



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 317 OF 2017
WITH
CRIMINAL APPLICATION NO. 4197 OF 2022

Balaji Sheshrao Gite,
Age : 46 years, Occu. : Convict No.11085,
R/o. At present in Central Prison, Nashik.

... Appellant

Versus

The State of Maharashtra,
Through Police Station Sonkhed,
Tq. Loha, Dist. Nanded.

... Respondent.

...
Ms. Bharati B. Gunjal, Advocate (appointed) for Appellant.
Mr. S. D. Ghayal, APP for Respondent – State.
...

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

DATED : 01st NOVEMBER, 2023

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

1. Getting dissatisfied by the judgment and order of conviction passed by learned Additional Sessions Judge, Kandhar, District Nanded dated 15.12.2016 in Sessions Case No. 62 of 2013 for commission of offence under sections 302, 201 of Indian Penal Code (IPC), convict Balaji Gite has preferred instant appeal.

FROM FIR, UNFOLD STORY IS AS UNDER

2. Appellant and deceased are husband and wife and they have two sons, namely Parmeshwar (PW2) and Dnyaneshwar and

two daughters, namely Varsha and Chaya. Appellant had once cut nose of deceased wife and as there used to be regular quarrels, deceased parted with the company of appellant and went to reside at Hagdal at her parents place. PW2 Parmeshwar, son also was put up with his grandparents.

One year prior to the incident, on assurance of good treatment and proper behaviour deceased resumed talks with appellant convict. According to prosecution, accused convict called deceased wife to Loha for cohabitation. Accordingly deceased went on 10.05.2013 around 4:00 p.m.. PW2 Parmeshwar made phone call to his mother around 7:30 p.m., but there was no response either from his mother or accused father. Next day, he again called his father, but his father abused him and further informed that his mother is not with him. He approached police station for lodging missing complaint and while he was searching for his mother, he got phone call from the mobile of his father. The caller informed that accused is lying on the road under influence of liquor. Police was duly informed. Police came and took appellant to Ahmedpur police station and there on inquiry he confessed about committing murder of wife Balikabai. On lodgement of report by PW2 Parmeshwar crime was registered for commission of offence under section 302 of IPC.

3. PW11 API Dhunne and PW12 PI Chate carried out and completed investigation respectively and accused was challaned and tried before Additional Sessions Judge, Kandhar, who, conducted trial and reached to a conclusion that appellant has committed offence of 302 and 201 of IPC and finally held guilty and convicted.

SUBMISSIONS

On behalf of appellant :-

4. Learned counsel for appellant would submit that, apparently there is false implication. There is no iota of evidence either direct or circumstantial. She would submit that, none of the circumstances relied by the prosecution are firmly and cogently proved. Learned counsel submitted that, there is no evidence to show that deceased Balikabai went to reside with appellant at Loha. There is no witness seeing them together at Loha or at spot of alleged incident. She would point out that, only piece of evidence is so called CDR and SDR, but according to her, that itself would not be incriminating circumstance. Learned counsel emphasized that, though there is alleged confession, it is before police and therefore inadmissible. It is pointed out that even when the case of prosecution is based on circumstantial evidence, motive has not been proved. Even prosecution claims that relations between

deceased and accused had come to normalcy, and therefore, it is her submission that, motive is not proved. While concluding the arguments, she would submit that, there is apparently improper appreciation of evidence as well as law resulting into wrongful conclusion and hence she prays to set aside the impugned judgment by allowing the appeal.

On behalf of State :

5. Learned APP would submit that, there is evidence of son of both appellant and deceased. Deceased was called by appellant and so she had been to him. Relations between appellant and deceased were reported to be strained. He submitted that, at earlier point of time also appellant had caused injury to deceased. On proper investigation and interrogation, he confessed about committing crime, and therefore, learned trial court has correctly appreciated the evidence and so he prays to dismiss the appeal.

6. In support of its case, record shows that prosecution has examined as many as 12 witnesses. The sum and substance of their substantive evidence and status of witnesses is enumerated as under :-

PW1 Deelip, pancha to memorandum of disclosure at the instance of accused, has not supported prosecution.

PW2 Parmeshwar, son of appellant and deceased deposed that, his father called his mother and so she went to him at Loha for cohabitation. She did not return and was rather found dead in a well water. His father had confessed before police about his mother being done to death by assaulting her with iron pipe and stones.

PW3 Pandurang, pancha to spot (Exh.20), which is a well.

PW4 Deepak is the Police Constable, who carrying muddemal for analysis (Exh.23).

PW5 Venkatrao, brother of deceased deposed that, he received call from his nephew PW2 Parmeshwar that his mother is missing and therefore search was taken. That, he further learnt from PW2 Parmeshwar about receiving phone call from the mobile of his father made by unknown person and therefore, this witness also visited police station. They found appellant in police custody. He stated that PW2 Parmeshwar made inquiry about his mother and accused gave confession regarding committing murder and therefore, he was brought to Ahmedpur police station and he again confessed before police and informed about dead body thrown in the well.

PW6 Govind, another pancha to memorandum of disclosure, did not support prosecution.

PW7 PI Devidas Dhole, **PW10** API Narwade, **PW11** API Dhunne and **PW12** PI Chate are the police official and Investigating Officers.

PW8 Dr. Neena Borade is the autopsy doctor.

PW9 Ravik, Nodal Officer of Vodafone company.

7. On hearing learned counsel for appellant and learned APP and on re-appreciating and re-analyzing the available evidence before trial court, it is emerging that, there is no direct eye witness and case is based entirely on circumstantial evidence.

8. At the outset it needs to be mentioned that there is no challenge at all in appeal regarding death of Balikabai to be homicidal one.

9. Therefore, now it is to be seen whether appellant herein has done deceased to death and to dispose of the body, it was thrown in the well. As stated above, the case is based on circumstantial evidence.

10. It has been consistently laid down by the Hon'ble Apex Court that when the case is based entirely on circumstantial evidence, the inference of guilt would be justified only if all

incriminating facts and circumstances are found to be incompatible with the innocence of the accused. There are numerous rulings on above aspect since the case of ***Hanumant Govind Nirgudkar and another v. State of M.P.***, AIR 1952 SC 343; ***Shivaji Sahebrao Bobade v. State of Maharashtra***, AIR 1973 SC 2622; ***Sharad B. Sarda v. State of Maharashtra***, AIR 1984 SC 1622 and ***Padala Veera Reddy v. State of Andhra Pradesh*** , 1989 (Suppl.2) SCC 706. The ratio of above rulings is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. The circumstances should not only be complete, but further they should be proved to be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. Recently, in the case of ***Pritinder Singh alias Lovely v. State of Punjab [2023 SCC OnLine 811]***, the conditions which are required to be fulfilled for returning guilt in a case based on circumstantial evidence are given in paragraph no.16, which could be summarized as under :

“..... (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 Sahabao Bobade v. State of

Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 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.”

. Apart from above essentials, it is also to be borne in mind that there are cardinal principles for proper administration of criminal justice. A few relevant could be reproduced as under:

“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.*

11. In the light of above legal requirements, we proceed to scan the evidence. On taking survey, it is revealed that, there is only evidence of PW2 Parmeshwar which is of some significance as his maternal uncle PW5 Venkatrao has hearsay information. Other siblings i.e. Dnyaneshwar and both sisters as well as parents of deceased with whom she was put up at relevant time are not examined by prosecution. Be it so. According to PW2 Parmeshwar, because of quarrels and previous injury caused to the nose, his mother i.e. deceased Balikabai was staying with her parents. On 10.05.2013, his father telephoned and called deceased mother at Loha and she accordingly went around 4:00 p.m. He claims that he made contact on phone to both accused and deceased around 7:30 p.m., but there was no response. Next day, when he called up accused father, witness has deposed that his father got angry and even denied deceased to be with him. He further stated that, his father advised him to search for her, then he stated that he received phone call in the afternoon from his father and on inquiry about his mother, he allegedly kept silent and therefore, he went to police station on the next day and gave missing complaint. Thereafter, he searched for his mother, but she was not traced. According to him, he received phone call on 13.05.2013 from the mobile of his father, but a third person was speaking and he informed that accused is lying by consuming liquor on the road.

Therefore, he requested said person to take accused to police station and said person accordingly took his father to police station. He further deposed that he himself, his maternal uncle and police from Ahmedpur police station went to Pimpalner police station and there they saw his father in the police station. His father appeared to be under influence of liquor and so he was taken to Ahmedpur police station and on inquiry about mother, his father disclosed that he committed murder of his mother and her body thrown in the well of Hagdal shiwar and took them to the spot. His father was arrested by police and police recorded statement of himself.

12. Above witness is cross examined at length, initially about names of brother of accused, their residence and about partition. He denied about quarrels between accused and his brother on account of property. He is unable to give distance between Limboti and Sonkhed police station or between village Hagdal to Sonkhed police station. He admitted crime being registered against his father for beating his mother. He admitted that, when he first received information, he proceeded to Pimpalner police station. He admitted that he did not personally meet the person who talk on phone of his father. He denied that Pimpalner police informed him about confession. He admitted that

police found some chits in the purse, wherein it was written that other persons have committed murder of his wife and that it was also mentioned that Babu and his father-in-law Gangadhar have committed murder of his wife. However, he denied seizure of the chit in his presence by Pimpalner police. He admitted that his father was brought at Sonkhed police station and made inquiry and he further admitted that inquiry was made with his father by police of Sonkhed, Ahmedpur and Pimpalner while he was in their custody.

Except above testimony of PW2 Parmeshwar, testimony of no other witnesses is of much relevance.

13. It seems that the trump card for prosecution in trial court is CDR and SDR reports of the phones, which were belonging to PW2 Parmeshwar, his father i.e. appellant and his deceased mother. As to when, where and how these mobiles were seized by police is not getting clear. No distinct panchanama of seizure of mobiles finds place in the record. Mere details seem to have been sent to the service provider and their reports showing details of CDR are brought on record. Unless it has been demonstrated that the said mobiles were owned used and possessed by above three persons, CDR is valueless. Customer application forms are not gathered. Therefore, this is a fatal lacuna for prosecution.

14. According to PW2 Parmeshwar, his deceased mother left around 4:00 p.m. on 10.05.2013, but there is no further evidence to show that she reached Loha and even was in the company of her husband - appellant. PW2 Parmeshwar claims that he lodged missing complaint, but that is not finding place on the record. His evidence suggests that he received call from mobile of his father and it was a call made by unknown person, who told him that his father was lying under influence of liquor on the road and therefore PW2 Parmeshwar suggested him to take him to police station. Since then, according to PW2 Parmeshwar, his father was in custody of police and when he and his uncle went, he learnt from police about confession given by his father. If at all it is confession to police regarding committing murder, it is invalid in the eyes of law.

15. Dead body of deceased was found in the well owned by one Dr. Chinawar, however he is not examined. Spot panchanama shows that dead body was extracted from the well on 14.05.2013 and it was said to be in decomposed condition. Autopsy doctor has not opined time since death even by approximation. Resultantly, when there is nothing to hold that deceased reached Loha and was in further company of appellant, in our opinion, it is unsafe to directly connect him, that too merely on a confession. Telephonic

conversation by way of CDR itself is not incriminating substance. CDR and SDR are mere corroborative piece of evidence and unless there is other incriminating circumstance, said reports are of no significance.

16. Parents of deceased with whom she was staying are not examined. There is no witness seeing deceased with accused at Loha or even they to be together at any point of time since evening of 10.05.2013 to 14.05.2013. Therefore, apparently evidence on behalf of prosecution in trial court is very weak and fragile in nature. Not a single circumstance is put-forth to accept the version of prosecution. When PW2 Parmeshwar himself deposed that relations between his mother and his father had achieved normalcy, motive also pales into insignificance.

17. On going through the judgment under challenge, in our considered opinion, there is improper appreciation of evidence. Opinion of learned trial Judge seems to have formed only on the basis of evidence of PW2 Parmeshwar, PW9 Nodal Officer and police witnesses, but the above aspect noticed by us on re-appreciation and reanalysis seems to have been unfortunately lost sight of by the learned trial Judge. There is no proper foundation or evidence to connect appellant with death of deceased Balikabai.

Therefore, in spite of such evidence, when learned trial Judge has recorded guilt, interference is called for and accordingly we allow the appeal. Hence, we proceed to pass the following order :-

ORDER

1. Criminal Appeal stands allowed.
2. The conviction awarded to the appellant viz. Balaji Sheshrao Gite in Sessions Case No.62 of 2013 by the learned Additional Sessions Judge, Kandhar, Dist. Nanded for the offence punishable under Sections 302, 201 of the Indian Penal Code, stands quashed and set aside.
3. The appellant stands acquitted of the offence punishable under Sections 302, 201 of the Indian Penal Code.
4. The appellant be set at liberty, if not required in any other case.
5. The fine amount deposited, if any, be refunded to the appellant after the statutory period.
6. We clarify that there is no change as regards the order in respect of disposal of muddemal.
7. Criminal Application No.4197 of 2022 stands disposed of.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)