



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 746 OF 2018

Sachin Shrikant Navgire
R/at : 691, Narayan Peth, Pune (At present
lodged in Yerwada Central Jail, Pune) ...Appellant

Versus

The State of Maharashtra
(At the instance of Vishrambaug Police
Station, District Pune) ...Respondent

ALONGWITH
CRIMINAL APPEAL NO. 947 OF 2011

Santosh Ramchandra Malbare, Indian
Inhabitant currently incarcerated at
Yerwada Central Pirson, Pune. ...Appellant

Versus

The State of Maharashtra
(Vishrambaug Police Station, C.R.No.
297/06) ...Respondent

Mr. Balwant Salunkhe a/w Ms. Rohini Kamble i/b Mr. Dipak Mane,
for the Appellant in APEAL/746/2018.

Mr. Veerdhawal Deshmukh a/w Mr. Rohin R. Chauhan i/b Mr. A.V.
Konde Deshmukh for the Appellant in APEAL/947/2011.

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

*CORAM : REVATI MOHITE DERE &
GAURI GODSE, JJ.
DATE : 18th OCTOBER, 2023*

JUDGMENT (PER : REVATI MOHITE DERE)

1. By these appeals preferred under Section 374 of the Criminal Procedure Code ('Cr.P.C'), the appellants have impugned the judgment and order dated 28th April, 2011 passed by the learned Additional Sessions Judge, Pune, in Sessions Case No. 317 of 2007, by which, the learned Judge was pleased to convict and sentence the appellants 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, to suffer rigorous imprisonment for two months;

-for the offence punishable under Section 394 of the Indian Penal Code, to suffer rigorous imprisonment for 5 years and

to pay fine of Rs. 1,000/- in default, to suffer rigorous imprisonment for one month;

-for the offence punishable under Section 450 of the Indian Penal Code, to suffer rigorous imprisonment for 2 years and to pay fine of Rs. 500/- in default, to suffer rigorous imprisonment for 15 days.

The aforesaid sentences were directed to run concurrently.

2. The prosecution case in brief is as under;

It is the prosecution case that one Shakuntala Dhavale (deceased) aged 72 years, was residing alone in Flat No.105, 106 Vishal Apartment, Sadashiv Peth, Pune. Shakuntala was running an STD booth at Omkar General Store, Sadashiv Peth, Pune and would visit the said booth wearing gold ornaments. On 17th November, 2006, the son and daughter-in-law of Shakuntala received a call from her neighbour – Smt.Abhyankar stating that the door of Shakuntala's

house was open and there was no movement seen inside the house and that the STD booth had also not been opened. Pursuant thereto, Shakuntala's son and daughter-in-law proceeded to the said flat and found pieces of glass bangles scattered on the floor in the passage and hall and the deceased was seen lying on the floor with both her legs and hands tied with katha rope. One red colour cloth was found thrust in Shakuntala's mouth and the gold ornaments worn by her were found to be missing. Accordingly, the Police were informed and Shakuntala was taken to Sasoon Hospital, where she was declared dead. Accordingly, Neeta Dhavale – daughter-in-law of deceased lodged an FIR alleging theft and murder of her mother-in-law i.e. Shakuntala Dhavale.

During the course of investigation, the appellants alongwith juvenile accused came to be arrested on 20th November, 2006. After investigation, chargesheet was filed as against the appellants in the Court of learned Judicial Magistrate, First Class. Since the offences were exclusively triable by the Court of Sessions,

the case was committed to the Sessions Court, Pune, for trial. As far as the third accused is concerned, a juvenile, chargesheet against him was filed in the Juvenile Court and he was tried by the Juvenile Court.

As far as the appellants are concerned, charges were framed as against them by the trial Court, to which, they pleaded not guilty and claimed to be tried. The defence of the appellants was that of total denial and false implication.

The prosecution, in support of its case, examined as many as 18 witnesses i.e. P.W.1- Smt. Neeta Uday Dhavale (PW-1), informant - daughter in law of the deceased; P.W.2 - Shri Shrikar Manohar Devlalkar, panch – to recovery of katha rope at the instance of appellant - Sachin; P.W.3 - Smt. Sayali Sachin Abhyankar, neighbour of the deceased; P.W.4 - Ajay Madhukar Dalvi – Panch to the Spot Panchanama; P.W.5 - Sachin Dinkar Abhyankar, neighbour of the deceased; P.W.6 - Dr. Ganesh Pandurang Pujari, the Medical officer, who performed the post mortem; P.W.7 - Kapil Anand Kulkarni, panch

– to recovery of some gold ornaments at the instance of appellant - Santosh; P.W.8 - Dagdu Suryabhan Selkar, panch – to the recovery of some gold ornaments at the instance of appellant - Santosh; P.W.9 - Sanjay Ramnaresh Mantri; P.W.10 - Smt. Lala Jayant Dusane, neighbour of the deceased; P.W.11 - Ms. Suchitra Ghansham Patil, Nayab Tahsildar who conducted the TIP; P.W.12 - Mahadev Ramchandra Vichare, Investigating Officer; P.W.13 - Deepak Ratilal Mehta, witness – to show that one galla in Saraswati Building was given to Surekha Malbare on rent; P.W.14 - Sarang Dattatraya Nerlekar, grandson of the deceased; P.W.15 - Basavraj Dharma Pale, watchman; P.W.16 - Vasant Ganpat More, Investigating Officer; P.W.17 – Eknath Subhash Parkhi, Government Approved Valuer and P.W.18 – Ashok Raghunath Jagdale, Investigating Officer.

Thereafter, the statements of the appellants were recorded under Section 313 of the Cr.P.C. The appellants did not adduce any evidence, nor did they examine any witnesses.

3. After hearing the parties, the learned Sessions Judge, Pune, convicted and sentenced the appellants as stated aforesaid in para 2.

4. Mr. Salunkhe and Mr. Deshmukh, learned Counsel appearing for both the appellants submitted that the prosecution has not proved the circumstances beyond reasonable doubt and as such, the impugned judgment and order of conviction cannot be sustained. They submitted that the only evidence *qua* the appellants is that of recovery of gold ornaments from both the appellants and in addition, a katha rope from the appellant i.e. Sachin and that the said evidence vis-a-vis recovery being suspicious, implicit reliance cannot be placed on the same. They submitted that the evidence of recovery suffers from several loopholes and as such, conviction based only on recovery evidence cannot be sustained.

5. Mrs.Shinde, learned APP, supported the impugned judgment and order and submitted that no interference was warranted.

6. Perused the evidence with the assistance of the learned Counsel for the respective parties. Admittedly, the prosecution case rests entirely on circumstantial evidence. Before we assess the evidence on record, it is apposite to bear in mind the five golden principles (Panchsheel) laid down by the Apex Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra***¹, which govern a case based on circumstantial evidence. Para 153 of the said judgment is reproduced hereinunder;

“153. (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. 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 Maharashtra 1973 2 SCC 793 where the 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.”

1 (1984) 4 Supreme Court Cases 116

(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.”

7. As noted above, the only evidence as against the appellant – Sachin i.e. accused No.2 is, recovery of gold ornaments and a katha rope; and as against appellant – Santosh i.e. accused No.1 is, recovery of some gold ornaments. The said gold ornaments recovered at the instance of the appellants, have been identified by P.W.1 – Neeta Dhavale, daughter-in-law of the deceased, as belonging to Shakuntala, however, not a single witness has stated that these were worn by her at the relevant time. The question that arises in the present case is, whether the circumstance of recovery has been proved by the prosecution beyond reasonable doubt and whether there is any evidence to suggest that the ornaments which were recovered at the

instance of the appellants, were worn by the deceased, at the time when she was done to death.

8. The fact that Shakuntala died a homicidal death is not in dispute. The question is whether the appellants are responsible for the same, having regard to the evidence that has come on record, so as to connect them with Shakuntala's death. The relevant witnesses, relied upon by the prosecution, with which, we are concerned, to prove recovery of gold ornaments and katha rope are the panch witnesses i.e. P.W.2 – Shrikar Devlalkar; P.W.4 – Ajay Dalvi; P.W.7 – Kapil Kulkarni; P.W.8 – Dagdu Selkar and P.W.9 – Sanjay Mantri. Before we consider the evidence of these witnesses, we propose to place on record the evidence of other witnesses.

9. P.W.1 – Neeta Dhavale, daughter-in-law of the deceased and complainant in her evidence has stated that she received a call from her neighbour – Smt. Abhyankar (P.W.3) that the door of her mother-in-law's flat was open; there were no movement in the house; and that the STD booth was not opened. Pursuant thereto, P.W.1 –

Neeta called on the landline number of her mother-in-law, however, no one picked up the phone. Accordingly, P.W.1 – Neeta and her husband came to the deceased's house, where they noticed that the said flat was not bolted; that when they entered the house, they found the footwear lying in the passage, pieces of glass bangles scattered on the floor and found Shakuntla lying on the floor, with her legs and hands tied with katha rope. They also found that her mouth was gagged with a cloth and the ornaments which she would normally wear, were not on her person. In the cross-examination, the said witness i.e. P.W.1 – Neeta has stated that her mother-in-law was having other ornaments, other than, what she would wear usually on her person. She has further admitted in her cross-examination that no theft of other valuable articles was found to be committed.

10. P.W.3 – Smt Sayali Abhyankar, neighbour of deceased Shakuntala, who informed P.W.1 - Neeta of the door being open and of no movements being seen has only stated in her evidence, what she saw on entering the house i.e. the deceased lying on the floor with her

hands and legs tied with a katha rope and that a cloth thrust in her mouth. P.W.3 – Smt. Abhyankar has not deposed with respect to the ornaments worn by the deceased at the relevant time.

11. Although, the prosecution has examined P.W.15 – Basavraj, to prove that appellant No.2 – Santosh was seen entering the building, abutting the building of the deceased, the said evidence by itself is not sufficient to point to his complicity. Infact, the appellant – Santosh has admitted going to the building abutting deceased's building, to do cable work. Admittedly, no witness has seen the appellant going to deceased's building.

12. Similarly, P.W.10 – Smt. Lata Dusane also a neighbour of Shakuntala has stated with respect to the cable connection in her house given by Prasad and Company on payment of cable charges. She has stated that the appellants used to come to collect the cable charges. Since there was nothing incriminating in her examination-in-chief, the said witness was not cross-examined.

13. It is the prosecution case that the said appellants would visit the building as cable operators and that, taking advantage of Shakuntala being alone, committed theft of her ornaments and murdered her. As noted above, there are no eye witnesses and hence the evidence of the aforesaid witnesses cannot be said to be incriminating. It is also not the prosecution case, that of the appellant accused were last seen in the company of the deceased. Thus, having regard to the aforesaid, the defence of the appellants, nothing turns on the Test Identification Parade conducted and the appellants being identified in the said TIP.

14. As far as recovery of katha rope and some ornaments at the instance of appellant - Sachin is concerned, the prosecution has examined P.W.2 – Shikar Dhavlalkar. The said witness is a witness to the recovery of katha rope at the instance of appellant - Sachin Navgire (Original Accused No.2). It appears from the evidence of the said witness that on 24th November, 2006, the said katha rope was

recovered from an under construction building at the instance of appellant - Sachin. The said witness has stated that the appellant – Sachin Navgire took them to the first floor of the said building and from that first floor there was a steel table and katha rope was over the said table. The said witness, in his cross-examination has admitted that when he went to the said building on 24th November, 2006, plastering work was going on i.e. on the day when katha rope was recovered. He has further admitted that the katha rope which was found was covered with mud and cement. In his cross-examination, the said witness has further admitted that the said katha rope shown to him i.e. 'Article - 10' did not contain mud or cement and that the katha rope is easily available in shops. It is, thus, evident that the katha rope, which was seized from an under construction building was easily accessible to one and all and as such, having regard to the admissions made by this witness, it is difficult to place implicit reliance on the said recovery i.e. of katha rope at the instance of appellant – Sachin Navgire.

15. It is also pertinent to note that the prosecution has examined P.W.9 – Sanjay Mantri, who was developing the property from where the recovery was effected, at the behest of the appellant – Sachin. He has stated that the building was under construction and the construction material was lying on the site, including katha rope. In the cross-examination, the witness has admitted that there were about 10 – 12 workers on site, at the relevant time.

16. As far as recovery of some gold ornaments is concerned, at the instance of appellant – Sachin, P.W.2 – Shrikar Devalalkar in his evidence has stated that again on 27th November, 2006, appellant - Sachin made a disclosure statement that he was ready to show the place where he has hidden the gold ornaments. Accordingly, the same was reduced into writing; after which, the appellant – Sachin took them to Shanivar wada via Appa Balwant Chowk. The appellant – Sachin asked the Police to stop the jeep near a tree and took them to an area having a barbed wire compound, from where he removed a stone lying there, dug the soil, and pulled out a packet from a tobacco

container, in which packet, two gold ear rings and two gold chains were found (Article Nos. 19, 20 and 21).

17. In his cross-examination, the said witness with respect to acting as a panch on 27th November, 2006 i.e. for recovery of the gold ornaments, has stated that he does not remember as to whether the same panch witness, who was present for the panchanama of 24th November, 2006, was present for the panchanama on 27th November, 2006. The said witness in his cross-examination has further admitted that the gold ornaments found in the tobacco pouch mentioned by him, was not before the Court and that it was correct to state that the articles – 19 to 21 i.e. the gold ornaments are not in the same condition, as seized. He has further stated that he does not remember whether lac seal was affixed on the articles after they were seized.

18. Considering the aforesaid evidence of recovery of katha rope and the gold ornaments at the behest of appellant – Sachin, it is difficult for us, to place implicit reliance on the said recovery.

19. As far as recovery of gold ornaments at the instance of appellant – Santosh (Original accused No.1) is concerned, the prosecution has examined P.W.7 – Kapil Kulkarni and P.W.8 – Dagdu Selkar. As far as P.W.7 – Kapil Kulkarni is concerned, he in his examination-in-chief has stated that on 24th November, 2006, he was called by Vishrambaug Police to act as a panch; that the appellant – Santosh disclosed that he wanted to make a statement and accordingly he made a statement that he had concealed articles and was ready to show the place where he had concealed the same; and that the same was reduced into writing. He has further stated that thereafter, the appellant – Santosh took the Police and the panchas to Huzurpaga Primary School where appellant – Santosh got down from the vehicle and took them inside the premises of Huzurpaga Primary School; that he took the Police and the panchas on the first floor of the school building; and that immediately after the place, where the school premises ends, there was a sign board of a shop, ‘Kajari’. He has further stated that the appellant – Santosh went to the said board and

took out a bundle from the said sign board and brought the said bundle on the first floor of the school; that the bundle was a green coloured bedsheet and when opened, gold ornaments i.e. gold bangles – Article 14 and patlya – Article 15 were found. Pursuant thereto, the said articles were seized. In his cross-examination, P.W.7 – Kapil has stated that when they reached at the gate of Huzurpaga school, he does not remember if any watchman was there at the gate or any student, in the school premises. He has stated that he cannot assign any reason as to why there is no mention of sign board of Kajari shop in the panchanama (Exhibit – 57) and that he does not remember whether the packet in which the ornaments were kept was sealed with lac or not.

20. P.W.8 – Dagdu Selkar is also a panch witness to the recovery of some of the gold ornaments, at the instance of appellant – Santosh. He has stated that the appellant -Santosh made a disclosure statement on 23rd November, 2006, pursuant to which, they went to the third floor of the Huzurpaga School by staircase; that the

appellant – Santosh unbolted the door, pursuant to which, they went inside; and that the appellant pulled out two gold rings wrapped in a paper. According to him, the said articles were seized under a panchanama. It is pertinent to note that as far as recovery effected on 23rd November, 2006 at the instance of appellant – Santosh is concerned, there is nothing to show that the said room from where the recovery was effected, belonged to whom or that the appellant – Santosh was staying in the said room. P.W.8 – Dagdu has admitted in his cross-examination, that the articles seized were not sealed. He has also admitted, that the Police had not made any enquiry with respect to the ownership of the room, in his presence.

21. Considering the evidence of P.W.7 – Kapil Kulkarni and P.W.8 – Dagdu Selkar, we find that their evidence is not free from suspicion and as such, cannot place implicit reliance on the said recovery evidence at the behest of appellant – Santosh.

22. It is also pertinent to note that P.W.13 – Deepak Mehta in his evidence has stated, that he was the Hon. Secretary of the

Huzurpaga School for about 8 years, and that shop No.3 in Saraswati Vilas Building was let out to Surekha Malbare and that she was paying rent for the said gala. This is the same gala from where the gold ornaments were allegedly recovered at the instance of appellant – Santosh. The evidence of this witness does not in anyway further the prosecution case, that the appellant was in sole occupation of the place, from where rings were recovered or in what way, the appellant – Santosh was related to Surekha Malbare. This witness has not even stated in his evidence that appellant – Santosh was staying in the said premises. Thus, the prosecution has failed to prove that the place from where some of the gold ornaments were seized, was rented out to the appellant – Santosh Malbare or that he was staying there. Not a single witness has deposed with respect to the same.

23. As noted above, there is also no evidence on record to show that the said ornaments i.e. recovered ornaments were worn by the deceased at the time of the incident.

24. Considering the aforesaid evidence on record and having regard to the fact that the conviction is essentially based on the recovery evidence which suffers from the infirmities, as spelt out hereinabove, it is difficult to implicit reliance on the same. Accordingly, the impugned judgment and order cannot be sustained and hence, the following order;

ORDER

i) Both the aforesaid appeals are allowed.

ii) The impugned Judgment and Order of conviction and sentence dated 28th April, 2011 passed by the learned Additional Sessions Judge, Pune, in Sessions Case No. 317 of 2007 is quashed and set aside and the appellants are acquitted of all the offences.

iii) The appellants be set at liberty forthwith, unless required in any other case.

iv) Fine amount if paid, be refunded to the appellants.

v) Appeals stand disposed of.

All parties to act on the authenticated copy of this order.

GAURI GODSE, J.

REVATI MOHITE DERE, J.