

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.706 OF 2015
WITH
APPLN/3666/2022 IN APEAL/706/2015

Azizkhan S/o Mohammad Khan Pathan
Age : 35 Years, Occ : Nil,
R/o. Rupala, Taluka Umarkhed,
Dist. Yeotmal.
(At present is in Nanded jail)

. . . Appellant
(Orig. Accused)

Versus

The State of Maharashtra

. . . Respondent

.....
Mr. Sunil B. Jadhav, Advocate for Appellant (Appointed Through Legal Aid)
APP for Respondent State : Mrs. P V. Diggikar
.....

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

DATED : 20th JANUARY 2023

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

1. Appellant, a convict has invoked jurisdiction of this Court by filing instant appeal, thereby challenging judgment and order of conviction passed by learned Additional Sessions Judge, Biloli, Dist. Nanded for commission of offence under section 302 and 392 of Indian Penal Code and thereby sentenced him to suffer imprisonment for life and to suffer rigorous imprisonment for ten years, respectively, for each of the above offence.

Factual matrix

2. Deceased Vimalabai was harvesting pulse(Tur) in her own field on 06.03.2011. Her son- informant Tukaram (PW1) had been to render labour services in the field of one Murlidhar Demewar. Tukaram was informed by one Prakash Jadhav that something has happened to his mother and so he rushed to their field and there he found his mother lying down in the field. Ornaments on her person were also found to be missing. She was shifted to hospital where she was declared dead and thereafter PW1 Tukaram lodged FIR against unknown person for commission of murder and committing robbery, on the strength of which, crime bearing No.19 of 2011 was registered with Ramtirth Police Station for the above offence.

3. Investigating machinery, after completing investigation, filed charge-sheet which came to be committed to the Court of Additional Sessions Judge, Biloli, wherein prosecution adduced evidence of in all 12 witnesses and also sought reliance on documentary evidence like FIR, panchanama, postmortem report etc. After appreciating the oral and documentary evidence learned trial court was pleased to convict the accused-appellant and hence the instant appeal.

4. In the trial court prosecution has relied on the evidence of PW-1 informant - Tukaram who is son of deceased, PW-4 Tirupati, PW-5 Shivaji and

PW-6 Manohar, residents of same village who claim to have seen accused. Prosecution also examined pancha witnesses, PW-2 Sadashiv, PW-3 Maroti, PW-7 Hanmantrao, PW-8 Shriram and PW-9 Balaji to prove various panchanamas. Nature of death has been established by examining autopsy doctor PW-10 Dr. Sunanda Kothale.

5. After going through the prosecution evidence, it appears to be their case that, accused strangled deceased Vimalabai to rob her of her gold and silver ornaments. This was precise motive according to the prosecution. Prosecution claims that there is recovery of the ligature rope which was allegedly put to use. It is also the case of prosecution that apart from the ligature, accused also pointed out the spot where he committed the murder and also gave disclosure about disposal of ornaments which were also seized. Prosecution found favour in the trial court as learned trial Judge accepted the evidence of prosecution to record guilt of accused.

6. This being first appellate court, as required, we proceed to re-appreciate, re-examine and carefully analyze the prosecution evidence to ascertain whether prosecution has at all succeeded in bringing home guilt of accused.

7. We have carefully gone through the testimonies of each of the above discussed witnesses.

There is no dispute that deceased died due to strangulation and as such, met homicidal death.

Admittedly, PW1 Tukaram, son-informant, seems to have subsequently learnt about his mother lying dead in their own field. Therefore, he is unaware as to how his mother met death. Case of prosecution entirely hinges on the testimonies of **PW-4** Tirupati, **PW-5** Shivaji, **PW-6** Manohar.

8. Prosecution has come with the case that these three independent villagers had seen accused on relevant day. That he was stranger in the village. Further, police arrested him and these three witnesses identified accused.

9. According to **PW-4 Tirupati** while he was grazing his cattle, at that time accused passed in front of him and he saw accused going towards the western side. This witness claims that accused also asked him whether this witness had a field to be ploughed as accused had his own tractor. Shortly thereafter i.e. after 2-3 hours, this witness claims that he learnt about mother of PW-1 Tukaram, i.e. Vimalabai found in dead condition in her field. In his short cross-examination, PW-4 Tirupati has admitted that the person who passed in front of him did not possess anything in his hand and that he had not seen that person prior to the incident. He further candidly admitted that police did not produce that person ever before him for identification.

10. Therefore, what is emerging from the above evidence of **PW-4** is that firstly, this witness though claims to have stated about seeing accused, where they both exactly met and where this witness was grazing cattle has not been clarified by this witness. It is not stated by him that he saw accused going towards the field of Vimalabai. He has not given exact time, that is, at what time of the day he met accused. No description about physical features or attire of accused are given by this witness in the witness box. Further, he is found to be stating in examination-in-chief itself that he **learnt from police** that “accused has committed murder of Vimalabai”. He has also admitted that he was never called for identification of accused.

11. Now, let us examine testimony of second star witness i.e. **PW-5 Shivaji**. According to him, on 06.03.2011, while he was proceeding towards his field at around 01.00 p.m., he saw crowd in the field of Namdeo Patil and so he immediately went there and saw of Vimalabai being killed by someone. According to him, her body was lying in the field of Namdeo Patil where cotton crop was going on. He has stated that accused was arrested by police on 15.03.2011. He claims to have seen accused prior to the incident, but clarified that there were no talks between them and further answered that if accused is shown to him, he can identify. This witness is not subjected to cross-examination.

12. Thus, from his evidence, it is emerging that he has merely seen dead body of Vimalabai and he speaks of arrest of accused. Though he has stated that he had seen accused previously, he stated that there were no talks between them. Even this witness has not given details of accused or about seeing accused go towards field of Raghunath Patil.

13. Evidence of **PW-6 Manohar**, is also heavily relied by the prosecution in the trial court. This witness stated that on 06.03.2011, while he went to his field at 10.00 a.m. and was watering his wheat crop, one unknown person alighted from auto rickshaw in front of his field. This witness claims that he asked that person's name and place, but there was no response and that person did not talk with him and went away. He also states that at around 1.30 p.m. to 1.40 p.m. he heard from public that someone had killed a woman by name "Nirmalabai". After two days, police came to village and brought accused with them and asked the accused as to how he committed the offence and as per directions of accused, they all went to the incident of spot and the spot was shown by the accused. It is stated that the person accompanied with the police was the same person to whom he had met near his field. This witness is also unfortunately not subjected to cross examination for want of presence of defence counsel. Resultantly, from the testimony of

PW-6, it is merely coming on record that this witness had seen accused alighting from auto rickshaw and subsequently police bringing him in the village for drawing spot panchanama.

14. Therefore, on careful evaluation of testimonies of PW4 Tirupati, PW5 Shivaji and PW6 Manohar, it is clearly emerging that accused was a stranger to the village. Secondly, PW4 Tirupati and PW6 Manohar claim to have seen and interacted with accused. Both of them are not giving details of the accused. Arrested accused was not shown to them by conducting test identification parade. In our opinion, it was crucial for prosecution and rather essential for investigating machinery to get identification done, more particularly, when accused was not resident of that village and was said to be a stranger. Unfortunately, including the Investigating Officer, all above witnesses are fairly admitting that they were never called for test identification parade. Consequently, testimony of these witnesses on which prosecution is resting their case, is apparently weak in nature. None of them had in fact seen accused entering the field of Vimalabai or even none of them spoke about accused going towards or in her field. These witnesses are merely stating that they saw accused. These Witnesses were located at distinct places at distinct time. Therefore, when none of these three speak about accused to be in the company of deceased or seen going towards field of deceased or to be present in her field, we are afraid whether their testimonies can at all be taken aid of.

For want of clear evidence from their side, it is unsafe to rely on their testimonies.

15. The second circumstance, according to prosecution, is recovery of nylon rope at the instance of accused in the backdrop of memorandum of disclosure under section 27 of the Indian Evidence Act. To prove this circumstance, prosecution seems to have examined PW-7 Hanmantrao. In his evidence (Exhibit-32), he has stated that on 15.03.2011 police called him at police station. Another pancha Madhavrao Jadhav was also present there. Accused made a statement in their presence that he is ready to show the spot of incident and also handover articles used by him in commission of the offence. Thereafter, accused took police and panchas to village Hipparga Mal and after traveling some distance he made the vehicle stop, alighted from it and started walking towards the spot which was in the field of Raghunath Patil and from the spot, beneath a neem tree he produced rope and that was seized by drawing panchanama. He identified memorandum as well as panchanama Exhibits- 33 and 34. Thus prosecution claims that investigating machinery has successfully proved seizure of article ligature used for strangulation.

16. From the above testimony it seems that at the instance of accused, rope was seized. The rope seems to be seized from a field belonging to deceased herself. However, in spite of alleged occurrence taking place on

06.03.2011 and police coming there and drawing spot panchanama, nothing was seized that day. Further, there was no need for memorandum of disclosure at the end of accused to show the spot, because police were already aware of the spot of incident and therefore why this futile exercise has been undertaken after more than a week of occurrence is not understood. Therefore, inference is that the said rope was lying beneath the alleged neem tree since 06.03.2011 to 15.03.2011. But nobody could spot it.

17. The third circumstance pressed into service by prosecution in the trial court is motive. Motive attributed is that for robing gold and silver ornaments on the person of Vimalabai, she was strangled. It is further case of prosecution that there was recovery of said ornaments at the instance of accused himself. To show recovery at his instance, prosecution has examined **PW-8 Shriram**. This witness deposed that on 16.03.2011 when he was called at police station, in presence of him and another pancha Madhav Jadhav, accused informed that he is ready show the gold ornaments which were kept in the custody of accused no.2 at Umarkhed. Therefore, these panchas, accused and police went there. Accused pointed out to the shop at Umarkhed and the shop of goldsmith was accordingly visited. He has claimed in his evidence that alongwith the goldsmith, accused and they all returned back to the police station. At police station, the goldsmith took out all gold ornaments purchased

by him and police prepared panchanama. He identified the panchanama to which he claims to be a signatory to be at Exhibit 37.

18. Above witness in cross-examination has answered that he is unable to give boundaries of shop, to which side it was opening. He is unable to state the registration number of vehicle which was used for travelling. He is unable to give time of leaving police station. However he has stated that there was seizure of 5 grams golden mani-mangalsutra, 7 grams golden ear-rings, silver armlet weighing 16 to 20 *tola*. This witness has answered that he and other pancha put signature on the panchanama at the shop at Umarkhed.

19. From the testimony of above witness, it is surfacing that accused who was arrested on 11.03.2011, has given disclosure after 5 days of custody. However, it is further emerging that panchanama of identification of ornaments drawn at the instance of Tahsildar is also not proved as witness to the said panchanama has not supported the prosecution. Even learned trial court has acquitted accused no.2. This also weakens the aspect of recovery of ornaments. There is no evidence that accused, who is resident of Yavatmal and in custody of Local Crime Branch, Nanded had occasion to go to Umarkhed.

20. It is also pertinent to note that if at all it was a case of removing ornaments on the person of deceased with intention to rob her, then, there would have been some marks of forceful removal of ornaments, more particularly ornaments in the ear. But there is no evidence to that extent.

SUMMATION

21. On taking audit of the entire evidence of the prosecution before the trial court, it is emerging that **firstly**, report is against unknown person. **Secondly**, though PW4 Tirupati, PW5 Shivaji and PW-6 Manohar claim to have seen accused, none of them speaks about accused going towards the field of Vimalabai. In fact, no identification parade has been taken. One of the three witnesses speaks about hearing about death of “Nirmalabai” and not Vimalabai. There is no full-proof evidence about these three witnesses seeing accused to be in the field or near the field of Vimalabai. Dead body was found in the field of Namdeo Patil, but he is not examined. Recovery is from open space which was in very vicinity of the spot where Vimalabai was found dead. No search seems to have been undertaken on 06.03.2011. Recovery of rope is from the same vicinity at a very belated stage. Seizure of ornaments is also found rendered and therefore, in our opinion, chain of circumstance has not been firmly and cogently proved.

22. We have carefully gone through the impugned judgment and order under challenge. It is revealed that after having rightly arrived at conclusion that death of Vimalabai was homicidal one and it be a case of murder, learned trial court ought to have appreciated the evidence on behalf of prosecution with complete circumspection. Evidence of PW4 Tirupati, PW5 Shivaji and PW6 Manohar seems to have accepted without assigning proper reasons. Testimonies of panchas are also blindly accepted. There are various shortcoming and lapses in the investigation. Apparently, accused is arrested after taking him in custody from Local Crime Branch, Nanded. He seems to be resident of Yavatmal. Therefore while accepting the case of prosecution learned trial Judge has adopted erroneous approach. More cautious and careful approach was expected while appreciating the evidence of prosecution as it was the case of charge under section 302. Therefore, we are constrained to interfere by allowing the appeal and accordingly we proceed to pass following order :-

OPERATIVE ORDER

- (i) Criminal Appeal stands allowed.
- (ii) The conviction awarded by the learned Additional Sessions Judge, Biloli, District Nanded on 21.01.2015 in Sessions Case No. 43 of 2011 to the appellant - Azizkhan S/o Mohammad Khan Pathan, stands set aside.

- (iii) The appellant stands acquitted of the offences punishable under sections 302 and 392 of Indian Penal Code.
- (iv) The appellant be set at liberty, if not required in any other case.
- (v) The fine amount paid, if any, be refunded to the accused-appellant after the statutory period.
- (vi) Pending Applications, if any, stands disposed of in view of disposal of the main Appeal.
- (vii) It is clarified that there is no change in the order in respect of disposal of Muddemal articles.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)