

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

CRIMINAL APPEAL NO. 467 OF 2016

1. Avinash s/o Ramrao Ankulwar,
Age: 23 years, Occu.:
R/o: Naigaon, Taluka: Naigaon,
District: Nanded.
2. Sham s/o Balaji Shinde,
Age: 27 years, Occu.:
R/o: As above.

[Appellant No.2 filed separate
Criminal Appeal No. 196/2022
as per order dated 07.07.2021.]

3. Avinash s/o Balaji Dhumal,
Age: 21 years, Occu.:
R/o: Village Aurala,
Taluka: Naigaon, District Nanded.

... Appellants

[Orig. Accused nos.1 & 4]

Versus

The State of Maharashtra,
Through the Police Station Ramtirth,
District Nanded.

... Respondent

**WITH
CRIMINAL APPEAL NO. 196 OF 2022**

Sham s/o Balaji Shinde
Age-32 years, Occupation – Labour,
R/o. Shinde Galli, Naigaon, Tq. Naigaon,
District Nanded.
[At present in Central Prison at Nashik]

... Appellant

[Orig. Accused no.2]

Versus

The State of Maharashtra

... Respondent

.....

Mr. Govind Kulkarni, Advocate along with Mr. Devang R. Deshmukh, Advocate for the Appellants in Criminal Appeal No. 467 of 2016.

Mr. Sudarshan J. Salunke, Advocate for the Appellant in Criminal Appeal No. 196 of 2022.

Mr. Ravindra S. Shinde, Advocate h/f Mr. S. S. Patil, Advocate to assist APP.

Mr. A. V. Deshmukh, APP for Respondent-State.

.....

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

Reserved on : 09.08.2023

Pronounced on : 22.08.2023

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. Vide both above referred appeals, life convicts, i.e. original accused nos. 1, 2 and 4, for offence punishable under Sections 302, 201 and 364 r/w 34 of the Indian Penal Code [IPC], are hereby assailing the judgment and order dated 08.07.2016 passed by the Additional Sessions Judge, Biloli in Sessions Case No. 02 of 2015.

FACTS IN BRIEF LEADING TO TRIAL

2. Accused No.1 Avinash [Ankulwar] owed amount of Rs.7,28,534/- towards deceased Satyawar. A week prior to deceased going missing, deceased had purchased a house and therefore, was in

dire need of funds and so he demanded dues from accused no.1 Ankulwar. Getting annoyed by repeated demand and to avoid repayment, it is the case of prosecution that, on 07.10.2014, when deceased had been to drop his child to school, he was abducted by all accused, taken from Narsi to Bichkunda via Nizamabad in a Tata Vista car bearing registration no. MH-26-AF-1944 and at Bichkunda, they all strangulated him and thereafter dumped his motorcycle in a well and further threw the dead body in the vicinity of Shantapur Shivar. Subsequently, to cause disappearance of evidence, they poured petrol on the dead body of Satyawar and set the body on fire.

3. On 08.10.2014, as deceased had not returned, he was initially searched with near and dear ones, but he was not found. Therefore missing was lodged by brother PW1, namely, Santosh. During inquiry of missing, wife of deceased informed about financial transaction between accused no.1 Ankulwar and her husband and therefore, accused no.1 was summoned for inquiry. Initially accused no.1 gave evasive answers but on in-depth inquiry, on 12.10.2014, he gave confessional statement regarding committing murder of Satyawar. Consequently PW1 Santosh set law into motion.

4. PW21 P.I. Sudhakar Jagpat [IO], who was entrusted with the investigation, carried out the same, arrested remaining three accused, drew inquest panchanama, spot panchanama, memorandum of disclosure, gathered postmortem report, sent the seizure of analysis, drew various panchanamas and finally, all four accused were chargesheeted for offence punishable under Sections 364, 302, 201 r/w 34 of IPC and were made to fact trial before Additional Sessions Judge, Biloli, who after conducting trial, analyzed the evidence and on hearing both sides, reached to a finding that prosecution had established the charges, however, only as against accused nos. 1, 2 and 4. Accused no.3 Umesh came to be acquitted by the same judgment dated 08.07.2016.

Hence the present appeals.

SUBMISSIONS

On behalf of the appellants:

5. Heard learned counsel Mr. Kulkarni as well as Mr. Salunke for the respective appellants. The sum and substance of their argument is that, implication is in absence of cogent, reliable and trustworthy evidence and is apparently false and on suspicion. According to them, there was no direct evidence and as such, the case was based on

circumstantial evidence. However, it is their case that, prosecution had miserably failed to establish any of the circumstances relied by it. They emphasized that here, case being based on circumstantial evidence, prosecution ought to have proved motive behind the occurrence but, according to them, it had utterly failed to do so. That there is no evidence in support of so-called dues at the end of accused no.1 or its demand.

6. Further, taking us through the testimonies of prosecution witnesses, it is their submission that, brother PW1 Santosh had admitted in his cross about receiving information about alleged death of Satyawar at the hands of appellant from the very police. On such count, they have criticized such case of prosecution as unworthy of credence by submitting that confessional statement has no evidentiary value.

7. By further pointing out that when PW21 IO, who has chargesheeted the appellants, had claimed about getting clue from the statement of wife of deceased regarding some financial transaction between accused no.1 Avinash Ankulwar and deceased, they have questioned then as to why said wife of deceased is not examined by prosecution and so, they submitted that, the very foundation of prosecution case is getting knocked off.

8. It is further pointed out that there is no iota of evidence, either oral or documentary, on the first count to establish the so called financial transaction between deceased and accused no.1 Avinash. At this juncture, they also questioned as to why rest of the accused, i.e. accused nos. 2 and 4 are roped in when it is candidly admitted by prosecution witnesses about there to be no transaction between deceased and such accused persons.

9. They would strenuously submit that here, at the threshold, prosecution had not established that said dead body was of Satyawar, i.e. brother of PW1 Santosh, and of nobody else. On this count, our attention is invited to the postmortem report and the autopsy doctor's evidence, who, according to them, had admitted in cross that dead body was highly decomposed and in unidentifiable condition and so, it is their submission that, very identity of deceased is not firmly and cogently established.

10. It is also submitted that deceased was resident of Narsi, whereas dead body was found at Shantapur Shivar. According to them, how deceased was taken to such spot is not emerging from the entire prosecution evidence. It is submitted that though prosecution attempted to examine witness who was said to be posted at a toll

post, it is pointed out that there is no evidence about deceased travelling in the said vehicle alleged to be used for abduction. Resultantly, it is submitted that, there is no trustworthy evidence about deceased being taken from Narsi to the scene of occurrence and on the way, he to be strangled.

11. According to them, case of prosecution is developed merely for the sake of solving the case and unnecessarily, without any piece of evidence, on a mere alleged confessional statement, appellants are made to face trial and are also surprisingly held guilty.

12. Criticizing the impugned judgment, it is submitted that learned trial court failed to apply its mind and appreciate the available evidence in its proper perspective. According to them, the opinion reached at by learned trial Judge is either in absence of evidence or on the count of misreading of the available evidence or based on conjectures and surmises. Consequently, they are seeking indulgence of this Court by setting aside the impugned judgment and order. They are seeking reliance on the case of *Hanumant Govind Nirgudkar and another v. State of M.P.* ; AIR 1952 SC 343.

On behalf of the State:

13. Per contra, strongly supporting the judgment and findings, learned APP would submit that prosecution had come with a very strong case, though circumstantial, as all circumstances relied were duly proved by prosecution by examining as many as 21 witnesses. Learned APP would also strenuously submit that there is no serious challenge or dispute about acquaintance of accused no.1 Avinash Ankulwar and deceased. There is no challenge to the case of prosecution about financial transaction between both of them.

14. It is submitted that deceased was picked up from Narsi by accused no.1 Avinash Ankulwar, who was trying to avoid dues towards deceased and therefore, taking aid of rest of the co-accused, he abducted deceased in a vehicle. Said vehicle is seized at the instance of the accused. He submits that, evidence indicates that they had strangled deceased in the car and had thrown the dead body and thereafter set it to fire. He submitted that there is evidence of vehicle passing through the toll post of which investigating machinery has gathered documents and even examined the person posted at the said toll post.

15. Learned APP further submitted that a handkerchief was used for strangulation and the same is also recovered at the instance of accused himself. The shop owner, from whose shop said handkerchief was purchased, is also examined by prosecution. It is submitted that ring on the person of deceased was also removed and sold by accused to a jeweler, who is also examined by prosecution.

16. Learned APP pointed out that after completion of crime, vehicle was taken for washing to wipe out the evidence and the labour at the car wash center, where the vehicle was got cleaned, is also examined by prosecution. That, recovery and discovery is also at the instance of the appellants-accused. Independent panchas to said memorandum and recovery are also examined by prosecution in the trial court and there testimony having remained unshaken, is rightly relied by learned trial court.

17. As regards identification of dead body is concerned, it is his submission that femur bone of deceased was preserved and got analyzed by comparing it with the blood sample of son of deceased and as such, identity is cogently proved. Death is homicidal and therefore, it is his submission that, in the light of availability of such evidence, all circumstances having been proved by prosecution,

learned trial court has correctly appreciated the evidence and has committed no error in recording guilt and so, he prays to dismiss the appeals.

18. Appeals being under Section 374 of the Code of Criminal Procedure [Cr.P.C.], we are now called upon to re-appreciate, re-analyze and re-evaluate the entire prosecution evidence. We are also called upon to test the legality and maintainability of the judgment impugned herein.

EVIDENCE BEFORE THE TRIAL COURT

19. Record shows that as many as 21 witnesses have been examined by prosecution and it would be fruitful to introduce the witnesses and in brief, narrate the sum and substance of their evidence:

PW1 Santosh is the brother of deceased. According to him, on 07.10.2014, his deceased brother left the house to drop the child at school, but he did not return and therefore, after search, on 08.10.2014 he lodged missing. According to him, on 12.10.2014, he was called at police station and informed about confession by accused no.1 Avinash Ankulwar regarding deceased

being abducted in a car, taken from Narsi to Pitlam and on the way, strangled with the help of accused Sham, Umesh and Dhumal. That, there was some money transaction between his deceased brother and accused Avinash Ankulwar. As his brother demanded money due towards accused no.1, to avoid repayment, accused committed murder of his brother and therefore, he lodged report Exhibit 41.

PW2 Sachin deposed about accused Avinash Ankulwar giving memorandum of disclosure on 12.10.2014, showing his readiness to show the spot where dead body was thrown. He identified the memorandum and recovery panchanama at Exhibits 43 and 44. He has also acted as pancha to memorandum of disclosure at the instance of accused no.4 Avinash Dhumal regarding showing the spot where after strangulation, clothes were burnt. The memorandum and spot panchanama are at Exhibits 45 and 46. He also deposed about acting as pancha to the memorandum of disclosure at the instance of accused no.1 Avinash Ankulwar showing readiness to show the spot where he burnt his clothes. This witness has identified the memorandum and recovery panchanama Exhibits 47 and 48.

PW3 Gajanan is pancha to inquest panchanama Exhibit 50.

- PW4** Sahebrao is pancha to seizure of mobiles Exhibits 52, 53, 54 and 55.
- PW5** Balaji is pancha to spot panchanama Exhibit 57.
- PW6** Kishan is pancha to seizure of a bond paper and a notebook Exhibit 59.
- PW7** Raju is pancha to memorandum at the instance of accused Sham regarding showing the spot where vehicle Tata Vista was parked and its seizure Exhibits 61 and 62.
- PW8** Shankar is pancha to memorandum of disclosure by accused Sham regarding showing the shop from where the handkerchief was purchased for alleged strangulation. The memorandum and recovery panchanama are at Exhibits 66 and 67.
- PW9** Sk. Ahmad is pancha to memorandum of disclosure by accused Avinash Dhumal regarding showing the shop of the jeweler to whom the ring was sold by him. The memorandum and seizure panchanama is at Exhibit 70.
- PW10** Santosh Ingle is the witness, who was in service at the car service center and he is examined to show that on 07.10.2014, Tata Vista vehicle was brought for washing and servicing. According to this witness, he

had seen blood stains on the mat and had allegedly asked accused Sham about it.

PW11 Ramesh is the owner of cloth shop from where accused Sham had purchased napkin. He has identified the accused.

PW12 Gangadhar stated that he was a mason working on the construction site of deceased and he knew both accused as well as deceased. According to him, accused no.1 Avinash Ankulwar had business transactions with deceased and he claims that he heard conversation between them on 04.09.2014 during which deceased asked accused Avinash Ankulwar to make payment of Rupees eight lakh due towards him.

PW13 Nirvan is the chef at a hotel and according to him, on 07.10.2014 all accused had come to the hotel for consuming liquor.

PW14 Prakash stated that while he was proceeding to Naigaon, in his presence accused Avinash Dhumal pointed the way to the police where motorcycle bearing registration no. MH-26-AN-4522 was thrown.

PW15 Dr. Jyoti Subba is the autopsy doctor who conducted postmortem and issued opinion Exhibits 83 and 84.

PW16 Vithal is the goldsmith who deposed that on 21.10.2014 police approached him and he was confronted with a ring which he identified to be from his shop. He stated that he knew deceased and he had sold it to him two years back.

PW17 Police Naik Sopan Valge
and

PW18 Police Constable Hanmant Sugave
Both police officials have acted as carrier of muddemal.

PW19 Dr. Sulbha Deshpande is the doctor who had issued opinion on query raised by police about hyoid bone to be in fractured condition or not. She identified the opinion and covering letter to be at Exhibits 99 and 100.

PW20 Srinivas is the manager of toll post who stated that on 07.10.2014, vehicle bearing registration no. MH-26-AF-1944 had passed through their toll at 2.50 p.m. He claims to have issued search report Exhibit 102.

PW21 Sudhakar Jagtap, Police Inspector, is the Investigating Officer, who narrated all steps taken by him during investigation till filing challan.

20. There are fairly settled propositions regarding manner of appreciation of evidence in a case which is based on circumstantial evidence. The settled principles are reflected in series of judgments since the landmark case of *Hanumant Govind Nirgudkar and another v. State of M.P.* ; AIR 1952 SC 343 followed by water shedding judgments in the case of *Shivaji Sahebrao Bobade v. State of Maharashtra* ; AIR 1973 SC 2622; *Sharad B. Sarda v. State of Maharashtra*, AIR 1984 SC 1622, *Padala Veera Reddy v. State of Andhra Pradesh* ; 1989 (Suppl.2) SCC 706, *Dhananjay Chatterjee @ Dhana v. State of West Bengal* ; 1994 SCC (2) 220 and *State (NCT of Delhi) v. Navjyot Sandhu @ Afsan Guru* ; 2005 (11) SCC 600, wherein the **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.

21. 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 ***Dhananjoy Chaterjee @ Dhana v. State of W.B.***, (1994) 2 SCC 220.

22. Here, case is of blind murder and admittedly case is based on circumstantial evidence. Out of in all 21 witnesses, more than half are only panchas and rest are brother of deceased, medical experts, police officials and PW12 Gangadhar, a mason engaged for alleged construction of deceased.

23. At the outset, we need to get satisfied as to whether prosecution has shown death of Satyawar to be homicidal one. It is also pertinent to note that here, both learned counsel for appellants are questioning the very identity of deceased.

24. In the light of above defence, we are constrained to visit the evidence of inquest pancha and autopsy doctor.

25. PW3 Gajanan stated that on 12.10.2014, on hearing news about dead body of businessman Satyawar, he went to see the same. He stated that dead body was in the forest area. Then he stated that it

was not identified as the face of the dead body was in burnt condition. He identified Inquest panchanama Exhibit 50.

In cross he admitted that he knew informant and that he is his relative. He answered that when he reached the spot, at that time panchanama was going on and he saw dead body from 50 feet distance from the road. He is unable to give exact boundaries of the spot where dead body was lying. He is also unable to give the colour of the clothes on the person of deceased. He denied any postmortem being done in his presence.

26. It is interesting to note that according to prosecution, dead body was discovered/recovered on 12.10.2014 upon memorandum of disclosure at the instance of accused No.1 Avinash Ankulwar. However, surprisingly, PW15 Dr. Jyoti Subba claims that she carried out spot visit on request of police and carried out autopsy of a dead body which had no head and the body was completely decomposed. Further, surprisingly she states that skull was lost but brain was exposed. Half portion of the upper part of body was burnt. That, there was advanced sign of putrefaction with flies, insects, maggots and there was peeled off skin and both upper limbs were dislocated from shoulder. That, there was rigor mortis in advanced stage. Witness

claims that after opening the stomach, she came across rice and she collected tissues for sending it to forensic lab. She also took right femur and hyoid bone for DNA test. She opined that it was “suspicion homicide death”. She spoke about preserving viscera for analysis. According to her, approximate time of death was three to four days. She identified postmortem report Exhibit 83 and also identified her opinion Exhibit 84.

While facing cross, she has answered that she prepared postmortem report on 28.10.2014. This shows that PM report is not drawn immediately as is required, but is prepared almost after a period of over two weeks since visit to spot. She admitted that dead body was unidentifiable and it was completely decomposed and so she is unable to make statement whether it is ante-mortem or postmortem. She answered that she does not remember whether there was any fracture to hyoid bone and whether it was so noted in the PM report. She admitted that she did not adopt procedure to find out whether injuries were ante-mortem or not. She admitted that on the day of postmortem, she was not definite about cause of death and hence she has not mentioned it in the certificate. She answered that for digestion of rice, it required four hours. She admitted that she has not given data for ascertainment of time of death.

In cross at the hands of learned counsel for accused no.2, she admitted that she did not mention in the final opinion or in the short opinion that death is homicidal.

27. Thus, the sum total of above evidence on the point of mode and manner of death is that, very autopsy doctor is categorical that there was suspicion about death to be homicidal one. So, this issue has virtually remained unanswered.

28. Now let us deal with the aspect of identity of dead body raised by appellants.

29. Heavy reliance is placed by each of the learned counsel on the answers given by PW15 Dr. Jyoti Subba in cross wherein it is admitted that the dead body was not identifiable.

However, autopsy doctor has spoken about preserving femur. Investigating machinery has taken efforts of collecting blood sample of son of deceased and DNA analysis report has confirmed that the blood sample matched with the DNA sample of deceased. Therefore, here, paternity is established.

DNA study is used for fixing identity of human being. Therefore, here, though nature and mode of death is not cogently proved to be homicidal, DNA analysis has definitely fixed identity of deceased as brother of PW1, namely, Satyawar.

30. Having dealt with above issues, we proceed to ascertain whether, as claimed by prosecution, it has been firmly and cogently proved that deceased was abducted, taken in a vehicle, thereafter strangled and after being done to death, dead body was thrown and later on incinerated to cause disappearance of evidence.

31. The following two circumstances are pressed into service by prosecution.

1. Motive
2. Recovery and discovery under Section 27 of the Evidence Act i.e. right from confessional statement to discovery of dead body, its spot, seizure of car and motorcycle.

FIRST CIRCUMSTANCE : MOTIVE

32. Prosecution claims that PW1 Santosh, who gave FIR, gave evidence that accused no.1 owed Rupees Seven Lakh and some odd amount towards deceased. As the said amount was demanded, to

avoid repayment, his brother was done to death. Apart from his testimony, prosecution seems to be taking recourse to the testimony of PW12 Gangadhar as well as a notebook seized in presence of PW6 Kishan.

33. On scanning the evidence of prosecution on these lines, it is emerging that though IO claims about receiving clue of financial transaction between accused no.1 Avinash Ankulwar and deceased in a statement of wife of deceased, namely, Vaishali, surprisingly she is not made to step into the witness box. In cross, IO has candidly admitted to that extent. Resultantly, the very source about information of alleged financial transaction is not before the Court.

Secondly, PW12 Gangadhar merely claims of overhearing conversation between accused and deceased, that too on 04.09.2014. Deceased had gone missing on 07.10.2014, but this witness in cross has admitted that accused no.1 was very much available and present with the very informant on 08.10.2014 itself. Therefore, his testimony is of no avail to the prosecution.

Likewise, even when prosecution claims to have laid their hands on a notebook at the instance of accused no.1 Avinash

Ankulwar under memorandum of disclosure and PW6 Kishan has been examined in that connection, no part of the said notebook is also placed on record by prosecution to demonstrate that there was financial transaction between accused no.1 and deceased and that accused owed amount towards deceased. Further, recovery of notebook is also under shadow of doubt as PW6 Kishan has candidly admitted that at the time of recovery and discovery and seizure of notebook, he was waiting outside the house. Therefore, said recovery is also not free from doubt.

SUMMATION ON MOTIVE

34. The residue which falls back on analyzing above evidence is that motive is not at all established by prosecution. There is no iota of evidence in support of financial transaction and dues and to avoid repayment of the same, accused no.1 entertained any motive. Informant has candidly admitted that rest of the accused had no financial transactions whatsoever with deceased. Resultantly, circumstance of motive collapses.

**SECOND CIRCUMSTANCE : MEMORANDUM AND RECOVERY
UNDER SECTION 27 OF THE EVIDENCE ACT**

35. The trump card in this case, for prosecution, is alleged disclosure memorandum and recovery at the instance of accused no.1 on 12.10.2014 i.e. while facing inquiry being conducted by PW21 IO on missing report. According to prosecution, involvement of appellants was unearthed on confessional statement, memorandum of disclosure followed by recovery of dead body/spot and vehicles.

36. Regarding evidentiary value of disclosure statements under Section 27 of the Evidence Act, the judgment of Privy Council in the case of *Pulukuri Kottaya v. King-Emperor* still holds the field and for decades, law laid down therein has been followed and reiterated in series of judgments. The relevant observation is as under:

“The difficulty, however great, of proving that a fact discovered on the information supplied by the accused, is a relevant fact, can afford no justification for reading into Section 27 something which is not there and admitting in evidence a confession barred under Section 26. Except in cases in which possession, or concealment of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation

of the prosecution case. It is only one link in the chain of proof and the other links must be forged in manner allowed by the law.”

The twin conditions which are required to be satisfied for application of this provision is, firstly, there is a voluntary disclosure at the end of an accused person and secondly, such person should be in the custody of police. The gist of this provision is that, “when any fact is deposed and discovered in consequence of information received from a person accused of an offence, in the custody of police officer, so much of such information, whether it amounts to confession or not, as relates distinctly to the fact thereby discovered may be proved.

37. As to what amounts to the expression “custody” is also time and again settled in the judgments of ***State of Andhra Pradesh v. Gangula Satya Murthy*** ; (1997) 1 SCC 272 and ***A. N. Venkatesh and another v. State of Karnataka*** ; (2005) 7 SCC 714, wherein it has been clarified that the word “custody” does not mean formal custody, which includes any kind of surveillance, restrictions or restraint by the police. Even if the accused was not “formally” arrested at the time when the accused gave the information, the accused was, for all practical purposes, in the custody of police.

Consequently, so much of the information given by the accused while in custody, as a result of which a fact is discovered, becomes admissible in evidence, whether information amounts to confession or not. As stated above, this is an exception to the bar of confessional statements made to police to be inadmissible by virtue of Section 25 and 26 of the Indian Evidence Act.

38. Keeping in mind the above settled legal position, if we deal with the prosecution evidence on record, it is emerging that PW21 IO is the recipient of said confessional statement. However, it is pertinent to note that so called confession is said to be given by accused no.1 Avinash Ankulwar alone i.e. on 12.10.2014. Other accused are not present at that time, though he names them to be with him. Likewise Even PW2 Sachin, a pancha to the memorandum panchanama also does not refer or mark presence of remaining accused. When it is a case of prosecution that all accused abducted deceased and they strangled him, and thereafter set his body to fire, obviously, it is a joint effort. But in view of above material, apparently, it is a confession by only accused no.1 Avinash Ankulwar on 12.10.2014 leading to discovery of body and spot. During such visits, other accused , inspite of being in custody on the same day, are not taken

along. Therefore, the question arises is, how confessional statement at the end of only accused no.1 could be applied to remaining accused persons. Except confessional statement, it is noticed that there is no other independent evidence.

39. Very recently, the Hon'ble Apex Court has dealt and discussed the law on evidentiary value of disclosure statements of co-accused in the case of ***Manoj Kumar Soni v. State of Madhya Pradesh*** ; (2023) SCC OnLine SC 984. We borrow and quote the observations of the Hon'ble Apex Court in para 24 of the judgment which are as under:

“24. The law on the evidentiary value of disclosure statements of co-accused too is settled; the courts have hesitated to place reliance solely on disclosure statements of co-accused and used them merely to support the conviction...”

By referring to the case of ***Haricharan Kurmi vs. State of Bihar*** ; AIR 1964 SC 1184, a judgment of Constitution Bench, the Hon'ble Apex Court reproduced the observations in said judgment as reflected in para 13, which are as under:

“13. ...In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right.”

40. Further it is seen that there were said to be even disclosures by accused nos.2 and 4, but not on 12.10.2014, inspite of claimed to be in custody. Rather, there is said to be memorandum at their end on 13.10.2014 and 19.10.2014, respectively. Their memorandums are regarding dumping of vehicles and burning of clothes. Panchas to their memorandums are again PW2 Sachin and PW7 Raju. Even on this count, there is no other contemporaneous evidence. IO has admitted that documents of seized vehicle to show title are not gathered for the best reasons known to him. This has also further weakened the prosecution version.

41. There is a very serious attack on behalf of both learned counsels on the manner of investigation and the lapses on the part of investigating machinery. In such backdrop, we have carefully gone through the cross-examination of IO which commences from para 5.

The crucial admissions noticed by us are summarized as under:

1. Firstly, no entry is taken in the station diary about receipt of information from wife of deceased.
2. Secondly, wife of deceased, namely, Vaishali, who spoke about transaction between accused and deceased, is surprisingly not examined to establish motive.
3. Thirdly, Accused no.1 Avinash Ankulwar was called for inquiry with regard to missing for two days, but no note to that extent is taken in the station diary.
4. Fourthly, much prior to registration of crime, memorandum of disclosure and recovery, inquest panchanama, spot panchanama and postmortem are got done.
5. Fifthly, details of the visits for recovery are not taken note in the station diary and same is not placed on record.
6. Sixthly, logbook extract reflecting visits to various places for causing seizure is not placed on record.

7. Seventhly, details of private vehicle used for recovery is not finding place on record.
8. Eighthly, including missing report and panchanamas, there is overwriting, scratching and no initials are caused over the same.
9. Ninthly, knife and documents of ownership of vehicles are not gathered.
10. Tenthly, document about alleged financial transaction between accused no.1 and deceased not finding place in the record.

The above material shows that except so called confessional statement by accused no.1 Avinash Ankulwar, there is no other independent evidence supporting the accusations of prosecution. Thus, the solitary circumstance is confessional statement and so called recovery and discovery upon memorandum of disclosure.

42. Repeatedly, law on evidentiary value of recovery and discovery by virtue of Section 27 of Evidence Act has been dealt and discussed by Hon'ble Apex Court and various High Courts. We name a few of them which are relevant and the same are as under:

- a. In the case of ***Sharad Birdhichand Sarda v. State of Maharashtra*** ; (1984) 4 SCC 116, following observations are made:

*“25. With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused, **but** such disclosure alone would not automatically lead to the conclusion that offence was also committed by accused. Infact, thereafter, burden lies on prosecution to establish a close link between discovery of the material object and its use in the commission of offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by prosecution.”*

- b. In the case of ***Mani v. State of T.N.*** ; (2009) 17 SCC 273, it is observed as under:

“26. The recovery is a weak kind of evidence and cannot be wholly relied upon and conviction in such a serious matter cannot be based on discovery. Once discovery fails, there would be literally nothing which would support of prosecution.”

Similar views are reflected in the case of ***Vijay Thakur v. State of Himachal Pradesh*** ; (2014) 14 SCC 609.

Even the Larger Bench of Hon’ble Apex Court in the case of ***Bijender @ Mandar vs State Of Haryana [Criminal Appeal No. 2438***

of 2010J ; Live Law 2021 SC 630 held that “conviction based on disclosure statement can be sustained only when the recovery is unimpeachable”.

Likewise, very recently also, in the case of ***Manoj Kumar Soni v. Stae of Madhya Pradesh*** ; 2023 Live Law (SC) 629, the Hon’ble Apex Court while holding that disclosure statement under Section 27 cannot be the sole basis of conviction, observed as under :

“A doubt looms: can disclosure statement per se, unaccompanied by any supporting evidence, be deemed adequate to secure conviction? We find it implausible. Although disclosure statements hold significance as a contributing factor in unriddling a case, in our opinion, they are not so strong a piece of evidence sufficient on its own and without anything more to bring home the charges beyond reasonable doubt.”

43. Comparing the quality of evidence in the case in hand with above settled legal position, in our opinion, even the second circumstance of recovery and discovery cannot be taken into consideration and relied for above said reasons.

44. Apart from above, there are other facets and distinct features of prosecution evidence rendering its case doubtful, i.e. deceased is reported to be missing since 07.10.2014. Exactly from where he was abducted has not been demonstrated by prosecution. When it was the case of prosecution that deceased was taken in a four-wheeler vehicle and strangled, who all played which role is not vividly also shown by prosecution. At which spot deceased was strangled is also not clarified. Motorcycle of deceased was said to be dumped in a well. From where said two wheeler was taken and by whom, and whether it was taken prior to alleged strangulation or subsequent, is also not clarified by prosecution. Dead body is found on 12.10.2014 from a spot which is abutting to a road. Body was said to be in decomposed condition. Autopsy doctor speaks of rice contents in the stomach. If according to autopsy doctor, death has taken place three to four days prior to PM, then, how semi digested rice is detected in the stomach. Consequently, time since death does not match with the date of missing or alleged abduction. Evidence of prosecution is conspicuously ambiguous on all above crucial aspects. Though there is accusation of use of knife, but IO has admitted that its recovery is not caused. Resultantly, there is force in the submission of both the learned counsel that investigation is full of major lapses.

SUMMATION

45. Both circumstances fail. Motive is not established. Circumstance of recovery and discovery under Section 27 of the Evidence Act is not free from doubt. Except so called confessional statement and memorandum of disclosure, there is no other independent corroborative evidence in support of prosecution case. Hence, in our opinion, in the light of settled legal position which is discussed in aforesaid paragraphs, here, prosecution has failed to prove its case beyond reasonable doubt. None of the circumstances are firmly and cogently proved thereby negating innocence of accused appellants.

46. We have carefully gone through the judgment under challenge. In our considered opinion, learned trial Judge has straightaway applied Section 27 and Section 8 of the Indian Evidence Act for accepting the case of prosecution without getting satisfied that there was other cogent, reliable evidence and circumstance on behalf of prosecution apart from confessional statement. Death is straightaway accepted as homicidal one, inspite of autopsy doctor herself unsure about mode of death. Therefore, we are constrained to hold that there is no proper appreciation of the available evidence and hence,

interference at the hands of this Court is called for. Hence, we proceed to pass the following order:

ORDER

- I) Both appeals stand allowed.
- II) The conviction awarded to the appellants by learned Additional Sessions Judge, Biloli, District Nanded in Sessions Case No.02 of 2015 after holding the appellants i.e. original accused Nos.1, 2 and 4, namely, Avinash s/o Ramrao Ankulwar, Sham s/o Balaji Shinde and Avinash s/o Balaji Dhumal, guilty of committing offences punishable under Sections 302, 201 and 364 read with Section 34 of Indian Penal Code on 08.07.2016, stands quashed and set aside.
- III) The appellants viz. Avinash s/o Ramrao Ankulwar and Avinash s/o Balaji Dhumal [in Criminal Appeal No. 467 of 2016] and appellant Sham s/o Balaji Shinde [in Criminal Appeal No. 196 of 2022] stand acquitted of the offence punishable under Sections 302, 201, 364 read with Section 34 of Indian Penal Code.
- IV) They be set at liberty if not required in any other case.
- V) The fine amount deposited, if any, be refunded to the appellants after the statutory period is over.

VI) We clarify that there is no change in the order of disposal of muddemal.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]

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