

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 557 OF 2017

Mujeeb s/o Shahanoor Shaikh
Age 25 years, Occ : Labour,
r/o Khojewadi, Taluka Gangapur,
District Aurangabad. ... Appellant

Versus

The State of Maharashtra ... Respondent

WITH
CRIMINAL APPLICATION NO. 6904 OF 2017
IN
CRIMINAL APPEAL NO. 557 OF 2017

Shaikh Rashid Shaikh Ibrahim,
Age 53 yrs., Occu – Agriculture,
R/o Dhakephal, Taluka Paithan,
District Aurangabad. ... Applicant
(intervenor)

Versus

1. The State of Maharashtra ... Formal Respondent
2. Mujeeb Shahanoor Shaikh,
Age-25 Yrs., Occu- Service in factory,
R/o Khojewadi, Taluka Gangapur,
District Aurangabad.
(At present in Harsool Jail,
Aurangabad) ... Respondent

.....

Mr. Nilesh S. Ghanekar, Advocate for the Appellant.
Mr. A. M. Phule, APP for the Respondent State.
Mr. H. M. Shaikh, Advocate for the Applicant in Criminal Application
No. 6904 of 2017.

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

Reserved on : 18.10.2023

Pronounced on : 31.10.2023

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. Dissatisfied by judgment passed by learned Additional Sessions Judge-8, Aurangabad in Sessions Case No. 199 of 2015 dated 15.11.2017, holding appellant guilty for charge under Section 302, 201 and 203 of the Indian Penal Code [IPC] and awarding him sentence of imprisonment for life, appellant-accused has questioned the legality, maintainability and sustainability of the conviction by filing instant appeal.

PROSECUTION STORY IN BRIEF IS AS UNDER

2. Appellant is son-in-law of PW1 Shaikh Rashid. He and his wife Reshma visited house of PW1 in the afternoon of 12.06.2015, took lunch and left around 5.00 p.m. Around 7.00 p.m., PW1 father of deceased got a call from one Shaikh Isaq intimating about appellant and PW1's daughter meeting with an accident. When informant, his son and nephews were leaving to the spot, another call was received from one Wasim informing about appellant being assaulted and

deceased Reshma being abducted. On reaching the spot, appellant narrated that he was followed by a Scorpio having five persons. They assaulted him first and then abducted deceased. On receipt of such information, all of them visited police station and there, appellant lodged report to the above extent.

3. During search, a footwear of deceased was found and on further search, her dead body was found lying in an abandoned room with several injuries. According to PW1 Sk. Rashid, while lodging FIR, appellant was fumbling and therefore, he became suspicious. Detailed inquiry with appellant revealed that it is he who was the perpetrator of the crime and he duly confessed to that extent.

4. Statement of PW1 Sk. Rashid was noted. Investigation was carried out, completed and accused was chargesheeted for above crime. On appreciation of evidence, learned trial court recorded the above findings which are now questioned before us by invoking Section 374 of the Code of Criminal Procedure [Cr.P.C.].

SUBMISSIONS

5. Learned counsel for the appellant submits that appellant is falsely implicated. He points out that there is no direct evidence. That, case is based entirely on circumstantial evidence, but prosecution could not establish single circumstance firmly, cogently and beyond reasonable doubt. He would emphasize that apparently implication is merely on suspicion and there is no iota of evidence in support of the allegations levelled against appellant. He pointed out that as many as ten witnesses were examined but testimony of none of them is worthy of credence for the simple reason that they are full of material omissions, contradictions and improvements. He further highlighted that there is not a single independent witness examined by prosecution. He would submit that there is no motive and it being a case based on circumstantial evidence, it was imperative for prosecution to first, at the outset, establish the very motive behind the occurrence. According to him, implication is only on recovery of a skull cap allegedly found lying near the dead body. He would submit that such article is easily available in market and is generally used by all persons belonging to Muslim community. There is no specific mark of identification to hold that the cap lying near the dead body of Reshma was of none other but of accused-appellant.

6. Learned counsel pointed out that when there was FIR at the instance of appellant, investigating machinery was duty-bound to investigate the same, but no steps whatsoever have been taken by the Investigating Officer and there is candid admission to that extent. Learned counsel took us through the answers given by the Investigating Officer and would submit that merely to solve the case and on suspicion, appellant is roped in, tried and unfortunately even convicted.

7. Resultantly, it is his submission that with such weak quality of evidence on record, learned trial court ought not to have accepted the case of prosecution which was full of major lacunas and ought not to have held charges proved. There is apparently non-appreciation of evidence coupled with failure to appreciate the defence raised by appellant and as such, he seeks interference at the hands of this Court for allowing the appeal.

8. Informant seems to have engaged counsel to resist the relief, however, for want of provision in Cr.P.C., original informant cannot seek distinct audience. At the most he can be permitted to assist the APP, if so required. Therefore, we permit him to assist the APP accordingly.

9. Supporting the impugned judgment, learned APP, with the able assistance of learned Advocate for original informant, would submit that there is ample evidence to connect appellant. That, appellant was maintaining extra marital affair. Deceased, her younger sister and even her parents are unequivocal about appellant receiving repeated calls and he secretly going aside and having conversation. To do away with deceased, he has projected a false story of assault on him and abduction of deceased. Investigation revealed his complicity and therefore, he was chargesheeted, tried and rightly held guilty. According to learned APP, the findings are supported by cogent reasons and judgment being legally sustainable and no case being made out on merits, he prays to dismiss the appeal.

EVIDENCE BEFORE THE TRIAL COURT

10. Following are the witnesses on behalf of prosecution in the trial court.

PW1 Shaikh Rashid Sk. Ibrahim is father of deceased.

PW2 Sainabee Shaikh Rashid is mother of deceased.

PW3 Muskan Rashid Shaikh is minor sister of deceased.

PW4 Rayees Rashid Shaikh is brother of deceased.

- PW5** Shaikh Asad Sk. Hussain is uncle of deceased.
- PW6** Shaikh Babar Shaikh Chand was pancha to spot panchanama and seizure of one footwear of deceased, a red colour bag, a namaj cap of white and black colour, and a blood stained stone which was lying near the dead body. He identified panchanama Exhibit 27.
- PW7** Shaikh Kadir Sk. Yusuf was pancha to spot panchanama and seizure of soil and one of the footwear of deceased. He identified panchanama Exhibit 30.
- PW8** Hussain Mohammad Shaikh acted as pancha to seizure of clothes and footwear of accused. He identified seizure panchanama Exhibit 33.
- PW9** Dr. Sanjay Gore is the medical officer who examined accused Mujeeb and claims to have found contusion over left side forehead 1x1 cm. He identified the certificate issued by him to be at Exhibit 41.
- PW10** API Pramod Bhatnate is the Investigating Officer [IO]

HOMICIDE

11. Here, homicidal death has not been disputed. Considering the 15 injuries mentioned by the autopsy doctor in column no. 17 of the postmortem report, out of which 10 are stab injuries over the upper

part of the body and 5 abrasions and contusions, and also the cause of death issued by the autopsy doctor as “shock and hemorrhage due to multiple stab injuries with head injury”, we too are convinced that death of Reshma is nothing but homicidal.

ANALYSIS

12. Precise allegation of prosecution is that accused had extra marital affair. He was repeatedly receiving anonymous calls and he was attending such calls by going aside. Parents-in-law of accused i.e. PW1 Sk. Rashid and PW2 Sainabee, PW3 Muskan- sister in law, PW4 Rayees-brother in law of accused as well as PW5 Sk. Asad-maternal uncle of deceased are the witnesses on above accusations. They all in their evidence speak about deceased informing about accused getting calls and he moving away from them and having secret talks. Mother-in-law of accused allegedly reported this to PW1 Sk. Rashid. Even PW3 Muskan i.e. sister-in-law of accused, who was allegedly in the company of both, accused and deceased that day, also deposed about accused receiving phone calls when they were on way to the house of PW1 Sk. Rashid. However, Investigating Officer has, in his cross, candidly admitted that though he procured CDR and SDR, no material was gathered or revealed as to with whom appellant was

having secret talks. Therefore, for want of evidence to that extent, the very aspect of motive behind the occurrence is getting knocked of. The Investigating Officer has apparently not investigated in that direction and he has admitted about it. As argued, it being a case based on circumstantial evidence, it was duty of investigating machinery to establish very motive behind the incident. However, prosecution has apparently failed to do so which is rightly pointed out by learned counsel for the appellant.

13. After going through the evidence of father of deceased i.e. PW1 Sk. Rashid and the Investigating Officer PW10 API Bhatnate, it is palpably evident that when appellant gave FIR regarding alleged occurrence with him about assault and abduction of deceased, that they entertained suspicion. However, immediately when appellant lodged FIR Exhibit 44, no investigation of his FIR has apparently been undertaken. The Investigating Officer has also candidly admitted that he did not investigate about the alleged occurrence reported by the appellant for the best reasons known to him. Resultantly, it seems that only on suspicion, appellant has been detained and confession is got recorded. Investigating Officer has not taken steps to produce appellant before Magistrate and get his so called confessional statement recorded under Section 164 of Cr.P.C. Why such step has

not been taken by the Investigating Officer is not explained by prosecution.

14. Another aspect which needs to be noted is that though appellant's parents-in-law and brother-in-law deposed about deceased unwilling to visit her own parents' house but accused insisted her, about accused receiving repeated calls, about accused meeting them in a grocery shop or about accused having affair, these are found to be omissions which are proved through the Investigating Officer. Therefore, statements of relatives of deceased, which are apparently recorded at a belated stage, are found to be full of material omissions and contradictions.

15. There is no dispute about death of Reshma to be homicidal. However, medical expert has, during autopsy, noted as many as 10 stab injuries along with head injury. Taking into consideration the nature of injuries, sharp weapon must have been put to use, but same has not been laid hands on by investigating machinery. Therefore, this also adds to the further weakness of the prosecution case.

16. What seems to have prevailed over the investigating machinery to implicate appellant is a skull cap allegedly found lying near the

dead body but, as pointed out by learned counsel for the appellant, there is nothing unique about said cap to attribute its ownership to only and only appellant and none other. It is an article which is used by persons belonging to Muslim community during offering *namaj*. None of the relatives have spoken about seeing accused wearing that cap or confirming the same cap to be belonging to appellant and none other. There is no evidence to show that on particular day and time, accused was wearing that skull cap. During visit by PW1 Sk. Rashid and others, including police machinery, to the spot where dead body was found lying, they all speak about coming across skull cap of appellant to be lying there, but no prompt interrogation is made with accused on this count on 13.06.2015. Therefore, mere recovery of a skull cap from the vicinity where dead body was found lying, in our considered opinion, would not be an incriminating material.

17. To sum up, here, apparently implication is on suspicion. Law is fairly settled that suspicion can never take place of proof. While conducting criminal trial, court is 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.

18. It is also cardinal principle of law that prosecution has to stand on its own legs. Primary duty of prosecution is to establish their own case and accused has every right to remain silent. In the case in hand, there is no foundation, nor it has been established by prosecution that the story allegedly projected by appellant about he being assaulted and deceased being abducted and then done to death is a feigned or a false story. Had the investigating machinery carried out investigation of FIR at the instance of appellant, it would have been open for prosecution to submit that false and concocted story was projected by

accused to save himself. Apparently, there was no investigation on the FIR at the instance of accuse. On the contrary, here, on the mere statement of PW1 Sk. Rashid, investigation has been undertaken, completed and accused has been chargesheeted. Therefore, here, the very manner of investigation leading into conclusion of investigation is shrouded with mystery. There are several lapses and lacunae. Cross of Investigating Officer itself exposes that there is no proper investigation.

19. For all above reasons, in our considered opinion, learned trial court ought not to have accepted the case of prosecution as proved beyond reasonable doubt. Hence, interference at the hands of this Court has become necessary and so, we proceed to pass the following order:

ORDER

- I. Criminal Appeal stands allowed.
- II. The conviction awarded to the appellant Mujeeb s/o Shahanoor Shaikh by the learned Additional Sessions Judge-8, Aurangabad in Sessions Case No. 199 of 2015 under Sections 302, 201 and 203 of IPC on 15.11.2017 stands quashed and set aside.
- III. Appellant stands acquitted of the offence punishable under Sections 302, 201 and 203 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.
- VI. It is clarified that there is no change as regards the order regarding disposal of muddemal.
- VII. Criminal Application No. 6904 of 2017 stands allowed to the extent of assisting prosecution.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]

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