

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

CRIMINAL APPEAL NO.345 OF 2015

Shivaji Punjaram Gaikwad,
Age about 53 years,
R/o: Morane, At present
Sawkifata, Thengoda, Shivar,
Taluka Satana, District – Nashik.
(At present lodged in Nashik
Road, Central Prison, Nashik).

...Appellant
(Orig. Accused)

Versus

The State of Maharashtra,
(Through Police Inspector,
Satana Police Station, Taluka
Satana, District: Nashik.

...Respondent

Mr. Murtaza Najmi, Appointed for the Appellant (*Amicus Curiae*).

Ms. P. P. Shinde, A.P.P for the Respondent-State.

***CORAM : REVATI MOHITE DERE &
GAURI GODSE, JJ.
DATE : 21st AUGUST 2023***

ORAL JUDGMENT (Per Revati Mohite Dere, J.):

1. The appellant has impugned the Judgment and Order dated 9th January 2014, passed by the learned Additional Sessions Judge, Malegaon in Sessions Case No.72 of 2011, convicting and

sentencing, him as under:-

- for the offence punishable under Section 302 of the Indian Penal Code, to suffer rigorous imprisonment for life and to pay fine of Rs.2,000/-, in default of payment of fine, to suffer rigorous imprisonment for two months;
- for the offence punishable under Section 201 of the Indian Penal Code, to suffer rigorous imprisonment for one year and to pay fine of Rs.1,000/-, in default of payment of fine, to suffer rigorous imprisonment for one month.

Both the substantive sentences were directed to run concurrently.

2. The prosecution case in brief is as under:-

According to the prosecution, deceased – Alkabai Shivaji Gaikwad, left home one day after a quarrel, to purchase some articles from the bazar. It is alleged that Alkabai's two children i.e. PW 1 – Vishwas Pawar and PW 2 – Ratna Pawar saw the appellant i.e. their step father following their mother Alkabai to the bazar through Sawki

Road. Thereafter, neither the appellant nor Alkabai returned home for about 2 to 3 days. It is the prosecution case, that after 2 to 3 days of Alkabai going missing, PW 1 – Vishwas saw the dead body of his mother in a well, when he had gone to start the water pump of the well. PW 1 – Vishwas saw Alkabai's hands tied, and her neck tied to a saree. Pursuant thereto, Alkabai's son - Vishwas (PW 1) informed the Police Patil, who came to the spot. Pursuant thereto, the dead body of Alkabai was removed from the well, inquest panchanama and spot panchanama were done. Thereafter, the postmortem examination was performed on the dead body and thereafter, the police recorded the FIR (Exhibit - 17) of Alkabai's son – Vishwas. During the course of the investigation, the statement of the witnesses were recorded and after investigation, charge-sheet was filed in the said case, as against the appellant, in the Court of the learned Judicial Magistrate First Class. As the offences were exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions for trial.

The learned Additional Sessions Judge was pleased to frame charge as against the appellant for the offences punishable under Sections 302 and 201 of the Indian Penal Code. The appellant pleaded not guilty to the charge and claimed to be tried.

The prosecution in support of its case examined as many as 5 witnesses i.e. PW 1 – Vishwas Deoba Pawar (complainant and son of the deceased - Alkabai); PW 2 – Ratna Devba Pawar (daughter of deceased - Alkabai), both, to show that the appellant was following Alkabai on the day of the incident; PW 3 – Dr. Nitin Shankarrao Chitalkar, the doctor who performed the postmortem examination on deceased – Alkabai; PW 4 – Suman Anil Nikam, deceased – Alkabai's real sister and PW 5 – Gopal Natthu Gadhari, the Investigating Officer, in the said case.

The defence of the appellant was that of denial and false implication. No defence witness was examined by the appellant in support of its case.

The learned Judge after hearing the parties was pleased to convict the appellant, for the offences as afore-stated in para 1.

3. Learned Counsel for the appellant assailed the judgment on several counts. He submitted that the prosecution had not proved its case beyond reasonable doubt as against the appellant, in particular, since the case was entirely based on circumstantial evidence. He submitted that the evidence on record would show that neither the date or time, when the appellant was last seen in the company of the deceased has been established by the prosecution nor does the postmortem report or the doctor's evidence reveal, as to how many hours prior, Alkabai was assaulted and her dead body thrown in the well. He submitted that merely because the appellant was absconding, the same, cannot be said to be incriminating, more particularly, the same cannot be a ground to convict the appellant. In support of his submission, learned counsel relied on the judgments in the case of *Bipin Kumar Mondal v/s State of West Bengal*¹; *Ganesh S/o Madhav Rajpanke v/s The State of Maharashtra*²; *Digamber Vaishnav and Another v/s State of Chhattisgarh*³ and *Chandmal and Another v/s State of Rajasthan*⁴.

1 (2010) 12 SCC 91

2 Cri. Appeal No.117 of 2015 decided on 25.04.2022

3 (2019) 4 SCC 522

4 (1976) 1 SCC 621

4. Learned APP supported the Judgment and Order of conviction and sentence and prayed for dismissal of the aforesaid appeal.

5. It is not in dispute that the conviction of the appellant in the present case is based solely on circumstantial evidence. In ***Sharad Birdhichand Sarda v/s State of Maharashtra***⁵ it was held that the onus is on the prosecution, to prove that the chain of circumstances is complete and that falsity or untenability of the defence set up by the accused, cannot be made the basis for ignoring any serious infirmity or lacuna in the case of the prosecution. The Apex Court then proceeded to indicate the conditions that must be fully established before a conviction can be made on the basis of the circumstantial evidence. The said 5 conditions are spelt out in para 153 of the said judgment. Para 153 of the said judgment is reproduced hereinunder:-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

5 (1984) 4 SCC 116
N. S. Chitnis

It may be noted here that this Court indicated that 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" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra⁶ where the following observations were made: [SCC para 19, p. 807 : SCC (Cri) p. 1047]

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 the 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."*

Thus, in a case of circumstantial evidence, the onus lies on the prosecution to establish the incriminating circumstances, by adducing reliable, cogent and clinching evidence, and the circumstances so proved, must form a complete chain of events, on the basis of which, no other conclusion, other than one of guilt of the

6 (1973) 2 SCC 793
N. S. Chitnis

accused can be reached.

6. In the present case, the prosecution has relied essentially on two circumstances i.e. the evidence of motive as well as, of last seen. In support of the said evidence, the prosecution has examined PW 1 – Vishwas and PW 2 – Ratna.

7. As far as PW 1 – Vishwas Pawar is concerned, he is the son of deceased – Alkabai. He has stated in his examination-in-chief that in the year 2003, he was residing at Sawki Phata alongwith his mother Alkabai (deceased), Shivaji (appellant), Ratna (PW 2) and Yogesh; that the appellant was his step father, and that he was insisting to perform 2nd marriage with Alkabai and that on account of the same, there would be quarrel between them. He has stated that one day, when he returned in the evening, his mother disclosed to him that the appellant was asking to perform 2nd marriage and that there were quarrels on account of the same; that pursuant thereto, the appellant started residing in a separate room. He has stated that the said incident had taken place 4 to 5 days prior to the date of the incident. According to

PW 1 – Vishwas, after 4 to 5 days, his sister – Ratna (PW 2) disclosed to him that Alkabai had gone to the bazar and therefore, he went to see her. He has stated that he saw his mother proceeding towards the bazar and the appellant following her, and, that they were on the Sawki road. He has stated that he returned home, however, thereafter neither, the appellant nor his mother returned home, for 2 to 3 days. He has stated that he made enquiries about them. PW 1 – Vishwas has further stated that after 2 to 3 days, he was told by the field landlady to start the water pump of the well and that when he started the water pump, he saw the dead body of his mother – Alkabai in the well; that her hands were tied with a rope and her neck was also tied to her saree. He has stated that he informed the villagers and the police patil, who came to the spot, pursuant to which, the dead body was removed from the well. He has further stated that the police thereafter conducted the inquest panchanama as well as the spot panchanama and thereafter, the body was sent for postmortem examination. Thereafter, PW 1 – Vishwas lodged an FIR as against the appellant alleging an offence punishable under Section 302 of the Indian Penal

Code. The said FIR has been exhibited as Exhibit – 17. According to PW 1 – Vishwas, about 2 days prior to the date of incident, his mother had demanded Rs.200/- from the appellant for bringing articles from the bazar, however, the appellant had refused to pay the said amount and hence his mother caught hold of the appellant's neck. He has further stated that the appellant was saying that he wanted to reside separately from his mother and as such they were not on good terms. He has further stated that the appellant was absconding, soon after the said incident.

8. In his cross-examination, several questions were put to the said witness i.e. with respect to the marriage of the appellant with his mother; with respect to the nature of enquiry made by him, when his mother went missing. The said witness denied the suggestion, that he had not personally seen his mother and the appellant going towards the bazar. A suggestion was also made to the witness that there was some other person who was following his mother, however, the said suggestion was denied by the said witness. It was also suggested that

his mother was having illicit relations with one Pawan Mali, however, the same was denied.

9. PW 2 – Ratna Pawar was also examined by the prosecution on the point of motive as well as last seen. Her evidence is on similar lines as deposed by PW 1 – Vishwas. She has stated that the incident, took place in 2003; that there was a quarrel between the appellant and her mother – Alkabai, as a result of which, there was a scuffle between them, when her mother demanded Rs.200/- from the appellant. She has stated that the matter was settled between them. She has further stated that the appellant was residing in an adjoining room and was not talking to them. She has further stated that after 2 to 3 days, Alkabai told her that she was going to the bazar at Satana; that at about 5:00 p.m. the appellant was also present and giving fodder to the cattle; that after her mother left for the bazar, the appellant also followed her; that after her brother-Vishwas came home and asked about the mother, she disclosed to him that their mother (Alkabai) had gone to the bazar to Satana and that the appellant had also gone

behind her. She has further stated that thereafter her mother did not return till late night. She has further stated that they felt that she may have gone to her relatives and therefore, did not search for her that night; that on the next day, she enquired with the relatives and also searched for her, but she was told that after 2 to 3 days, that Alkabai's dead body was found in a well, when PW 1 – Vishwas went to start the motor pump of the well. She has further stated that pursuant thereto, the police arrived and started their investigation.

10. In her cross-examination PW 2 – Ratna has stated that at the time of the incident, she was about 8 years of age (when her evidence was recorded she was about 18 years). Although, suggestions were made to the said witness that there was no quarrel between her mother and the appellant on account of payment of Rs.200/-; that she did not report to her brother, the same have been denied by her.

11. PW 3 – Dr. Nitin Chitalkar is the doctor, who performed the postmortem of Alkabai. He has stated that on 11th October 2003,

he received a requisition letter from the police, for conducting the postmortem examination of Alkabai, at the spot; that pursuant to the said letter, he went to Sawki Phata, where the dead body of a female person i.e. Alkabai was lying outside the well, in the field. Accordingly, PW 3 – Dr. Chitalkar, conducted the postmortem on the dead body. He noted that the “Body was decomposed, wet with water. Signs of decomposition were all over the body. Tongue outside mouth, oozing from mouth and nostril present. Both upper limbs were tied to each other with cotton rope, strangulation marks around neck present. Bruises around strangulation mark present. Eyes were closed.” Accordingly, he opined that the cause of death was 'death due to strangulation'. The postmortem is at Exhibit – 32. The death was stated to be homicidal due to strangulation. Although the witness i.e. P.W.3 – Dr.Chitalkar was cross-examined, there is nothing brought on record to disbelief his testimony.

12. The question that arises for consideration is, whether the prosecution has been able to prove the circumstances i.e. the

circumstances of motive and last seen, in the facts of the present case, having regard to the evidence that has come on record. As noted above, both PW 1 – Vishwas and PW 2 – Ratna have alleged motive i.e. the demand of Alkabai of Rs.200/- from the appellant, which the appellant refused to give, pursuant to which, there was a quarrel between them. It is pertinent to note that both Vishwas and Ratna were minors, at the time when the alleged incident took place. Vishwas was about 13 years and Ratna was about 8 years of age. It is a matter of record that when the evidence of Vishwas and Ratna was recorded, they were about 22 and 18 years of age respectively. Thus, it appears that the evidence came to be recorded after almost 8 to 9 years. It appears from the evidence of the said witnesses, that they had seen the appellant follow Alkabai. Both the said witnesses do not talk about the appellant being last seen in the company of Alkabai i.e. being together. What is specifically deposed by the witnesses is that the appellant was seen ‘following’ Alkabai to the bazar. It is nowhere stated in the evidence of these witnesses, that they were together. Admittedly, the month and date is also not mentioned by either of the

witnesses in their evidence. Having regard to the time-gap between the appellant seen following Alkabai and finding of Alkabai's dead body in a well, after 2-3 days, the evidence of 'last seen' appears to be doubtful.

13. Admittedly, the dead body of Alkabai was found in a well after 2 to 3 days of the incident. No missing complaint was lodged by any person with respect to missing of Alkabai, in the interregnum. A perusal of the evidence of PW 3 – Dr. Chitalkar does not spell out, the approximate time when Alkabai was done to death; does not speak about the approximate time of death of Alkabai. In column 11 of the postmortem i.e. column of *rigor mortis*, it is stated as *rigor mortis* present. No questions asked by the prosecution, as to the approximate time of death.

14. Thus, it is difficult to come to a conclusion as to when Alkabai was done to death, in the light of the medical evidence that has come on record. In the present case, there is no close proximity

between the circumstance of alleged last seen and the approximate time of death, as stated aforesaid, in the light of the evidence adduced by the prosecution, thus making the evidence of last seen as weak and unreliable. The dead body is stated to have been found after 2 to 3 days after Alkabai went missing. Infact, in the facts of the present case, it is doubtful, whether it can be said that the appellant was last seen in the company of the deceased, considering that both, the appellant and the deceased were not seen together, but the appellant was allegedly seen following Alkabai to the bazar, a busy place. Thus, the evidence of last seen in the present case by itself cannot be said to be incriminating having regard to the evidence that has come on record.

15. The Apex Court in the case of *Nizam & Anr. v/s State of Rajasthan*⁷, held, that where the time gap between the last seen together and the discovery of the body of the deceased was long, the possibility of some other interventions during this period could not be ruled out. Where time gap between the last seen and time of death is

⁷ (2016) 1 SCC 550
N. S. Chitnis

long enough, as in the present case, then it would be dangerous to come to the conclusion that the accused is responsible for the murder. In such cases it is unsafe to base conviction on the “last seen theory” and it would be safer to look for corroboration from other circumstances and evidence that has come on record. The motive alleged by the prosecution, is that demand of money by Alkabai and refusal of the appellant to pay the same; Alkabai holding appellant’s neck and appellant asking Alkabai to marry him. The three reasons do not inspire confidence, as all are stated to be 2-3 days prior to the incident.

16. In *Anjan Kumar Sarma & Others v/s State of Assam*⁸, the Apex Court in para 23 has observed as under:-

“23. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.”

17. The learned Judge has also relied upon the abscondence of the appellant to convict him for the alleged offences. It is settled law that suspicion however strong cannot take the place of legal proof and as such, merely because the appellant was absconding for a few days cannot lead to a conclusion that the appellant is guilty of the offence.

18. Considering the evidence that has come on record, we are afraid, that the prosecution has not proved its case beyond reasonable doubt. The incriminating circumstances do not inspire confidence and as such are unsafe to be relied upon.

19. Having regard to what is stated aforesaid, we pass the following order:-

ORDER

- i) The Appeal is allowed;
- ii) The Judgment and Order dated 9th January 2014, passed by the learned Additional Sessions Judge, Malegaon in Sessions Case No.72 of 2011, convicting and sentencing the appellant, is quashed

and set aside;

iii) The appellant is acquitted of the offence, with which he is charged. The appellant is set at liberty forthwith, if not required in any other case. Fine amount, if paid, be refunded to the appellant.

20. Appeal is allowed and accordingly disposed of.

21. All concerned to act on the authenticated copy of this judgment.

GAURI GODSE, J.

REVATI MOHITE DERE, J.