



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

CRIMINAL APPEAL NO. 498 OF 2023

Shivram @ Narayan Devrao Pande,
Age : 54 years, Occu. Beggar,
R/o. Wadgaon, Tq. Pusad, Dist. Yewatmal.

...Appellant
[Orig. Accused No.1]

Versus

The State of Maharashtra

...Respondent

....
Mr. Anand V. Indrale Patil – Advocate [Appointed through Legal Aid] for
the Appellant
Mrs. Dr. Kalpalata Patil Bharaswadkar – Addl.PP for Respondent/State
.....

CORAM : R. G. AVACHAT
AND
NEERAJ P. DHOTE, JJ.

DATE OF RESERVING THE JUDGMENT : 13TH JANUARY, 2025
DATE OF PRONOUNCING THE JUDGMENT : 21ST JANUARY, 2025

JUDGMENT [Per : Neeraj P. Dhote, J.] : -

1. This Appeal under Section 374(2) of the Code of Criminal Procedure [hereinafter referred to as 'Cr.P.C.'] is directed against the conviction for the offence punishable under Section 302 of the Indian Penal Code [hereinafter referred to as 'IPC'] and sentence in the nature of life imprisonment with fine of Rs.11,000/-, in default, to suffer Rigorous Imprisonment for two years, recorded by the learned Additional Sessions Judge, Nanded, against the Appellant vide the Judgment and Order dated 09.01.2023 in Sessions Case No. 220/2019.

2. The Prosecution's case, as revealed from the Police Report, is as under : -

2.1. Informant – Digambarrao Ramrao Narwade was employed as a Labourer on the farm of one Satish Khandre at village Kothari, Tq. Kinwat, Dist. Nanded. Dhondiba Jyotiram Pilwan (hereinafter referred to as 'Deceased') and Shivram @ Narayan Devrao Pande (the Appellant) used to stay in the said agricultural field in the night. On 24.11.2018, the Informant returned to the field after grazing the goats. On that day, Chandrabhagabai and Chayabai were employed for plucking the cotton balls in the said field. They kept the bundles of plucked cotton in the room at the said field. The Appellant along with two unknown persons and one unknown woman were present in the field. The Appellant and the said woman and the deceased were talking while preparing Non-veg and consuming liquor. Chhayabai and the Informant went to their respective homes. On the next i.e. 25.11.2018, around 06:00 am, when the Informant came to the field, he noticed the deceased lying in an injured condition. There were injuries on his head, eyes, hands and the right leg. Pieces of bangles were lying near him. The Informant raised alarm and telephonically informed the said Satish Khandre. The Informant was told by Satish Khandre to inform the Police. The Informant went to the Kinwat Police Station and reported the incident to the Police. His statement was recorded in the form of First Information

Report and Crime came to be registered against the Appellant, two unknown persons and one unknown woman vide Crime No. 291 of 2018, for the offence punishable under Section 302 r/w 34 of the IPC.

2.2. The Police along with the Panchas reached the spot where the dead body was lying. The spot panchanama was prepared. The Police prepared the Inquest and referred the dead body for *post mortem*. After the *post mortem*, the dead body was handed over to the family of the deceased. During the investigation, the Police recorded the statements of the witnesses. The CDR and the SDR of the Cell Phone of the deceased were requisitioned. The Appellant came to be arrested on 14.01.2019. Two more accused came to be arrested during the course of the investigation. The clothes of the accused came to be seized. The cause of death was revealed as '*multiple head injuries with multiple fracture with haemorrhagic & neurogenic shock with alcohol intoxication*'. The seized articles were referred for the Chemical Analysis. The statement of the Informant and two witnesses were recorded under Section 164 of the Cr.P.C. On completion of the investigation, the charge-sheet came to be submitted against three accused persons including the Appellant.

3. On committal, the learned trial Court framed the Charge against the Appellant and two accused for the offence punishable under

Section 302 r/w 34 of the IPC, vide Exh. 06, to which they pleaded not guilty and claimed to be tried. To prove the Charge, Prosecution examined in all eleven (11) witnesses and brought on record the relevant documents collected during the course of investigation. After the Prosecution closed its evidence, the statement of the Appellant and the co-accused came to be recorded under Section 313 of the Cr.P.C. After hearing both the sides and appreciating the evidence on record, the learned trial Court convicted the Appellant, as referred to above in paragraph no. 1 and acquitted the two co-accused.

4. Heard learned Advocate for the Appellant and learned Addl.PP for the Prosecution. Scrutinized the evidence on record.

5. On the point of Homicidal death, it is submitted by the learned Advocate for the Appellant that, there is no serious dispute on the circumstance that the death of Dhondiba Jyotiram Pilwan was Homicidal. Learned APP submits that the evidence on record conclusively established the Homicidal death of the said person.

6. It is the case of the prosecution that, Dhondiba Jyotiram Pilwan, husband of PW4 – Chandrabhaga Dhondiba Pilwan, met with an Homicidal death. To establish the Homicidal death, the relevant evidence would be that of PW1 – Raju Shivling Pillewad, PW2 –

Digambar Ramrao Narwade, PW8 – Dr. Sana Mehrin d/o Magdoom Mohioddin and PW11 – Vijaykumar Kamble, API.

7. The evidence of PW2 – Digambar Ramrao Narwade shows that he was working as Labourer in an agricultural field situated in village Kothari. He was knowing the deceased Dhondiba Jyotiram Pilwan. On 25.11.2018, at about 06:00 am, when he went to the said agricultural field, he saw Dhondiba lying in an injured condition with injuries on his head, hands, eyes and right leg. He informed the Police about the same and the Police came on the spot. The evidence of PW11 – Vijaykumar Kamble, the API, shows that, he was informed about the incident of murder in the agricultural field. He made necessary Station Diary Entry and proceeded on the spot with the staff where PW2 – Digambar Ramrao Narwade was present and he identified the dead body. He called the Panchas and prepared the spot panchanama and the Inquest, and referred the dead body for the *post mortem*. The broken pieces of wood, pieces of bangles, blood stained clothes and the empty plastic balloon for carrying country-made liquor were found on the spot. The evidence of PW1 – Raju Shivling Pillewad shows that, he was a Public Servant working in Municipal Council, Kinwat. On the request of the Police, he acted as the Panch for the spot panchanama and the Inquest, which are at Exhs.24 and 25, respectively. He deposed that the spot was the field in village Kothari where a dead body of male person

was lying with the injuries on the head. The evidence of these witnesses corroborate each other's evidence.

8. There is medical evidence of PW8 – Dr. Sana Mehrin d/o Magdoom Mohioddin, who was the Medical Officer at the Sub-District Hospital, Gokunda, Tq. Kinwat, Dist. Nanded, from April-2018 till 2019. On 25.11.2018, when she was on duty, dead body of Dhondiba Jyotiram Pilwan was received from the Kinwat Police Station for *post mortem*. She performed the *post mortem* and found the following external and internal injuries on his person.

External Injuries : -

- 1] *Rigor mortis was seen at the lower limbs and upper limbs of the dead body.*
- 2] *Both external auditory canals were stained with blood clotting.*
- 3] *Both the nostrils were having clotted blood. Left eye was contused and swollen.*
- 4] *Lacerated wound was present on parietal area size 6 cm. X 0.8 cm. with irregular margin.*
- 5] *Lacerated wound was present at right frontal area size 2.5 cm X 0.4 cm. X 0.2 cm oblique with irregular edges.*
- 6] *Lacerated wound over upper left occipital area size 3 cm. X 0.5 cm. X 0.2 cm oblique with irregular margin.*
- 7] *Lacerated wound at middle left occipital area size 2 cm X 0.5 cm. X 0.2 cm. horizontal with irregular margin.*
- 8] *Lacerated wound at lower left occipital area size 2 cm. X 0.5 cm. X 0.2 cm. horizontal with irregular margin.*
- 9] *Contusion over left periorbital area – size 4 cm X 2 cm.*

Internal Injuries : -

- 1] *Communitated fracture at left temporo occipital area of skull.*
- 2] *Depressed fracture at parietal area of skull. The external injuries on upper left occipital area and at middle left occipital area correspond to the injury No.1 on the skull i.e. communitated fracture at left temporo occipital area.*
- 3] *The external injury of lacerated wound at lower left occipital area was corresponding with depressed fracture at parietal area of skull.*

8.1. The *Post mortem* Report at Exh. 63 and the Certificate of Final Cause of Death at Ex. 64, prepared by this witness, are brought on record. On *post mortem*, she found the cause of death as '*multiple head injuries with multiple fracture with haemorrhagic & neurogenic shock with alcohol intoxication*'. Her further evidence shows that the death was unnatural and Homicidal. According to this witness, the said injuries were possible by use of the sticks. The fracture injury like the one on frontal region was possible due to fall on the hard and blunt surface under the influence of liquor.

9. All the above referred witnesses were cross-examined by the defence. Nothing fatal for the prosecution was brought on record in the cross-examination in respect of the Homicidal death. The circumstance that Dhondiba Jyotiram Pilwan died a Homicidal death, is established.

10. The another circumstance brought on record by the Prosecution is that the Appellant was lastly seen with the Appellant. It is

submitted by the learned Advocate for the Appellant that, the Appellant's conviction was mainly on the testimony PW2 – Digambar Ramrao Narwade and PW4 - Chandrabhaga Dhondiba Pilwan. The last seen circumstance cannot be accepted and is liable to be discarded. On the other hand, it is the submission of the learned APP that, from the testimony of the said two witnesses, it is established by the Prosecution that the deceased was seen lastly in the company of the Appellant before his death.

11. If we go through the evidence of PW2 – Digambar Ramrao Narwade, the labourer working in the agricultural field, and PW4 - Chandrabhaga Dhondiba Pilwan, the wife of the deceased, respectively, it goes to show that on 24.11.2018, PW4 - Chandrabhaga Dhondiba Pilwan and PW6 – Chayabai Govindrao Pitlewar were engaged for plucking cotton balls in the said agricultural field of Satish Khandre and the deceased, the Appellant, two unknown male persons and one woman were present in the agricultural field. After plucking the cotton balls and keeping them in the room at the agricultural field, they left for their respective homes. In the morning of the next day, Dhondiram Jyotiram Pilwan was found dead in the said agricultural field. PW2 – Digambar Ramrao Narwade informed the Police and lodged report against the Appellant, two male persons and one woman that, they committed Murder of Dhondiba Jyotiram Pilwan.

12. Though Prosecution examined PW6 – Chayabai Govindrao Pitlewar, who was the niece of the deceased and PW4 – Chandrabhaga Dhondiba Pilwan, and was engaged to pluck the cotton balls in the said agricultural field, her evidence shows that, she did not know the accused persons, however, she saw them while they stayed with her aunt. Her evidence shows that, she identified the accused persons as the Police had shown them to her. The evidence of PW6 – Chayabai Govindrao Pitlewar is, therefore, of no assistance in establishing the identity of the accused.

13. The above discussed evidence of PW2 – Digambar Ramrao Narwade and PW4 – Chandrabhaga Dhondiba Pilwan clearly shows that it was not only the Appellant alone who was seen with the deceased but there were other two male persons and one woman in the company of the deceased. Their evidence goes to show that the said time was around 05:00 p.m. The dead body was noticed in the early morning on the next day. The medical evidence do not show the time of death, however, the Medical Officer in her evidence deposed that, all the injuries were caused within about 12 hours from the examination. The *post mortem* examination as seen from the evidence of the Medical Officer was performed between 12:00 pm and 01:00 pm on 25.11.2018 i.e. on the next day of last seen together. If we go by this evidence, it is

seen that the injuries would have been caused in the midnight between 12:00 and 01:00 am and so there is gap of 7 hours between causing the injuries and last seen together. The other two male accused who were charge-sheeted and tried along with the Appellant, came to be acquitted by the learned trial Court vide the impugned Judgment and Order. Undisputedly, there is no Appeal against their acquittal. We find substance in the submissions of the learned Advocate for the Appellant that, the learned trial Court heavily relied upon the portion marked from the statement u/s 161 of Cr.P.C. of PW9 – Janabai Narayan Metkar, to convict the Appellant.

14. The evidence of PW9 – Janabai Narayan Metkar shows that she was begging for alms after the death of her husband. She visited village Kothari for begging the alms. As she did not support the case of prosecution, she was cross-examined by the learned APP. Except the portion marked in her previous statement, nothing has come in her substantive evidence for establishing the Charge. It is needless to state that the previous statements can be used for the purpose of omissions and contradictions and it cannot take the place of substantive evidence. Her evidence shows that, due to poor vision, she was unable to identify the accused persons. True it is that under the settled position of law the evidence of witness, who did not support the prosecution, to the extent it supports the prosecution can be taken into consideration. However,

nothing of that sort could be elicited in the cross-examination of PW9 – Janabai Narayan Metkar done by the Prosecution.

15. It is clear from the above referred evidence that, it was not only the Appellant alone who was seen in the company of the deceased in the evening prior to the death. There were other two male persons and one woman (PW9 – Janabai Narayan Metkar). When the deceased was lastly seen in the company of three persons and the Appellant, in absence of any other evidence, the last seen circumstance cannot be separated and used only against the Appellant. In the light of the above discussion, the circumstance of last seen cannot form the basis to hold that the Charge was established against the Appellant.

16. The other circumstance relied upon by the Prosecution is that of seizure of mobile of deceased. It is submitted by the learned Advocate for the Appellant that the evidence on record do not establish that the mobile phone of the deceased was seized from the possession of the Appellant. The witness examined by the Prosecution that she purchased the mobile of the Deceased from the Appellant is unreliable and cannot be taken into consideration. It is submitted by the learned APP that the evidence on record shows that the Appellant sold the mobile of deceased to PW10 – Parvatabai Ramji Kale, which came to be seized during the course of the investigation.

17. The evidence of PW11 – Vijaykumar Kamble, the API, shows that, during the course of investigation, the mobile phone of the deceased was seized from the possession of one Mr. Sudharkar Khude, the resident of Adilabad. The evidence of PW5 – Shivaji Dnyandev Mirase shows that, on 19.12.2018, the Police seized the article 'N' mobile phone from Sudhakar Khude in the Rural Police Station, Adilabad, under the Panchanama at Exh. 48. The said person Sudhakar Khude is not examined as the witness. The evidence of PW10 – Parvatabai Ramji Kale shows that, she purchased the said mobile phone for Rs. 200/- from a beggar. Though PW10 – Parvatabai Ramji Kale in her evidence deposed that the said beggar was the Appellant who was the son of her maternal uncle, the said evidence was an omission in her previous statement recorded by the Police. It is a vital omission. Further, she admitted that, she did not prepare any document in writing in respect of the purchase of the said mobile phone for Rs. 200/-. We, therefore, find merit in the contention of the learned Advocate for the Appellant that the evidence of PW10 – Parvatabai Ramji Kale did not establish that she purchased the article 'N' mobile phone from the Appellant.

18. The evidence of PW4 – Chandrabhaga Dhondiba Pilwan, who was the wife of the deceased, shows that the said mobile phone

article 'N' was shown to her and she identified the same to be that of her deceased husband. Her evidence nowhere shows as to on what basis she identified the said mobile phone as that of her deceased husband, in absence of any special or specific identification on the said phone. Admittedly, neither there is any documentary evidence brought on record by the Prosecution to show that the said mobile handset was that of the deceased nor any identification exercise by mixing article 'N' phone with the similar mobile phone, was undertaken for identification of the same by PW4 - Chandrabhaga Dhondiba Pilwan. Even if for the sake of argument it is accepted that the said mobile phone was that of the deceased, the evidence on record do not conclusively establish that it was in the possession of the Appellant and he sold the same to PW10 – Parvatabai Ramji Kale.

19. The evidence of PW3 – Kishan Rama Kadam, who was the Panch for the seizure of clothes of the acquitted accused. His evidence shows that the said clothes were kept on the table in the Police Station. The evidence of PW7 Poshatti Linganna Kamble, who was working as the Watchman in the Godown near the spot of incident, shows that, on noticing the crowd behind the godown, he saw the dead body and informed PW4 – Chandrabhaga Dhondiba Pilwan. He was unaware as to what incident had taken place.

20. The other evidence is in the nature of Chemical Analysis Report [hereinafter referred to 'CA Report'] in respect of the articles sent for the Chemical Analysis. The said Reports are at Exhs. 91 to 94. On going through the said CA reports, it is seen that they are in respect of the viscera, articles collected from the spot, clothes of the deceased and the blood of the deceased. They are not in respect of the clothes of the Appellant, which were referred for Chemical Analysis, vide letter 'Exh.90' and recorded as Exhs. 'E-1' and 'E-2'. Therefore, it is clear that there is no incriminating evidence in the nature of CA reports against the Appellant.

21. The evaluation of the evidence on record discussed above do not form a complete chain, which gives rise to the conclusion that it was the Appellant who was the author of the Crime. We need not burden this Judgment by quoting well settled principles in respect of the circumstantial evidence, which are laid down by the Hon'ble Apex Court right from the Judgments in *Hanumant v. The State of Madhya Pradesh*, MANU/SC/0037/1952 and *Sharad Birdhi Chand Sarda v. State of Maharashtra*, MANU/SC/0111/1984 and the subsequent Judgments. The circumstances of Appellant lastly seen together with the Deceased and seizure of mobile phone of Deceased from the Appellant are not conclusively established so as to draw a conclusion that the Appellant was the perpetrator of the Crime, though the Homicidal death of

Dhondiba Jyotiram Pilwan is established. The other circumstances, as discussed above, are also not conclusive in nature so as to uphold the conviction of the Appellant for the said Homicidal death of Dhondiba Jyotiram Pilwan. In this view of the matter, the conviction and the sentence awarded by the learned trial Court to the Appellant, needs to be quashed and set aside. Hence, the following order is passed.

ORDER

- [i] The Criminal Appeal is allowed.
- [ii] The conviction and sentence recorded by the learned Additional Sessions Judge, Nanded, against the Appellant vide the Judgment and Order dated 09.01.2023 in Sessions Case No. 220/2019, for the offence punishable under Section 302 of the IPC, are quashed and set aside.
- [iii] The Appellant is acquitted of the offence punishable under Section 302 of the IPC in Sessions Case No. 220/2019.
- [iv] The Appellant be released forthwith, if not required in any other case.
- [v] The R&P be sent back to the learned Trial Court.
- [vi] The fee of the learned Advocate Mr. Anand V. Indrale Patil appointed through Legal Aid to represent the Appellant is quantified at Rs.12,000/- [Rupees Twelve Thousand], to be paid by the High Court Legal Services Sub-Committee, Aurangabad.

[NEERAJ P. DHOTE]
JUDGE

[R. G. AVACHAT]
JUDGE