

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

CRIMINAL APPEAL NO. 735 OF 2016

Raosaheb Damu Ghule,
Age 25 years, R/o Valvade,
Taluka Malegaon, District Nasik ... Appellant
(At present Nashik Road Central (Ori.Accused No.1)
Prison, Nashik)

Versus

1. The State of Maharashtra
(Through Vadner Khakurdi Police
Station), Taluka Malegaon, District
Nasik.

2. Bapu Barsu Ghule,
R/o. Valvade, Tal. Malegaon,
Dist. Nashik

... Respondents

Mrs. Aisha Mohammed Zubair Ansari a/w Ms. Nasreen Ayubi
for the Appellant

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

*CORAM : REVATI MOHITE DERE &
MANJUSHA DESHPANDE, JJ.
WEDNESDAY, 3rd APRIL 2024*

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

1 This appeal is directed against the judgment and order dated 28th September 2016 passed by the learned Ad-hoc Additional Sessions Judge at Malegaon, District Nasik in Sessions Case No. 83/2013, convicting the appellant, as under :

- for the offence punishable under Section 302 of the Indian Penal Code, to suffer imprisonment for life and to pay a fine of Rs. 10,000/-, in default, to suffer rigorous imprisonment (‘RI’) for three months;
- for the offence punishable under Section 201 of the Indian Penal Code to suffer RI for two years and to pay a fine of Rs. 1,000/-, in default, to suffer further RI for one month;
- Both the sentences were directed to run concurrently.

2 The prosecution case, in a nutshell is, that the deceased-Khandu, elder son of PW1-Bapu Barsu Ghule was

having an affair with the appellant's wife, pursuant to which, the appellant killed Khandu. According to PW1-Bapu (complainant), he saw his son-Khandu (deceased) and the appellant grazing sheep in the field of Tukaram Sonawane on 22nd April 2013; that Khandu and the appellant had decided to stay in the field along with the sheep at night; and that on the next day, when he went to the field and asked the appellant where his son-Khandu was, the appellant replied that he was not there since last evening i.e. since 22nd April 2013. It appears that thereafter, on the very same day, the dead body of Khandu was found in a well, entangled in a rope. Pursuant thereto, the villagers gathered on the spot and the dead body was removed. According to PW1-Bapu, he lodged an FIR as against the appellant alleging offence punishable under Section 302 of the Indian Penal Code.

During the course of investigation, statements of witnesses came to be recorded and thereafter, charge-sheet was filed in the said case before the Court of the learned Judicial

Magistrate, First Class No.1, Malegaon. Since the offence under Section 302 was exclusively triable by the Court of Sessions, the case came to be committed to the Court of Sessions for trial.

Accordingly, the learned Additional Sessions Judge framed charge as against the appellant on 12th March 2014, to which, the appellant pleaded not guilty and claimed to be tried. The defence of the appellant was that of false implication and denial. The prosecution examined 9 witnesses in support of its case. Thereafter, the learned Judge recorded the statement of the appellant under Section 313 Cr.PC and after hearing the parties, the learned Judge convicted and sentenced the appellant as stated aforesaid in para 1 herein-above.

3 Ms. Ansari, learned counsel for the appellant submitted that the prosecution had failed to prove the circumstances on record and the case as against the appellant beyond reasonable doubt. She submitted that infact, none of the

circumstances point to the complicity of the appellant in the alleged crime. She submitted that the evidence of PW1-Bapu Ghule, cannot be termed as last seen. She submitted that the prosecution has not proved recovery of the stone and seizure of the appellant's clothes by cogent and legal evidence and as such, the conviction of the appellant cannot be sustained.

4 Mrs. Shinde, learned A.P.P supported the judgment and order of conviction and sentence passed by the trial Court and submitted that no interference was warranted in the same.

5 We have heard learned counsel for the parties at some length and perused the evidence on record.

6 The prosecution, in support of its case, examined as many as 9 witnesses i.e. PW1-Bapu Barsu Ghule (complainant); PW2-Nandu Bhika Deshmukh (Panch to the spot panchanama); PW3-Sharad Digambar Sonawane (Panch to inquest panchanama); PW4-Sopan Hari Sonawane (Panch to seizure

panchanama of clothes of deceased); PW5-Ashok Sadashiv Deshmukh (Panch to seizure of stone); PW6-Amol Shravan TThakare (Panch to seizure of clothes of the appellant); PW7-Rajendra Pira Ahire, who removed dead body of the deceased; PW8-Haribhau Pandharinath Kolhe, the Investigating Officer; and PW9-Faizal Suleman Sohail Ahmed (Doctor who conducted post-mortem).

7 Admittedly, the prosecution case rests on circumstantial evidence. As far as homicidal death of Khandu is concerned, the same is not disputed by the learned counsel for the appellant. The fact that appellant died a homicidal death is proved by the prosecution. However, the question that arises for consideration, is whether the appellant is the author of the same. In this context, the prosecution has relied on the evidence of PW1-Bapu Ghule (father of the deceased Khandu), to prove motive as well as to show that the deceased was last seen with the appellant.

8 PW1 in his evidence has stated that the marriage of Khandu was fixed on 25th April 2013; that his son-Khandu would graze sheep alongwith the appellant; that on 22nd April 2013, his son Khandu and appellant were grazing sheep in the field of Tukaram Sonawane; that on 23rd April 2013 at about 6:30 a.m, he went to the field of Tukaram Sonawane, in order to take his son home for marriage, as Khandu (deceased) and the appellant were staying in the field alongwith sheep at night; that when he asked the appellant as to where Khandu was, the appellant replied that since last evening i.e. 22nd April 2013, Khandu was not there; that he had seen blood stains on the appellant's clothes and also marks of something being dragged and hence he followed the said marks, upto the well, where he saw the body of his son-Khandu entangled in a wire rope; that he raised an alarm, pursuant to which, the villagers gathered at the spot and the dead body of Khandu was removed from the well. According to PW1-Bapu, the appellant was suspecting the character of his wife and was under the impression that there was an affair between

Khandu and his wife, pursuant to which, the appellant had assaulted his wife.

A perusal of the cross-examination would reveal that there is a material omission brought on record, in the cross examination of this witness, with respect to him, having seen blood stains on the appellant's clothes. Infact, a perusal of the evidence of PW1 vis-a-vis the appellant being last seen in the company of the deceased appears to be doubtful, having regard to the evidence on record and the prompt response of the appellant, that he had not seen Khandu from the previous evening. In the facts, the evidence of PW1 does not inspire confidence, with respect to Khandu being last seen in the company of the appellant. In so far as motive is concerned, it is the prosecution case that the deceased-Khandu was to get married on 25th April 2013 and as such, a solitary statement of the said witness that the appellant was suspecting the character of his wife and was under an impression that there was an affair between the deceased and his wife, does not inspire confidence. Thus, the evidence of PW1-

Bapu vis-a-vis his son-Khandu being last seen in the company of the appellant and on motive, does not inspire confidence and as such, for want of cogent evidence, we do not find it safe to place implicit reliance on the said circumstances.

9 As far as recovery of stone at the instance of the appellant is concerned, there is nothing in the substantive evidence of PW5-Ashok Deshmukh to show that the appellant had produced the stone as disclosed by him in the memorandum statement, nor does the substantive evidence of PW5 reveal that there were any blood stains on the stone, although the Chemical Analyser's report shows that there were blood stains on the stone. Even otherwise, the stone was recovered from an open place accessible to one and all and as such, it is difficult to place implicit reliance on the said circumstance i.e. recovery of stone at the instance of the appellant. Neither does the evidence of PW8, the Investigating Officer, reveal that the stone produced by the appellant was blood stained.

10 As far as seizure of clothes of the appellant is concerned, it appears from the evidence of PW6-Amol Thakare that on 25th April 2013, when the appellant was arrested, the appellant's clothes were seized. The substantive evidence of PW6-Amol Thakare does not reveal that the clothes worn by the appellant were blood-stained nor does the evidence of PW8-Haribhau Kolhe, who seized the appellant's clothes under a panchanama, reveal that the appellant's clothes were blood-stained. The aforesaid circumstances are the only circumstances adduced by the prosecution to prove the complicity of the appellant.

11 The Apex Court in the case of *Sharad Birdhichand Sarda v. State of Maharashtra*¹, in para 153, has laid down the five golden principles (Panchsheel) which govern a case based only on circumstantial evidence. Para 153 of the said judgment is reproduced herein-under:

1 (1984) 4 SCC 116

“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.

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 Maharashtra² 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

2 (1973) 2 SCC 793

(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.”

12 We, having considered the evidence on record as stated aforesaid and keeping in mind the golden principles laid down in *Sharad Sarda's case (supra)*, are of the opinion that the prosecution has miserably failed to prove its case against the appellant, beyond reasonable doubt. Hence, we pass the following order :

ORDER

- i) The Appeal is allowed;
- ii) The impugned judgment and order dated 28th September 2016, passed by the Ad-hoc Additional Sessions Judge at Malegaon, District Nasik in Sessions Case No.83/2013, convicting and sentencing the appellant, is

quashed and set-aside;

iii) The appellant-Raosaheb Damu Ghule is acquitted of the offence, with which he is charged. The appellant be set at liberty forthwith, if not required in any other case.

iv) The fine amount, if paid, be refunded to the appellant.

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

MANJUSHA DESHPANDE, J. REVATI MOHITE DERE, J.