

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 1292 OF 2019

. Rambhau S/o. Tatyta Tambe,
Age:- 44 Years, Occu:-Agri,
R/o. Nadi, Tq. Madha,
Dist. Solapur.

. . . Appellant
(Orig. Informant)

Versus

1. The state of Maharashtra,
Through the Police Station Officer,
Police Station Paranda,
Tq. Paranda, Dist. Osmanabad.

2. Haridas S/o. Bhagwan Tarte,
Age:- 40 Years, Occu:- Agri.,
R/o. Pithapuri, Tq. Paranda,
Dist. Osmanabad.

. . . Respondents
(R.No.2 Ori. Accused)

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Mr. Kishor R. Doke, Advocate for the Appellant.
Mrs. Preeti Diggikar, APP for Respondent No.1-State.
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**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 8th February, 2023

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

. Original informant i.e. brother of deceased has invoked provisions under Section 372 of the Code of Criminal Procedure thereby questioning the acquittal of present respondent no.2 from the offence punishable under Section 302 of the Indian Penal Code (IPC).

BRIEF FACTS OF THE CASE

2. Deceased Ashabai was married to accused respondent no.2 and they both were residing at Pithapuri, Tq.Paranda. Out of their wedlock, they had two sons namely Tushar and Shubham. Initially for a period of 4 to 5 years everything was smooth but subsequently accused respondent no.2 started suspecting character of deceased wife and harassed her. Deceased was promptly reporting about it to her brother informant as well as other members of family. On 04-07-2012, the appellant / informant received information that his sister was lying in the field in dead condition. Therefore, he went there and he came across injury marks on her neck and therefore, he lodged report against present respondent no.2 holding him responsible for the murder of Ashabai.

3. On the strength of above report, crime was registered, investigation was carried out and after completing the same **PW12** Prabhakar charge-sheeted the accused. Trial was conducted against accused before learned Additional Sessions Judge, Bhoom, who after appreciating oral and documentary evidence of the prosecution, held that prosecution has failed to establish the guilt of the accused. It seems that learned trial Judge has held that case of prosecution was based on circumstantial evidence and prosecution could not complete the chain of circumstances and thereby learned trial Judge passed judgment and order dated 21-08-2019 acquitting the accused.

It is the above acquittal which is now questioned by brother of deceased by preferring instant appeal on following grounds :

GROUND

- i) In spite of availability of cogent and reliable evidence, the same has not been properly appreciated.
- ii) Medical evidence had strongly suggested death to be homicidal and deceased was staying with accused.
- iii) There was ample evidence regarding deceased to be in the company of accused shortly before the incident and as such theory of last seen together was established by examining **PW3** Jalindar and **PW4** Dattu, but the same has not been appreciated properly.
- iv) Accused was spotted fleeing away on his motorcycle
- v) Accused was absent for three days after the occurrence.

Therefore, according to appellant, there were strong, reliable circumstances to connect accused with death of his sister but it is his grievance that in spite of availability of cogent evidence and in spite of prosecution firmly establishing the circumstances, learned trial Judge erred in acquitting the accused.

4. In the light of above, we proceed to examine the evidence available on record. Admittedly, here prosecution came with a case of circumstantial evidence there being no direct evidence. The **circumstances** which are pressed

into the service in the trial Court by the prosecution could be summarized as under:

- i) Homicidal death.
- ii) Motive - Accused suspecting character of his deceased wife.
- iii) Deceased was in the company of accused on the date of incident i.e. accused is the last person seen in the company of deceased.

5. Let us see whether above referred circumstances are cogently and firmly proved by the prosecution.

EVIDENCE ON BEHALF OF PROSECUTION

6. Record shows that following is evidence on behalf of prosecution :

- i) **PW1** Anna Tambe is a Panch to inquest panchanama. His evidence is at Exh.21.
- ii) **PW2** Rambhau Tambe is informant. His evidence is at Exh.24.
- iii) **PW3** Jalindar Vithoba Tambe is cousin of deceased. His evidence is at Exh.27.
- iv) **PW4** Dattu Rupanwar is a villager. His evidence is at Exh.28.
- v) **PW5** Arun Rupanwar is panch to seizure panchanama. His evidence is at Exh.29.
- vi) **PW6** Ashvini Tarte is relative of accused. Her evidence is at Exh.34.
- vii) **PW7** Dr.Ashrubha Jagannath Jadhav is autopsy Doctor. His evidence is at Exh.36.

- viii) **PW8** Dr.Madhukar Sadavarte is the Doctor who treated deceased at Paranda. His evidence is at Exh.41.
- ix) **PW9** Sachin Pingore is Conductor at Barshi Depot. His evidence is at Exh.43.
- x) **PW10** Navnath Chormale is Police Patil of village Pithapuri. His evidence is at Exh.44.
- xi) **PW11** Mukund Karpe is Conductor at Paranda Depot. His evidence is at Exh.46.
- xii) **PW12** Prabhakar Wagh is Investigating Officer. His evidence is at Exh.52.

7. We propose to give a brief account of sum and substance of substantive evidence that emerged before the trial Court, which is as under :

PW1 Anna seems to be Pancha to inquest and he has stated that there were three injuries on the neck of deceased. According to him, inquest was drawn in his presence and he identified it to be at Exh.22. He has also acted as panch to spot panchanama, which is in land Gut no.28 wherein there was standing sugarcane crop. He has identified articles seized from the spot like mobile, broken pieces of bangles, footwear, bottle of pesticide and a liquor bottle.

8. **PW2** Rambhau is the informant, who has set law into motion and

according to him, deceased was his younger sister. That her marriage was performed with accused 17 years back and they had two children. He stated that 4 to 5 years prior to the incident, accused started suspecting character of his sister. Then he stated that in 2007, accused gave telephone call to this witness and asked him to come to Paranda and there he told this witness that his sister Ashabai was having illicit relationship and he suspected about the same and he told him to ask Ashabai to behave properly and further stated that if she does not behave properly, they will be defamed and he would kill her or else he would kill himself. Then he claims that on 04-07-2012 one Anna Tambe came and informed about message received from Gajendra Tambe about Ashabai lying dead in her agricultural field and thereafter, he visited said spot and he lodged report Exh.25.

9. **PW3** Jalindar is cousin of deceased and according to him on 04-07-2012 while he was proceeding on his motorcycle to Paranda on that day at around 11:30 a.m. he saw accused and deceased proceeding from Paranda to Munshi on motorcycle. Then he stated that at 05:00 p.m., brother of Ashabai informed him that Ashabai is dead and so he went and he noticed injury marks on her neck. He also stated that Ashabai told him that her husband was suspecting her character.

10. **PW4** Dattu stated that on 04-07-2012 he had been to Paranda Bazaar

and while he was proceeding towards his field via Munshi at around 01:00 p.m. he noticed accused hurriedly proceeding towards Paranda and later on this witness learnt that Ashabai was killed by accused.

11. **PW5** Arun stated tThere being no merit in the appeal, we are constrained to dismiss the appeal and accordingly, we proceed to pass following order :hat on 08-07-2012 he was called at Police Station and Police seized State Transport tickets from accused vide panchanama Exh.30. However, this witness has stated that he does not remember what happened there. Finding him not supporting, he was cross-examined after seeking the leave of the Court and there he again supported prosecution case about accused informing him about parking his motorcycle at Laxmi Temple and showing the spot and memorandum to that extent. He identified seizure panchanama at Exh.32.

12. **PW6** Ashvini stated that accused is her cousin father-in-law but she has not supported prosecution and she has merely answered that on the date of incident she has noticed Ashabai alone in the agricultural field talking on phone.

13. **PW7** Dr.Ashruba is a Doctor, who conducted post mortem and issued post mortem report and opined death of Ashabai due to compression of neck.

14. **PW8** Dr.Madhukar is the medical practitioner, who stated that on 04-07-2012, Ahsabai visited his dispensary on complaint of injury to right thumb. He stated that he made enquiry with Ashabai and she stated that her husband had gone to the market and as such Ashabai was in his dispensary from 11:00 a.m. to 12:00 noon.

15. **PW9** Sachin is the Bus Conductor and he spoke about issuing two State Transport tickets from Pandharpur to Kurduwadi and Kurduwadi to Barashi.

16. **PW10** Navnath is the Police Patil of the village.

17. **PW11** Mukund is the Bus Conductor who was in the State Transport Bus on 07-07-2012 which was travelling from Barshi to Paranda and he spoke about issuing ticket bearing no.053830.

18. **PW12** Prabhakar is the Investigating Officer.

ANALYSIS AND CONCLUSION

19. Now let us see whether the circumstances pressed into service by prosecution are firmly and cogently proved as the case is entirely based on circumstantial evidence. It is trite law that when case is entirely based on

circumstantial evidence, the Court must take great care while evaluating circumstantial evidence to get ensure that the circumstances on which prosecution relies are fully consistent with the sole hypothesis of guilt of accused and inconsistent with the innocence of accused.

By series of judgments, it has been held that when case is based on circumstantial evidence, it must satisfy following tests. **Firstly** the circumstances from which an inference of guilt sought to be drawn, must be cogently and firmly established. **Secondly**, those circumstances should unerringly point towards the guilt of the accused. **Thirdly**, the circumstances taken cumulatively should form a chain so complete that there is scope for the conclusion that within all human probabilities crime was committed by accused and none else. **Fourthly**, the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis then that of guilt of accused and such evidence should not only be consistent with the guilt of the accused but should also be inconsistent with his innocence. The few landmark rulings that could be referred and relied to above exposition of law are as follows :

- a) *Hanuman Govind Nargundkar and Another vs. State of M.P.*; AIR 1952 SC 343;
- b) *Sharad Birdhichand Sarda vs. State of Maharashtra*; (1984) 4 SCC 116.
- c) *Dhananajoy Chatterjee @ Dhana vs. State of W.B.*; 1994 (2) SCC 220.
- d) *Shyamal Ghosh vs. State of West Bengal*; (2012) 7 SCC 646;
- e) *State of U.P vs Satish*; (2005) 3 SCC 114;

f) Mohd. Mannan @ Abdul Mannan vs. State of Bihar; (2011) 5 SCC 317.

20. In administration of criminal justice, Courts are equally expected to always borne in mind the following cardinal principles :

1. *The accused is presumed to be innocent unless such a presumption is rebutted by the prosecution by producing the evidence to show him guilty of offence with which he is charged.*
2. *If two views are possible on the basis of evidence produced in the case, one indicating to the guilt of the accused and the other to his innocence, the view favourable to the accused is to be accepted.*
3. *Where the court entertains reasonable doubt regarding the guilt of the accused, the benefit of such doubt should go in favour of the accused.*
4. *The court must not reject the evidence of the prosecution taking it as false, untrustworthy or unreliable on the ground or on the basis of conjectures and surmises.*
5. *The case of the prosecution must be judged as a whole having regard to the totality of the evidence.*
6. *In appreciating the evidence the approach of the court must be integrated and not truncated or isolated. In other words, the impact of evidence in totality on the prosecution case or innocence of accused has to be kept in mind in coming to the conclusion as to the guilt or innocence of the accused.*
7. *In reaching to the conclusion about the guilt of the accused, the court has to appreciate, analyze and assess the evidence placed before it by yardstick of probabilities, it's intrinsic and animus of witnesses.*
8. *The court has to keep in mind that the accused 'must be' and not*

merely 'may be' of guilty of an offence. The mainly distance between 'must be' and 'may be' is long and divides vague conjectures from sure conclusions.

9. *Suspicion, however grave it may be, cannot take the place of legal proof.*
10. *The court must ensure that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, the benefit of doubt must be given to the accused. However, the Court must borne in mind that the reasons of doubt should not be trivial or merely a probable. It must be fair doubt i.e. based upon the reasons and common sense.*

21. In the light of above legal requirements, we proceed to scan the evidence on record.

FIRST CIRCUMSTANCE

22. According to the prosecution the deceased was met homicidal death in her own field. **PW7** Dr.Ashruba, autopsy Doctor is examined at Exh.36 and he has narrated following four injuries noted by him in his post mortem report.

1. Bruise – size 2x1 cm. brown in colour, over left mandible.
2. Bruise – size – on Neck to Anterior aspect, at level of thyroid cartilage, brown in colour, oval shape, of 1.5 to 2.cm. each, three in numbers,
3. CLW – at base of right upper limb thumb, of size 2x0.5x0.5 cm., bluish black in colour, with dressing material over it.
4. Abrasion – over right wrist, size 0.5cm x 0.5 cm., two in numbers.

He stated that as per protocol he also noted internal examination findings and he preserved viscera for opinion and at that time he did not opine about cause of death due to suspicion of poisoning material. Then he stated that CA report did not show any poison and therefore, he issued final opinion as cause of death is “due to compression of the neck”. He defined what is meant by compression of neck and according to him, death of Ashabai was homicidal one.

In his **cross-examination** he has candidly admitted that he was not sure about cause of death. He again answered that he has not mentioned cause of death as “compression of neck” because he was not confident about the same. Therefore, in the light of such answers given by medical expert, it cannot be said that her death is only and only homicidal and not otherwise. Therefore, first circumstances is not firmly established regarding death of Ashabai to be homicidal.

SECOND CIRCUMSTANCE

23. Second circumstance is motive. According to prosecution, accused was suspecting character of his wife Ashabai. In support of such accusation, prosecution is relying on testimonies of **PW2** Rambhau and **PW3** Jalindar. Therefore, we intend to scan their evidence with utmost care.

From the evidence of **PW2** Rambhau, brother of deceased, it is emerging that marriage of accused and deceased is 17 years old and they have two children. While under cross, he has admitted that during her entire life

Ashabai never lodged report with Police about harassment meted out by accused by suspecting her character. His evidence shows that though he claims that his sister used to tell him whenever she visited, he speaks of accused himself calling him to Paranda and informing about behaviour of his sister i.e. in the year 2007. This witness also while facing cross has admitted that he himself did not lodge any report to the Police at that point of time.

24. **PW3** Jalindar, who is cousin of deceased, merely stated that **PW2** Rambhau, brother of Ashabai informed him that accused husband of Ashabai was suspecting character of Ashabai. Therefore, this witness though is a relative of deceased, he has mere hearsay information.

25. It is not getting clear from the prosecution evidence as to with whom accused suspected that deceased wife had developed relations. Therefore, there is mere allegation of suspicion of character but no necessary details as to with whom she was getting close or for what count her character was rendered suspicious, has not come on record. Even otherwise as stated above, marriage of accused and deceased is said to be 17 years old and there are two grown up children. From the testimony of informant, it seems that years back he had learnt from accused about behaviour of deceased to be not proper and to give understanding to her. Though this witness states that at that time accused allegedly said that if she does not improve he will kill her or he will

do something to himself. In spite of so, brother does not seem to have taken any step and alleged occurrence is after few years of such conversation between accused and informant. Therefore, for want of material, circumstance of motive cannot be said to be proved.

THIRD CIRCUMSTANCE

26. Third circumstance is last seen together. Prosecution has come with a case that accused was seen taking deceased on his motorcycle towards Paranda at 11:30 a.m. and in the same afternoon around 03:00 p.m. deceased had met homicidal death in her field due to compression of neck. Prosecution further claims that witness has seen accused hurriedly fleeing and not attending funeral and as such he was absconding and there is evidence to that extent. Consequently, prosecution has come with a theory of last seen together.

It is settled law that such theory can be applied only when the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than accused being the author of crime becomes impossible. There are umpteen judgments as to when circumstance of last seen together can be said to be established and when it cannot be so said. We propose to name a few judgments which are as under :

- a) *Shyamal Ghosh vs. State of West Bengal*; (2012) 7 SCC 646.
- b) *Munawwar vs. State of Uttar Pradesh*; (2019) 3 SCC (Cri) 314.
- c) *Noor Mohammad @ Anwar and Others vs. State U.P.*; 2013 SCC Online Allahabad 13025.
- d) *Jaswant Gir vs. State of Punjab*; (2005) 12 SCC 438.
- e) *Anjan Kumar Sarma vs. State of Assam*; AIR 2017 SC 2617.
- f) *Arvind Singh vs. State of Maharashtra*; (2021) 11 SCC 1.

27. In the light of above settled legal position and legal requirements for accepting the theory of last seen together, we proceed to scan the evidence of prosecution witnesses, more particularly, **PW3** Jalindar and **PW4** Dattu.

At Exh.27 **PW3** Jalindar has testified about deceased to be his cousin sister and accused to be her husband. According to him, on 04-07-2012 while this witness was proceeding to Paranda, he claims that at around 11:30 a.m. he noticed accused and deceased proceeding from Paranda towards Munshi on motorcycle and at 05:00 p.m. he got news of Ashabai to be dead.

Above witness is subjected to **cross** by learned defence Advocate and he has answered that roads of Nadi to Paranda and Paranda to Pithapuri are distinct. He has denied that there was heavy traffic on the road. He has admitted in his cross that he did not inform Police that in the morning he had noticed accused and deceased proceeding on motorcycle. He admitted that neither Police visited Nadi to make enquiry with him nor any written letter was issued to him asking him to attend Police Station.

28. Another witness on this circumstance is **PW4** Dattu. He claims to be knowing Ashabai as well as informant and accused. He stated that accused is son-in-law of their village. According to him, he was walking from his field by Munshi road at that time, at around 01:00 p.m. he noticed Haridas proceeding towards Paranda on his motorcycle. He stated that he wished him but accused hurriedly went away.

In his **cross-examination** he has stated that his wife is cousin sister of **PW2** Rambhau, brother of deceased. He gave distance between Paranda to Nadi at about 7 to 8 km. He had admitted that Nadi to Paranda and Paranda to Pithapuri are different road. He stated that he was present in the funeral but admitted that he did not inform about accused proceeding on motorcycle in hurriedly manner.

29. Another witness on above aspect is **PW8** Dr.Madhukar. He is a medical practitioner running a dispensary at Paranda. According to him, on 04-07-2012, deceased visited his dispensary for dressing on a injury to right thumb. He stated that he treated her. He claims that on the enquiry by him, deceased stated that her husband had gone to the market. According to him, Ashabai came to dispensary between 11:00 a.m. to 12:00 noon. He handed over the copy of OPD register to Police.

In his **cross-examination** he has stated that he knew brother of Ashabai as well as accused husband. He denied that at the behest of Police he

prepared papers.

Above is the evidence on the circumstance of last seen theory.

30. On analyzing the above evidence, it is emerging that according to **PW3** Jalindar, he saw accused and deceased both proceeding on the motorcycle towards Paranda at 11:30 a.m. **PW8** Dr.Madhukar also speaks about deceased visiting his dispensary between 11:30 a.m. to 12:00 noon. According to **PW4** Dattu he had been to Bazaar at Paranda at around 01:00 p.m. and at that time he noticed accused proceeding on motorcycle in a hurry, however, in which direction he saw him proceeding is not clarified. Therefore, there is no witness who had seen accused and deceased returning back together from Paranda to their village or they both to be available in the field at one and the same time after returning from Paranda. Though **PW6** Ashwini has been examined by prosecution, she merely speaks of seeing deceased alone in the field talking on the mobile phone. Consequently, from 01:00 p.m. till deceased was found lying dead in the field, there is no evidence about accused to be in the company of deceased for these 3 to 4 hours. It has come in the evidence that one mobile was lying near the dead body, however, admittedly, Investigating Officer has not carried out investigation regarding its ownership.

Though prosecution seems to have taken aid of witnesses like **PW9** Sachin and **PW11** Mukund who were Bus Conductors and were allegedly on duty on 07-07-2012, and by examining them, prosecution has attempted to

seize State Transport tickets i.e. of journey from Chiplun to Barshi and from Barshi to Paranda, but there is no evidence either oral or documentary to show that after parking motorcycle accused ran away. **PW9** Sachin and **PW11** Mukund, except producing tickets of State Transport bus, have not stated anything incriminating nor accused is confronted to them to ascertain whether accused undertook the journey. Therefore, their testimonies are of no avail to the prosecution.

No doubt case of prosecution about accused not available three days is tried to be brought on record, but mere absence of accused itself is not sufficient to point finger of accusation against him unless there is material indicating that accused committed the act and thereafter fled. Who was at the field in the company of deceased, is not coming on record. Therefore, there is vacuum since accused and deceased going in the morning hours to Paranda till deceased being found dead. Though 2 to 3 witnesses are examined, none of them had seen accused and deceased together returning to their field. Therefore, in our opinion the theory of last seen together is not cogently or firmly proved so as to hold accused guilty or answerable for death of Ashabai. Infact as stated above, here at the threshold, prosecution has not firmly and cogently established that death of deceased was only and only homicidal and not otherwise.

31. The other aspects which are also need to be pondered and considered

are that here inspite of informant brother being aware of conduct of accused towards his sister i.e. since 2007, no report has been lodged. Surprisingly inspite of learning about death of Ashabai on 04-07-2012, FIR is apparently lodged after four days i.e. on 08-07-2102 and no explanation whatsoever for said delay has been given by the informant. Therefore, there is a room to infer that report is after thought and after due deliberation.

SUMMATION

32. Here prosecution come with the case of availability of three circumstances i.e. homicidal, motive and last seen theory. Unfortunately, none of the circumstances is firmly and cogently established by prosecution. Apart from belated FIR, there is no trustworthy and creditworthy testimony of prosecution witnesses either on the point of suspicion of character or about pressing the neck of deceased. Resultantly, the only inference from such evidence which emerges is that prosecution has not discharged its primary burden of establishing the guilt of the accused beyond reasonable doubt.

33. We have gone through the judgment passed by the learned trial Judge. The learned trial Judge has refused to accept the case of prosecution. It is the only possible view that could emerge with quality and nature of evidence adduced by the prosecution. No fault can be found in the findings and judgment rendered by the learned trial Judge. There being no merit in the

appeal, we are constrained to dismiss the appeal and accordingly, we proceed to pass following order :

ORDER

(i) Criminal Appeal No.1292 of 2019 is dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

SPT