



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.1215 OF 2019

Pradeep s/o. Premnath Kawathe,
Age : 33 years, Occ. Nil,
r/o. Nalwadi, Tq.Omerga,
Dist. Osmanabad

..Appellant

Vs.

The State of Maharashtra

..Respondent

Mrs.S.G.Chincholkar, Advocate for appellant (appointed)
Mr.S.D.Ghayal, Addl. Public Prosecutor for the respondent

**CORAM : R.G.AVACHAT AND
NEERAJ P. DHOTE, JJ.
RESERVED ON : MARCH 06, 2024
PRONOUNCED ON : MARCH 13, 2024**

JUDGMENT (PER R.G.AVACHAT, J.) :-

The challenge in this appeal is to the judgment and order of conviction and consequential sentence passed by learned Addl. Sessions Judge, Omerga, Dist. Osmanabad, in Sessions Case No.14 of 2016. Vide the impugned judgment an order, the appellant was convicted for the offence punishable under Section 302 of Indian Penal Code and therefore, sentenced to suffer life imprisonment and directed to pay fine of Rs.5,000/- with default stipulation.

2. The appellant is behind the bars since 13.05.2016 till date. It appears that the appellant was represented by Legal Aid Advocate before the trial court. Before us as well, he was represented by an Advocate appointed by Legal Aid Services.

3. The facts, giving rise to the present appeal, are as follows:-

The appellant is resident of village Nalwadi, Tq.Omerga, Dist. Osmanabad. Kamlakar Kawathe (deceased) was also resident of the very village. It is the case of prosecution that Kamlakar played black magic. As a result whereof, the appellant could not find a match/life partner. The appellant, therefore, committed Kamlakar's murder at his cattle-shed with an assault on his head with stick by 02.30 a.m. on 13.05.2016. As a result of the assault, the stick was broken into two pieces; one remained by the side of the dead body of Kamlakar and the other piece was held by the appellant. The appellant, allegedly, made phone-call to his master (PW 6 - Shivram) and made extra-judicial confession. The appellant then went to the common bore-well in the village and publicly proclaimed (confessed) to have killed Kamlakar. The Police Patil of the village, in the meanwhile, had reported the matter to the concerned police station. A station-diary entry to that effect was

made. PW 2 – Motiram (brother of deceased) lodged the First Information Report (Exh.24) at the Police Station little past 09.00 a.m. of 13.05.2016. The Police Officer paid visit to the village. He drew the scene of offence panchnama (Exh.36). Inquest panchnama (Exh.40) too was conducted. The mortal remains of the deceased was removed for post-mortem examination. The clothes on the person of the deceased were seized under panchnama. The appellant was arrested. Blood stained piece of stick and the clothes on his person, were taken charge of. The seized articles were submitted to F.S.L. for analysis and report. Statements of the persons acquainted with the facts and circumstances of the case were recorded. Upon completion of investigation, the appellant was proceeded against by filing charge sheet.

4. Learned Judicial Magistrate, First Class, Omerga, Dist. Osmanabad, committed the case to the court of learned Addl. Sessions Judge, Omerga (trial court), for trial in accordance with law. The trial court framed Charge (Exh.9). The appellant pleaded not guilty. His defence was of false implication. According to him, thieves had come to the village on that night. The deceased might have been murdered by them.

5. The prosecution examined eight witnesses and produced in evidence certain documents to establish the charge. The trial court, on appreciation of the evidence in the case, convicted the appellant and consequentially, sentenced as stated above.

6. Heard learned counsel for the parties.

7. Learned counsel for the appellant would submit that the case was based on circumstantial evidence. Motive has not been proved. There was no electricity at the scene of the offence and at the common bore-well as well. The road leading to the cattle-shed of the deceased was rough. There is evidence to indicate that in the recent past, thieves had entered the village. On the given night as well, villagers sensed arrival of thieves. There were shouts in that regard. The appellant was arrested simply on suspicion. The police official, who carried the seized articles to F.S.L., was not examined. Learned counsel, therefore, urged for allowing the appeal.

8. Learned Addl. Public Prosecutor would, on the other hand, submit that the appellant made extra-judicial confession to his master (PW 6 Shivram) and even to some of the villagers. He was apprehended while armed with a blood-stained stick. The piece of stick and the clothes held by him bore blood stains of the blood-

group of the deceased. Learned Addl. Public Prosecutor would further submit that the extra-judicial confession made by the appellant to his master on cell-phone has been duly reinforced in view of the C.D.R. The same is supported by the certificate under Section 65-B of the Indian Evidence Act. According to learned Public Prosecutor, no interference with the impugned judgment and order is, therefore, warranted. He, ultimately, urged for dismissal of the appeal.

9. Considered the submissions advanced. Perused the evidence on record. Let us advert thereto and appreciate the same.

10. The case is based on circumstantial evidence. In the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116**, the Apex Court has observed thus :-

“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.

(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.”

11. It needs no mention that the motive plays an important role in the case based on circumstantial evidence. The prosecution is under obligation to establish motive. True, in some of the cases, motive may remain hidden.

12. In the case in hand, following circumstances were proposed to be established to bring home the charge:-

- (i) Motive;
- (ii) Extra-judicial confession;
- (iii) Arrest of the appellant armed with a piece of stick stained with blood of the blood-group of the deceased;
- (iv) Clothes on the person of the appellant borne blood stains of the blood-group of the deceased;

13. PW 1 - Dr. Dinkar conducted autopsy on the mortal remains of Kamlakar. He noticed, following four injuries on the person of the deceased:-

- 1) Partial fracture at occipital region, deep head injury size 12x6x3 c.m.
- 2) Left hand ankle and radius bone cut to injury with fracture.
- 3) Trauma of back side of ear and back.
- 4) Both reg of trauma with abrasion

In his opinion, the cause of death of Kamlakar was *"shock due to massive head injury due to assault"*.

In response to the questions put to him during cross-examination, he (PW 1) admitted that had the deceased been extended medical treatment immediately, he would have survived. The Medical Officer flatly denied that the head injury might have been caused due to fall from motor-bike. He, however, admitted that injuries noticed on the back and leg of the deceased might be possible due to fall from the motor-bike.

14. It is undisputed that the deceased met with homicidal death. The question is, whether the appellant is author thereof?

15. PW 2 – Motiram, brother of deceased, testified that by little past 02.30 a.m., PW 6 – Shivram and PW 7 – Ambadas came to his residence to tell him the appellant to have had informed Shivram on cell-phone, that he (appellant) killed Kamalakar at his cattle-shed. He (PW 2 – Motiram) along with some of the villagers visited the land of the deceased Kamlakar, to find him dead. He had suffered head injury. The broken piece of stick was lying nearby the deceased. It is further in his evidence that PW 7 – Ambadas told him that the another piece of broken stick was held by the appellant. It is further in his evidence that he, therefore, returned to the village and noticed the appellant sitting nearby bore-well. The appellant was armed with a blood-stained piece of broken stick. The evidence of PW 2 – Motiram further disclosed that about one and half years before the incident, the appellant had disclosed the village boys that the deceased was doing black-magic, due to which, his (appellant's) marriage was not settled.

16. The FIR (Exh.24) was lodged by PW 2 – Motiram. The contents therein reinforce his oral evidence before the court. His cross-examination, however, indicates that both Shivram and Ambadas were his nephews. The appellant was serving with Shivram on yearly remuneration. The appellant was financially poor. The

other questions in the form of suggestions, indicating the deceased to have had extra-marital relationship with wife of one of the villagers and that person was, therefore, annoyed with the deceased, have been denied. The evidence of PW 2 – Motiram is relevant only to the extent of setting the criminal law in motion. His evidence as regards the appellant to have made extra-judicial confession to Shivram and Ambadas, is hearsay. True, his evidence indicates that he saw the appellant armed with blood-stained stick-piece at the bore-well. We propose to advert to this piece of evidence little later.

17. Admittedly, the village Police-Patil had informed the concerned police station about the incident in the mid-night itself. PW 8 – Vilas, A.P.I., testified that the village Police Patil had informed on telephone about Kamlakar to have been murdered at his cattle-shed. A station-diary entry to that effect was made. On close scrutiny of the prosecution evidence, we find the said station-diary is not forthcoming. The evidence of PW 8 – Vilas further indicates that he immediately went to the village. He drew the scene of offence panchnama (Exh.36) in the presence of panchas. He then conducted inquest in the presence of panchas (PW 7 and one Sachin Kavate). Same indicates that both these documents came into being even before registration of the FIR. No explanation is forthcoming as to

why the information given by Police Patil was not treated as FIR. Be that as it may.

18. When PW 8 - Vilas had paid visit to the village, the informant (PW 2) must be presumed to have been there. It is still not known, as to why he lodged the FIR little past 09.00 a.m. When, according to the villagers, the appellant was present at the bore-well, it is not known, why PW 8 - Vilas did not take him into custody. On the contrary, the evidence of PW 8 indicates that he deputed separate Police-Party to overpower the appellant and bring him to the police station. Column 14 of the inquest panchnama is blank. The heading of column 14 is "*More information/suspicion (if any)*".

19. PW 3 - Dr.Vasant had examined the appellant to find no injury on his person. The certificate issued by him is at Exh.26. The appellant had, however, problem of breathlessness of respiratory system.

20. PW 4 - Sadhana was one of the villagers. It is in her evidence that she woke up in response to the shouts "*thieves arrived*". She, therefore, came out of the house. She went to the common bore-well with a pot. It was 02.30 a.m. One Mahadev Jamadar was also present near the bore-well to fetch water. It is

further in her evidence that the appellant came from the side of agricultural land. He was armed with a broken stick. The appellant stood there and proclaimed "*to have killed Kamlakar*". It is further in her evidence that she got afraid thereby and ran back to her residence.

21. We do not propose to rely on the evidence of PW 4 – Sadhana. She was an unmarried woman. It is unimaginable that after hearing shouts about thieves to have arrived in the village, and according to her, admittedly, the thieves had come to the village on 2-3 occasions in the past, she, on her own (alone) would come to the bore-well with a pot to fetch water by 02.30 a.m. True, according to her, about 22-25 villagers had gathered. Her evidence, however, indicating that no sooner she heard shouts regarding thieves to have arrived in the village, she, on her own, went to the bore-well, does not appeal to our conscious. It is, therefore, reiterated that we do not place reliance on the evidence of this witness. Necessary consequence thereof is that the so called extra-judicial confession loudly made by the appellant did not get proved by her evidence.

22. We have now evidence of PW 6 – Shivram, on the point of extra-judicial confession made by the appellant. His evidence

indicates that the appellant was serving with him on yearly remuneration. His evidence further indicates that the appellant made him phone call from cell-phone no.8806528403 to cell-phone no.9763436660 and informed to have committed murder of Kamlakar. It is further in his evidence that the appellant asked him to tell the same to the brother of the deceased so that the dead body of Kamlakar would be taken care of lest dogs may eat it. It is further in his evidence that he, immediately, visited PW 2 – Motiram at his house and related the same. It is further in his evidence that he returned to his house thereafter. This conduct of PW 6 that he returned to the house after such serious incident in the small village, is abnormal. More so, when he was Ex-Sarpanch of the village. His evidence further indicates that when the police van came to the village, he visited the spot near the water tank. He saw the appellant lying on the ground with stick in his hand.

It is not known as to why the appellant was lying on the ground. Was he not keeping well?

23. PW 5 – Sadhana testified that the appellant was standing on a heap of sand near the bore-well and proclaimed to have killed Kamlakar. The evidence of both these witnesses does not get reconciled.

24. Although PW 6 – Shivram testified about the phone-call and even gave details about the cell-phone numbers, it is not known, as to why the prosecution did not examine the Nodal Officer(s) of the concerned service providers, to establish the C.D.R. filed on record along with certificate under Section 65-B of the Evidence Act. It is not known as to how the trial court could admit these documents in evidence, without having been proved in accordance with the relevant provisions of the Evidence Act. Learned APP, therefore, could not be heard to say that the extra-judicial confession made by the appellant on phone-call to his master (PW 6 – Shivram) gets reinforced by C.D.R. on record. When the appellant, allegedly, made phone-call to Shivram by little past 02.30 a.m. and he (appellant) was there all along until overpowered by the police, it is surprising, as to why no cell-phone was found on his person for being seized under a panchnama.

25. PW 7 – Ambadas is witness to the scene of offence panchnama (Exh.36). According to PW 2 – Motiram (informant), it was Ambadas and Shivram, who had visited his residence to inform about the extra-judicial confession made by the appellant. Evidence PW 7 – Ambadas is, however, silent to state that he had accompanied PW 6 – Shivram to the house of PW 2 – Motiram to

relate him about extra-judicial confession. The record, however, indicates that while the evidence of PW 7 was being recorded, the appellant had collapsed before the court, an ambulance was summoned and he was rushed to the hospital for treatment.

26. True, the C.A. reports (Exhs.50 to 52) indicate that the blood group of the deceased was "A". The clothes on the person of the appellant and the piece of stick, allegedly seized from him, borne blood stains of the blood group "A". The Police Officer, who carried these articles to F.S.L., has not been examined. When the appellant was present in the field at early in the morning when the police visited, it is not known, as to why he was officially arrested by little past 09.30 a.m. If we accept the case of the prosecution as it is, it has to be assumed that the appellant continued to possess blood-stained stick from 02.00 a.m. until he was officially arrested under panchnama (Exh.45.). There is evidence of PW 6 - Shivram to indicate that the appellant was lying on the ground.

27. None of the prosecution witnesses testified that the appellant was obsessed with the fact of not getting a match/life partner on account the deceased to have played black-magic. Whatever evidence is there in that regard is hearsay. The appellant was just 29 years of age at the relevant time. His photographs

indicate that he was smart. We meant to say that there was nothing to indicate him to have any wrong with him not to find a suitable match/life partner. As such, the prosecution has failed to prove the motive.

28. On the question of extra-judicial confession, it has to be stated that same is a very weak piece of evidence. The evidence in that regard of Sadhna (PW 5) has already been disbelieved. We also do not propose to believe the evidence of PW 6 – Shivram in that regard, since the C.D.Rs. have not been duly proved. The appellant allegedly made extra-judicial confession on cell-phone and not personally during meeting between him and PW 6 – Shivram. The case of the prosecution that the appellant loudly proclaimed to have killed the deceased, does not appeal to conscious. Such a conduct probably occurs when a person is not keeping mentally well or is under influence of alcohol.

29. Photographs were snapped while the scene of offence panchnama (Exh.36) was drawn. Those have been admitted in evidence. The photographs indicate that the deceased was lying in his cattle-shed. He had suffered head injury. The broken piece of stick stained with blood was lying by his side. The Forest officer's

report, without examining him, does not establish the prosecution case that the another piece of stick, allegedly seized from the appellant, was part of the stick that was found beside the dead body. Admittedly, the incident took place by 02.30 midnight. The scenario appearing in the photographs indicate that it was not the place whereat, the deceased would sleep overnight. No bedding is noticed. His motorcycle is seen lying in the cattle-shed itself. Same indicates that there might have been a scuffle between the deceased and the assailant.

30. While scrutinising the police papers, we came across with a communication dated 17.06.2016, made by the Asstt. Police Inspector, Murum Police Station to the Medical Officer, Rural Hospital, Murum. Said communication was relating to asking for medical certificate of the appellant. It has been recorded in the said letter that there was quarrel between the appellant and the deceased. The deceased then gave kick on the chest of the appellant. The appellant complained chest-pain. The appellant has so stated at the Rural Hospital, Murum, in the early morning of 13.05.2016, i.e., no sooner he was taken into custody (unofficially). It appears that the Investigating Officer did not make investigation on the lines on which the appellant had made complaint/grievance to have been kicked on

his chest by the deceased. True, the Medical Officer (PW 3 - Dr.Vasant) had issued certificate on examining the appellant on 13.05.2016 itself. The certificate was, however, issued on 18.06.2016, i.e. on the next day of communication dated 17.06.2016 made by A.P.I. to the concerned Medical Officer. Said certificate indicates that the appellant had respiratory problem. He complained breathlessness. The Investigating Officer appears to have made no investigation to find as to why did the deceased happen to be at his cattle-shed at the dead of night, while it was not his place where he would sleep overnight. It is reiterated that the photographs on record indicate the motorcycle of the deceased to have been lying on the ground. In our view, the prosecution has not brought on record the genesis of the incident.

31. In short, the prosecution failed to establish the motive. The alleged extra-judicial confession is not relied on for the reasons given herein above. When the report of the incident was lodged immediately by the Police Patil of the village, the station-diary entry is not forthcoming. When the matter is reported to the Police Patil, he is presumed to be in the know as to how the incident occurred. The Police Patil has not been examined. It is not known as to why he did not inform the appellant to be the culprit. When PW 8 - Vilas,

A.P.I., visited the village pursuant to the report lodged by the Police Patil and the appellant being available in the village, he did not arrest him until little past 09.30 a.m. PW 2 – Motiram (informant) did not lodge the report immediately on arrival of the police in the village. The inquest panchnama and the scene of offence panchnama were drawn before registration of the FIR. The appellant's grievance that the deceased had assaulted on his chest with kick, appears to have not been inquired into. There might have been some substance in the claim of the appellant since the incident happened at the dead night at a place where at the deceased would not sleep overnight. Photographs and the scene of offence panchnama indicate the motorcycle of the deceased was lying on the ground. Same suggests that there might have been scuffle between the assailant and the deceased. The police official, who carried the seized article to F.S.L., has not been examined to establish the link.

32. It does not appeal to us that the appellant remained armed with the blood-stained stick from 02.30 a.m. until he was officially arrested at 09.00 a.m. Admittedly, he was medically examined before he was arrested. Same indicates that he had allegedly parted with the stick. All in all, the prosecution has failed

to establish each and every circumstance beyond reasonable doubt. Benefit thereof must go the appellant, who is behind the bars close to eight years.

33. For all the aforesaid reasons, interference with the impugned order of conviction and consequential sentence is warranted. Hence, the following order:-

(i) The appeal is allowed.

(ii) The order of conviction and consequential sentence dated 08.05.2018, passed by learned Addl. Sessions Judge, Omerga, Dist. Osmanabad, in Sessions Case No.14 of 2016, for the offence punishable under Section 302 of Indian Penal Code, is hereby set aside. The appellant is acquitted of the said offence.

(iii) The appellant be released forthwith, if not required in any other offence.

(iv) Fine amount paid by the appellant, if any, be refunded to him.

[NEERAJ P. DHOTE, J.]

[R.G. AVACHAT, J.]

KBP