

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 502 OF 2016

Usha w/o Hanumant Kshirsagar
Age 25 years, R/o Chanai,
Tq. Ambajogai, District Beed.
At present in jail

... Appellant
[orig. Accused]

Versus

The State of Maharashtra :
Through Police Station Officer,
Ambajogai City Police Station,
Tq. Ambajogai, District Beed.

... Respondent

.....
Mrs. Renuka B. Ghule Palve, Advocate for the Appellant
Mr. S. D. Ghayal, APP for the Respondent-State.
.....

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

Reserved on : 14.07.2023

Pronounced on : 27.07.2023

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. The appellant is assailing the judgment and order of conviction passed by learned Additional Sessions Judge, Ambajogai in Sessions Case No. 16 of 2015 dated 02.06.2016 by which the appellant was held guilty and thereby stood convicted for the offence punishable under Sections 302 and 201 of the Indian Penal Code [IPC].

PROSECUTION CASE IN TRIAL COURT

2. Appellant was first wife of PW8 Hanumant. After five to six years of cohabitation, relations between appellant and accused became strained. Appellant used to repeatedly leave his company and go to her parents. Appellant had filed complaint at Women's Redressal Forum. On the festival of Diwali in 2014, appellant left PW8 Hanumant and went to reside with her parents and she did not return. When all efforts of Hanumant and his parents to persuade appellant to come and cohabit failed, Hanumant performed second marriage with deceased Suvarna. Thereafter, appellant came back to Chanai to cohabit with Hanumant. Appellant was annoyed because of the second marriage and so she started harassing deceased.

On 03.12.2014, both appellant and deceased together left the house for washing clothes at the river. There, deceased who was differently abled lady, was strangled and done to death and thereafter, her dead body was thrown in well water. Initially A.D. was registered, but subsequently offence was revealed and therefore, appellant was arrested and after investigation, chargesheeted and tried and the trial culminated into conviction. The same is now questioned here by way of instant appeal by invoking Section 374 of the Code of Criminal Procedure [Cr.P.C.].

SUBMISSIONS IN BRIEF**On behalf of the appellant :**

3. Learned counsel for the appellant would submit that impugned judgment and order is perverse and illegal. According to her, there was no case warranting conviction. It is pointed out that there was no direct evidence either on the point of motive or last seen together, which is the foundation of prosecution story. She would vehemently submit that there is no reliable evidence at all to suggest that appellant and deceased were in each other's company when the alleged incident took place. According to learned counsel, case being based on circumstantial evidence, prosecution was required to prove motive, but the same has not been established. She pointed out that the only witness relied by prosecution in support of 'last seen', i.e. Gayabai, is not examined by prosecution. Therefore there is weak, scanty or no evidence about involvement of accused. It is submitted that mere pair of footwear at the scene of occurrence is not an incriminating circumstance. It is pointed out that in spite of so, such circumstances are taken into consideration by learned trial Judge. According to her, there is no independent trustworthy evidence and therefore, conclusion reached by learned trial Judge is in absence of credible evidence and hence it is submitted that the conclusion and

findings being perverse, are not maintainable in the eyes of law and consequently she prays for allowing the appeal.

On behalf of the State :

4. According to learned APP, there is strong evidence about appellant leaving company of husband Hanumant and going to stay with her parents. That, as she refused to come for cohabitation, Hanumant performed second marriage with deceased who was differently abled. It is pointed out that precisely getting annoyed because of said marriage, appellant came back to reside, threatened and harassed deceased. It is submitted that in order to eliminate deceased, she was taken to river on the pretext of washing clothes and there she was strangulated and thereafter her dead body was thrown. According to learned APP, parents in law of accused and deceased are unequivocal about both ladies leaving the house together at around 3.00 p.m. Thereafter, deceased did not return alive. Appellant hurriedly left the house. Therefore it is submitted that there are strong circumstances. Deceased was seen going in the company of appellant. Appellant is answerable for the unnatural death. She was already annoyed with deceased and she had issued threats which were promptly reported by deceased to her father and

he had deposed to that extent. Therefore, taking into account such evidence, it is submitted that judgment and order cannot be faulted at and he prays for dismissal.

5. Being first appellate court and last fact finding court, we undertake the exercise of re-examining, re-analyzing and re-appreciating the entire evidence to find out whether the impugned judgment is sustainable in the eyes of law.

6. Here is a case based on circumstantial evidence. Undisputed facts are that appellant was the first wife. On her refusal to come to cohabit with husband Hanumant, he performed second marriage with deceased.

7. The circumstances which are relied by prosecution could be summarized as under:

1. Motive
2. Last seen together
3. Scene of occurrence.

8. In support of above circumstances, it seems that prosecution has adduced and relied on following oral testimony.

SUM AND SUBSTANCE OF THE ORAL EVIDENCE

9. **PW1** Bapu Upade, father of deceased stated about marriage of his daughter with Hanumant as a result of first wife [appellant] refusing to cohabit with him. According to him, his daughter used to inform him about threats issued by appellant questioning deceased how she can stay during subsistence of first marriage. On 03.12.2014, he learnt about the occurrence and therefore he gave report Exhibit 23.

10. **PW2** Shobha Ubale was aunt of deceased and she acted as pancha to inquest panchanama. She identified the same at Exhibit 27.

11. **PW3** Mukesh Kshirsagar is the pancha to spot panchanama and seizure of article at Exhibit 30.

12. **PW4** Dr. Vishwajeet Pawar is the autopsy doctor, in whose opinion, death was due to 'asphyxia due to ligature strangulation associated with head injury'.

13. **PW5** Mahadeo Gaikwad is the pancha to Exhibit 37 which was seizure panchanama of cloth tied around the neck of deceased.

14. **PW6** Aviraj Misal is the pancha to confrontation of sealed articles and its identification by drawing panchanama Exhibit 39.

15. **PW7** Bharat Kshirsagar is the father of Hanumant. He deposed about first marriage of his son with appellant and after five to six years, she picking up quarrels and repeatedly going to her parents' house at Kaij. That, she was tried to be brought back but she used to leave company of Hanumant. That, during Diwali of 2014 without informing she left the house and went to her parents and refused to come back and therefore, second marriage of Hanumant was performed on 15.11.2014 with Suvarna [deceased]. Thereafter, appellant came back to reside. On 03.12.2014, appellant and deceased went for washing clothes to the river. Only appellant returned and left hurriedly and therefore, deceased was searched and was found in the well. He stated that appellant did not like marriage of Hanumant with deceased.

16. **PW8** Hanumant, husband also stated about his marriage with appellant, subsequently appellant leaving his company and repeatedly going to her parents and filing complaints to Women's Redressal Cell. She left the house during Diwali festival and refused to come and therefore, he performed second marriage with deceased. Thereafter,

on 20.11.2014 appellant returned back for cohabitation. There used to be quarrels between both, appellant and deceased. Appellant questioned said marriage. According to him, on 03.12.2014 he had been to Ambajogai. On the way back he learnt from one **Janka Shinde** about appellant hurriedly returning home and leaving in auto rickshaw. Not finding deceased in the house, she was searched and her dead body was found in the well.

17. **PW9** Gangabai, mother-in-law of deceased also stated that Usha did not cohabit properly, frequently raised quarrels and went to her parents' house and was required to be brought back and when after Diwali she went and refused to come, second marriage of Hanumant was performed. Thereafter, appellant returned to cohabit and she started ill-treating deceased and beat her. According to her, in the afternoon of Wednesday, while she was sitting outside of the house, appellant and deceased went together for washing clothes to the river. Around 4.00 p.m., Gayabai came and informed that appellant alone returned home with wet clothes and left the house with her belongings and child in hurried manner. Therefore, deceased was searched and her body was found in well. According to this witness, footwear of the appellant were lying at the scene of occurrence.

18. **PW10** Police Naik Pandit Munde is the carrier of muddemal.
19. **PW11** API Babasaheb Borse is the Investigating Officer.
20. **PW12** Dr. Shilpa Kamble is the doctor who examined Usha on 04.12.2014 and issued medical certificate Exhibit 61.

ANALYSIS

21. Being charged under Section 302 of IPC, it is to be first ascertained whether death of Suvarna is homicidal, suicidal or accidental.
22. Taking into account the inquest panchanama, postmortem report, medico legal expert's evidence and injuries noticed on the person of deceased reflected in column nos. 17 and 19, there is no hesitation to hold that death of Suvarna is unnatural and rather homicidal.
23. 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.

24. 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 Sahabrao 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.”

25. 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.

26. Keeping in mind above legal requirements, we proceed to deal with each of the circumstances relied by prosecution:

(1) MOTIVE

27. According to prosecution, appellant was annoyed with deceased for performing second marriage with Hanumant and therefore, to eliminate her, she was done to death. Here, evidence of informant father [PW1 Babu] and parents-in-law [PW7 Bharat and PW9 Gangabai] assumes importance. On going through the evidence, it is revealed that father and in-laws are only speaking about appellant threatening deceased and harassing her or ill-treating her. When those instances took place has not been stated by any of them. Even husband has not stated about when such threats were issued and what mode of harassment was inflicted. It was expected of these witnesses to show that immediately in proximity to the unnatural death met by Suvarna, there were threats or harassment. They have also not stated as to what steps were taken by them, so that there should be normalcy in the relationship. It also appears that the behaviour of appellant was not found by these persons of such nature that she was seriously talking about eliminating deceased. The very aspect of mother-in-law speaking about appellant and deceased together going for washing clothes suggests that relations were not

strained. Therefore, as regards circumstance of motive is concerned, there is very weak or little evidence. Only in cross, husband answered about threats being given by appellant to deceased but what was the nature of threats has not been elaborated by him and even alleged threat is of 23.11.2014, whereas the incident in question is of 03.12.2014. Husband has admitted that no complaint was lodged against appellant for issuing threats.

28. The case being based on circumstantial evidence, it was mandatory for prosecution to cogently establish the motive, but it has apparently failed to do so in the case in hand. Hence such circumstance cannot be held as proved.

(2) LAST SEEN TOGETHER

29. According to prosecution, appellant had come back to cohabit, but after second marriage of Hanumant with deceased. Only husband spoke about appellant coming on 20.11.2014. Be it so. According to mother-in-law PW9 Gangabai, around 3.00 p.m., while she was sitting outside the house, she saw both appellant and deceased informing her about they going to river for washing clothes. According to her, at around 4.00 p.m. her neighbour Gayabai came and told that only

appellant came to the house hurriedly and left with her son in auto rickshaw. This witness stated that she came out of the house and saw appellant Usha going by auto rickshaw and therefore suspected about Usha and then she and her husband rushed towards the river and on search, they found *chappal* and detergent lying in the vicinity of river and dead body of Suvarna was lying in the well.

In para 6 of her cross, omissions are brought about she seeing Usha going in rickshaw, about *chappal* and detergent noticed near the spot of incident. These are material omissions. It is pertinent to note that the lady neighbour Gayabai, from whom this witness claims to have heard about appellant returning hurriedly, is unfortunately not examined by prosecution.

30. Record shows that learned APP in the trial court passed on a pursis that he is giving up this witness Gayabai as she is not supporting. In our view, the prosecutor in the trial court ought to have made this witness Gayabai step in the witness box and ought to have allowed her to depose in whatever manner she wanted. However, directly pursis of giving up, has been placed on record. For the said reason, there is no evidence of Gayabai and a crucial witness has not been examined.

31. It is also worth mentioning that Hanumant claims that while he was returning from Ambajogai, he learnt from one Janka Shinde about appellant hurriedly returning home and leaving in auto rickshaw. Even said lady Janka Shinde is not examined by prosecution.

32. On analyzing the evidence, here, father-in-law PW-7 Bharat in para 4 of examination-in-chief states that at 3.00 p.m. appellant and deceased went to the river for washing clothes after seeking permission of PW9 Gangabai. He also spoke about neighbour Gayabai coming and informing about Usha alone returning with wet clothes, picking up bucket of clothes, taking her son and hurriedly leaving. It is surprising that this witness has further stated that when his son Hanumant returned and he made inquires, this witness claims that they told him that they both went to river for washing clothes. This witness has not stated about visit of neighbour Gayabai about seeing appellant going hurriedly and leaving hurriedly. Even husband Hanumant has not spoken to his parents about whatever he claims to have learnt from lady namely Janka Shinde.

33. Resultantly, there is no convincing evidence about appellant and deceased together leaving the house for washing clothes and only appellant returning back hurriedly and leaving the house hurriedly

with her child and belongings. The answers given in cross by these witnesses render their testimonies unworthy of credence. Therefore, in our opinion, even the circumstance of last seen together is not cogently established.

(3) SCENE OF OCCURRENCE

34. Case of prosecution in the trial court is that in the vicinity of the well there were thorny bushes and leaves. The same were found entangled in the hair of dead body of Suvarna. Therefore, it is their case that deceased was strangled outside the well and thereafter her dead body was thrown in the well with sari entangled around her neck. A case is also advanced by prosecution that footwear of appellant were found lying near the scene of occurrence. Therefore, prosecution came with the case that such circumstance suggests involvement of none other than appellant.

35. In support of seizure of footwear *chappal* at the scene of occurrence, prosecution seems to have examined PW3 Mukesh. According to him, in his presence police seized the foot chain [anklet], a pair of slippers, Wheel Active soap and detergent powder. But while under cross, this pancha has admitted that the seizure does not bear label of his signature.

36. PW6 Aviraj seems to be a pancha to identification of article. According to him, in his presence the in-laws and husband of deceased identified the articles. However, even this witness in cross has admitted that police officer Borse met him and told that he has drawn panchanama and this witness has to sign and accordingly signature was caused. Therefore, such testimony further weakens the case of recovery of footwear and further its identification. Resultantly, even above circumstance of scene of occurrence does not firmly suggest or establish that appellant has strangled deceased. Mere finding footwear at the scene of occurrence is itself not an incriminating circumstance against the appellant, more particularly when other circumstances like motive and last seen are not firmly and cogently proved.

37. It is trite law that burden is on prosecution to prove the guilt, that too beyond reasonable doubt. As to what is reasonable doubt has been time and again reiterated by the Hon'ble Apex Court in various cases like *State of U.P. v. Krishna Gopal and another*, (1988) 4 SCC 302 and *Krishnan and another v. State Represented by Inspector of Police*, (2003) 7 SCC 56. we reproduce the same as under:

“Though the standard of proof beyond reasonable doubt is a higher standard, there is, however, no absolute standard. What degree of probability amounts to “proof” is an exercise particular to each case. Doubts would be called reasonable if they are free from a zest for abstract speculation. To constitute reasonable doubt, it must be free from an over-emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case.”

Above ratio is maintained and still holds the field.

38. Hear, as stated above, none of the circumstances put forth and relied by prosecution are cogently proved. Evidence is found to be very weak in nature. Prosecution could not firmly establish that appellant, out of annoyance of second marriage, threatened and harassed deceased and she entertained ill motive. Ultimately, here, evidence of last seen also is very fragile and weak. The circumstances at the scene of occurrence are also not unerringly pointing to the

involvement of appellant. Therefore, here, reasonable doubt has crept in. As prosecution failed to prove its case beyond reasonable doubt, benefit of doubt is required to be extended to the appellant.

39. On examining the judgment under challenge, it is noticed that learned trial Judge has accepted the case of prosecution about appellant, out of annoyance of second marriage, to eliminate the deceased, took her to the well, strangled her and thereafter threw her body in the well. We are afraid that there was no foundation or legally acceptable evidence or circumstance to connect appellant with the unfortunate death of Suvarna. Therefore, above findings and conclusion being in absence of trustworthy evidence, the judgment under challenge is required to be interfered with. Hence, we proceed to pass the following order:

ORDER

- I. The appeal stands allowed.
- II. The conviction awarded to the appellant Usha w/o Hanumant Kshirsagar by the learned Additional Sessions Judge, Ambajogai on 02.06.2016 in Sessions Case No. 16 of 2015, for the offence punishable under Sections 302 and 201 of IPC stands set aside.

- III. The appellant stands acquitted of the offence punishable under Sections 302 and 201 of IPC.
- IV. The appellant 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 the learned Additional Sessions Judge, Ambajogai regarding disposal of *muddemal*.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]

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