

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

CRIMINAL APPEAL NO.268 OF 2017

. Morsing @ Pintu Sonu Pawar
Age: 23 years, Occu.: Labour,
R/o. Shevge Tanda, Tq.Parola,
Dist.Jalgaon. ..Appellant

VERSUS

1. The State of Maharashtra
2. Ranchhod Ramji Pawar
Age: 50 years, Occu.: Labour,
R/o. Shevge Tanda, Tq.Parola,
Dist.Jalgaon. ..Respondent

...
WITH

CRIMINAL APPEAL NO.623 OF 2017

. Motiram S/o Rohidas Pawar
Age: 27 years, Occu.: Labour,
R/o. Shevge Tanda, Tq.Parola,
Dist.Jalgaon. ..Appellant
(Orig. Accused No.1)

VERSUS

. The State of Maharashtra ..Respondent

...
WITH

**CRIMINAL APPLICATION NO.6144 OF 2017
IN APPEAL/623/2017**

. Motiram S/o Rohidas Pawar
Age: 27 years, Occu.: Labour,
R/o. Shevge Tanda, Tq.Parola,
Dist.Jalgaon (Presently in Jail) ..Applicant

VERSUS

. The State of Maharashtra ..Respondent

...
Mr.Satej S. Jadhav, Advocate for Appellant in Criminal Appeal No.268/2017.
Mr.Imran G.Durrani,, Advocate for Appellant in Criminal Appeal No.623/2017.
Mr. S.D.Ghayal, APP for Respondent no.1 – State
Mr. Sudarshan J. Salunke, Advocate for assist to APP.

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

DATE : 7 AUGUST 2023

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

1. Feeling aggrieved by the judgment and order of conviction dated 30-05-2017 passed by the learned Additional Sessions Judge, Amalner in Sessions Case No.16 of 2015 thereby recording guilt and convicting both the appellants for charge under Sections 363, 120-B, 302, 201 read with 34 of the Indian Penal Code (IPC), the appellants have preferred instant appeals by invoking Section 374 of the Code of Criminal Procedure (Cr.PC.).

PROSECUTION CASE IN THE TRIAL COURT

2. Informant is working as Supervisor in a Sugar Factory. He had paid an amount of Rs.2,00,000/- to accused no.1 for supplying labours. Fearing recovery, it is the case of prosecution that both the accused hatched conspiracy and accused no.1 with the help of accused no.2, kidnapped son of informant namely Arun between 06:30 p.m. to 07:00 p.m., took him towards a remote spot and they throttled him and committed his murder and thereafter, they buried his body for diminishing evidence. As the child was missing and inspite

of being searched he was not found, informant i.e. father of the child lodged report, which was made basis for registration of crime bearing no.222 of 2014.

Investigation of above crime was entrusted to PW10 Ingale (PSI), who after its completion, challaned both accused for above charges. Learned Additional Sessions Judge framed and explained charge and on its denial, undertook trial wherein eleven witnesses have been examined by prosecution. After hearing both the sides, learned Additional Sessions Judge accepted the case of prosecution as proved and convicted the appellants for above charges.

3. Heard both the learned Counsel for the appellants at length. The common grounds raised before us could be summarized as under :

GROUND

Firstly, impugned judgment is illegal, perverse and not sustainable in law.

Secondly, there is no appreciation of evidence in its proper perspective and in its legal requirement.

Thirdly, case being based on circumstantial evidence, ought to have been proved beyond reasonable doubt by establishing each and every circumstance relied by the prosecution, but it has failed to do so.

Fourthly motive is not forthcoming and is thereby not cogently established by prosecution even when it was mandatory to prove it and case is based on circumstance evidence.

Fifthly theory of last seen together is pressed into service, but prosecution miserably failed to establish the same and connect the appellants to the death of deceased Arun.

Sixthly, non-examination of material witnesses like mother, brothers or friends and relatives of deceased, amounts to withholding material witnesses.

Seventhly, chain of circumstances is not complete and rather getting snapped at several places and case is not proved beyond reasonable doubt.

Submissions on behalf of State :

4. In answer to above, learned APP would submit that in the trial Court case has been proved beyond reasonable doubt. Theory of last seen together and discovery of dead body is cogently and firmly proved by adducing independent witnesses. According to him, motive was also proved by prosecution. Because of fear of repayment of money, crime was committed. Independent witness had seen deceased in the company of accused no.2 and thereafter, he was not found alive. Therefore, theory of last seen together is also firmly established coupled with discovery of spot at the instance of none other than appellants and therefore, it is his submission that learned trial Judge has rightly accepted the evidence adduced by the prosecution and has committed no error whatsoever in holding guilt and convicting appellants. Thus, he prays for dismissal of appeals.

5. 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. Prosecution, through the testimony of eleven witnesses has tried to establish complicity of both the accused appellants herein. The status and role of these witness are as under :

PW1 Ranchhod Ramji Pawar is father of deceased and informant. His evidence is at Exh.24.

PW2 Sharad Eknath Patil is spot Pancha. His evidence is at Exh.26.

PW3 Uttam Mahadev Pawar is Pancha to seizure of mobile handset of accused. His evidence is at Exh.30.

PW4 Ukha Govinda Paward is an independent witness. His evidence is at Exh.34.

PW5 Jagan Dashrath Chavan is an independent witness. His evidence is at Exh.36.

PW6 Yogesh Prabhakar Joshi is carrier. His evidence is at Exh.37.

PW7 Dr.Ajit Gajanan Pathak is Autopsy Doctor. His evidence is at Exh.42.

PW8 Jairam Abhiman Patil is Photographer. His evidence is at Exh.51.

PW9 Lalchand Subha Pawar is Pancha to seizure of Mobile handset. His evidence is at Exh.53.

PW10 Milind Akaram Ingale is the Investigating Officer. His evidence is at Exh.55.

PW11 Sachin Mahadev Shinde is the Nodal Officer. His evidence is at Exh.65.

6. After hearing submissions of both sides, we have noticed that there is serious dispute about manner, nature or mode of death. Arun a boy of 14 years, is found to have died due to throttling. By examining PW7 Dr.Pathak (Autopsy Doctor), above opinion has been reached at. It seems from the record, more particularly from the cross-examination of above witness that, testimony of Medico Legal Expert has remained virtually unchallenged as regards to nature of death is concerned. Even during appeal, no fault is attributed as regards to medical opinion about cause of death. Therefore, we also do not hesitate to hold that death of Arun is not natural but is homicidal one.

The only question now we are required to address and answer is that as claimed by prosecution whether the appellants before us are responsible for the above homicidal death.

Here there is no direct evidence and as is seen case of prosecution is rested only on circumstantial evidence.

7. 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; *Dhananjoy 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.

8. 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.

9. Bearing in mind above legal position, we proceed to deal with case in hand.

On hearing both sides and on going through the record, only three circumstances seem to be relied by the prosecution which are as follows :

Firstly motive.

Secondly last seen together.

Thirdly recovery, discovery on spot at the instance of accused.

FIRST CIRCUMSTANCE

10. Case of prosecution is that PW1 Ranchhod, who is father of deceased and informant had made payment of Rs.2,00,000/- to accused for arranging labour for sugarcane cutting. However, they failed to supply labours and even further failed to repay the amount. Thrust of prosecution is that to avoid repayment, they picked up and kidnapped Arun and thereafter, throttled and after being done to death, to screen themselves, they have wiped of the evidence by burring the dead body.

11. On re-analyzing testimonies and oral account of above stated witnesses of prosecution, except **PW1** Ranchhod, father of deceased and informant, there is no witnesses throwing light on the alleged motive. Informant in his cross-examination stated that there was no agreement between him and accused / appellants for supplying labours for monetary consideration of Rs.2,00,000/-. Unfortunately neither in examination-in-chief nor in cross-examination, it is brought on record as to when such payment was made and by what mode. Further the evidence of prosecution is found to be absolutely silent about any demand made by appellants which was so consistent and persistent that to avoid the same, conspiracy was hatched by appellants. Except PW1 Ranchhod, father of deceased and informant, there is no witness uttering a word about so called transaction between informant and appellant. Therefore, here what was the motive for conspiracy and killing the child has not at all

come on record. Therefore, there is little or no evidence on the point of alleged motive behind the occurrence. Resultantly, in our opinion, prosecution has miserably failed to established motive.

It is trite law that in the case based on circumstantial evidence, there is heavy burden on prosecution to establish the motive, though it is insignificant in the case based on direct evidence. Here case was admittedly based on circumstantial evidence and therefore, prosecution was expected to establish motive by leading cogent, reliable evidence but it has failed to do so. Hence, first circumstance fails.

SECOND CIRCUMSTANCE

12. Theory of last seen together is sought to be established by examining **PW4** Ukha. Therefore, we have visited his evidence at Exh.34 and scrutinized it minutely. He seems to be a Priest of a temple and he was performing pooja every morning and evening. He claims to be knowing the accused, who are present before the Court but he did not know Ranchhod i.e. informant - father of deceased. He deposed that three years back, on the day of Dussehra festival at 06:00 p.m., he had been to temple for performing pooja and about 06:30 p.m., he saw accused no.2 - Morsing and boy Arun proceeding towards field of Padam Tima for answering call of nature. He further categorically stated that he was knowing Arun i.e. deceased. Witness stated that thereafter, he returned home. He claimed that he came to know about Arun to be

kidnapped. Then he testified that on 5th day Police brought accused no.1 - Motiram near the field of Padam Tima and such accused showed the spot to the Police and gave declaration that dead body of Arun was buried at the said place. That dead body was taken out and panchanama was drawn. According to him, Police recorded his statement on 10-10-2014 and his statement under Section 164 of Cr.PC. was recorded on 14-10-2014.

Above witness is subjecte to **cross-examination** by learned Counsel for the accused in the trial Court wherein he has answered that he is not deposing falsely about accused no.1 bringing Police to the field of Padam Tima on 05-10-2014 and showing the spot. He had admitted that on 04-10-2014, he did not disclose to the Police or even PW1 Ranchhod about he seeing deceased Arun with accused Morsing.

In **cross-examination** at the hands of learned Counsel for accused no.2, he answered that he knew one Sonu Pawar, who is father of accused no.2. He denied that Sonu was labour contractor. He answered that he did not know father of Arun. According to him, Arun has no friend. According to him, distance between Ramdevbaba and house of Morsing is around 150 to 200 feet and there are 100 houses at their Tanda. He answered that there is only one way to go to field of Padam Tima. He admitted that children used to play near temple, but he is unable to name them. He stated that on 5th none of the relatives of Arun was present in the field. He admitted that he did not give any information about the incident of 3rd to Police. He admitted that since

05-10-2014 to 10-10-2014 he did not talk with the relatives of Arun. Rest is all denial.

Before drawing the conclusion on his testimony, we deem it fit to first give a brief account of settled law in case of theory of last seen together propounded by Hon'ble 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.

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) and *Shyamlal Ghosh* (supra).

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.

13. On going through the testimony of **PW4** Ukha in the light of requirement of above settled position, we have noted that his evidence is not at all worthy of credence to apply said theory of last seen together for following reasons;

Firstly, though he claims to have seen deceased in the company of accused no.2 between 06:30 p.m. to 07:00 p.m. together going towards the field of Padam Tima, it is surprising to find that he has stated about it for the first time to Police in his statement dated 10-10-2014. He himself stated in the examination-in-chief about learning regarding son of informant being missing and kidnapped, but surprisingly he has not passed such information about seeing deceased in the company of accused no.2 on the evening of 03-10-2014 itself. He has also chosen to remain silent inspite of claiming to be present at the time of disclosure of spot of burial of dead body on 05-10-2014. This is unnatural conduct on part of PW4 Ukha.

14. **Secondly**, he only speaks about seeing accused no.2 going to the field in the company of deceased and according to him, they both were going for answering call of nature. Question is that when he has not spoken about interacting with them, then on what basis he could assert and depose that they both were proceeding towards the Padam Tima for answering call of nature. No utensil or water container is found near the spot. There is no evidence nor there is any investigation demonstrating that alleged spot of occurrence was

used by the villagers to ease themselves. Even otherwise, he only speaks about seeing one accused i.e. accused no.2. For above reasons, we are afraid whether his sole testimony can at all be relied and used by prosecution.

15. As stated above, apart from seeing accused no.2 to be the last person in the company of deceased when he was alive, it is equally incumbent for prosecution to state time since death at least by approximation. PW Dr.Pathak, Autopsy Doctor in his post mortem report has given time since death as between 36 to 72 hours. This is immense and huge gap. There is nothing to show that since evening of 03-10-2014 till 05-10-2014 accused were only persons in the company of deceased and no one else. In view of the above legal position about theory of last seen together, case of prosecution need not be relied upon such theory. All requirements for attributing and applying theory are missing from prosecution evidence and therefore, in our considered opinion, even this circumstance fails to inspire confidence.

THIRD CIRCUMSTANCE

16. Discovery and recovery of spot. Prosecution claims that on 05-10-2014 spot was discovered at the instance of accused no.1 Motiram. It is to be borne in mind that there is not one but two persons are facing charge of 302 read with 201 of the IPC. Under such circumstance, how discovery and recovery of spot only at the instance of one accused could at all be freely used

by prosecution to hold both the accused responsible. It is also brought to our notice by learned Counsel for appellants that distance between spot of burial and house of informant is barely 300 to 400 feet. If this is so, then surprisingly how very act went unnoticed from informant or his family members as well as residents of locality, which were said to be of closely knit hamlet of 100 houses, is not getting clear. For above reasons also, circumstance of recovery and discovery is not free from doubt.

17. Though prosecution claims that CDR is there to connect appellants, the mobile handset, which was said to be in possession of deceased and was allegedly put to use by accused to call informant, is not before the Court. Therefore, even this circumstance is weak in nature. Even Nodal Officer **PW11** Sachin has candidly admitted about possibility of using mobile connection by other person than the person in whose name the SIM card is used, cannot be ruled out. There is one recovery of a mobile at the instance of accused no.1 but it is of 08-10-2014. Investigating Officer admits that there being water, the mobile handset and SIM card could not be recovered. He has admitted that after arresting both accused, he did not gather documentary evidence in respect of subscriber for mobile numbers. He even admitted that he did not verify I.M.E.I. number of mobile handset in which SIM card 9130116237 was seized by panchanama Exh.54.

CONCLUSION

18. Therefore, taking into consideration entire evidence including answers given by PW10 Ingale, Investigating Officer in the cross-examination, it is revealed that the evidence of prosecution is full of ambiguities. There is no finding or basis in support of accusation of hatching conspiracy of kidnapping the child and thereafter, committing his murder by throttling. There are two persons facing same charge, but who did what and which amongst them throttled deceased, is not getting clear. Therefore, none of the circumstance is found to be incriminating one so as to accept the case of prosecution.

19. We have carefully gone through the impugned judgment. In our considered opinion, learned trial Judge has not properly appreciated the available evidence and has even lost sight on legal requirements for fixing culpability and criminality. There was no incriminating circumstance proved or established by prosecution so as to accept the case of prosecution. Therefore, in our opinion, there is total non-application of mind and non-appreciation of evidence as well as law. Consequently, such judgment cannot be allowed to be sustained in the eyes of law. Therefore, interference by the hands of this Court becomes necessary and as appellants succeed, we proceed to pass following order :

ORDER

- I. Both the appeals stand allowed.
- II. The conviction awarded to both the appellants, i.e. accused no.1 Motiram s/o Rohidas Pawar and accused no.2 Morsing @ Pintu Sonu Pawar by learned Additional Sessions Judge, Amalner, District Jalgaon in Sessions Case No. 16 of 2015 on 30-05-2017 after holding them guilty of committing offence punishable under Sections 363, 120-B, 302, 201 r/w 34 of the Indian Penal Code stands quashed and set aside.
- III. Both the appellants stand acquitted of the offences punishable under Sections 363, 302, 201 r/w 34 of the Indian Penal Code and Section 120-B of the Indian Penal Code.
- IV. Both of them be set at liberty, if not required in any other case.
- V. The order of directing the fine amount to be paid to PW1 Ranchhod Ramji Pawar i.e. respondent no.2 in Criminal Appeal No. 268 of 2017 under Section 357 of the Code of Criminal Procedure also stands set aside.
- VI. The respective fine amount deposited, if any, be refunded to the appellants after the statutory period.
- VII. We clarify that there is no change in the order regarding disposal of muddemal.
- VIII. Criminal Application No. 6144 of 2017 stands disposed of.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)