

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

CRIMINAL APPEAL NO.286 OF 2016

Deepak S/o Venkat Survase,
Age-22 years, Occu:Labour,
R/o-Deoni, Taluka-Deoni,
District-Latur

**...APPELLANT
(Ori. Accused)**

VERSUS

- 1) The State of Maharashtra,
Through P.S.O.,
Police Station, Deoni,
Taluka-Deoni, District-Latur,
- 2) Vishnu S/o Shankarrao Shringare,
Age-44 years, Occu:Tailoring,
R/o-Deoni, Taluka-Deoni,
District-Latur.

...RESPONDENTS

...
Mr. N.S. Ghanekar Advocate for Appellant.
Mr. S.J. Salgare, A.P.P. for Respondent No.1.
Mr. B.S. Bhale Advocate for Respondent No.2.
...

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

DATE : 19th AUGUST, 2023

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. The appellant – original accused by the present Appeal

takes exception to his conviction in Sessions Case No.11 of 2014 by the learned Additional Sessions Judge, Udgir, District-Latur on 18th February 2016 after holding him guilty of committing offence punishable under Sections 302, 201, 363, 369 of the Indian Penal Code.

2. The prosecution story, in short, is that deceased Sadanand, aged 10 years, was son of PW-3 Pinkabai and informant PW-7 Vishnu (present respondent No.2). Deceased Sadanand was studying in 4th standard in Zilla Parishad Prashala at Deoni. Sadanand had gone to school as usual on 11th January 2014, which was Saturday. It was the morning school and the interval was around 11.00 a.m. Deceased did not attend the class room after the interval. This fact was noticed by his class-teacher PW-4 Sunita. Thereafter she had made arrangements to send the school bag of deceased Sadanand to his house. Sadanand's brother Amar was also studying in the same school and he informed the said fact of missing of Sadanand to his mother PW-3 Pinkabai. Informant Vishnu was at Hyderabad at that time. When the fact was made known that Sadanand went missing; all the family members started searching him. The fact was made known to his father at Hyderabad, who came on the next day and lodged the First Information Report (for short "the FIR")

against present appellant. It has been contended that one Pramod Sanjay Bele had told that he has seen Sadanand with Deepak i.e. accused and therefore inquiry was made with the parents of the accused also and parents informed that the accused did not come to house. At the time when the FIR was registered vide Crime No.10 of 2014, it was under Section 369 of the Code of Criminal Procedure. Police then apprehended the accused on 14th January 2014 and discovered the dead body of Sadanand. There is WC behind one Mahila Gat Sadhan Kendra and the dead body was found lying there. The inquest panchnama and spot panchnama was carried out on 15th January 2014 and dead body was sent for postmortem. The postmortem has been conducted between 9.45 a.m. to 11.00 a.m. on 15th January 2014 and the cause of death has been given as "Asphyxia due to strangulation". Under the said circumstance, Sections 302, 201 and 363 of the Indian Penal Code came to be added. In the FIR as well as in the statements those were recorded immediately thereafter, it was told that Sadanand was wearing gold pendant in leaf shape and therefore, it was suspected that murder is due to said gold leaf. When the dead body was found, there was no such article in the neck of Sadanand. While he was in custody accused Deepak gave

memorandum and showed the place of offence as well as took the panchas and the Police to jeweler PW-6 Sayyed Majid to whom he had allegedly sold the said gold leaf. The Jeweler had given him a gold ring and cash of about Rs.340/- in return. The gold ring, even the gold leaf pendant was then seized under seizure panchnama. Statements of witnesses were recorded. Seized articles were sent for chemical analyzer and after completion of the investigation, charge-sheet was filed.

3. After committal of the case, charge was framed and when accused pleaded not guilty, prosecution examined in all twelve witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides, the learned trial Judge has sentenced the accused to suffer imprisonment for life and to pay fine of Rs.10,000/-, in default to suffer rigorous imprisonment for six months for the offence punishable under Section 302 of the Indian Penal Code. Further, accused has been sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.2000/-, in default to suffer rigorous imprisonment for three months for the offence punishable under Section 201 of the Indian Penal Code. For offence punishable under Section 363 of the Indian Penal Code,

he has been sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.2000/-, in default to suffer rigorous imprisonment for three months. Further, for the offence punishable under Section 369 of the Indian Penal Code, he has been sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.2000/-, in default to suffer rigorous imprisonment for three months. All the substantive sentences have been directed to run concurrently. The set off has been granted under Section 428 of the Code of Criminal Procedure. Out of fine amount recovered, an amount of Rs.10,000/- was directed to be given to the informant PW-7 by way of compensation under Section 357(1) of the Code of Criminal Procedure and the copy of the Judgment and order was directed to be sent to District Legal Services Authority, Latur for grant of compensation under Section 357-A of the Code or Criminal Procedure.

4. Heard learned Advocate Mr. Ghanekar for the appellant, learned APP Mr. Salgare for the State and learned Advocate Mr. Bhale appearing for respondent No.2.

5. It has been vehemently submitted on behalf of the accused – appellant that the learned trial Judge has not appreciated the

evidence properly. The accused is not challenging the fact that death of Sadanand is homicidal in nature, but the accused is challenging that he is said to be the author of the crime. There was absolutely no evidence against the appellant. Case of the prosecution is based on circumstantial evidence and therefore, the prosecution ought to have proved the chain of events and those circumstances ought to have been proved to be pointing towards the accused as an author of the crime. Though the prosecution has examined parents of the deceased i.e. PW-3 Pinkabai and PW-7 Vishnu, yet it can be seen that they are not eye witnesses to the incident. There was no evidence produced by the informant to show that deceased Sadanand used to wear gold leaf pendant. Further no evidence was produced by the prosecution to show that what was the weight of the gold article. On the point of 'last seen together' the prosecution has relied on the evidence of PW-11 Parmeshwar Sanjay Bele, who was 13 years old boy at the time of his deposition. His evidence does not show that soon before the incident the deceased was seen in the company of the accused. The evidence of PW-6 Shivnanda, who used to prepare mid-day-meal for the students, is also not helpful to the prosecution as her evidence would show that she had seen Sadananad with the accused on 11th January 2014 and

the dead body of Sadanand was recovered after three days i.e. on 14th January 2014. Further, the seized gold pendant was not got identified from the parents of Sadanand and therefore the prosecution has failed to establish the motive. As the learned trial Judge has not appreciated the evidence properly, interference is required and the appellant deserves to be acquitted.

6. Per contra, the learned APP supported the reasons given by the learned trial Judge while convicting the accused. It is submitted that testimony of PW-11 Parmeshwar and PW-6 Shivnanda would show that deceased was lastly seen in the company of the accused. Evidence of PW-1 Dr. Manoj Hude would show that the dead body was severely decomposed and therefore he could not take note of external injuries but on the basis of internal injuries, the finding was given as the cause of death was "asphyxia due to strangulation". Therefore, the prosecution has proved beyond reasonable doubt, that death of Sadanand is homicidal in nature. The evidence of PW-3 Pinkabai and PW-7 Vishnu i.e. mother and father of the deceased would show that on the day of incident when Sadanand went missing, he was wearing gold pendant and when his dead body was

recovered the said article was not in the neck of Sadanand. Therefore, the prosecution has proved the motive. The conviction for the offence punishable under Sections 302, 201, 363, 369 of the Indian Penal Code is perfectly legal and it does not require any interference.

7. PW-1 Dr. Manoj Hude is the autopsy doctor who has conducted autopsy on the dead body of Sadanand. He deposed that postmortem was started at 9.45 a.m. and completed at 11.00 a.m. He deposed that since dead body was decomposed, no external injuries were found, however some internal injuries were noticed. Internal injuries were sub cutaneous tissues muscles situated in front and anterio lateral aspect of larynx and trachea and base of tongue show patechial haemorrhage. He also noticed fracture of superior horn of thyroid cartilage present. He further deposed that all injuries were ante mortem and cause of death was "Asphyxia due to strangulation". There was no serious challenge to his finding by the accused and therefore, it can be certainly said that the prosecution has proved the fact that death of Sadanand is homicidal in nature.

8. Now the crucial question would come, as to whether the accused was the author of the crime. Prosecution has relied on the circumstantial evidence only as there is no direct evidence. In order to satisfy the circumstantial evidence beyond reasonable doubt, the said evidence led by the prosecution should go through the tests laid down in the various authorities by the Hon'ble Supreme Court. We can lay our hands on the decision in ***Sharad Birdhichand Sarda vs. State of Maharashtra*** reported in **(1984) 4 SCC 116**, wherein it has been held that -

"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."

9. The evidence is, therefore, now required to be tested on the above said principles.

10. Prosecution has relied on the evidence of PW-11 Parmeshwar Sanjay Bele, who appears to have been referred as Pramod Sanjay Bele in the FIR Exhibit-34, on the point of 'last seen together'. If we consider testimony of PW-11 Parmeshwar, it can be seen that he is 13 years old boy, taking education in 7th standard at the time of deposition. He says that their school starts at 8.30 a.m. and ends at 12.00 noon on Saturdays and there used to be an interval in between. He says that he was sitting near *Balwadi* class during the interval when Sadanand came out. Sadananad went to hawker's cart near the school and purchased *Papdi*. Then he says that Deepak i.e. accused took Sadanand towards water tank. He had then climbed the wall and

saw but he could not find Deepak and Sadanand. He thereafter says that he got down from the wall and asked Deepak, where Sadanand was and then Deepak told him that Sadanand went to his house. Parmeshwar then says that he went to school and brother of Sadanand took his school bag to home. Parmeshwar has stated that he had seen Sadanand wearing gold leaf in the neck. In his cross-examination, he has stated that there was crowd around *Papdi* hawker. Around 10 to 15 boys were near the hawker's cart. He had not listen as to what talk was going on between Sadanand and Deepak. The wall was by the side of the school. Thus, it is to be noted that according to Parmeshwar, he had seen accused taking Sadanand towards the water tank. If we consider the spot panchnama, we cannot see any structure like water tank near the spot. If Parmeshwar was referring to some structure in his school then the prosecution has not taken any pains to bring the situation of that spot on record.

11. The examination-in-chief of PW-11 Parmeshwar would give an impression that he has seen accused taking Sadanand towards water tank and then he himself had climbed the wall to see them but could not notice them. In the first sentence Parmeshwar says that Deepak took Sadanand towards water tank and in the next sentence he says that he climbed the wall

to see them. What was the time gap between he watching accused taking Sadanand towards water tank and then climbing the wall to search Sadanand, has not been told. He does not say as to what prompted him to climb the wall and see where Sadanand has gone. He does not say that he suspected as to why accused is taking Sadanand with him and out of that curiosity he had climbed the wall. He then says that when he got down from the wall, he asked accused as to where Sadanand was and accused replied that Sadanand has gone to his house. Again, after how much time he saw Deepak alone and asked him in respect of the whereabouts of Sadanand, has not been told by him. But it appears from the evidence of PW-11 Parmeshwar that soon thereafter he noticed that Deepak was alone and Sadanand was not with him. It is stated that the said spot where the dead body was found, is behind the school but it has not been told as to how the road goes from the school to the said spot. Under the said circumstance, the testimony of this witness does not throw complete light.

12. Even if for the sake of arguments it is accepted that PW-11 Parmeshwar proves the fact that he had seen deceased alive in the company of accused, it would be around 11.00 a.m. of 11th

January 2014 and the dead body has been recovered on 14th January 2014. The prosecution is not explaining as to why Parmeshwar was not asked to show the road from which the accused had taken deceased along with him. PW-12 the investigating officer Dr. Ashwini Shelar has not stated that she had tried to search for deceased boy by taking help of PW-11 Parmeshwar. At this stage itself, if we consider the postmortem report, then it says that death might be within 4 to 6 hours after last meal. Nobody has seen deceased consuming anything and as aforesaid, the difference from the date of missing till recovery of dead body is about three days. It is also then stated in the postmortem report Exhibit-15 that the death might have occurred 72 hours prior to the postmortem. This calculation also does not go till 11th January 2014 from the date of carrying out the postmortem on 15th January 2014. Therefore, on this count also, the testimony of PW-11 Parmeshwar cannot be relied upon.

13. PW-12 Dr. Ashwini – the Investigating Officer has deposed in her examination-in-chief itself that she received information that the accused has been apprehended by Police and brought to Police Station on 14th January 2014, therefore, she went to Deoni Police Station and interrogated the accused. After the

interrogation, they went to Mahila Gat Sadhan Kendra with him. There is a WC behind the said Kendra. Dead body of Sadanand was found lying there. Still she had not prepared panchnama on 14th January 2014, may be the spot panchnama cum inquest panchnama and had not send the dead body immediately thereafter. The inquest panchnama is also carried out on 15th January 2014 at 8.00 a.m. She has intentionally not given the time at which she had interrogated the accused and accused had shown / discovered the dead body of Sadanand. This is the serious lapse in the investigation by PW-12 Dr. Ashwini. The arrest of the accused is at 10.20 hours on 15th January 2014. The Investigating Officer has not stated when and from where the accused was apprehended by the Police. If accused was apprehended on 14th January 2014 and the FIR specifically named the accused as suspect, then why the accused was not arrested immediately. There was no question of any confirmation of the information or research to be undertaken. The cognizable offence was registered against the accused and at that time it was under Section 369 of the Indian Penal Code. Under the said circumstance the said discovery; of course for which there is no panchnama executed in presence of independent panchas, cannot be said to be under Section 27 of Indian Evidence Act.

14. PW-3 Pinkabai and PW-7 Vishnu are the parents of Sadanand. They have established the fact of missing of Sadanand but their testimony does not go beyond. They are not the eye witnesses to the incident. As regards the gold leaf pendant is concerned, they both have not stated as to what was the approximate weight of the said gold article. Unless they would have told the said fact, we cannot appreciate that whatever has been recovered from PW-9 Sayyed Majid to whom the said pendant was sold, is the same. The said seized article No.1 i.e. gold leaf pendant was not got identified from PW-7 Vishnu and PW-3 Pinkabai. According to PW-9 Sayyed Majid, a boy had come to his shop in 2014. The said boy took out gold leaf pendant from his neck and told that he should be given gold ring by taking the same. Thereafter PW-9 Sayyed Majid had given gold ring from the available gold with him and kept the gold leaf with him. This witness further stated that he had also given around Rs.300/- to the said boy. He then says that after 4 to 5 days the boy was brought by the Police to him and Police made inquiry. Accordingly, he had given answers and also produced the gold leaf, article No.1. Important point to be noted is that, gold ring article No.2 allegedly seized at the instance of

the accused was shown to PW-9 Sayyed Majid and in categorical terms he says that it is not the same ring which he had given to the said boy. In the cross-examination PW-9 Sayyed Majid has stated that he had not made inquiry while taking gold leaf, he had not seen the cash memo of the gold leaf. He had given the receipt in respect of the gold ring. Interestingly, the prosecution has further come with the case that the said gold ring was then sold to another goldsmith. PW-12 Dr. Ashwini, in her examination-in-chief had said that accused had gone to Pandharpur by railway. She had recorded statement of Ismail Mandal from whom the accused had purchased one ring. Said Ismail Mandal has not been examined by the prosecution for the reasons best known to it. Therefore, as regards the gold leaf, for which it is alleged that Sadanand was kidnapped and then murdered, has not been established at all.

15. PW-6 Shivnanda Kalyankar is the lady working in Zilla Parishad School of Deoni. She is the lady who used to prepare Khichadi i.e. mid-day-meal for the students. She says that she was knowing accused as he resides in her lane. She knows him as pick-pocketer. According to her, accused had come to the school on 10th January 2014 as well as on 11th January 2014.

She had seen the accused while she was distributing Khichadi to the students. She then says that she had seen Sadanand with accused on Saturday. Interesting point to be noted is that in her examination-in-chief no more details have been taken. At which time she distributed Khichadi on 11th January 2014, has not been told by her. According to her, Sadanand as well as accused were loitering in the school premises and accused was holding sweets in his hand. This fact has not been corroborated by PW-11 Parmeshwar. It also appears from her testimony that she did not find anything odd when she found deceased in the company of the accused. She does not say that she has seen both of them going out of the school premises. Therefore, testimony of PW-6 Shivnanda is also not helpful to the prosecution to bring home the guilt of the accused.

16. PW-8 Balaji is the panch to the spot panchnama. PW-10 Krishnkant Bele is the panch to the seizure panchnama of clothes of the accused, seizure of clothes of deceased and these panchnamas are not much disputed. But as regards the shirt of the accused is concerned, it is said that left chest pocket was torn and it is also mentioned that stitches had come out and one of the button was missing. It is then said that the similar button

was found near the WC. Even if we take this circumstance as incriminating, yet only on the basis of this piece of evidence conviction cannot be based.

17. As aforesaid, the Investigating Officer has not collected proper piece of evidence and lacunas have been left. Accused cannot be given benefit of the faulty investigation, but herein this case the said fault is going to the root of the case.

18. After churning the entire evidence, which is of circumstantial in nature and testing it on the touchstone of the golden principles laid down in ***Sharad Birdhichand Sarda vs. State of Maharashtra*** (supra), we do not find that pieces of evidence are indisputably pointing out towards the accused. The prosecution has failed to establish the motive also, which is mandatory in the case based on circumstantial evidence. The learned trial Judge appears to have been carried away with the testimony of PW-11 Parmeshwar and to some extent, PW-6 Shivnanda on the point of 'last seen together'. In fact the said theory has not been properly appreciated. The time gap between the witnesses witnessing the deceased alive in the company of the accused and the time of death should be very narrow so as

to infer that the said piece of evidence is proved. Under such circumstance, the Appeal succeeds. It is not the case that this Court is taking the second view in the Appeal wherein two views are possible. When there is failure on the part of trial Court to appreciate the evidence properly and the conviction is not based on sound legal principles, then definitely interference is required.

19. Here, we are aware that the trial Court has granted compensation on two heads, one is under Section 357(1) of the Code of Criminal Procedure, that is out of the fine amount and secondly, under Section 357-A of the Code of Criminal Procedure. Reasons have tried to be assigned as to why the trial Court was of the opinion that compensation needs to be granted under Section 357-A of the Code of Criminal Procedure. When we are allowing the Appeal and setting aside the conviction, then certainly the order regarding payment of compensation out of the fine amount i.e. under Section 357(1) of the Code of Criminal Procedure needs to be set aside. However, as regards the compensation to respondent No.2 under Section 357-A of the Code of Criminal Procedure is concerned, deserves to be maintained as the deceased was the citizen of India whose life and liberty was required to be protected by the State. It has

been proved by the prosecution that deceased Sadanand has been murdered. What the prosecution failed to prove is that the murder was committed by the present appellant and therefore, taking into consideration the fact that a young boy has lost his life and the informant has lost his son, we are maintaining the said order under Section 357-A of the Code of Criminal Procedure.

20. We are coming across certain cases in which the trial Courts are granting compensation under Section 357-A of the Code of Criminal Procedure. It is also then written that copy of the Judgment be sent to the concerned District Legal Services Authority Office but when inquiry is made, as to whether the District Legal Services Authority is quantifying such compensations under Section 357-A of the Code of Criminal Procedure, we are getting the information that the concerned Courts are not taking up the paper work. When such orders are passed, it is only one letter that is required to be given by the concerned Court to the Chairman of the District Legal Services Authority to which the copy of the Judgment is required to be attached. Therefore, we hereby direct that all the Courts should follow and take up the steps to send the copies of the Judgments

wherein they pass such order of compensation under Section 357-A of the Code of Criminal Procedure, immediately to the concerned office of the District Legal Services Authority in their District.

21. For the reasons stated herein above, we pass the following order:-

ORDER

- (1) The Appeal is hereby allowed.
- (2) The conviction awarded to the appellant in Sessions Case No.11/2014 for the offence punishable under Sections 302, 201, 363, 369 of the Indian Penal Code stands set aside.
- (3) The appellant stands acquitted of the offence punishable under Sections 302, 201, 363, 369 of the Indian Penal Code.
- (4) He 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 and referring the case for

compensation to respondent No.2 under Section 357-A of the Code of Criminal Procedure.

(7) The copy of this Judgment be sent to District Legal Services Authority, Latur, immediately for further action.

(8) We hereby direct all the Criminal Courts in Maharashtra that whenever in criminal matters compensation is awarded under Section 357-A of the Code of Criminal Procedure, the copy of the Judgment or order should be immediately given to the District Legal Services Authority Offices of their Districts for further action.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/AUGUST23