

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.577 OF 2016

Ajikh Khan Mohd. Khan Pathan,
Age 41 yrs., Occ. Nil,
R/o Jawalga, Tq. Himayatnagar,
Dist. Nanded.
At the time of incidence at Rupala,
Tq. Umarkhed, Dist. Yeotmal.

... Appellant

... **Versus** ...

The State of Maharashtra
Through the Police Station Officer,
Dharmabad Police Station,
Tq. Dharmabad, Dist. Nanded.

... Respondent

...

Mr. Z.H. Farooqui, Advocate (appointed) for appellant

Mr. S.D. Ghayal, APP for respondent

...

WITH

CRIMINAL APPEAL NO.531 OF 2016

Sunil Shankarrao Tak,
Age 40 yrs., Occ. Business,
R/o Tikal Ward, Umarkhed,
Dist. Yeotmal.

... Appellant

... **Versus** ...

The State of Maharashtra
Through the Police Station Officer,
Dharmabad Police Station,
Tq. Dharmabad, Dist. Nanded.

... **Respondent**

...

Mr. Z.H. Farooqui, Advocate for appellant

Mr. S.D. Ghayal, APP for respondent

...

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

RESERVED ON : 18th AUGUST, 2023

PRONOUNCED ON : 21st SEPTEMBER, 2023

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 The appellants in both the appeals are original accused Nos.1 and 3 in Sessions Case No.46/2011. They have been held guilty by learned Additional Sessions Judge, Biloli, Dist. Nanded on 29.07.2016. Appellant in Criminal Appeal No.577 of 2016 i.e. original accused No.1 has been held guilty of committing offence punishable under Section 302 and 392 of the Indian Penal Code. He has been sentenced to suffer imprisonment for life and pay fine of Rs.10,000/-, in default to suffer simple imprisonment for six months, for the offence punishable under Section 302 of the Indian Penal

Code, whereas for offence punishable under Section 392 of the Indian Penal Code he has been sentenced to suffer rigorous imprisonment for 10 years. He has been acquitted of the offence punishable under Section 376 of the Indian Penal Code. Appellant in Criminal Appeal No.531 of 2016 i.e. original accused No.3 has been convicted for the offence punishable under Section 411 of the Indian Penal Code and has been sentenced to suffer simple imprisonment for one year and to pay fine of Rs.10,000/-, in default to suffer simple imprisonment for two months.

2 Before we proceed we would like to place on record that original accused No.3 – appellant in Criminal No.531 of 2016 was represented by Advocate. However, as regards the original accused No.1, it appears that on the request by the appellant, Advocate Mr. V.H. Dighe came to be appointed to represent him by order dated 19.10.2016. He prepared the appeal memo and then by order dated 16.11.2016 the appeal came to be admitted. When the matter came up for final hearing, he remained absent. By order dated 14.03.2023 this Court made it clear that if he remains absent on the next date, then some other Advocate would be appointed to represent the appellant. On 28.03.2023 also he was absent and, therefore, we appointed learned Advocate Mr. Z.H. Farooqui, who was holding for Advocate Mr. N.V. Gaware in Criminal Appeal No.531 of 2016. Thus, a proper legal

representation has been given to the appellant in Criminal Appeal No.577 of 2016.

3 Heard learned Advocate Mr. Z.H. Farooqui for the appellant and learned APP Mr. S.D. Ghayal for the respondent in both matters.

4 It has been vehemently submitted on behalf of the learned Advocate representing both the appellants that the learned trial Judge has not considered the facts and the evidence in proper perspective. Informant is the husband of deceased. Deceased had gone to the field on 23.01.2011 for plucking cotton. She had not returned till 5.00 p.m. and, therefore, search was made till 12.00 hours at night. Again on the next day i.e. on 24.01.2011 he went to the field along with villagers and neighbourers around 8.00 a.m. and the dead body of his wife was found in the field of one Bhojanna Sambetwad. Near the said dead body there was one cotton bag, one chappal, broken bangles, one receipt issued by one Masjid and railway ticket. There were ligature marks on the neck of deceased. The gold articles i.e. Mangalsutra, ear top and toe ring in silver were found missing. There was no sari and blouse on the person of deceased. He also found four water pouches, two broken liquor bottles, one bag near the dead body and, therefore, he lodged First Information Report regarding murder of his wife.

5 Learned Advocate for both the appellants further submits that the prosecution has examined in all 14 witnesses to bring home the guilt of the accused, however, none of them is an eye witness. The case of the prosecution was based on circumstantial evidence. The circumstantial evidence was in the nature of discovery of the gold ornaments, purse allegedly belonging to deceased. The prosecution has further come with a case that the accused was facing charges for the offence punishable under Sections 302 and 392 of the Indian Penal Code in other cases also and he came to be arrested by Local Crime Branch and then he was transferred in the present case also. Merely because the accused was convicted in another offence by the same Judge, it appears that he has been convicted in this case also. Present appellant in Criminal Appeal No.577 of 2016 and another accused challenged their conviction in Criminal Appeal No.564 of 2015 and Criminal Appeal No.689 of 2015 before this Court and they have been acquitted on 10.11.2022. These appellants are not challenging the fact that death of deceased is homicidal in nature, but there was no evidence to connect the said crime with the present appellant. The alleged discovery under Section 27 of the Indian Evidence Act cannot be considered as voluntary discovery and there is no identification of original accused No.3 by the panch, who allegedly present at the time of discovery. There is also no identification of the ornaments and, therefore, it could not have been held by

the learned trial Judge that the offence is proved beyond reasonable doubt. Both the appellants deserve acquittal.

6 Per contra, the learned APP vehemently supported the reasons given by the learned trial Judge. It is not in dispute that deceased's death is homicidal in nature. That has been proved through the medical evidence of PW 12 Dr. Shaikh Ikbāl Ahmed. No doubt, the case of the prosecution is relying on the circumstantial evidence, but those circumstances have been cogently proved. Accused came to be arrested on 19.03.2011 in this case and thereafter he has given memorandum. The Mangalsutra, one of the ear rings (out of the pair) which is stated to be of gold and toe ring in silver was sold to one Kishor Varma, who was the Jeweller of shop Vyankatesh Jewellers. This might be in respect of another matter, but as regards the present matter is concerned, the Mangalsutra was sold to accused No.3. Actually, he had sold the golden beads and not the entire Mangalsutra. PW 2 Sayareddy has supported the prosecution. Thereafter he has voluntarily discovered purse and water bottle. The purse was belonging to the deceased and PW 4 Sudhakar Jadhav has proved the said panchnama. The purse as well as gold beads have been identified by the informant – PW 3, the husband of the deceased. Testimony of PW 8 Saibaba to prove the panchnama dated 21.03.2011 also supports the prosecution. Therefore, there was ample

evidence against the appellant – accused No.1 to hold that he is the author of the crime, so also, as regards accused No.3 is concerned, he has received the stolen property and, therefore, offence under Section 411 of the Indian Penal Code was proved against him.

7 After going through the evidence, even before starting to scan the same in detail, we are concerned to observe that the investigation of the matter is absolutely poor. It appears that the accused was arrested in another crime and this offence would have gone undetected and, therefore, the appellant – original accused No.1 appears to have been involved in the matter. It will not be out of place to mention here that it was argued that in all 23 cases were registered against the appellant – original accused No.1. Out of those 23 matters, except 9 matters the remaining are in respect of offence under Section 302 of the Indian Penal Code. Therefore, we were interested to know when the accused came to be arrested and in what matter and then how he has been got transferred in the present case. By our order dated 31.07.2023 we directed the prosecution to give the data and accordingly the data has been provided, which states that the accused came to be arrested on 11.03.2009 in Crime No.15/2009, registered with Himayatnagar Police Station, Dist. Nanded by Local Crime Branch, for the offence punishable under Sections 302, 376, 413, 411 of the Indian Penal

Code. The status has been given that the accused has been acquitted from the said offence. From those 23 offences in Crime No.85/2009 registered with Mukhed Police Station 'A' Summary was submitted and in Crime No.70/2009 registered with Loha Police Station, for the offence punishable under Section 394 of the Indian Penal Code also 'A' Summary was filed. If we keep those two offences aside, still the accused has faced 21 offences and the trial and in most of the offences he has been acquitted. It has been brought to our notice that a special team was constituted by Commissioner of Police as matters were reported that by searching a lady at lonely places they have been robbed and murdered. Under the said circumstance, when this was the background, it was expected that the learned trial Judge ought to have meticulously scan the evidence. Of course, some of the acquittals were prior to the decision in the matter and some are after that. Yet, the learned trial Judge went on to brand the accused as 'serial killer', which is definitely objectionable. Unless there is clear evidence to that effect, nobody should be branded in such a way.

8 Now, turning towards the case in hand, the testimony of PW 12 Dr. Shaikh Iqbal Ahmed would give the findings in Postmortem Report Exh.82 as the cause of death is "asphyxia due to strangulation by ligature". In the cross there is no serious challenge to the same and, therefore, there is no

hurdle in accepting that deceased's death is homicidal in nature. However, we would like to say that the murder weapon i.e. rope was not shown to PW 12 Dr. Shaikh by the learned APP, who was conducting the trial and his opinion, as to whether that can be the murder weapon has not been extracted. The alleged murder weapon i.e. rope appears to have been seized from the spot. Therefore, there was no question of connecting the said murder weapon with the accused. Suffice it to say that from the testimony of the autopsy surgeon it can be said that the prosecution had proved that death of deceased is homicidal in nature.

9 PW 3 is the husband of deceased. From his examination-in-chief it can be certainly say that he had gone to market and deceased had gone for plucking cotton. When she did not return till 5.00 p.m., he undertaken the search and the dead body was found on the next day morning and it appears that the dead body was in naked condition. The gold as well as silver articles on her person were found missing and then he has lodged the First Information Report Exh.47 against unknown person. He has identified the beads, two golden nose rings and ear rings, one Mangalsutra and silver toe rings. In his cross-examination he has admitted that police had arrested him in the said crime for inquiry. That means, he himself was in the array of accused and there is absolutely no explanation by PW 14 PI Mr. Govardhan

Kole – the Investigating Officer as to under which circumstances or why he had let PW 3 informant to go. If he was arrested then there should be report under Section 169 of the Code of Criminal Procedure, but that was not got exhibited and in his examination-in-chief there is no explanation for the same. In his cross-examination he admitted that he had obtained the permission from the learned trial Judge for Polygraph, Narco Test and Brain Mapping of the informant, that too, on two occasions. Even as regards the accused is concerned, he got the permission, but he had not taken him to Mumbai for carrying out those tests. Thus, it can be seen that he appears to have acted as per his own whims. If he had no intention to carry out such tests, then why he sought the permission. But it is required to be noted that even the informant was in the array of accused immediately after the incident.

10 PW 3 informant has not stated a single word that he suspected that his wife was subjected to rape. PW 9 is the nephew of PW 3 and deceased. PW 11 is the brother of deceased. PW 5 is the brother-in-law of deceased. He has no personal knowledge of anything but appears to be involved in search operation and then he saw the dead body, but he categorically says that the deceased was raped. PW 6 is the wife of PW 5, who has also seen the dead body. Except these witnesses, there is no other

witness who has been examined by the prosecution to say as to in whose field deceased was plucking the cotton. Nobody had seen deceased talking to accused or going with him. The distance between the field where she was supposed to pluck cotton and the place where her dead body was found has not come on record. There is no investigation as to how she could have been taken to that spot and as the rope and other articles were found at the spot, it appears to be the spot where the entire activity had taken place. It will not be out of place to mention here that PW 12 Dr. Shaikh does not say about the evidence of rape on the person of deceased and, therefore, ultimately the learned trial Judge has acquitted the accused from the said charge. Even in the cross-examination of PW 3 he has admitted that nobody has seen the incident in the village.

11 Turning to the circumstantial evidence, it was mandatory for the prosecution to prove the golden principles laid down in **Sharad Birdhichand Sarda vs. State of Maharashtra** [AIR 1984 SC 1622] and, therefore, whether only on the basis of alleged discovery under Section 27 of the Indian Evidence Act, whether it can be said that the prosecution has proved the offence beyond reasonable doubt, has to be considered. PW 2 Sayareddy is the panch witness to the said discovery panchnama dated 22.03.2011. If we consider his testimony, it can be certainly said that the identification of the

accused has not been got done in Court from him. Merely because he is giving the name of the accused will not be sufficient. In his cross-examination there is denial, however, important point to be noted is that when his testimony was recorded, the muddemal was not before the Court. Therefore, identification of the articles alleged to be discovered by the accused persons is not proper at all. It appears to be a running panchnama connected to other crime also and, therefore, in that background the identification of the jewellery in a particular case become imperative. This discovery panchnama says that the accused No.3 discovered 20 golden beads. That means, the other articles were not discovered on this day before him. How he could have purchased only golden beads, is a question. There is no other discovery from accused No.3. The other ornaments alleged to have been recovered from original accused No.2 Kishor Varma. However, surprisingly accused No.2 has been acquitted by the learned trial Judge. If that panchnama has been held to be proved on the basis of testimony of PW 2 by the learned trial Judge, then how it would have resulted in acquittal of one goldsmith and conviction of the other, is a mystery. It has been observed by the learned trial Judge that what has been recovered from accused No.2 is the new gold articles which were not robbed by accused No.1, but then as accused No.3 was arrested in another crime registered with Ramtirth Police Station, it has been stated that he had the dishonest intention. This reason is

absolutely absurd. There was nothing on record to show that original accused No.3 had the knowledge that those golden beads were stolen property. In fact, what accused No.3 had gold before the said panchas as it is reflected in the panchnama ought to have been seen by the learned trial Judge. He has said that the accused disclosed to him that those golden beads belong to his wife and he wanted to sell them. The pick and choose method could not have been adopted when the panchnama is a running panchnama.

12 PW 7 Gangadhar is the panch to the identification of the gold articles by the husband of the deceased. In fact, PW 3 had not produced on record any documentary evidence to show that those articles were belonging to his wife.

13 The most interesting panchnama that has been drawn is on 21.03.2011 and in order to prove that PW 8 Saibaba has been examined. That panchnama Exh.75 has been discarded as 'Pratyakshik Panchnama', meaning thereby demonstration panchnama. It appears that the accused No.1 was asked in presence of police, as to how he has committed the offence and then he has narrated the incident, which has been then told by PW 8 Saibaba. The learned Judge ought not to have allowed the prosecution to examine him. The basic nature of such panchnama was inadmissible in

nature. The accused after his arrest cannot be asked to demonstrate as to how he has committed the offence. PW 14 PI Mr. Govardhan Kole is the Investigating Officer and at the beginning itself we have stated that the investigation carried out by him was of poor quality.

14 Only on the basis of the discovery panchnama the accused No.1 could not have been held guilty of committing murder and robbery. The judgment by the learned trial Judge is perverse. We are also taking note of the fact that the accused No.1 i.e. the appellant in Criminal Appeal No.577 of 2016 has been acquitted from Criminal Appeal No.689 of 2015 by this Court on 10.11.2022 i.e. Sessions Case No.59/2011 by learned Additional Sessions Judge, Hingoli.

15 The learned Advocate for the appellant has rightly relied on **Shiv Kumar vs. State of Madhya Pradesh [(2022) 9 SCC 676]**, wherein it has been held that -

“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. Even if the recovery of items was made, the prosecution must further establish the essential ingredient of knowledge of the reception of the stolen property. Reliance solely upon the disclosure statement of co-accused will not otherwise be clinching, for the conviction under Section 411 of the Indian Penal Code.”

Therefore, taking into consideration this ratio and the scanning of the evidence, as aforesaid, the conviction awarded to the original accused No.3 deserves to be set aside. Further, he relied on the decision in **Manoj Kumar Soni vs. The State of Madhya Pradesh** decided by Hon’ble Supreme Court in Criminal Appeal No.1030 of 2023 on 11.08.2023, wherein it has been held that conviction cannot be solely on the basis of discovery statements. For the aforesaid reasons, we hold that the prosecution had failed in proving the offence against the accused persons beyond reasonable doubt. The appeals, therefore, deserve to be allowed. Hence, following order.

ORDER

1 Both the appeals are hereby allowed.

2 The conviction awarded to the appellant in Criminal Appeal No.577 of 2016 i.e. original accused No.1 **Ajikh Khan Mohd. Khan Pathan** by learned Additional Sessions Judge, Biloli, Dist. Nanded in Sessions Case

No.46/2011 after holding him guilty for the offence punishable under Sections 302 and 392 of the Indian Penal Code stands quashed and set aside.

3 The conviction awarded to the appellant in Criminal Appeal No.531 of 2016 i.e. original accused No.3 **Sunil Shankarrao Tak** by learned Additional Sessions Judge, Biloli, Dist. Nanded in Sessions Case No.46/2011 after holding him guilty for the offence punishable under Section 411 of the Indian Penal Code stands quashed and set aside.

4 Both the appellants stand acquitted of the offences charged.

5 The appellant in Criminal Appeal No.577 of 2016 i.e. original accused No.1 **Ajij Khan Mohd. Khan Pathan** be set at liberty, if not required in any other case.

6 The bail bond of the appellant in Criminal Appeal No.531 of 2016 i.e. original accused No.3 **Sunil Shankarrao Tak** stands cancelled.

7 The fine amount deposited, if any, be refunded to the appellants after the statutory period.

8 We clarify that there is no change as regards the order in respect of disposal of muddemal.

9 The fees of the appointed Advocate Mr. Z.H. Farooqui in Criminal Appeal No.577 of 2016 is quantified at Rs.10,000/- (Rupees Ten Thousand only).

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

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