

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 38 OF 2017

Machhindra Ukandi Suryawanshi,
Age : 35 years,
R/o. Gadadgavan, Tq. Jintur.

... Appellant.

Versus

The State of Maharashtra,
Through Police Station Khultabad,
Dist. Aurangabad.

... Respondent.

...
Ms. Monica R. Dahat, Advocate for Appellant (Appointed)
Mr. A. V. Deshmukh, APP for Respondent - State
...

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

DATED : 04 AUGUST, 2023

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

1. Appellant, a life convict, by virtue of instant appeal is taking exception to the judgment and order passed by learned Additional Sessions Judge, Aurangabad, dated 25.08.2016 in Session Case No. 393 of 2009, by which he is held guilty and convicted for offence under sections 302 and 201 of Indian Penal Code (IPC).

FACTS GIVING RISE TO SESSIONS TRIAL

2. Deceased Gangasagar was married to appellant in 1993. While residing at Gadadgavan, appellant put up demand of

Rs.20,000/-. On account of failure to meet the demand, it is the case of prosecution that, she was subjected to ill-treatment. In the year 2003, accused took deceased to Nashik and from there he alone came back to the village. Deceased went to village Pimpri Ling along with her children. Subsequently, on assurance of appellant to treat her properly, deceased went back to cohabit with him. Appellant brought deceased for treatment at Aurangabad. There he sold her *Mangalsutra*. He made her consume liquor projecting it to be a medicine, i.e. in the forest of Mhaismal. It is specific allegation that, he thrust a stone on her head, killed her and thereafter threw her body in the valley and covered it of by use of foliage, so as to cause disappearance of evidence.

Dead body was detected by forest officials, who intimated police. On receipt of post mortem report regarding death to be due to head injury, police, on behalf of State set law into motion. Investigation revealed complicity of appellant and therefore, he was tried and finally held guilty and resultantly convicted and sentenced to imprisonment for life.

In above backdrop, appellant had preferred instant appeal challenging the judgment on various grounds mentioned in the appeal memo.

SUBMISSIONS

3. Learned counsel for appellant took us through the entire oral evidence as well as documentary evidence adduced in trial Court and she would submit that judgment is patently perverse, illegal and unsustainable in the eyes of law. According to her, evidence is either misread or not appreciated as required by law. She would strenuously submit that there being no direct evidence, entire story of prosecution was based on circumstantial evidence and but according to her, prosecution had miserably failed to prove any circumstance. According to learned counsel, in fact, there was not a single incriminating circumstance to connect appellant with the death of Gangasagar.

4. She would further submit that, in fact dead body was found in highly decomposed condition and therefore, it was unidentifiable. Learned counsel also took us through the testimony of autopsy doctor, more particularly the cross-examination and would point out that, the body was completely unidentifiable. It is submitted that, investigating machinery did not get DNA analysis conducted, as it had become essential for fixing identity. That, surprisingly identification of dead body is said to be got done from relatives, i.e. on the basis of clothes and some ornaments. However, she would vehemently submit that apart from failing to conduct

identification of so called articles, it has not been demonstrated that the witnesses were really aware that those articles belonged to deceased and none else.

5. It is next submitted that prosecution came with theory of last seen together, but according to learned counsel, prosecution had miserably failed to cogently prove such circumstance. She gave the timeline relied by prosecution and would submit that the gap between deceased last seen alive in the alleged company of appellant and she found dead being immense and huge, such theory cannot be taken recourse to. According to learned counsel, the gap is almost of 4 to 5 days, and therefore, it is her submission that, it was not open for prosecution to put into play such circumstance.

6. Learned counsel further submitted that, there is said to be confession regarding assault and even under section 27 of the Indian Evidence Act, there is said to be disclosure about the spot. According to her, so called confession being hit under section 24 and 25 of the Indian Evidence Act, the same cannot be gone into and taken into account at all. She very vociferously submitted that when investigating machinery was already aware of the spot on detection of dead body, then, she questions, how alleged disclosure of spot at the instance of accused could at all be used by

prosecution, as disclosing of new fact.

7. She lastly submitted that there is no iota of evidence to connect appellant with said death. She pointed out that even FIR is at belated stage, of which there is no explanation. That, accused is shown to be arrested after a gap of one month or so, after dead body being spotted.

Consequently, she urged that when by no means such evidence can be applied to implicate appellant, how learned trial Judge accepted the case of prosecution as proved. She concluded by submitting that findings and reasons not being in consonance with the evidence, judgment is not liable to be maintained and sustained.

Learned counsel for appellant relied on the following judgments :

- (1) *Sharad Biridhichand Sarda Vs. State of Maharashtra*
AIR 1984 SC 1622;
- (2) *Malleshappa Vs. State of Karnataka;*
2008 ALL MR (Cri.) 280 (S.C.)
- (3) *Baldev Singh Vs. State of Haryana;*
AIR 2009 SC 963
- (4) *Vikramjit Singh @ Vicky Vs. State of Punjab*
2007 ALL SCR 2094
- (5) *Hanuman Govind Nargundkar Vs. State of M.P.*
AIR 1952 SC 343

- (6) *Bodhraj Alias Bodha and Ors. Vs. State of Jammu and Kashmir;*
(2002) 8 SCC 45
- (7) *Ashish Batham Vs. State of M.P.*
AIR 2002 SC 3206

8. In answer to above, learned APP would submit that there is cogent and convincing evidence on behalf of prosecution. That, investigation revealed that appellant was upset for non fulfillment of his demand of money. That, he was found to be keen in performing second marriage. It is submitted that, therefore, on the pretext of giving treatment, he brought deceased to Aurangabad and then took her in the forest of Mhaismal and there he made her consume liquor. Thereafter, he stoned her and committed her murder. There is confession on his behalf along with discovery of spot. He had sold her *Mangalsutra* to raise money and the jeweler was also examined by prosecution in the trial court. A full-proof case was made out, and therefore, learned trial Judge correctly appreciated the available evidence and committed no mistake whatsoever in recording guilt. For all above reasons, he prays for confirming the judgment and order of conviction by dismissing the appeal.

9. This being first appellate court, as required by law, we undertook the exercise of re-appreciation, re-examination and reanalysis of prosecution evidence.

10. Admittedly, there being no direct evidence, and case being based entirely on circumstantial evidence, it is incumbent upon prosecution to establish the circumstances firmly, cogently and beyond reasonable doubt.

Law on appreciation of circumstantial evidence, is fairly dealt in umpteen judgments, viz. *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.”*

11. 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.

12. In the light of above settled legal position, we proceed to scan and sift the evidence adduced by prosecution in trial court. It seems that prosecution has examined in all 11 witnesses.

The sum and substance of their testimonies, their status and role could be summarized as under :-

PW1 Jailal is pancha to seizure of stone (Exh.28) dated 08.07.2009.

PW2 API Pathan, a police official, who drew inquest panchanama (Exh.37) and got postmortem done on the spot itself. According to him, autopsy revealed death to be due to head injury, and therefore, on behalf of State, he set law into motion vide Exh.41.

PW3 Suryakanta, sister of deceased deposed about marriage of his sister with appellant and regarding demand of Rs.20,000/- raised by him, and as demand was not met, appellant started ill-treating her. According to this witness, deceased went missing while she was cohabiting with appellant and therefore, she

was searched. Missing was also lodged. Parents of appellant told that deceased was taken by appellant. Nephew of appellant informed regarding appellant's intention to perform second marriage as his first wife died. That, at Jintur police station in presence of this witness, appellant gave confession about making deceased drink liquor and thereafter smashing her head with stone in the forest of Mhaismal and disposing of her body. This witness claims that police showed articles and clothes of deceased and it was got confirmed through this witness, that the same belonged to deceased.

PW4 Shaukat deposed that in his presence at police station, Khultabad, on 01.08.2009, clothes of deceased were identified and panchanama was drawn vide Exh.46.

PW5 Dr. Bawaskar, autopsy doctor, who conducted post mortem and opined about probable cause of death due to head injury. He identified post mortem report at Exh.50.

PW6 Syd. Afsar, pancha to memorandum of disclosure under section 27 of Indian Evidence Act, i.e. regarding spot.

PW7 Kamalkishor is the jeweler and according to him, on 04.07.2009, a couple had approached them for sale of *Mangalsutra* and bids. Deal was struck and transaction was

completed. He paid Rs.520/- for the ornaments. This witness deposed that, on 02.08.2009 police came with a person and also confronted him photograph of a lady and he identified the person as well as the photograph.

PW8 Shankar, pancha to inquest (Exh.37);

PW9 P.I. Dhananjay and **PW10** Raghunath, police officer, who carried out investigation respectively;

PW11 Mohd. Rauf, second pancha to seizure of clothes of deceased.

13. On the strength of above witnesses, prosecution put forth following circumstances in support of the accusation and charge.

First : Last seen together.

Second : Possession and sale of ornaments of deceased.

Third : Recovery and discovery.

FIRST AND SECOND CIRCUMSTANCE

14. According to prosecution, parents of appellant informed about appellant taking deceased with him and shortly before murder, appellant was in the company of deceased at the shop of PW7 Kamalkishor. There he sold *Mangalsutra* belonging to deceased. The money so raised was used for purchasing liquor and

deceased was made to consume it, saying that, it was her medicine for acidity. Thereafter, while she was under influence of liquor in the forest, he hit her with stone, committed her murder, and then, disposed of the body by covering it with dry foliage.

15. Apparently, here, parents of appellant, who informed PW3 Suryakanta about appellant taking deceased along with him, are not examined. In support of above theory, PW7 Kamalkishor has been examined. However, his testimony shows that, a couple had come to his shop on 04.07.2009. According to this witness, husband of the lady was standing outside and he alone entered the shop for selling *Mangalsutra*. This witness stated that he refused to purchase it, but then wife came inside the shop weeping and therefore, he purchased it and paid Rs. 520/-. According to this witness, on 02.08.2009, appellant was brought by police and he identified him as well as the lady from the photograph shown to him to be accompanying with that person.

 In cross, this witness admitted that the persons had not carried receipt of gold *Mangalsutra* and that is why he initially refused to purchase it. Rest is all denial.

16. Except above witness, there is no other witness who had allegedly seen accused and deceased together. It is noticed that

neither PW3 Suryakanta gave the date on which she made inquiries with parents of appellant, nor they informed him on which day appellant took his wife. It is noticed that even PW3 Suryakanta is resident of Pimpri Ling where deceased was allegedly residing with her children. No other villager or neighbour is examined on the point of accused cohabiting with deceased and taking her with him anywhere. No evidence is gathered about their alleged visit to Aurangabad for treatment and appellant taking her towards Mhaismal. Where he purchased liquor, which he allegedly made her consume is also not coming on record. Even where the actual consumption and occurrence of assault took place is also not getting clear. Therefore, chain of circumstances is not getting completed, rather it is getting snapped at various places.

17. Though jeweler (PW7 Kamalkishor) has claimed about a couple approaching for sale of *Mangalsutra* on 04.07.2009, except alleged confrontation of appellant and photograph of a lady, there is no other convincing evidence about sale of *Mangalsutra*. There is nothing in black and white about alleged transaction of sale of *Mangalsutra* except version of above witness regarding his statement recorded by police on 02.08.2009. No recovery of *Mangalsutra* is also caused and no panchanama of its seizure is also on record. But still, prosecution claims that PW3 Suryakanta,

sister of deceased had identified the ornaments. Therefore, the quality of evidence discussed above is apparently not only unconvincing but is very weak and fragile in nature.

18. When theory of last seen together is relied, then it is expected of prosecution to even establish time since death at least by approximation. Before re-appreciating the evidence on this count, it is desirable to briefly discuss the law on the point of theory of last seen together propounded by Hon'ble Apex Court time and again.

It is time and again held that "last seen theory comes into play, only where the **time gap** between the **point of time** when accused and deceased were seen last alive and when deceased is **found dead** is **so small** that possibility of anyone other than accused being the author of crime becomes impossible. In absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to the conclusion in those cases. Such observations are spelt out in the case of *State of U.P. v. Satish*, (2005) 3 SCC 114 and *Shyamlal Ghosh v. State of West Bengal*, (2012) 7 SCC 646.

19. Similarly, law is also squarely settled that while invoking circumstance of last seen together, it is equally necessary

for prosecution to establish, time since death. Such proposition is propounded in landmark case of *Niranjan Panja v. State of West Bengal*, (20100 6 SCC 525 *Shyamlal Ghosh* (supra).

20. Here, as stated above, there is no evidence whatsoever either oral or documentary to show that in immediate proximity to the death, appellant was in the company of deceased. Medico legal expert's evidence i.e. testimony of autopsy doctor is silent about time since death. Admittedly, dead body was found in decomposed condition. Therefore, by no means, in our opinion, theory of last seen together can be applied here.

Consequently, these circumstances fail as not proved.

RECOVERY AND DISCOVERY

21. Prosecution claims that clothes and articles on the person of deceased, which were recovered from the scene of occurrence were confronted to PW3 Suryakanta . That, identity of article was thus got confirmed from sister of deceased (PW3 Suryakanta). It is also further case of prosecution that there is discovery of spot of incident in presence of PW3 Suryakanta as well as PW6 Syd. Afsar at the instance of appellant.

22. On appreciating the available evidence on above count,

it is seen that in presence of PW6 Syd.Afsar black beads chain, clothes and foot chain of deceased were seized and the same were confronted to sister of deceased (PW3 Suryakanta). In testimony of sister (PW3 Suryakanta), in para 8, we find her deposing about clothes of deceased, foot chain, ring of toe as well as *Mangalsutra* were confronted to her. However, it is surprising that if according to prosecution *Mangalsutra* was already sold to PW7 Kamalkishor by appellant, question that arises is, then which *Mangalsutra* was again confronted to sister PW3 Suryakanta, when it is not shown to be distinctly seized from PW7 Kamalkishor vide any panchanama.

23. PW3 Suryakanta, sister of deceased and PW6 Syd. Afsar are examined to show that there is discovery of spot at the instance of appellant.

But, as rightly pointed out by learned counsel for appellant, when even prior to arrest of appellant, the spot was already known to police, how its discovery could be attributed again to appellant to show discovery of spot at his instance.

SUMMATION

24. Therefore, to sum up, here, none of the circumstances is cogently and firmly proved, rather there is not a single incriminating circumstance. On going through the testimony of

PW3 Suryakanta, we find that her brother i.e. with whom appellant allegedly raised demand of money and quarreled as well as Pralhad Khillare and Pavan Khillare, who are named in her substantive evidence, are not examined to lend support to the testimony of PW3 Suryakanta. Though PW3 Suryakanta in para 2 of her evidence speaks about money being given to deceased by her relative, namely Raju Sugandhe, however such relative is not examined. Since when accused and deceased were cohabiting at Pimpri Ling is not established. When and where appellant brought her to Aurangabad for treatment is also not substantiated, nor it is established that it is he who took her towards the vicinity of scene of occurrence, made her drink liquor and thereafter stoned her.

Resultantly, in our opinion, there is nothing to connect appellant. His complicity cannot be accepted with such quality of evidence adduced by prosecution in the trial court.

25. We have gone through the impugned judgment. It is apparent that learned trial Judge has misread the evidence on record. Appreciation is patently with erroneous approach. Reasons assigned for accepting the prosecution case are not convincing. Therefore, such judgment cannot be allowed to be sustained. Interference at the hands of this court is thus necessary. Appellant

succeeds. Hence, we proceed to pass following order :-

ORDER

1. The appeal stands allowed.
2. The conviction awarded to the appellant by learned Additional Sessions Judge, Aurangabad in Sessions Case No.393 of 2009 on 25.08.2016 after holding him guilty of committing offence under Section 302 and 201 of Indian Penal Code stands quashed and set aside.
3. The appellant - Machhindra Ukandi Suryawanshi stands acquitted of the offence punishable under Sections 302 and 201 of Indian Penal Code.
4. He be set at liberty, if not required in any other case.
5. Fine amount deposited, if any, be refunded to the appellant after the statutory period is over.
6. We clarify that there is no change in respect of order of disposal of Muddemal property.
7. Fees of learned Advocate, who is appointed to represent the cause of appellant, is quantified at Rs.10,000/-.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)