

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

CRIMINAL APPEAL NO. 262 OF 2016

Ramakant Murhari Aalat,
Age: 47 years, Occupation: Agriculture,
R/o: Bothi, Tq: Chakur, District: Latur.

... Appellant
[Orig. Accused No.2]

Versus

State of Maharashtra

... Respondent

.....

Mr. Joydeep Chaterji, Advocate for Appellant.
Mr. A. V. Deshmukh, APP for Respondent-State.
Mr. B. R. Kedar, Advocate to assist APP.

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**WITH
CRIMINAL APPEAL NO. 292 OF 2016**

Hanmant @ Billa Vishwanath Aalat
Age: 26 years, Occu. Agril.,
R/o. Bothi, Tq. Chakur,
Dist. Latur.

... Appellant
[Orig. Accused No.1]

Versus

The State of Maharashtra,
Through Police Station, Chakur,
Tq. Chakur, Dist. Latur.

... Respondent

.....

Mr. Anand V. Patil (Indrale), Advocate for Appellant.
Mr. A. V. Deshmukh, APP for Respondent-State.
Mr. B. R. Kedar, Advocate to assist APP.

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

DATE : 05 JUNE 2023

JUDGMENT (ABHAY S. WAGHWASE, J.) :

1. Both the appeals are arising out of judgment and order passed by learned Sessions Judge, Latur in Sessions Case No. 108 of 2014 and are therefore taken up and decided by way of this common judgment.

FACTS GIVING RISE TO SESSIONS TRIAL

2. Appellants, i.e. accused no.1-Hanmant and accused no.2-Ramakant were chargesheeted by Chakur Police Station, Latur for commission of offence punishable under Section 302 r/w 34 of the Indian Penal Code [IPC] on the premise that, they intentionally and knowingly committed murder of Vikas by assaulting him with axe for maintaining illicit relations with wife of accused no.2-Ramakant. Brother of deceased Vikas i.e. PW2-Govind set law into motion by approaching Chakur Police Station informing that deceased Vikas had kept his wife and children at Latur for education purpose and deceased was cultivating his own land at village Bothi by engaging servants and he was commuting between Latur and Bothi and at sometimes stayed at Bothi itself for agricultural purpose and mostly stayed in the house of accused Ramakant.

Informant alleged that on 06.07.2014, both accused persons were in the company of deceased Vikas and they together enjoyed

party in the field and on the intervening night of 06.07.2014 and 07.07.2014, in the backdrop of suspicion of illicit relation between deceased Vikas and wife of accused no.2-Ramakant, both accused persons assaulted deceased with axe. Hence the FIR Exhibit 39.

3. After investigation, accused were chargesheeted and after framing charge trial was conducted during which prosecution examined in all 9 witnesses and relied on documentary evidence. Learned trial Judge appreciated and analyzed the above evidence and concluded that prosecution has established the charge and thereby convicted and sentenced both accused to suffer imprisonment for life and to pay fine and in default, to suffer rigorous imprisonment.

It is the above judgment and order of conviction which is assailed herein by both the appellants by invoking Section 374 of the Code of Criminal Procedure [Cr.P.C.]

RIVAL SUBMISSIONS

On behalf of the appellants:

4. We have heard learned counsel for the appellant Ramakant in Criminal Appeal No.262 of 2016 extensively and he had taken us through entire evidence on record, more particularly the evidence adduced by prosecution to support circumstances of motive and last

seen together. Questioning the motive, he took us through the evidence of very informant as well as PW5-Pawan. According to him, motive is not at all getting clear from these witnesses. He would emphasize that case in hand being based on circumstantial evidence, it was imperative for prosecution to establish, at the threshold, availability of motive. He pointed out that informant's evidence is silent whereas evidence of PW5-Pawan is rendered doubtful in the light of answers given by him in cross-examination. Further, according to him, there is no material or corroborative evidence on the aspect of alleged affair between deceased and wife of appellant Ramakant. Inviting our attention to the FIR, he submitted that from the FIR itself it is evident that informant had entertained mere suspicion. As regards the circumstance of last seen together is concerned, he took us through the evidence of PW2-Govind (informant) and PW-6 Arjun and would submit that these witnesses claim to have seen deceased in the company of accused in the evening, but deceased was found dead at around 8.00 a.m. next day and the gap of more than 12 hours being enormous, it is his submission that it was not open for prosecution to deploy theory of last seen together. At this juncture he also submitted that even time since death has not been stated by autopsy doctor and therefore assessment of time done by learned trial Judge is without strong

foundation.

5. He strenuously submitted that though recovery is attributed to accused persons under Section 27 of the Evidence Act, taking into account the fact of date of seizure, till the seized article was dispatched for analysis, according to him, the chain of custody has not been cogently proved to rule out tampering or contamination of the evidence. Therefore, according to him, even the circumstance of seizure pressed into service by prosecution is of no avail to the prosecution. He pointed out that material witnesses like Madhav, who was servant of deceased, have not been examined, including father of deceased. Thus, it is his submission that taking into account such poor and weak quality of evidence, learned trial court ought not to have accepted the case of prosecution and ought not to have recorded guilt as is done by the learned trial Judge. He consequently prays for allowing the appeal.

6. Learned counsel for the appellant accused no.1-Hanmant in Criminal Appeal No. 292 of 2016 adopted the above submissions, and also submitted that prosecution has not established motive as against accused no.1 to commit crime.

On behalf of prosecution

7. In answer to above, learned APP would submit that prosecution has clearly, cogently and firmly established all the circumstances relied by it. Accused were only persons last seen in the company of deceased. There was motive behind the occurrence. Deceased had affair with wife of one of the accused. Weapon has been recovered from the scene of occurrence . There is witness who had seen the axe with accused Hanmant. Death to be homicidal is not challenged. Therefore, coupled with evidence of seizure, as prosecution has adduced clinching evidence, learned trial court committed no error whatsoever in appreciating such evidence and recording guilt. Hence he prays to dismiss the appeal.

8. This being first appellate court, in view of judgment in the case of *Ishvarbhai Fujibhai Patni v. State of Gujarat*, (1995) 1 SCC (Cri.) 222 and also in *Geeta Devi v. State of UP and others*, 2022 SCC OnLine SC 57, this court is expected to re-appreciate, re-examine and reanalyze the entire evidence before the trial court. Consequently, we undertake the said exercise by quoting sum and substance of the evidence of prosecution which is as under.

PROSECUTION EVIDENCE

9. Prosecution, through the testimony of nine witnesses, has tried to establish complicity of both the accused appellants herein.

PW1- Bhanudas is a pancha to seizure of cloths, axe and other articles and also pancha to inquest panchanama.

PW2-Govind informant-brother of deceased gave evidence that he had seen both accused sitting with his deceased brother in the evening on 06.07.2014 and thereafter his brother was found dead in the same field where they all three were sitting. Therefore, none other than accused are responsible for the death of his brother Vikas.

PW3-Narsing is the pancha to seizure of clothes of deceased and also pancha to memorandum and seizure Exhibits 42 and 43.

PW4-Dr. Jyoti Rathod is the autopsy doctor who opined death to be homicidal one.

PW5-Pawan - nephew of deceased Vikas claims that few days prior to the incident, while accused and deceased were enjoying party, at that time accused Ramakant was enraged because deceased touched the subject of his wife. According to him, axe owned and possessed by accused Hanmant was the same which was lying near

the dead body.

PW6-Arjun claims that on 06.07.2014 when he had been to the field of Vikas to borrow nozzle for sprinkler, he had seen accused and deceased sitting near the cattle shed and on next morning Vikas was found dead.

PW7-Shivdas, PW8-Sanjay and PW9-PI Gajanan Saidani are police witnesses.

ANALYSIS

10. Admittedly the case in hand is based on circumstantial evidence. It seems from the record that to establish their case, prosecution had pressed into service the following circumstances;

- a. Motive,
- b. Last seen together,
- c. Dead body of Vikas found in the field of Bajali Ghuge,
- d. Identification of axe and its seizure,
- e. Seizure of articles from spot,
- f. Seizure of clothes of both the accused under Section 27 of the Evidence Act,
- g. Seizure of clothes of deceased and inquest panchanama and
- h. Dog handler's report.

11. Thus, here we are dealing with a case which is based on circumstantial evidence as there is no direct evidence. Before analyzing the evidence, it would be apt to throw light on the settled legal position about manner of appreciation of case 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.

12. Similarly, while conducting criminal trial, court is also expected to bear in mind the cardinal principles of criminal jurisprudence that **firstly**, fundamental burden of proving the case is always on the prosecution; **secondly**, fouler the crime, greater the degree of proof; **thirdly**, prosecution must prove its case beyond reasonable doubt; **fourthly**, accused “must be” and not merely “may be” guilty of the offence and the distance between “must be” and “may be” should not be long and divide conjectures from sure conclusion; **fifthly**, suspicion however strong, never takes place of proof; and lastly, court must ensure that miscarriage of justice is avoided and if facts and circumstances of the case so demand, benefit of doubt should go to the accused, provided it is fair doubt based on reasons and common sense.

The above principles are derivative of several landmark cases like **Bhagirath v. State of M.P.**, AIR 1976 SC 975; ***Shankarlal Dixit v. State of Maharashtra***, AIR 1981 SC 765 and ***Dhananjay Chatterjee @ Dhana v. State of W.B.***, (1994) 2 SCC 220.

13. Bearing in mind the above settled legal position, we proceed to analyze the above discussed evidence and circumstances. The first and foremost circumstance pressed into service by prosecution is motive. It seems that to establish said circumstance prosecution has relied on PW2-Govind (informant) and PW5-Pawan. However on carefully analyzing the evidence of PW2-Govind, as is rightly pointed out by learned counsel for the appellants, entire substantive evidence of PW2-Govind seems to be silent about alleged motive. Though PW5-Pawan spoke about accused Hanmant disclosing him about affair between Vikas and wife of accused Ramakant and in another party enjoyed by accused and deceased, deceased himself introduced the topic of wife of Ramakant and this precisely had enraged Ramakant, from para 10 of the cross-examination of PW5-Pawan it is revealed that he has admitted about not stating so in similar manner in his statement to police. Further, it is a mere suspicion expressed and there is no further material in support of alleged affair between Vikas and wife of Ramakant. Rather, it is also pertinent to note that in spite

of such suspicion, including accused Ramakant, all three are back in each others company even on the evening of 06.07.2014. therefore, here, it transpires that there is very weak or no cogent evidence in support of alleged illicit affair between deceased Vikas and wife of accused Ramakant so as to entertain the motive. Informant also in the FIR speaks of mere suspicion to that extent. Consequently with such material, it is not open to hold said circumstance of motive to be firmly and cogently established. It is fairly settled that in a case based on circumstantial evidence motive must be proved though it is insignificant in a case based on direct evidence.

14. Now let us turn to the next circumstance i.e. last seen together. Before re-appreciating the evidence on this count, i.e. testimony of PW2-Govind and PW6-Arjun, it is desirable to briefly discuss the law on the point of theory of last seen together propounded by Hon'lbe Apex Court time and again. It is held that "last seen theory comes into play, only where the **time gap** between the **point of time** when accused and deceased were seen last alive and when deceased is **found dead** is **so small** that possibility of anyone other than accused being the author of crime becomes impossible. In absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to the conclusion in

those cases and the few cases that can be named and referred are *State of U.P. v. Satish*, (2005) 3 SCC 114 and *Shyamlal Ghosh v. State of West Bengal*, (2012) 7 SCC 646.

15. Similarly, law is also squarely settled that while invoking circumstance of last seen together, it is equally necessary for prosecution to establish, time since death. Such proposition is propounded in landmark case of *Niranjan Panja v. State of West Bengal*, (2010) 6 SCC 525 *Shyamlal Ghosh* (supra).

16. Resultantly, it is essential for prosecution to establish that time gap between accused and deceased last seen together and deceased found dead is minimal or so small that possibility of third person to be involved can be easily ruled out.

17. In the light of above legal requirement, if the evidence of prosecution on this count is analyzed, it seems that according to PW2-Govind, he had seen accused and deceased together in the evening around 6.00 p.m. to 7.00 p.m. of 06.07.2014. Whereas, deceased was reported to be found dead at 8.00 a.m on the next day i.e. 07.07.2014. Therefore, here apparently time gap is over 14 hours or so.

18. Whereas according to PW6, he went to the field of deceased for borrowing nozzle of sprinkler around 5.00 p.m. on 06.07.2014. He claims that after collecting the nozzle while he was returning, hearing some noise, he accosted the name of deceased, upon which not only deceased Vikas but even both accused stood up. That time deceased asked this witness to take the nozzle and thereafter this witness left to his house. On the next morning he learnt about murder of Vikas. Therefore, even this witness had seen accused and deceased together almost 14 hours prior to deceased Vikas found in dead condition.

19. Further, as discussed above, in view of settled legal position, prosecution is also expected to establish time since death at least by approximation. On going through the evidence of autopsy doctor, aspect of time since death has not been opined by the medico legal expert. Neither prosecution took pains to question the doctor on this aspect nor defence seems to have taken pains to cross-examine doctor about time since death. Therefore, apart from huge gap between accused and deceased found together while deceased was alive and deceased found dead, time since death is also not established by prosecution. We have gone through the judgment of learned trial Judge. Surprisingly in spite of no substantive evidence on the point of

time since death, learned trial Judge appears to have taken into consideration the findings noted in the PM report about semi digested food found in the stomach contents and has concluded that death certainly had taken place around 1.45 a.m. The computation and the basis applied are not elaborated. Mere availability of semi-digested food is not a sure guide to ascertain time since death. It is pertinent to note that the Hon'ble Apex Court in the case of ***Masji Tato Rawool and others v. State of Maharashtra***; (1971) 3 SCC 416 has in unequivocal terms observed that "contents of stomach found at the time of postmortem are not safe-guide to determine the time of incident, because that would be a matter of speculation in absence of reliable evidence on the question as to when deceased had his last meal and what that meal consisted of." Further, it is common knowledge and even agreed by medico legal jurists like Modi that process of digestion of food is dependent on various variables like age, climatic conditions, nature of food consumed etc.

Therefore, there being no concrete evidence as to when and where deceased consumed meals and whether he consumed it while he was in the company of both accused, we are afraid whether it is open for a court to carry out computation and to arrive to any exact time with certainty or exactitude, more particularly in absence of any

foundation. It is revealed from the spot panchanama that there is no evidence gathered regarding preparation of food or utensils so as to infer that dinner was consumed at that place itself. In the light of above discussion, in our considered opinion, even evidence on circumstance of last seen together fails to inspire confidence and so cannot be accepted as proved.

20. As regards the circumstance of dead body found in the field of Balaji Ghuge i.e brother of deceased, that itself cannot be a circumstance and even defence has not questioned the said circumstance. As regards the circumstance of seizure of axe and other articles at the spot as well as seizure of clothes are concerned, they by itself are not sufficient to form a chain when the very foundation of motive and last seen together has been rendered doubtful. Even it has come on record that articles were seized, but in view of the answer given by pancha witness that his signatures are not available on the label, credibility of link evidence or chain of custody also comes under cloud. Lastly, the circumstance of report of dog handler also cannot come to the aid of prosecution unless there is other positive evidence regarding culpability or involvement of accused persons. Therefore, here, as all circumstances are not forming a complete chain and the chain getting snapped at crucial places, it is unsafe to hold that

prosecution has established its case or firmly and cogently proved the circumstances relied by it.

21. As regards the findings and reasons assigned by the trial court, in our opinion, there is no proper appreciation as required by law. Before accepting the circumstances as proved, the circumstances and evidence ought to have been proved beyond reasonable doubt. Precisely this has not happened in the instant case. We have touched the aspects which are not proved beyond reasonable doubt. There being no circumstance which is so strong so as to connect the accused with the death of Vikas, learned trial Judge ought not to have held the case of prosecution as established and proved. Resultantly, we find this a fit case for interference and hence we proceed to pass following order:

ORDER

- I. Both the appeals are allowed.
- II. The conviction awarded by learned Sessions Judge, Latur on 29.02.2016 in Sessions Case No. 108 of 2014 to the appellant-accused no.1 Hanmant @ Billa Vishwanath Aalat and appellant-accused no.2 Ramakant Murhari Aalat for the offence punishable under Section 302 r/w 34 of IPC stands set aside.

- III. Both the appellants stand acquitted of the offence punishable under Section 302 r/w 34 of IPC.
- IV. The appellants be set at liberty, if not required in any other case.
- V. Fine amount deposited, if any, be refunded to the appellant after statutory period.
- VI. It is clarified that there is no change in the order passed by learned Sessions Judge in respect of disposal of Muddemal articles.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

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