motorcycle came in front of the clinic and Seema went along with the said motorcycle driver. But she says that she had not seen the motorcycle rider. After some time Seema's brother-in-law came and made inquiry and at that time Sister Pote told that she has left the clinic. Therefore, the testimony of this witness is also not useful on the point of last seen together as she has not identified the accused.

15 Prosecution has examined PW 14 Sumanbai Jadhav, who is the neighbour, who resides at some distance from the house of PW 1 Sanjay and Seema. She has stated that accused used to reside at the back side of house of PW 1 Sanjay. She says that there were illicit relations between Seema and Ashok and she had caught them on one occasion. When she had asked them about the same, they attempted to beat her and, therefore, she had not intervened. Surprisingly, she further says that accused had taken his sister-in-

law and, therefore, Seema used to quarrel with accused. Seema used to tell all those facts to her. But then she used to say Seema that she should concentrate and look after her own family. In her cross-examination she had stated that she had not informed PW 1 Sanjay about the illicit relations of Seema not even to his father. She admits that accused was serving at Ahmednagar and then she admits that Seema had not told anything to her. It appears that she is a got up witness. When she says that PW 1 Sanjay is her nephew, then, if at all she would have noted that Seema was having illicit relations, she would have definitely told it to PW 1 or to his father. Further, it is absolutely not told by her that since when the said illicit relations were going on and even after the said relationship was on the verge of breaking up and there used to be quarrels between deceased and accused, still, after alleged information about the same by Seema, she would advise Seema to keep quiet, is a further surprising fact. This witness is totally unbelievable.

16 The further limb of the prosecution story is that accused had given a phone call to PW 7 Balasaheb Ambade, who is a Police Patil of Rastapur on 07.08.2015 saying that he is at Panvel and would bring the girl i.e. sister-in-law, to whom he had allegedly taken to Gujarat. Then on the next day i.e. 08.08.2015 around 9.30 p.m. he says that accused went to the house of one Bhakad Sir and at that time the girl as well as accused were

present. He says that both were taken to the house of the girl. Question arises that - when he had the knowledge that the girl was kidnapped and at that time she appears to be minor, then being Police Patil why he had not taken to accused to Police Station ? Prosecution has examined PW 11 Abasaheb Bhakad. He has stated that accused had given phone call to him from Ahmednagar about a year prior to his deposition and told that he had having love affair with his sister-in-law and asking his advise as to what he should do. He told that he should come to his house. Accordingly, the girl and accused i.e. Ashok came to his house. Police Patil also came to his house and he asked the Police Patil to take the girl to her house. He has not given the dates and, therefore, it is hard to believe that around the date of incident the accused was in the village.

17 Taking a detailed scrutiny of whatever the evidence has been adduced it can be certainly said that there was absolutely no circumstances against the accused. None of the witnesses had seen the deceased in the company of accused after 8.00 a.m. on 07.08.2015 till her dead body was found. Therefore, the golden principles stated above were not at all attracted. The prosecution had miserably failed in proving the guilt of the accused, much less, beyond reasonable doubt. The learned trial Judge has totally erred in convicting the accused. When the appreciation of evidence

itself is wrong, the findings arrived are perverse and, therefore, interference is required. The appeal deserves to be allowed.

ORDER

- 1 Criminal Appeal stands allowed.
- 2 The conviction awarded to appellant Ashok Vilas Bargal by the learned District Judge-1 and Additional Sessions Judge, Newasa in Sessions Case No.43 of 2015 on 30.01.2017 for the offence punishable under Sections 302 and 201 of the Indian Penal Code stands set aside.
- 3 We clarify that the order regarding payment of fine amount as compensation to PW 1 Sanjay Sitaram Jadhav under Section 357(1) of the Code of Criminal Procedure also stands set aside.
- 4 Appellant stands acquitted of the offence punishable under Sections 302 and 201 of the Indian Penal Code.
- 5 The appellant be set at liberty, if not required in any other case.
- 6 Fine amount deposited, if any, be refunded to the appellant after the statutory period.

7 It is clarified that there is no change as regards the order regarding disposal of muddemal.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

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