

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

CRIMINAL APPEAL NO. 724 OF 2016

Madhukar Ramrao Bhosale
Age : 43 years, Occu. : Agri.,
R/o. : Aadgaon Bhosle, Tq. Kannad,
Dist. Aurangabad.

... Appellant

Versus

The State of Maharashtra

... Respondent

...
Mr. Vijay B. Jogdand Patil, Advocate for Appellant
Mr. S. D. Ghayal, APP for Respondent – State

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

DATE : 22 AUGUST, 2023

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

1. Appellant is taking exception to the judgment and order of conviction passed by the learned Sessions Judge, Aurangabad in Sessions Case No.160 of 2013 by which appellant is held guilty for commission of offence under Sections 498-A and 302 of the Indian Penal Code (IPC) and sentenced to suffer imprisonment for life.

PROSECUTION CASE IN BRIEF

2. Deceased Nirmala was married to appellant. They have 11 years old son namely Akash. According to prosecution, accused put up a demand of Rs.20,000/- for purchasing a cow and on account of non-fulfillment of such

demand, he subjected her to ill-treatment. Another accusation of prosecution is that after getting drunk, accused used to suspect character of deceased.

Case of prosecution is that on 19-01-2013, accused in above backdrop, threw deceased in the well as a result of which she died. Accused himself telephoned PW1 Deepak, brother of deceased, who reached and found dead body of his sister in a well. After funeral, he set law into motion holding appellant responsible for death of his sister.

After investigation, accused was chargesheeted, tried and on appreciation of evidence, learned Sessions Judge held him guilty for above offence and sentenced him to suffer imprisonment for life, which is now questioned by preferring instant appeal.

SUBMISSIONS

On behalf of appellant :

3. Learned Counsel for the appellant pointed out that apparently he is falsely implicated out of annoyance. He pointed out that, except one independent witness, who claims to have received extra-judicial confession, there is no other reliable witness on behalf of prosecution. He pointed out that even testimony of said witness cannot be relied because he had not promptly reported so called extra-judicial confession made to him. It is pointed out that learned trial Court has not considered and appreciated law on extra-judicial confession. It is pointed out that, on one hand electronic

evidence has been disbelieved by learned trial Judge, but at the same time, has held motive as well as case of prosecution proved. He pointed out that important witnesses are not examined. That inspite case being based on circumstantial evidence, none of the circumstances are proved cogently and even when it was imperative to prove motive, prosecution has failed to do so. Learned counsel submitted that case is of suicide. Accidental death (AD) was reported and registered. That inspite of so, learned trial Judge has erred in accepting the case of prosecution as proved and so he submits to re-appreciate the evidence and allow the appeal.

On behalf of State :

4. Per contra, canvassing in favour of the judgment, learned APP would submit that death of Nirmala is shown to be due to drowning. That deceased was in the company of accused. That there was mal-treatment apart from suspecting character of deceased. In such background, appellant had committed murder by throwing wife in the well. None but accused himself reported informant about the occurrence. Even there is extra-judicial confession. Resultantly, it is prayed that there being convincing evidence, guilt and conviction is rightly recorded and he prays to dismiss the appeal.

5. It is seen that here case of prosecution is based on testimonies of eleven witnesses and their status and role could be summarized as under.

EVIDENCE OF PROSECUTION

PW1 Deepak Kautikrao Daud is brother of deceased. His evidence is at Exh.7.

PW2 Santosh Sakharam Kale is cousin of deceased. His evidence is at Exh.12.

PW3 Kachru Kaduba Avhal is Pancha to spot Panchanama. His evidence is at Exh.16. Spot panchanama is at Exh.17.

PW4 Pundlik Narayan Kharat is Pancha to panchanama of Compact Disc (CD). His evidence is at Exh.19. Panchanama of CD is at Exh.10.

PW5 Bhausahab Narsingrao Bhosle is Pancha to Spot Panchanama and Seizure Panchanama of clothes of accused. His evidence is at Exh.23. Seizure Panchanama of clothes of accused is at Exh.24.

PW6 Ashok Vishwanath Nalawade is Pancha to Seizure Panchanama of mobile of accused. His evidence is at Exh.25. The said panchanama is at Exh.26.

PW7 Dr.Ajay Vijay Rajput is Autopsy Doctor. He conducted post mortem of the dead body. His evidence is at Exh.30. Postmortem report is at Exh.32. He has issued provisional death certificate and the same is at Exh.33.

PW8 Fransic Patrik Parera is working as Nodal Officer in Vodafone Cellular Company. His evidence is at Exh.37.

PW9 Dattaram Shantaram Angre is working as Nodal Officer in Idea Company.

PW10 Haribhau Kashiraj Bhosle is a resident of the same village where accused resides. His evidence is at Exh.53.

PW11 Ramkrishna Namdeo Tayade is the Investigating Officer. His evidence is at Exh.57.

ANALYSIS

6. In view of the charge, it is first required to be seen as to whether prosecution has discharged its burden of proving death of Nirmala to be only and only homicidal and not otherwise.

To ascertain the same, we visited testimony of Autopsy Doctor - **PW7** Dr.Rajput,. In his examination-in-chief, he has stated about conducting post mortem of dead body of Nirmala. He has opined that cause of death was “asphyxia due to drowning”. According to him, death might have occurred 10 to 12 hours prior to the timing of post mortem.

In **cross-examination** he has admitted that there was no bleeding injury or external injury on the dead body.

7. On appreciating the above medico legal expert’s evidence, here only opinion is about death due to drowning. However, it is not clear whether drowning was accidental, suicidal or otherwise. We have noticed that here there was said to be mere four feet water in the well. Therefore, how drowning can take place in such level of water is a crucial question that has remained unanswered. For want of clarification and reasoning, it cannot be for sure side that death of Nirmala is homicidal one and not otherwise.

8. Now let us sift to other evidence on record to ascertain whether as claimed by prosecution, there was mal-treatment to attract offence under

Section 498-A of the IPC and whether accused suspected fidelity of deceased wife.

On above count, we have visited evidence of **PW1** Deepak, brother of deceased, who seems to have deposed on the point of ill-treatment and demand of Rs.20,000/- for purchasing a cow. When the demand was raised has not been clarified. He merely speaks of his sister being tortured, but in what form, is not elaborated by him. Admittedly marriage is over 15 years old. It is pertinent to note that, while facing **cross-examination** in paragraph 11, omission has been brought about his sister informing him about ill-treatment meted out to her by making a phone call.

Similarly, another witness **PW2** Santosh, who is the cousin of deceased, is found to be silent about demand of Rs.20,000/- for purchasing cow. His version is about beating by means of iron bar, which is not even the case of prosecution as well as informant.

Parents of deceased are also not examined. Therefore, here there is very weak evidence on the point of Section 498-A of the IPC.

9. Now let us see whether prosecution has shown that accused committed murder of Nirmala by throwing her in the well. Admittedly, there is no direct eye witness.

It is pertinent to note that here charge, which is explained to the accused vide **Exh.5**, is about throwing wife in the well as a result of which she died and thereby he committed murder.

However, it is noticed that according to **PW1** Deepak, informant, he received a phone call from accused on 19-01-2013 informing that he has killed Nirmala and then has thrown her body in the well of Tejrao Patil. If this is the version of informant, then it is clear that prior to being thrown in the well, murder has been committed. Where such murder has taken place is not demonstrated by prosecution by adducing any evidence whatsoever. **PW11** Tayade, Investigating Officer claims to have directly visited the well but where accused initially killed her and by what mode has not come on record. Version of **PW1** Deepak is contrary to the very charge which speaks about throwing Nirmala in the well and thereby committing her murder.

10. **PW1** Deepak, brother of deceased, has claimed in his substantive evidence about accused himself disclosing about committing murder of Nirmala and throwing her dead body in the well. He claims to have recorded alleged conversation between him and accused in his own phone and he further claims that he has handed over his mobile phone and SIM to Police. This is done on 20-01-2013. Investigating machinery seems to have prepared a CD of the said conversation and it was played in the Court by examining **PW4** Pundlik, Pancha.

However, **PW4** Pundlik in his evidence at Exh.19 though has stated about hearing conversation of the CD at Police Station, he stated in **examination-in-chief** itself that he does not know the accused and he is unable to state as to whether accused present before the Court is the same, whose voice sample was recorded in his presence. Subsequently, during **cross-examination**, he seems to have supported prosecution wherein he has admitted that accused present in the Court is the same person whose voice sample was recorded in the CD. He further stated that he could not identify the accused as more than a year has lapsed. In **cross-examination** at the hands of defence, he has admitted that there is difference in the voice of both the CDs i.e. CD Article 'E' and CD Article 'F' and that he is unable to state who prepared both the CDs.

11. As stated above, seizure of mobile of accused is done on 20-01-2013 vide Exh.9. According to **PW11** Tayade, Investigating Officer, on 23-01-2013 informant produced a CD regarding conversation between him and accused and the said CD was seized vide panchanama Exh.10. Investigating Officer claims that on 23-01-2013 he had called one Nayyar Khan Mohammad Khan Pathan, who does the work of taping conversation and who is also a Photographer. He was called for preparing CD of sample of voice of accused and in presence of two Panchas, he told accused to give voice sample and

accordingly, accused gave. A CD of sample voice was prepared and said CD was seized vide panchanama Exh.20.

But in paragraph 12 of **cross-examination**, the Investigating Officer has admitted that he has not recorded statement of shop owner from whom accused purchased mobile. He admitted that he cannot tell whether Nayyar Khan was holding licence of the shop. He admitted that he did not obtain certificate from Nayyar Khan that he is an expert in recording voice in CD. He also admitted that no receipt of payment made to Nayyar Khan is placed on record.

12. Therefore, taking above material into consideration, without obtaining order from the Court, **PW11** Tayade, Investigating Officer, on his own, has taken steps to record voice sample of accused. How, why and on whose instance informant had prepared a CD on his own and handed over to Police is not coming on record. Investigating Officer directly seems to have seized so called CD handed over by informant that too on 23-01-2023 i.e. after three days of the incident. So called Nayyar Khan, whose services were procured for preparing CD, is not shown to be an expert and is not even examined. Therefore, required procedure for gathering voice sample for proving it to be of accused is apparently not followed thereby rendering such evidence doubtful. Certificate under Section 65-B of the Indian Evidence Act is also not

procured by the Investigating Officer and therefore, it is not open for the Court to accept such evidence.

13. Prosecution has also come with a case that there was extra-judicial confession to **PW10** Haribhau. However, inspite of claiming to have received extra-judicial confession on the night of 19-01-2013, this witness has not further intimated Police on his own nor he has informed it to anyone.

In **cross-examination** this witness has admitted that accused is not in his relation. He himself stayed in the village whereas accused resided in the farm. He had no transaction with accused whatsoever. He is also not aware of the name of wife of accused. Therefore, why would accused make extra-judicial confession to such person is a moot question. Therefore, so called extra-judicial confession to such witness is of no significance.

SUMMATION

14. Here as stated above, prosecution has failed to prove cruelty as contemplated under Section 498-A of the IPC. Charge is framed for committing murder by throwing in well, whereas complaint of brother is entertained about receiving extra-judicial confession from accused that after committing murder he threw body in the well. Where the murder was actually committed is a mystery. How the body was taken to the well is also not

demonstrated. PW7 Dr.Rajput, Autopsy Doctor has attributed death due to drowning. His such opinion is diametrically opposed to the case of prosecution about initially committing murder and then throwing body in the well. Extra-judicial confession is of no avail as there is no other independent incriminating circumstance. Important witness like child of accused and deceased is not examined. Resultantly, in our opinion, case of prosecution is not proved beyond reasonable doubt.

15. We have gone through the judgment under challenge. It is noticed that learned trial Judge has not appreciated available evidence in its correct perspective. The shortfalls and lapses noticed by us, which are noted above, are lost sight of by learned trial Judge. In absence of reliable evidence, motive has been accepted as proved. In absence of necessary certification as required under Section 65-B of the Indian Evidence Act, electronic evidence has been entertained and discussed. Guilt seems to have been fastened only on account of failure of appellant to report alleged occurrence of suicidal jump in the well. Delay in reporting is the reason for doubting the bonafides of accused. All such findings and observations, in our opinion, are without any foundation and as such, the same cannot be allowed to be sustained. Hence, we pass the following order.

ORDER

- I. Criminal Appeal stands allowed.
- II. Conviction awarded to the appellant - Madhukar Ramrao Bhosale in Sessions Case No.160 of 2013 by learned Sessions Judge, Aurangabad on 12-08-2015 for the offence punishable under Sections 498-A and 302 of the Indian Penal Code, stands quashed and set aside.
- III. The appellant stands acquitted of the offence punishable under Sections 498-A and 302 of the Indian Penal Code.
- 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. We clarify that there is no change in the order passed by learned Sessions Judge, Aurangabad regarding disposal of *Muddemal*.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)