



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

CRIMINAL APPEAL NO. 734 OF 2023

Suresh Suklal Mahajan
Age: 53 years, Occu.: Labour,
R/o Saptshrungi Colony, Jalgaon,
Dist. Jalgaon

..APPELLANT

VERSUS

State of Maharashtra
Through MIDC Police Inspector,
Jalgaon, Dist. Jalgaon

..RESPONDENT

....
Mr. B.R. Waramaa, Advocate for appellant
Mr. N.S. Tekale, A.P.P. for respondent - State
....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**
RESERVED ON : 08th JANUARY, 2025
PRONOUNCED ON : 15th JANUARY, 2025

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

1. The challenge in this appeal is to the judgment and order of conviction and consequential sentence passed by the Court of Additional Sessions Judge, Jalgaon ('trial Court') in Sessions Case, No. 255 of 2021 on 12th July, 2023. Vide the impugned order, the appellant has been convicted for the offence of murder, and therefore, sentenced to suffer imprisonment for life and to pay a fine of Rs.5,000/- with default stipulation.

2. The facts in brief giving rise to the present appeal are as follows :-
Vandana (deceased) would reside alongwith her son, Dipak (PW 4) and his wife, Amruta as a tenant in one room premises belonging to PW 1

– Ramesh. Vandana was a vegetable vendor. She was acquainted with the appellant. The acquaintance developed into emotional relationship. The appellant would frequently visit the house of Vandana. The son of the deceased deposed that the appellant and deceased would reside as husband and wife for many years. There is, however evidence that the appellant was already married and blessed with children. He has parents as well. His permanent residence was somewhere else.

In the early morning of 27th August, 2021, Vandana was found dead in her room. On the previous evening i.e. by little past 07:00 p.m. Vandana and the appellant were seen together. They had been to the house of PW 3 - Ramlal to get their money back. It was a sum of Rs.50,000/-. According to the prosecution, there used to be frequent quarrels between the appellant and the deceased. The appellant, therefore, committed her murder.

3. The First Information Report ('F.I.R.') (Exh.17) was lodged by the landlord, PW 1 – Ramesh. A crime vide C.R. No. 567 was, therefore, registered. The appellant was arrested. Crime scene panchanama (Exh.64) was drawn. Mortal remains of Vandana was subjected to inquest and autopsy as well. Before arrest, the appellant too was subjected to medical examination. Clothes on the person of both, the appellant and the deceased, were taken charge of. The articles found at the crime scene were also seized. All the seized articles were sent to R.F.S.L., Nashik. Statements of the persons acquainted with the facts and circumstances of the case were

recorded. On completion of investigation, the appellant was proceeded against by filing the charge-sheet.

4. The trial Court framed the charge (Exh.8). The appellant pleaded not guilty. His defence was of total denial.

5. To bring home the charge, prosecution examined thirteen witnesses and produced in evidence certain documents. On appreciation of the evidence in the case, the trial Court convicted and consequently sentenced the appellant as stated above.

6. Learned counsel for the appellant would submit that the case is based on circumstantial evidence. The room in which the deceased would reside, was located on the ground floor. The three adjoining rooms had also been occupied by three different tenants. The upstairs premise was also in occupation of someone else. None of the occupants of those premise had seen the appellant in the room of the deceased on the fateful night. According to him, the burden of proof remains static. It is for the prosecution to bring home the charge beyond reasonable doubt. No motive has been proved or even alleged. The substantial evidence, in the nature of recovery of a trouser and knife at the instance of the appellant was from an open space, which was accessible to one and all. The C.A. report (Exh.44) of those articles do not conclusively indicate them to have blood stains of blood group of the deceased. Learned counsel relied on the following two authorities to ultimately urge for allowing the appeal :-

- I) ***Mulak Raj & Ors. Vs. State of Haryana, 1996 AIR (SC) 2868***
- II) ***Harish Shamsundar Chhangani & Ors. Vs. State of Maharashtra & Ors., 2016 All.M.R.(Cri.) 5290***

7. Learned A.P.P. would, on the other hand, submit that there was voluminous evidence to indicate the appellant did have extra marital relationship with the deceased. Both of them would reside together for long. A day before the incident, the appellant and the deceased were last seen together. According to learned A.P.P., it is therefore for the appellant to explain when did he part with the company of the deceased. He offered no explanation. Learned A.P.P. then adverted our attention to the postmortem report (Exh.85) and opinion of the Medical Officer that time of death was within twenty-four hours to thirty-six hours, within which the appellant and the deceased were together. He then brought to our notice the arrest panchanama of the appellant (Exh.107) to indicate there was blunt trauma on his chest (injury). Learned A.P.P. meant to say that there must have been resistance on the part of the deceased. He then adverted our attention to the Call Data Records (CDRs) of the cell phone of the appellant to indicate that on the fateful night his location was at Rameshwar Nagar, whereat the deceased would reside. According to learned A.P.P. it is, therefore, for the appellant to come clean and explain the incriminating circumstances appearing against him. He relied on the judgment of the Apex Court in case of ***State of Rajasthan Vs. Kashi Ram, (2006) 12 SCC 254*** and particularly the following observations made therein :-

“17. We have been taken through the entire evidence on record. The medical evidence on record clearly proves that the death of Kalawati and her two minor daughters was homicidal caused by strangulation. The cause of death was asphyxia. It is also established on record that the deceased was last seen alive in the company of respondent on 3-2-1998 at her house. The prosecution has also successfully established the fact that the house was found locked on the morning of 4-2-1998 and continued to remain locked till it was opened after removing the door on 6-2-1998. Throughout this period the respondent was not to be seen and he was arrested only on 17-2-1998. Neither at the time of his arrest, nor in the course of investigation, nor before the Court, has the respondent given any explanation in defence. He has not even furnished any explanation as to where he was between 4-2-1998 and 17-2-1998. It has been argued on behalf of the prosecution that this most important circumstance has been completely ignored by the High Court. The case of the prosecution substantially rested on this circumstance. The respondent was obliged to furnish some explanation in defence. He could have explained where he was during this period, or he could have furnished any other explanation to prove his innocence. Counsel for the respondent on the other hand, contends that though the respondent furnished no explanation whatsoever, there is evidence on record to prove that he had gone to attend Suratgarh fair with his family members. A question, therefore, arises whether the presumption under Section 106 of the Evidence Act may be drawn against the respondent in the facts of the case, since the facts as to where he was during the relevant period and when he parted company with the deceased, were matters within his special knowledge the burden of proving which was cast upon him by law.

23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional

link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., AIR 1960 Mad 218.

24. There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since, the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt.”

According to learned A.P.P., the trial Court has rightly convicted the appellant. The evidence on record warrants no interference with the impugned order. He, therefore, urged for dismissal of the appeal.

8. Considered the submissions advanced. Perused the judgment impugned herein and the authorities relied on. Needless to mention, each criminal case has to be decided on the facts and circumstances appearing therein. True, principle of law emerged from the judgment of the Apex Court or the Bench of co-equal strength of the High Court would be binding on this Court. Learned counsel for the appellant was not right in submitting that the judgment of this Court relied on by him has no precedential effect of the Bench of co-equal strength, is incorrect. Be that as it may.

9. Since the case is based on circumstantial evidence, we first need to have reference to the judgment of the Apex Court in case of ***Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622***, wherein it has been observed thus :-

“(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 merely ‘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.”

10. In the case in hand, the following circumstances are relied on to bring home the charge :-

- (I) Homicidal death;
- (II) Extra-marital relationship between the appellant and the deceased;
- (III) Last seen together;
- (IV) Recovery of knife and trouser of the appellant, stained with blood;
- (V) Failure of the appellant to explain the incriminating circumstances appearing in the evidence against him;

(I) Homicidal death :-

11. Vandana (deceased) met with homicidal death is a fact not in dispute before us. It was PW 10 – Dr. Vaibhav, who conducted autopsy on the mortal remains of Vandana. He noticed twenty-six antemortem injuries. In his opinion, the cause of death was head injury. He further opined that injury nos. 1 to 26, collectively, were sufficient to cause death in the ordinary course of nature. Six injuries suffered by the deceased were incised injuries.

(II) Extra-marital relationship between the appellant and the deceased :-

12. The motive attributed to the appellant was that his frequent quarrels with the deceased. There is, however no evidence to indicate over what issue both fought/quarreled with each other. The F.I.R. (Exh.17) was lodged by the landlord, PW 1 – Ramesh. After having informed him by PW 3 – Dipak, he went to his premises and peeped into the room. He noticed Vandana was lying. A rope was tied to her neck and the other end was tagged to a hook of a rafter. On his reporting, the police arrived. A crime scene panchanama (Exh.64) was drawn. Some articles including 500 mg. weighing weight (iron) was seized. The evidence of PW 1- Ramesh would indicate that the appellant would intermittently visit the deceased.

During his cross-examination, he testified that several persons used to visit his premise since number of tenants were residing therein separately. The evidence of PW 1 – Ramesh is relevant only to the extent of setting the criminal law in motion and the fact that the deceased was residing in one of his rooms as a tenant.

13. PW 2 – Kunal was a friend of PW 3 – Dipak (son of the deceased). Kunal was residing in the adjoining room of the deceased. He testified that the incident took place during the intervening night of 27th and 28th August, 2021. He was asleep in his room. On receiving the phone call of Dipak, he went to the room of the deceased and knocked on the door of it. There was, however no response. No door was opened in response to his knock. He, therefore, peeped in through the window to see Vandana was lying down in the condition of hanging with a rope. The evidence of this witness too does not further the prosecution case, except to the extent that his evidence further tells that one old person would visit Vandana frequently. He identified the appellant, who was present before the Court through video conferencing as that person, who used to visit Vandana.

14. Evidence of this witness is, however silent to indicate that on the intervening night or sometime there before, the appellant was with Vandana in her room.

15. PW 4 – Dipak, son of the deceased, deposed that on the given day he was away. He was residing at village Tondar, Tq. Udgir, Dist. Latur along with his wife – Amruta. His father died in the year 1995. Vandana (deceased) would reside at Jalgaon alongwith the appellant. They had intimate relationship. They stayed together for about twenty years. He too was residing with his mother. He further testified that there used to be

frequent quarrels between his mother and the appellant. He, therefore, started residing at Tondar, Tq. Udgir.

There is no concrete evidence as to since when Dipak started residing away from his mother, because PW 1 and 2 had deposed that the deceased would reside alongwith her son – Dipak and his wife in the room owned by PW 1 – Ramesh.

(III) Last seen together :-

16. PW 3 – Ramlal would reside in the very vicinity i.e. Rameshwar Nagar. He testified that deceased – Vandana was acquainted with him. One ole person used to visit Vandana's residence. He identified the appellant before the Court as that old person. He further testified that both, the appellant and Vandana had come to his residence by little past 07:30 p.m. of the fateful night and took away Rs.50,000/- kept with him by them. He further testified that thereafter he took the dinner and went to sleep. On the following morning he learned about the incident.

During his cross-examination, he deposed that he did not know the occupation of the appellant. He admitted to have no personal acquaintance with the appellant. He, however denied that Vandana had alone come to him to get back the money.

17. Based on the evidence of this witness, the prosecution wants to make out a case of the appellant to have been lastly seen in the company of the deceased. Admittedly, this witness did not know the appellant. He only

described him as an old person, who used to visit Vandana. According to him, both of them had been to his residence. In our view, when PW 3 – Ramlal was not knowing the appellant (suspect of committing murder of Vandana), the Investigating Officer ought to have arranged for the test identification parade to have lead in the investigation that the appellant to have been lastly seen in the company of the deceased.

18. Admittedly, there were four rooms on the ground floor and two on the upper floor of the said premise. Each room was occupied by a separate tenant. None of them claimed to have heard a quarrel / noise or even presence of the appellant at/in the room of Vandana from 07:30 p.m. onwards or any time thereafter until before Vandana was noticed dead in her room. In our view, the evidence as regards the last seen theory is very hazy. True, the appellant to each and every question put to him gave negative response. He did not offer any explanation.

(IV) Recovery of knife and trouser of the appellant, stained with blood :-

19. On arrest of the appellant, he made a disclosure statement in the presence of PW 13 – Vijay, Investigating Officer and PW 7 – Satish, panch witness. The disclosure statement made by the appellant finds place at Exhibit 72. He then led them to an isolated place in bushes and took out a knife and his trouser. Now let us see whether this disclosure statement conclusively lead us to infer the appellant's complicity in the crime in question. The blood grouping of blood of the deceased was inconclusive.

Meaning thereby, her blood group could not be ascertained. Admittedly, the blood group of the appellant is 'O'. The trouser, which was recovered pursuant to his disclosure statement, borne a blood stain of the blood group 'O' (Exh.44). So far as the blood grouping of the blood found on the knife is concerned, the C.A. report (Exh.44) is inconclusive. True, human blood was found on the knife. The very C.A. report indicates clothes of the deceased borne blood stains of blood group 'O'. One may, therefore, infer that the blood group of the deceased might be 'O'

(V) Failure of the appellant to explain the incriminating circumstances appearing in the evidence against him :-

20. Then our attention was drawn to the arrest panchanama of the appellant (Exh.107), which suggests there was injury to his thumb and blunt trauma on his chest. Admittedly, PW 11 – Dr. Nita had examined the appellant soon before his arrest. Her evidence indicates that on local examination, she did not notice any external injury or even swelling on the person of the appellant. She was examined as a prosecution witness. The contents of arrest panchanama gets eclipsed by the the evidence of PW 11 – Dr.Nita.

21. The CDRs of the cell phone of the appellant were relied on. Those find place at Exhibit 109. The appellant admitted these documents. True, the cell phone of the appellant was shown at a location falling under Rameshwar Nagar tower. The very information supplied by the cellular company indicates that the said SIM card was issued to the appellant on his

address, “15 A, Rameshwar Colony, Kadil Bhag, Rameshwar Colony Parisar, Mehrun, Jalgaon”. It needs no mention that each tower covers at least a distance of 3-4 kilometers in radius. When the very SIM card was issued to the appellant on his residential address of Rameshwar Nagar, he has every reason to contend that he was residing at Rameshwar Nagar at the relevant time. It is true that PW 4 – Dipak in his cross-examination testified that the appellant would reside at Saptashrunji Colony. To be specific, whether the appellant is residing at Saptashrunji Colony, the answer is in present tense. His cross-examination was conducted in November 2022, i.e. about sixteen months after the incident. The appellant is charged with an offence of murder and the punishment therefor is either death or imprisonment for life. There should have been, therefore, direct or concrete circumstantial evidence. The circumstances relied on should be conclusive in nature. We do not reiterate what has been observed by the Apex Court in Sharad Sarda’s case referred to hereinabove.

22. It is true that PW 10 – Dr. Vaibhav has given the time of death between twenty-four hours to to thirty-six hours before the conduct of autopsy. The same is very vague. Although the first hour thereof may be falling or corresponding to the time of 07:00 p.m. by which PW 3 – Ramlal claimed to have seen the appellant and the deceased together as they had come to him. We had already observed that the evidence of this witness is hazy for want of holding T.I. parade. This witness neither known the appellant nor has he given his description.

23. At the cost of repetition, it is observed that burden of proof in criminal case remains static. True, the incriminating circumstance appearing in the evidence needs to be explained by the accused. In our view, the incriminating circumstances taken together do not form the chain so as to conclude that it was the appellant and none else, who committed murder of Vandana. The facts of the case of Kashi Ram (supra) relied on by learned A.P.P. indicate that the accused – respondent therein was married to Kalawati (deceased). They were blessed with two children. There was no cordial relationship. There were incidents of the respondents assaulting Kalawati and treat her with cruelty. A panchayat had also been convened at the house of father of the respondent. From the facts of the said case, it would be crystal clear that the respondent therein (accused) was staying with his wife (deceased) and two children, and thereafter he disappeared. The facts of the present case would indicate that the appellant was married and blessed with children. His parents were alive. He would stay somewhere else. He would intermittently visit the house of Vandana (deceased). Nobody had seen him in the room of Vandana on the fateful night. Neither he was seen entering Vandana's room or exiting the same at the material time. That makes all the difference.

24. In short, appreciation of the aforesaid entire evidence lead us to conclude the prosecution to have failed to bring home the charge beyond reasonable doubt. Based on such quality of evidence, the trial Court ought not to have convicted the appellant. Interference with the impugned order of

conviction and consequential sentence is, therefore, warranted. In the result, appeal succeeds. Hence, the following order :-

ORDER

- (I) Criminal appeal is allowed.
- (II) Impugned judgment and order dated 12th July, 2023 passed by the Court of Additional Sessions Judge, Jalgaon in Sessions Case No. 255 of 2021 convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code is hereby set aside. He stands acquitted thereof.
- (III) The appellant be released forthwith, if not required in any other case.
- (IV) Fine amount paid, if any, be refunded to him.

SSD

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)