



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.820 OF 2018

Rajebhau S/o Sudamrao Tengse
Age : 37 years, Occ.: Agril.,
R/o Renapur, Tq.Pathri,
Dist.Parbhani.

... Appellant

Versus

The State of Maharashtra
Through Police Station Officer,
Police Station Pathri,
Tq. Pathri, Dist.Parbhani.

... Respondent

.....
Mr.Mahesh P. Kale, Advocate for Appellant
Mr.S.J.Salgare, APP for Respondent-State

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

DATE : 08 NOVEMBER, 2023

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

1. Aggrieved by the judgment and order of conviction passed by the learned Sessions Judge, Parbhani in Sessions Case No.128 of 2016 dated 03-10-2018 holding present appellant guilty for offence under Section 302 of the Indian Penal Code (IPC) and sentencing him to suffer imprisonment for life and to pay fine of Rs.10,000/-, the convict has preferred instant appeal by invoking Section 374 of the Code of Criminal Procedure.

CASE OF PROSECUTION IN BRIEF

2. On 15-05-2016, appellant brought deceased to satisfy his sexual urge in the field in the jurisdiction of village Renapur. After consuming liquor, to satisfy his lust, he tried to commit sexual offence. It is a specific case of prosecution that when deceased resisted, accused committed her murder by use of knife and thereafter, he himself approached PW1 Mahesh, owner of the neighbouring land at around 10:30 p.m. and informed that he had committed murder of a lady beneath Neem tree. PW1 Mahesh, PW2 Bhimrao and PW3 Krishna, who heard above narrative, went and verified and thereafter, information was passed to Police. PW1 Mahesh himself lodged report on the strength of which Police registered Crime bearing no.124 of 2016 for offence under Section 302 and finally PW6 Jagtap (PI), who was entrusted with investigation, carried out and completed the same and chargesheeted accused.

Case being exclusively triable by Court of Sessions, was duly committed and tried by learned Sessions Judge, Parbhani, who permitted prosecution to lead evidence. On evidence closure purshis, incriminating material was brought to notice of accused. His defence is of false implication. After hearing both sides, the learned trial Court held that prosecution has established the case beyond reasonable doubt and finally holding appellant guilty, sentenced him as above, which is now questioned before us.

SUBMISSIONS

On behalf of Appellant :

3. Attacking the case of prosecution, learned counsel for appellant would submit that it is apparently a false implication that too on the basis of alleged extra-judicial confession. Apart from said extra-judicial confession, there is no other incriminating material. According to him, when case was based on circumstantial evidence, it was duty of prosecution to prove all the circumstances firmly and cogently and that too beyond reasonable doubt. He submits that, however none of the circumstances put forth by prosecution are firmly proved, still learned trial Judge has accepted the case of prosecution without assigning sound reasons. He next submitted that there is no evidence in support of the case that deceased was brought by accused and that no one had seen deceased in the company of appellant to hold him responsible. He further pointed out that even recovery is not proved beyond reasonable doubt and therefore, with such weak evidence, learned trial Judge ought to have acquitted him by giving benefit of doubt, but instead of doing so, guilt has been recorded in absence of reliable, trustworthy evidence and hence he prayed to set aside the impugned judgment by allowing the appeal.

On behalf of State :

4. Countering the above submissions, learned APP submitted that appellant himself has given extra-judicial confession to the neighbour of the spot where

alleged incident took place. That in memorandum under Section 27 of the Indian Evidence Act, appellant himself has given story that he brought the deceased, he consumed liquor and when he tried to force himself on her, she has resisted the same and therefore, she was done to death. That circumstance at the scene of occurrence and tell-tale signs clearly suggest resistance and struggle by deceased. Her clothes on the body were in such condition, which clearly suggested that accused wanted to satisfy his lust. Moreover, immediately after killing deceased lady, he himself went and informed PW1 Mahesh who was in company of PW2 Bhimrao and PW3 Krishna. That there is recovery of weapon at his instance. Therefore, there being ample evidence against him, learned trial Judge has committed no error in recording guilt and so he prays to dismiss the appeal for want of merits.

5. Here case of prosecution is rested on oral evidence of in all six witnesses.

PW1 Mahesh Ambadasrao Kulkarni is informant. His evidence is at Exh.19.

PW2 Bhimrao Kondiba Nandanware is agricultural labour. His evidence is at Exh.24.

PW3 Krishna Bhagwan Gaikwad is agricultural labour. His evidence is at Exh.25.

PW4 Rajesh Vinayak Chilwant is Pancha to seizure of clothes of accused. His evidence is at Exh.28.

PW5 Dr.Siddheshwar Shivrajappa Halge is Autopsy Doctor. His evidence is at Exh.42.

PW6 Sudhakar Bhimrao Jagtap (PI) is the Investigating Officer. His evidence is at Exh.51.

6. As required under Section 374 of the Cr.P.C., we have carefully re-appreciated and re-analyzed prosecution evidence adduced in trial Court.

It seems that identity of deceased is unfortunately not revealed. Autopsy has been conducted on unknown female by PW5 Dr.Halge, Medical Officer at Civil Hospital Osmanabad, who noticed eight injuries during post mortem and it is his opinion that death is due to “head injury with multiple injuries”. Injury no.7 is said to be corresponding with injury mentioned in column no.18. Doctor has further opined that internal injuries are possible by weapon like article-A which is used for ploughing the field and called as “rumne”.

Therefore, taking into account medico legal expert’s evidence and even before us as learned Counsel for appellant has not disputed mode of death to be homicidal one, we need not further get ourselves satisfied that the lady met homicidal death.

7. Now it is to be seen whether as claimed by prosecution in the trial Court, appellant is responsible for the death of deceased. On taking survey of prosecution evidence, it is further emerging that informant **PW1** Mahesh, **PW2** Bhimrao and **PW3** Krishna are star witnesses for prosecution. Let us discuss in brief their testimonies while they were in the witness box.

EVIDENCE ON BEHALF OF PROSECUTION

PW1 Mahesh gave evidence that at around 06:00 p.m. to 06:30 p.m. on 15-05-2016, after rendering agriculture work, while in the company of **PW2** Bhimrao and **PW3** Krishna, they went to the village. They all again returned to the agriculture field at around 08:30 p.m., they chitchatted and went to sleep. At around 10:30 p.m., they woke up hearing dog's barking and so they came out of the house located in very agriculture field. **PW1** Mahesh claims to have seen appellant in the light of electric bulb. He was merely on a undergarment and on being questioned why he came in the late night, he allegedly answered that a lady has been killed under a Neem tree in the field of Bhoru Kaka. This witness and others went to verify and they saw one lady lying on the back with her saree lifted upto her thighs and she had head injury. They saw two empty liquor bottles and a weapon, which is used for ploughing field which is called as "Rumne" and a handkerchief. This witness claims that he gave a call to his brother Sanjay Kulkarni and they went to Police Station

and returned to the agriculture field with Police, who confirmed the lady to be dead. He claims that he lodged report. He claims even to have shown the spot to the Police.

PW2 Bhimrao also stated in the similar manner that at around 10:00 p.m., they heard dog's barking and he, PW1 Mahesh and other agriculture labours came out. Appellant had come there. Appellante was not wearing clothes except underwear and he disclosed to PW1 Mahesh that he killed a woman. They all went to the Neem tree and saw a lady lying in injured condition and thereafter, PW1 Mahesh approached house of Sanjay Kulkarni and then approached Police. He also identified article-A and two liquor bottles, which were said to be lying there.

Similarly **PW3** Krishna also testified about barking of dog at around 10:00 p.m., appellant coming to the field of PW1 Mahesh and on being questioned, informing about 13killing a woman and they going and verifying.

8. Now let us deal with the **cross-examination** faced by above three witnesses.

In the initial part of the cross-examination, location, circumstances around the spot, geographical directions are extracted. In subsequent paragraphs, questions are put regarding the residence of brother of PW1 Mahesh, visit to the Police Station, he is asked how much time they were at

the spot and at what time report was lodged. Then he is asked about crop in the field, about traffic on the road adjoining to the field. Then questions are put regarding political affiliation of accused. He is asked about reason of PW2 Bhimrao and PW3 Krishna in his company that night. Rest all are denial.

PW2 Bhimrao and **PW3** Krishna also are extensively **cross-examined** but on similar lines as like that of PW1 Mahesh.

ANALYSIS

9. There being no direct evidence, undisputedly case is based on circumstantial evidence.

Before analyzing the evidence, it would be apt to throw light on the settled legal position about manner of appreciation of case based on circumstantial evidence. Since the landmark case of *Hanumant Govind Nirgudkar and another v. State of M.P.*, AIR 1952 SC 343 followed by water shedding judgments in the case of *Shivaji Sahebrao Bobade v. State of Maharashtra*, AIR 1973 SC 2622; *Sharad B. Sarda v. State of Maharashtra*, AIR 1984 SC 1622; *Padala Veera Reddy v. State of Andhra Pradesh*, 1989 (Suppl.2) SCC 706; *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 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.

10. Similarly, while conducting criminal trial, court is also expected to bear in mind the cardinal principles of criminal jurisprudence that **firstly**, fundamental burden of proving the case is always on the prosecution; **secondly**, fouler the crime, greater the degree of proof; **thirdly**, prosecution must prove its case beyond reasonable doubt; **fourthly**, accused “must be” and not merely “may be” guilty of the offence and the distance between “must be” and “may be” should not be long and divide conjectures from sure conclusion;

fifthly, suspicion however strong, never takes place of proof; and lastly, court must ensure that miscarriage of justice is avoided and if facts and circumstances of the case so demand, benefit of doubt should go to the accused, provided it is fair doubt based on reasons and common sense.

The above principles are derivative of several landmark cases like **Bhagirath v. State of M.P.**, AIR 1976 SC 975; ***Shankarlal Dixit v. State of Maharashtra***, AIR 1981 SC 765 and ***Dhananjay Chatterjee @ Dhana v. State of W.B.***, (1994) 2 SCC 220.

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

First circumstance – Extra-judicial confession.

Second circumstance – Theory of last seen together.

Third circumstance – Recovery and discovery under Section 27 of the Indian Evidence Act.

Bearing in mind above settled legal position, let us deal with the evidence to ascertain whether so called circumstances are firmly and cogently proved that too beyond reasonable doubt completely ruling out innocence of accused and unerringly pointing out his guilt.

FIRST CIRCUMSTANCE - EXTRA JUDICIAL CONFESSION

12. The trump card for prosecution is extra-judicial confession given to PW1 Mahesh, PW2 Bhimrao and PW3 Krishna. On sifting their evidence, it is emerging that they are farmers residing in the fields adjoining to the spot where deceased lady was found dead. All these three witnesses, in their substantive evidence, claim that on the night of 15-05-2016, appellant approached them in bare clothes and informed that a lady has been killed beneath Neem tree belonging to the field of Bhoru Kaka and so they all went and saw a lady lying with fatal injuries. They also claim to have seen two empty liquor bottles, a steel glass, a weapon used for ploughing called “Rumne” and a handkerchief lying near the lady. PW2 Bhimrao and PW3 Krishna are also lending support to so much of the evidence while they testified at Exhibits 24 and 25.

All above three witnesses are subjected to extensive **cross-examination** but on other aspects. The alleged information seems to have been given to all above three witnesses at around between 10:00 p.m. to 10:30 p.m. Their testimonies show that the scene of occurrence is field belonging to one Sanjay Kulkarni, who is adjoining landowner of PW1 Mahesh, but he is not examined. FIR is lodged on the next day at 06:00 a.m. i.e. almost after 8 to 9 hours, inspite of Police being informed shortly after alleged disclosure and inspite of Police paying visit to the spot.

13. Whenever there is extra-judicial confession, it is fairly settled legal position that there has to be other incriminating material or circumstances to connect a person for an offence and that extra-judicial confession is weak type of evidence. On the sole basis of extra-judicial confession, conviction cannot be recorded. It has been held in numerous cases that when extra-judicial confession is surrounded by suspicious circumstances, its credibility become doubtful and it loses its importance. After dealing with numerous previous cases, Hon'ble Apex Court in the case of ***Sahadevan and Another v. State of Tamil Nadu***; (2012) 6 SCC 403 held as under:

“16. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused.

i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

ii) It should be made voluntarily and should be truthful.

iii) It should inspire confidence.

iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

vi) Such statement essentially has to be proved like any other fact and in accordance with law.”

Very recently the Hon’ble Apex Court in the cases of ***Nikhil Chandra Mondal v. State of West Bengal***; 2023 LiveLaw (SC) 171, ***Pawan Kumar Chourasia v. State of Bihar***; (2023) LiveLaw (SC) 197 and ***Moorthy v. State of Tamil Nadu***; 2023 LiveLaw SC 679 touched the above aspect of evidentiary value of extra-judicial confession.

It is not known in which capacity appellant held above three witnesses so that he got prompted to confess before them. They merely seem to be acquainted with each other and nothing more than that and therefore, question arises, why he would confide to them. The above three witnesses merely speak about seeing appellant when they came out of house on hearing barking of the dog and thereafter, on being questioned, they all deposed about alleged extra-judicial confession given by appellant. Thus, said extra-judicial confession, cannot be straightway accepted and applied and therefore, it is to be further seen whether there are other incriminating circumstantial evidence apart from extra-judicial confession.

Their depositions do not show that they immediately believed the said extra-judicial confession. They say that they confirmed the fact by visiting the place. Surprising conduct on their part is that inspite of alleged confession, they allowed the accused to leave the place quietly. They had not tried to catch him and produce before Police.

SECOND CIRCUMSTANCE – THEORY OF LAST SEEN TOGETHER

14. Prosecution has come with a case that accused appellant had brought deceased to satisfy his urge of sexual desire. When she resisted, he killed her. There is no witness seeing deceased being engaged and then brought to the spot. No person had seen he bringing her there. It seems that some disclosure made at the time of memorandum of disclosure regarding handing over article, appellant gave information that he brought the lady from Bus-stand but there is no evidence for namesake that appellant was spotted in Bus-stand area and there deal was struck and she was brought. No one has seen accused and deceased together. PW1 Mahesh, PW2 Bhimrao, PW3 Krishna all three claim about coming across two liquor bottles near the dead body. From where the liquor was purchased has not been investigated. Resultantly, from where deceased was brought by appellant is not at all coming on record and therefore, in our opinion, it is not open for the prosecution to apply theory of last seen together. Even inspite of examining PW5 Dr.Halge, medico legal expert, who conducted autopsy and tendered post mortem report, time since death has not been estimated even by approximation. Even medical evidence does not suggest or support theory of prosecution about attempt of forceful act or resistance by deceased lady inviting annoyance of appellant. Infact, in our opinion, theory of engaging deceased lady to satisfy sexual urge and she

resisting are self contradictory. Therefore, for all above reasons, said theory goes out of purview and consideration.

**THIRD CIRCUMSTANCE – RECOVERY DISCOVERY U/S 27 OF
THE INDIAN EVIDENCE ACT**

15. The last circumstance, which prosecution is catching hold of, is recovery of blood stained clothes allegedly caused in presence of PW4 Rajesh on 18-05-2016. Prosecution claims that while in custody, accused gave memorandum that he is ready to show place where he has concealed blood stained clothes and Memorandum Exh.29 was drawn and accused took them to a shed and from beneath a gunny bag blood stained baniyan taken out and handed over and seized vide panchanama Exh.30.

There is no investigation on the point as to which clothes accused was wearing on that day. If he was wearing shirt also then how blood stains can appear only on his baniyan. What happened to his shirt and pant ?

The pancha witness to the memorandum of disclosure has admitted that the place from where recovery was done was open shed having no doors and the said place belongs to father of accused. But there is no evidence about alleged ownership of father of accused. Even otherwise recovery is from open shed. Therefore, even this circumstance is weak in nature.

The sum total of above discussed evidence clearly shows that circumstance of last seen together and recovery not having been proved

beyond reasonable doubt, cannot be taken aid of for accepting the extra-judicial confession.

Here the only piece of evidence which is taken recourse to is extra-judicial confession and for above reasons, we consider it a very weak nature of evidence. There is no other credible, independent and reliable evidence to rely on the extra-judicial confession and hence, case cannot be said to be proved beyond reasonable doubt.

16. We have gone through the impugned judgment. We have realized that learned trial Court has not appreciated the evidence and considered law as required and has straightaway accepted the case of prosecution. Reasons assigned are not convincing and moreover are not in consonance with the evidence available on record and this prompts us to interfere by setting aside the impugned judgment and allowing the appeal. Accordingly, we proceed to pass the following order :

ORDER

1. Criminal Appeal stands allowed.
2. The conviction awarded to the appellant viz. **Rajebhau Sudamrao Tengse** in Sessions Case No.128 of 2016 by the learned Sessions Judge, Parbhani on 03-10-2018 for the offence punishable under Section 302 of the Indian Penal Code, stands quashed and set aside.

3. The appellant stands acquitted of the offence punishable under Section 302 of the Indian Penal Code.
4. The appellant be set at liberty, if not required in any other case.
5. The fine amount deposited, if any, be refunded to the appellant after the statutory period.
6. We clarify that there is no change as regards the order in respect of disposal of muddemal.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

SPT