

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

**CRIMINAL APPEAL NO. 513 OF 2016
WITH
CRIMINAL APPLICATION NO. 1148 OF 2018**

Suresh S/o. Sominath Pawar,
Age : 25 years, Occu. : Agril.,
R/o. Yesgaon, Tq. Gangapur,
Dist. Aurangabad.

... Appellant

Versus

The State of Maharashtra

... Respondent

...
Mr. Satej Jadhav h/f. Mr. M. S. Karad, Advocate for Appellant.
Mr. A. V. Deshmukh, APP for Respondent – State.
...

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

DATED : 18th JULY, 2023

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

1. Appellant Suresh is hereby taking exception to judgment and order of conviction dated 10.08.2016 passed by learned Additional Sessions Judge, Vaijapur in Sessions Case No. 102 of 2014, thereby holding him guilty for commission of offences under sections 302 and 201 of Indian Penal Code (IPC), vide instant appeal.

FACTUAL MATRIX

2. Appellant had illicit relations with one Shobhabai.

Deceased Anil desisted appellant from maintaining and continuing such relations. Therefore, according to prosecution, deceased was viewed as obstruction and to eliminate him, appellant called him near the water tank and by use of knife he stabbed him to death and thereafter threw the body in the well for causing disappearance of evidence. Hence, he was arrested and charge-sheeted on the basis of report lodged by wife (PW1).

After charge-sheeting, he was put up for trial before learned Additional Sessions Judge, who on appreciating the oral and documentary evidence, accepted the case of prosecution as proved and thereby convicted appellant for the charge of murder. Said judgment is now questioned on various grounds raised in the appeal memo.

RIVAL CONTENTIONS

3. Learned counsel for appellant would submit that implication and guilt recorded is in absence of any incriminating material. Learned counsel took us through the testimonies of prosecution witnesses and would submit that admittedly there was no direct evidence and case was entirely based on circumstantial evidence. Under such circumstances, he would further add that, it was incumbent upon prosecution at the threshold to establish very motive behind the occurrence by leading reliable evidence.

However, it is submitted that, from none of the testimonies of prosecution witnesses motive is cogently proved. It is further submitted that, circumstance like last seen together is pressed into service, but even said theory has not been established. Learned counsel submitted that, though one witness is examined, he has only allegedly seen deceased talking with appellant. However, it is specifically pointed out that there is a gap of almost 12 to 13 hours between so called last seen and deceased found dead and according to learned counsel, gap being immense, it is unsafe to connect appellant with death of deceased. Referring to the recovery and discovery panchanama, it is submitted that such circumstance is also not proved beyond reasonable doubt. There are major discrepancies and shortfalls making it unsafe for reliance. He would strenuously submit that prosecution has come with a case of deceased being called by making a phone call, but prosecution has utterly failed to demonstrate as to who was the person who had called and admittedly there is no evidence to show that the appellant was the person who had called. Resultantly, it is submitted that prosecution had miserably failed to prove the case beyond reasonable doubt. According to learned counsel, it was a case of benefit of doubt, but trial court failed to consider and appreciate the evidence on the law as required and as such it is his submission that the conclusions recorded in the judgment being

untenable, he prays to allow the appeal.

4. Canvassing in favour of judgment, learned APP would submit that, there is strong overwhelming evidence adduced by prosecution in trial court. Investigation revealed that appellant was harboring ill-will as deceased was preventing him from continuing illicit relationship with a lady. Therefore, as deceased has become a hurdle, it is pointed out that, he was called at the scene of occurrence and murdered. That, there is ample evidence about deceased Anil going on receipt of phone call towards the tank. There are witnesses, who had seen accused and deceased talking that night. Thereafter, deceased was found dead and so it is submitted that appellant being the last person in the company of deceased, he is rightly arrested, tried and rightly held guilty. It is submitted that all circumstances relied by the prosecution are cogently proved. There is recovery at his instance. Resultantly, it is submitted that, conviction and guilt recorded by trial court cannot be faulted.

SUM AND SUBSTANCE OF THE ORAL EVIDENCE BEFORE TRIAL COURT

5. PW1 Nirmala, wife of deceased. According to her, on 25.07.2014, after dinner her husband received phone call and so he went on motorcycle, but did not return and on next day, he was

found dead with grievous injury. According to her, there was illicit relation between Suresh and Shobhabai and her husband was advising appellant Suresh not to do such thing and for such reason her husband was murdered.

PW2 Yogesh, **PW3** Manohar and **PW4** Babasaheb are panchas to seizure of clothes, inquest and articles, like mobile and buttons from the scene of occurrence etc.

PW5 Harischandra seems to be the cousin of deceased, even according to him, he had seen deceased Anil going towards the water tank. That, deceased allegedly informed him that he has received a phone call and so he is going towards water tank. As he did not return, wife of deceased informed him and so he attempted to take search and dead body was found in the well. He has also acted as a panch to scene of occurrence panchnama (Exh.38). He too stated that deceased was hurdle in the illicit relationship of Shobhabai with accused and so accused murdered him.

PW6 Somnath, younger brother of deceased stated that on 25.07.2014, in the evening, he, Vishnu, Amol and Harischandra were talking. Anil was also present there. Deceased received phone call from someone and so he went towards the water tank.

Next day, as he did not return, he was searched and dead body was found in the well. According to him, there were illicit relations between Shobhabai and appellant Suresh and deceased used to convince him. They were feeling obstacle of deceased and therefore, he was called and murdered by sharp weapon.

PW7 Amol, friend of deceased stated that, in his presence, on 25.07.2014 deceased informed Vishnu about receiving a call and going towards the water tank. He did not return and his dead body was fetched out of the water with several injuries.

PW8 Sachin panch to memorandum of disclosure of handing over knife and its seizure panchana (Exh.55)

PW9 Gokul claims that he had found battery light of deceased while he was returning from Gangapur.

PW10 Karbhari stated that, on 25.07.2014, he had seen appellant Suresh and deceased near the tapari and thereafter, he saw deceased going on vehicle and appellant followed him. Next day, he learnt about the occurrence.

PW11 Sominath claims that while he and appellant were returning from Ahmednagar, in his presence, appellant purchased **button knife** and on inquiry appellant informed that he needs it while going and returning field.

PW12 Karansing, panch to memorandum of disclosure regarding handing over clothes stitched from tailor. Tailor Gani confirmed that accused had stitched clothes with him. A diary was seized from the tailor.

PW13 Syed Gani Badshaha, a tailor stated that accused brought appellant on the shop on 05.08.2014 and police asked him whether appellant had stitched clothes from him and he answered in affirmative. On asking by police he handed over diary (Article No.25).

PW14 Sandeep, second panch to memorandum of disclosure and seizure of knife.

PW15 Ganesh, Carrier; **PW16** Pralhad, photographer;

PW17 Rafik Abdul Aziz Bagwan stated that, on 04.08.2014, police came with a boy. Said boy told police that he had purchased **folding knife** from this witness. This witness gave statement to the police that on 21.07.2014, he was approached by

three boys with a demand of **folding knife**. As it was not with him, on further request of those boys, he sent Abdul Razzak to fetch knife from Ayaz i.e. on payment of Rs.550/-. He identified the knife which was arranged by Ayaz.

PW18 Ashok is the Investigating Officer.

PW19 Dr. Surajkumar, Medical Officer, who conducted post-mortem and he issued post-mortem report and opinion about cause of death.

ANALYSIS

6. Here, there being no direct evidence, obviously case is based on circumstantial evidence. Law on appreciation of evidence in a case based on circumstantial evidence is squarely and fairly settled. 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, five golden principles are enunciated which served as a test 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.”

7. Bearing above guiding precedents, we proceed to re-examine, re-analyze and re-appreciate the evidence and case of prosecution put-forth in trial court.

It needs to be noted that during appeal, there was no

serious challenge to the mode and nature of death. It seems from the evidence, more particularly, that of autopsy doctor (PW19), deceased had suffered various stab injuries which are noted in post-mortem report in column nos. 17 and 19. According to doctor, cause of death was due to shock and hemorrhage due to multiple stab wounds over heart and lung. Above testimony has not been rendered doubtful during cross-examination. Therefore, death of Anil is shown to be homicidal one.

Resultantly, now it is to be seen whether as claimed by prosecution, appellant herein is the author of the said injuries and thereby responsible for murder of Anil.

8. On hearing learned counsel for appellant and on going through the evidence adduced in trial court, it is seen that following circumstances were relied by prosecution in support of the charge :-

- (i) Motive,
- (ii) Last seen together,
- (iii) Recovery and discovery of knife, clothes and articles, like mobile and buttons.

Let us deal with the each of the above circumstance to ascertain whether the same are compatible with the guilt of the accused.

MOTIVE

9. Case of prosecution is that, appellant had illicit relations with one Shobhabai. Deceased used to desist him from indulging in it and therefore to eliminate deceased, he was called and murdered. In support of said circumstance, prosecution seems to be relying on testimonies of PW1 Nirmala-Wife, PW5 Harischandra - Sarpanch, PW6 Somnath - brother.

On going through the evidence of wife (PW1), it is seen that, in examination-in-chief she stated that, there were illicit relations between Suresh and Shobhabai. Her husband was advising Suresh not to do such thing. On said reason Suresh murdered her husband. However, in cross-examination, in paragraph 5, she candidly admitted that, she had not told police during her statement about said illicit relations between Suresh and Shobhabai and that for said reason Suresh murdered her husband. Therefore, apparently there is material omission to that extent.

PW5 Harischandra, a cousin and a Sarpanch of the village also spoke about said relations by stating that Anil was hurdle in the illicit relations between appellant Suresh and Shobhabai and so he was murdered.

In spite of being Sarpanch, he has not thrown light as to who was that lady and he also did not speak about deceased desisting appellant and therefore he was considered as hurdle. His statement is also recorded on 05.08.2014.

Younger brother PW6 Somnath also deposed about illicit relations between appellant Suresh and Shobhabai. According to him, Anil was convincing him and therefore, they were feeling obstacle of Anil and so he murdered. However, in para 2 of the cross-examination, he has admitted that he did not state to the police about said illicit relationship. He admitted that, he even did not state Shobhabai and Suresh were feeling deceased to be an obstruction.

To sum up on these circumstances, it is emerging that there is weak or no evidence on the point of alleged motive. Who was the said lady has not been elaborated by any of the above three witnesses. It is pertinent to note that, friend of deceased PW7 Amol has not uttered anything about alleged illicit relations between appellant and the said lady. Case being based on circumstantial evidence, it was incumbent upon prosecution to establish motive, but it had apparently failed to do so. Therefore, this circumstance is not proved.

LAST SEEN TOGETHER

10. According to prosecution, appellant - accused met deceased that night. No other person than appellant was in the company of deceased. PW10 Karbhari had allegedly seen both of them together.

11. In the light of such case, we have carefully examined testimony of PW10 Karbhari, who in his evidence at Exh.61 stated that, on 25.07.2014, in the night, he was sitting near the shop of Vishwanath. Shivaji had come there. Deceased and Suresh were near the tapari. Anil went on vehicle. This witness claims that he had asked deceased where he was going and deceased allegedly replied that he was going to the land. He further stated that appellant followed him.

This witness in cross-examination answered that, appellant and deceased were talking properly. After 5-7 minutes deceased left. Appellant also left. He answered that, he had no talks with appellant and they both being on talking terms. Next day, after the incident, he came to know about the occurrence. This witness answered that, he felt like informing police, but till 18.08.2014, he did not disclose information to police or anyone in

the village. He did not meet mother and wife of deceased. He answered that, on 18th he approached police. He answered that, he has not received court service. He further admitted that, police told them and accordingly he gave statement.

12. Taking into account above answers in to consideration, *firstly*, this witness is unworthy of credence for the simple reason that he had not informed anyone in the village or police about seeing deceased being followed by appellant. *Secondly*, he has given statement to police after inordinate delay. Even otherwise his evidence is of no use to prosecution because he merely speaks of seeing appellant and deceased near a pan-tapari. He has not informed the exact time of seeing them together. He has named Vishwanath and Shivaji to be there, but these persons are also not examined to lend support or corroborate the testimony of this witness.

13. It is pertinent to note that around 8.00 p.m. of 25.07.2014, deceased allegedly left on motorcycle. His dead body was traced in a well at around 9.15 a.m. of 26.07.2014. Apparently, gap between both such timings is more than 12 hours. Evidence gathered by prosecution does not show that except appellant no one had come in contact with deceased. It was

expected of prosecution to establish so. Taking into account the huge gap, between alleged last seen and deceased found dead, this theory cannot be taken aid of by prosecution.

Therefore, even this circumstance is not cogently proved.

RECOVERY AND DISCOVERY

14. Case of prosecution is that, investigation revealed that, appellant have purchased knife on 21.07.2014 itself, i.e. with intention to do away deceased. Knife was purchased at Ahmednagar.

15. PW11 Sominath has been examined in support of above accusation, whose testimony is at Exh.62. On going through the same, it is seen that this witness runs a saloon. According to him, on 21.07.2014 appellant approached him and requested him to accompany him to Ahmednagar. While returning, appellant stopped the motorcycle near the handcart. There appellant allegedly made inquiry with a person near the handcart and this witness saw appellant paying Rs.550/-. On being asked appellant allegedly told him that he has purchased **button knife**. This witness further stated that he asked him for what purpose the knife was required and appellant allegedly answered that he needs

while going or returning to the field. This witness identified the knife shown in the court.

In cross-examination, on the point of alleged transaction, he answered that, when the vehicle was stopped near the handcart at Ahmednagar, he was at the distance 10-15 feet away. Omission is brought about informing police regarding asking appellant why he was purchasing knife and about seeing appellant to pay Rs.550/- for purchasing knife. He admitted that, he had not disclosed to anyone about whatever happened on 21.07.2014. He answered that, as statement was read over to him, he gave evidence in the court.

16. The other witness whose testimony is taken recourse to is PW17 Rafik. According to this witness, he had a handcart. On 04.08.2014, police approached him with a boy. Said boy told that he had purchased knife from this witness. Police took him to Waluj Police station and there he told them that on 21.07.2014 three boys approached him while he was at the handcart. They had asked him about **folding knife** and he told them that it is not available with him. That, those boys further asked as to where it would be available and so he advised them to look at Asha talkies. That, as boys were not knowing Asha talkies, he sent Abdul

Razzak, who was near his handcart with those boys. They brought folding knife from Ayaz. Boys paid Rs.550/-, out of which he send Rs.400/- to Ayaz. According to this witness, they told that they needed knife for self protection. He identified the knife as Exh.D-1 and even the appellant.

In his cross-examination, he has answered that, he could identify only the customers who were regularly coming to him. He was not knowing accused. That, police had shown him the accused and they had brought to him. That, accused has not forced him to bring the knife. He does not know whether permission is required for selling the knife.

17. Therefore, on analyzing above evidence of both witnesses i.e. PW11 Sominath and 17 Rafik, more particularly, their cross-examinations, it is revealed that, appellant allegedly purchased knife on 21.07.2014 in presence of PW11 Sominath. It is pertinent to note that, according to PW11 Sominath accused - appellant allegedly purchased **button knife**, whereas according to PW17 Rafik, who allegedly arranged knife, speaks about **folding knife**. Therefore, both witnesses are giving different description of the knife. Material omissions are brought in the evidence of PW11 Sominath about he asking appellant why he purchased knife and

about appellant handing over Rs.550/-. PW17 Rafik has candidly answered that, he was not knowing accused and he remembers only regular customers. Further, the boy named Abdul Razzak, who was allegedly directed by this witness to fetch knife, is not examined by prosecution. Even the person named Ayaz from whom said person Abdul Razzak actually brought the knife is also not examined by the prosecution.

18. Therefore, evidence of neither PW11 Sominath nor PW17 Rafik can be used by prosecution in support of their case about appellant purchasing knife shortly before the incident. Therefore, even circumstance of appellant allegedly purchasing knife is not cogently proved.

19. According to prosecution, at the instance of accused while in custody, he gave memorandum of disclosure regarding handing over the knife and clothes. Apparently, seizure of knife and clothes from open field wherein chili vegetable was cultivated which was on Yesgaon road. However, panch PW14 Sandeep in cross-examination is unable to give description of clothes seized in his presence. Even otherwise when we have already found that very aspect of purchase of knife by appellant is rendered doubtful, it would be unsafe to apply recovery and discovery to implicate appellant.

20. Prosecution claims that, from the scene of occurrence four buttons were seized i.e. three near the well and one in the well water. It is specific case of prosecution that, the three buttons out of the well are of the shirt of accused, whereas the button found in the well water is of the shirt of deceased. Though witness tailor who had allegedly stitched clothes, is examined the buttons were not confronted for verification that the same buttons were used while stitching clothes of accused. Same as also happened with said alleged buttons found in the well. Mere diary from the tailor has been seized and articles are not confronted to this witness. Therefore, we are afraid whether it is open at all for prosecution to press such weak circumstance into service to connect appellant in a serious case of murder.

21. Here, it is also worth noting that very foundation of case of prosecution is phone call received by deceased and so he leaving house. Though attempt is made to gather CDR, ownership and possession of mobile has not been established and proved and therefore, the very genesis and foundation of the prosecution case is not firmly proved. It is surprising to find that wife, brother and Sarpanch of the village when are unanimously claiming about deceased receiving phone call and he informing about it and

leaving the house, nobody seem to have questioned him as to from he had received phone call and to whom he is going to meet.

22. To sum up here, none of the circumstances discussed above and firmly and cogently proved beyond reasonable doubt. The chain of circumstances is not getting complete. Therefore, case of prosecution cannot be said to be proved beyond reasonable doubt.

23. We have carefully gone through the judgment under challenge. On examining observations of learned trial Judge, more particularly, para no. 31 onwards, learned trial Judge seems to have discussed the substantive evidence of prosecution witnesses in detail, but appreciation which is reflected in para no. 70 onwards goes to show that learned trial Judge is only convinced about death of Anil to be homicidal one. However, doubts have been raised and entertained by learned trial Judge regarding seizure and sealing of article knife, but at the same time conclusion has been drawn that knife before the court is proved to be weapon used for murder. In para no. 81, learned trial Judge has also admitted that some facts and circumstances are doubtful. Statements of witnesses are recorded after inordinate delay and that motive is doubtful. However, still case of prosecution is accepted and guilt is recorded.

Therefore, it is apparent that, here learned trial Judge, in spite of noting major shortfalls, has still convicted the accused. Therefore, in our opinion, the judgment under challenge not being supported by sound reasons, cannot be allowed to be sustained. Hence, appellant succeeds and we accordingly proceed to pass following order :-

ORDER

- I. The appeal stands allowed.
- II. The conviction and sentence awarded to the appellant Suresh s/o Sominath Pawar in Sessions Case No. 102 of 2014 by learned Additional Sessions Judge, Vaijapur, District Aurangabad on 10.08.2016 for the offence under Sections 302 and 201 of IPC stands quashed and set aside.
- III. The appellant stands acquitted of the offence 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 the statutory period is over.

VI. As regards the muddemal is concerned, there is no change in the order as regards disposal of mobile phones those have been seized and the other muddemal which was worthless. However, as regards disposal of knife is concerned, as per Chapter VI para 81 of the Criminal Manual, the said knife be confiscated and be sent to District Magistrate for its disposal in stead of destroying it as directed in clause (6) of the operative order of the impugned judgment.

VII. The appeal is accordingly disposed off.

VIII. In view of disposal of the appeal, nothing survives for consideration in Criminal Application No. 1148 of 2018 and the same stands disposed off.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)