



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPEAL NO.335 OF 2023

Appellant : Mr. Manoj s/o Ramuji Gawade (In Jail)
Aged 39 years, Occupation : Service,
R/o Indiranagar,, Gadchiroli,
Tq. and Dist. Gadchiroli.

– Versus –

Respondent : State of Maharashtra,
Through Police Station Officer,
Police Station Aheri, District Gadchiroli.

Mr. R.R. Vyas, Advocate for the Appellant.
Mr. S.S. Doifode, A.P.P for the Respondent.

CORAM : **VINAY JOSHI AND M.W. CHANDWANI, JJ.**
RESERVED ON : **4th DECEMBER, 2023.**
PRONOUNCED ON : **5th JANUARY, 2024.**

J U D G M E N T : (Per M.W. Chandwani, J.)

The appeal challenges the judgment and order dated 24/03/2023 passed by the Sessions Judge, Gadchiroli in Sessions Case No.74 of 2021, thereby convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and to pay fine amount of Rs.10,000/-, in default, to suffer further punishment of simple imprisonment for a period of one month.

02] The case of the prosecution can be culled out as under :

The appellant was working in Police Department. He got married with informant Nilima Gawade (PW-5) on 31/05/2011. He was addicted to liquor and used to have frequent quarrels with his wife. The appellant along with his wife was residing in a rented premises at Aheri. At the relevant time, the appellant was deputed as a bodyguard of a Member of Legislative Assembly (M.L.A.). On the fateful day, i.e. on 23/06/2021, deceased -Maruti Warlu Mattami, father of Nilima Gawade and father-in-law of the appellant, had been to the house of the appellant. At about 08:00 p.m., the appellant returned to his house from duty. Nilima and the deceased were about to start their dinner. Nilima called the appellant to join them, on which the appellant told that he would join later. At that time, there was a quarrel between the appellant and the deceased. On being asked by the appellant as to why the deceased used to visit the house of the appellant, the deceased left the food and went outside the house. The appellant followed him and further quarrelled with the deceased in the porch of the house. Nilima brought both of them inside the house. The deceased was sitting on the sofa. The appellant again picked up quarrel with the deceased. A scuffle took place between them. Nilima was trying to save the utensils containing the food. The appellant took out 9 mm service pistol and tried to shoot at Nilima. The

deceased intervened. The appellant shot the bullet at the deceased. The bullet hit the chest of the deceased, whereby he fell on the sofa. The appellant also tried to shoot at Nilima, but she snatched the pistol from the appellant. Upon hearing Nilima's scream, neighbours gathered there. The deceased was moved to Sub-District Hospital at Aheri, where he was declared to be brought dead.

03] Nilima lodged report of the incident to Aheri Police Station. The police seized live cartridges, two empty cartridges and two damaged cartridges of 9 mm pistol, apart from the blood-smeared earth from the spot under panchnama. The appellant was arrested on 24/06/2021. On voluntary statement of the appellant, 9 mm service pistol, which he had concealed inside his house, came to be recovered. The pistol and all the rounds were sent to the ballistic expert and after completion of investigation, a charge-sheet for the offence punishable under Sections 302 and 307 of the Indian Penal Code came to be filed. As the appellant abjured the charge, he was tried. At the trial, the prosecution, in all examined 13 witnesses.

04] The learned Session Judge, after appreciating the evidence on record, convicted the appellant for the offence punishable under Section 302 of the Indian Penal Code and sentenced him to suffer imprisonment for life

and to pay fine of Rs.10,000/-, in default, to suffer further simple imprisonment for one month. The appellant is before us by way of this criminal appeal challenging the order of conviction.

05] We have heard Mr. R.R. Vyas, learned Counsel for the appellant and Mr. S.S. Doifode, learned Additional Public Prosecutor for the respondent/State.

06] Before the trial Court, the prosecution categorized its witnesses into various categories. First category was of eye witness - Nilima Manoj Gawade (PW-1), wife of the appellant. Second category is of panch-witnesses. The third was of medical evidence. In fourth category, the prosecution examined the neighbours, who heard the noise and gathered there, so also Ashish Maroti Mattami (PW-4), son of the deceased and brother of Nilima (PW-5). Last category of witnesses is of the police personnel.

07] The most crucial witness is Nilima (PW-5), the wife of the appellant. She has testified that the appellant is addicted to liquor. The appellant was the bodyguard to the M.L.A. He used to quarrel with her under the influence of liquor. On 23/06/2021, her father had been to the house of the appellant at Aheri. This witness arranged plates for dinner and asked the

appellant to come for dinner. But, the appellant told her that he would join later. There was a scuffle in between the appellant and the deceased on account of frequent visits of the deceased to the house of the appellant. The deceased left the dinner plate and went outside. The appellant followed him. Again quarrel took place between them in the porch of the house. This witness brought the deceased inside the house and asked him not to quarrel. The deceased sat on the sofa in the house. Again there was quarrel between the appellant and the deceased. They started beating each other. When the witness was removing the utensils containing food, she heard noise of bullet shots and found her father lying on the sofa. She noticed that the deceased received bullet injury. She threw the pistol/gun outside the house. Thereafter, she went outside the house. On the alarm raised by this witness, ambulance arrived and the deceased was moved to the hospital. In spite of cross-examination by the learned Additional Public Prosecutor, this witness did not support on the point of actual act of shooting by the appellant. In the cross-examination done by the appellant, the material, which has been brought on record, is that the appellant had removed the belt with the gun and kept it on the sofa and her father was lying on the three seater sofa.

08] The tenor of the evidence of Nilima, the sole eye-witness, shows that though she explained the circumstances in which the quarrel took place

between the appellant and the deceased, she did not support the case of prosecution on actual assault/shooting at the hands of the appellant. Perusal of evidence of Ashish Mattami (PW-4), brother of Nilima, reveals that Nilima had told him that the appellant shot the deceased. It appears that Nilima was in dilemma. On one hand, she lost her father and on other hand, if she deposes against the appellant, her own husband, he would be convicted and, therefore, Nilima did not support the case of the prosecution on actual shooting. Now, the case of the prosecution rests on circumstantial evidence.

09] Before analyzing the further factual aspects of the case, we may state that an offence can be proved by the circumstantial evidence also. The principal fact may be proved by certain inferences drawn from other proved facts. To put it differently, circumstantial evidence is not direct to the point in issue, but consists of evidence of various other facts which are so closely associated with the fact in issue, if taken together, form complete chain of circumstance from which the existence of the principal fact can be legally inferred.

10] In *Hanumant Govind Nargundkar v. State of M.P.*¹ relied by the learned Counsel for the appellant, it was observed thus:

1 (1952) 2 SCC 71 : AIR 1952 SC 343

‘10. ... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.’

11] A reference may be made to a latter decision of the Supreme Court in ***Sharad Birdhichand Sarda v. State of Maharashtra***². Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are :

“(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned ‘must’ or ‘should’ and not ‘may be’ 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.”

12] What is deduced from the above judicial pronouncements and from a line of the subsequent decisions of the Supreme Court which we need not mention here is that where a case rests squarely on circumstantial evidence, each circumstance has to be proved independently by cogent evidence. The chain of established circumstances must be complete in such a way that only inference of guilt of accused incompatible with his innocence is drawn. Keeping this principal in mind, we now revert to the facts of the present case.

13] From the evidence of Nilima, the wife of the appellant, the prosecution could clearly establish the presence of the appellant and the deceased on 23/06/2021 at the time of incident in the house of the appellant. Even the prosecution could succeed in proving the fact that there was quarrel thrice between the appellant and the deceased just before the incident. The appellant was having his pistol, which he kept on sofa.

14] To prove the scene of the offence, the prosecution sought to rely on the evidence of Kauser Azam Khan (PW-1) and Eknath Shankar Chandekar (PW-3). The tenor of evidence of these witnesses shows that on 24/06/2021 at about 09:30 am, they had been to the scene of occurrence, where they found a hole in three seater sofa. There was a hole in the three seater sofa and below that sofa, one empty cartridge case of 9 mm pistol was found. In another sofa, there was a hole through and through, and a damaged cartridge of 9 mm pistol was found stuck in the wall behind the sofa. There was a hole on the kitchen door and also a hole on the tile of the wall of the bathroom. After removing the said tile, an empty cartridge came to be extracted. Likewise, one empty cartridge of 9 mm pistol was found below the bed. The police also recovered 25 live cartridges of 9 mm pistol from the house of the appellant. Two empty cartridges and two damaged cartridges were also seized. Blood-smeared earth as well as blood-smeared sofa cover were seized.

15] We will now discuss the medical evidence. Perusal of version of Dr. Nitesh Madhukar Nakat (PW-10), it reveals that he conducted postmortem examination on the body of deceased Maroti Mattami and he noticed the following external injuries:

- i. Entry wound 0.5 cm x 0.5 cm mole over blackening line around it. On right side of chest 5 cm from sternum below 3rd rib 1 cm deep.

- ii. Exit wound 1.5 cm x 0.75 cm. 5 cm from mid auxiliary line on left side of the back within 1 cm deep.
- iii. Laceration on the left arm on back side 2.5 cm x 3.5 cm.
- iv. There was fracture of forth rib on the right side.

He also noticed the following internal injuries:

- i. Forth rib fracture on right side 1 x 1.5 cm near right clavicle area.
- ii. There was a small 0.5 x 0.5 cm injury to the left side of right lung.
- iii. There was 1 x 1 cm injury on left lung over lower lobe.
- iv. There was injury 1 x 1 cm injury seen on right atrium, mid septum and on left atrium on upper part of left ventricle.

16] This witness opined that the cause of death of the deceased was due to the injuries to left and right lung and heart caused by fire arm. The spot of incident and the evidence of Dr. Nitesh Nakat (PW-10) show that a bullet has passed through the body of deceased leaving entry and exit wound and other internal injuries mentioned above. Rather, the bullet entered the chest of the deceased and exited from back of the deceased.

17] It is to be noted here that, the pistol, which was seized in the crime, was subject to ballistic analysis. The ballistic report, which we find at Exh.41, reveals that empty cartridges (Articles 'C' and 'D'), which were recovered from the spot, have been fired through 9 mm pistol.

18] Thus, from the evidence referred above, it has been proved by the prosecution that on 23/06/2021, the deceased had been to the house of the appellant. On the night of that day, there was a quarrel between the appellant and the deceased thrice. The appellant and Nilima, wife of the appellant and the deceased were present at the time of incident. The deceased died just because of bullet injury on his chest, that he sustained during the course of the quarrel with the appellant. The said bullet was shot from the pistol of the appellant. Obviously, it was the service pistol of the appellant, which he used to possess with him being a bodyguard of the local M.L.A.

19] This takes us to the arguments of the learned Counsel for the appellant. According to him, the prosecution could not prove the recovery of pistol at the instance of appellant under Section 27 of the Evidence Act. According to him, the prosecution failed to prove one of the crucial link. Therefore, the chain of circumstances is not complete, so as to hold the appellant guilty of murder. Since, one of the links is missing and not proved, the appellant is entitled for benefit. To buttress his submissions, he seeks to rely on the decision of the Supreme Court in the case of ***Laxman Prasad Alias Laxman vs. State of Madhya Pradesh***³, wherein the Apex Court has held that if

one of the links is missing and not proved, in view of the settled law on the point, the conviction ought to have been interfered with. Taking help of this ratio, the learned Counsel for the appellant vehemently submits that the prosecution failed to prove recovery of weapon at the instance of the appellant. According to him, Kausar Khan (PW-1), who was panch to Spot Panchnama as well as memorandum panchnama, has specifically deposed that no statement of the appellant was recorded in his presence. Therefore, according to him, recovery at the instance of the appellant has not been proved by the prosecution. He submits that since the chain has not been completed, the appellant is entitled for the benefit of doubt and, therefore, the appeal be allowed.

20] *Per contra*, Mr. Doifode, learned Additional Public Prosecutor for the State submits that though Kausar Khan (PW-1) did not support the prosecution case on the point of voluntary statement, the other panch Eknath Chandekar (PW-3) has specifically deposed regarding voluntary statement made by the appellant. According to him, Kausar Khan (PW-1) as well as Eknath Chandekar (PW-3) have specifically deposed that the appellant showed the pistol at his house, which was lying below the bed. Therefore, there is ample evidence on record, which proves the recovery of pistol at the instance of the appellant.

21] We have perused the evidence of Kausar Khan (PW-1), who has not deposed about the voluntary statement of the appellant, but he has specifically deposed that he along with other panch and the appellant went to the house of appellant. The appellant went to the middle room and showed the pistol, which was kept below the bed. Eknath Chandekar (PW-3) in his evidence has deposed that the appellant stated to police that he was ready to show the weapon and some writings might have taken place. This evidence of recording of voluntary statement of the appellant is corroborated by Investigating Officer Shri Amol Narayan Thakur (PW-11). Further evidence of Eknath Chandekar (PW-3) shows that he had been to the house of the appellant along with the police and panchas, where the appellant showed the pistol, which was recovered. The evidence of Kausar Khan (PW-1) and Eknath Chandekar (PW-3) over recovery of the pistol is corroborated by the Investigating Officer Shri Amol Narayan Thakur (PW-11). Therefore, it cannot be said that recovery at the instance of the appellant has not been proved.

22] A perusal of the statement of the appellant recorded under Section 313 of the Code of Criminal Procedure reveals that when the incriminating circumstances were put to the appellant, he kept mum and offered no explanation as to how the deceased sustained bullet injury from his service pistol.

23] It is the settled law that when any fact is within the knowledge of the person, the burden of proving that fact is upon him. If the accused does not throw any light upon the fact, which was proved to be within his special knowledge in view of Section 106 of the Indian Evidence Act, such failure on the part of the accused may be used against the accused, as it may provide an additional link in the chain of circumstances.

24] A reference may be made to the decision of the Apex Court in the case of *Prem Singh Vs. State (NCT Delhi)*⁴, wherein it has been held in paragraph 56 of the decision as under :

“56. It is, of course, the duty of prosecution to lead the primary evidence of proving its case beyond reasonable doubt but, when necessary evidence had indeed been led, the corresponding burden was heavy on the Appellant in terms of Section 106 of the Evidence Act to explain as to what had happened at the time of incident and as to how the death of the deceased occurred. There had not been any explanation on the part of the Appellant and, as noticed, immediately after the incident, he attempted to create a false narrative of accidental drowning of the children. There had not been any specific response from the Appellant in his statement under Section 313 of Code of Criminal Procedure either.”

25] Once, it is proved that there was quarrel between the deceased and the appellant at the time of incident, there is nothing in the evidence of Nilima to suggest the presence of any third person. The presence of the appellant at the scene of occurrence is not in doubt. The deceased died due to bullet injury that too which was fired from the service pistol of the appellant. In these circumstances, the appellant owes a duty to throw light upon the facts, which are proved to be within his special knowledge in view of Section 106 of the Evidence Act. Then, it is for the appellant to offer an explanation as to how the deceased died with the bullet, which was shot from his service pistol. The appellant failed to offer any explanation. The non-explanation of this vital circumstance adds to the chain of circumstances.

26] Thus, in the present case, the circumstances, which have been proved by the prosecution, are that the deceased was in the house of the appellant; the quarrel took place between the appellant and deceased just before he was shot with a bullet; the said bullet was shot from the pistol of the appellant and recovery of the pistol at the instance of the appellant. These circumstances are seen together coupled with non-explanation of the appellant as to how the deceased died by bullet shot from his pistol, formed a complete chain and unerringly point towards the guilt of accused, which are consistent with only one hypothesis that, it is only the appellant, who shot the

bullet from the pistol which hit the deceased. All incriminating circumstances are found to be inconsistent with the innocence of the appellant.

27] To conclude, the learned trial Court appreciated the evidence in proper perspective by holding the appellant guilty of murder of deceased Maruti Mattami. The order of conviction of the learned trial Court is just, legal and proper. Therefore, it does not require any interference. The appeal is sans merit, deserves dismissal, which we direct.

(M.W. CHANDWANI, J.)

(VINAY JOSHI, J.)

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