IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.798 OF 2018
(APPEAL AGAINST CONVICTION)

Dattu @ Datta Bhika Tongare
C – 9491,
R/o, Janori, Taluka Dindore,
Dist. Nashik
Ramjinagar, Gangapur Canal, Ozar Shivar,
Taluka Niphad, Dist.: Nashik.
Presently lodged at NASHIK CENTRAL PRISON
NASHIK. ...Appellant

Versus

The State of Maharashtra ...Respondent

Mr. Kavin Bookseller i/b Mr. Rohan J. Dave for the Appellant

Mr. K. V. Saste, Addl. P.P. for the Respondent-State.

CORAM : REVATI MOHITE DERE &
DR. NEELA GOKHALE, JJ.

RESERVED ON : 26th MARCH 2025

PRONOUNCED ON : 7th APRIL 2025

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

1. By this appeal, the appellant has assailed the judgment and order dated 25th September 2014, passed by the learned

Additional Sessions Judge, Niphad, in Sessions Case No.47 of 2012, convicting and sentencing him, as under:-

- for the offence punishable under Section 302 of the Indian Penal Code ('IPC') to suffer imprisonment for life and to pay a fine of Rs.2,000/- in default, to suffer rigorous imprisonment for one year.

2. A few facts as are necessary to decide the aforesaid appeal are set out hereinunder :-

The appellant was in a relationship with the deceased and had introduced the deceased to PW1 – Balkrushna Chaudhary, as his wife. It is the prosecution case that 15 days prior to the incident, the appellant and the deceased alongwith two kids (kids from deceased's first marriage) had come to PW1 – Balkrushna Chaudhary's house for a job. According to PW1 – Balkrushna, one day prior to the incident, the appellant took a sum of Rs.2,000/- from him and went to attend the market at Ozar alongwith his wife and children; that on the next day when PW1 went to his field at about 6:30 a.m. to start the pump set and went to the shed where the appellant was residing, he found

the deceased lying with a blanket on her body. On removing the blanket PW1 noticed some blood, pursuant to which he reported the same to Ozar Police Station. Pursuant thereto, PW1 – Balkrushna lodged an FIR, which was marked as Exhibit – 15. The appellant was arrested on 23rd May 2012.

During the course of investigation, the police recorded the statement of witnesses, drew the panchanama and after investigation, filed a charge-sheet against the appellant in the said case, in the Court of the learned Judicial Magistrate First Class, Pimpalgaon (B), Niphad, for the offence punishable under Section 302 of the IPC. As the case was sessions triable, the case was committed to the Court of Sessions.

The learned Additional Sessions Judge-2, Niphad, framed charge (Exhibit – 7), as against the appellant for the offence punishable under Section 302 of the IPC, to which the appellant pleaded not guilty and claimed to be tried.

The prosecution in support of its case examined 8 witnesses. PW1 – Balkrushna Rangnath Chaudhary, the complainant,

who had employed the appellant on his field; PW2 – Eknath Nana Chaudhary, panch to the spot panchanama; PW3 – Lalita Dattu Tongare (daughter of the accused and the deceased), aged about 6 years (aged about 4 years at the time of the incident). Her evidence was not recorded and whatever little that was recorded, she said nothing incriminating against the appellant; PW4 – Sindhubai Somnath Sitan, mother of the deceased; PW5 – Manoj Bhagwan Khairnar, the photographer; PW6 – Arjun Kacharu Mondhe, brother-in-law of the accused (hostile); PW7 – Dr. Rekha Malhari Sonawane, Medical Officer attached to Pimpalgaon Baswant Primary Health Centre and, PW8 – Gulabrao Parashram Wagh, Police Inspector attached to the Ozar Police Station.

The defence of the appellant was that of total denial and false implication.

After recording the 313 statement of the appellant and after hearing the learned counsel for the parties, the learned Additional Sessions Judge, Niphad, was pleased to convict and sentence the appellant as aforesaid in paragraph No.1 of this Judgment.

3. Learned counsel for the appellant submitted that the prosecution had not proved its case beyond reasonable doubt and as such the appellant be acquitted of the offence, for which he was convicted. He submitted that the circumstances on record were far from sufficient to convict the appellant for the said offence. He submitted that the appellant has primarily been convicted, having regard to Section 106 of the Evidence Act i.e. as the appellant had not explained the circumstances against him or discharged the burden cast on him under Section 106 of the Evidence Act. He submitted that the last seen evidence of PW1 cannot be termed as last seen having regard to the evidence that has come on record. He further submitted that apart from the said evidence, there is no other evidence to connect the appellant with the alleged offence.

4. Learned Additional Public Prosecutor supported the impugned judgment and order of conviction and sentence passed by the trial Court and submitted that no interference was warranted in the same.

5. Perused the evidence and the relevant documents with the assistance of the learned counsel appearing for the appellant and the learned Additional Public Prosecutor for the respondent – State. Admittedly, the prosecution case rests on circumstantial evidence. The law with respect to circumstantial evidence is well settled.

6. In ***Sharad Birdhichand Sarda v/s State of Maharashtra***[1] the Apex Court laid down the five golden principles (Panchsheel), which govern a case based only on circumstantial evidence. Para 153 of the said judgment is reproduced hereinunder:-

> *"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 Maharashtra*[2] *where the following observations were made: [SCC para 19, p. 807 : SCC (Cri) p. 1047]*

1 (1984) 4 SCC 116
2 (1973) 2 SCC 793

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

(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."

7. Keeping in mind the aforesaid, we now proceed to deal with the circumstances adduced by the prosecution *qua* the appellant,

(i) The evidence of last seen;

(ii) The C.A report which shows that there was blood group of the deceased on the appellant's shirt and lower part of the pant; and

(iii) The appellant had not given any plausible explanation under Section 106 of the Evidence Act.

8. The fact, that the deceased died a homicidal death is not in dispute. The cause of death of the deceased as per the postmortem is stated to be '*Death due to shock due to injury to multiple vital organs*'. The question that arises for consideration is, whether the appellant is the author of the said injuries, keeping in mind the evidence adduced by the prosecution against the appellant.

9. As far as the evidence of last seen is concerned, the prosecution has relied on the evidence of PW1 – Balkrushna Chaudhary. PW1 – Balkrushna in his evidence has deposed that 15 days prior to the incident, one couple i.e. the appellant and his wife had come to his house with two small kids; that they requested him to give them a job; that the male person was Dattu @ Datta Bhika Tongare (appellant), a resident of near Gangapur canal; that he confirmed the fact that the appellant's parents were staying at Gangapur canal by going there; that he gave the couple a shed to reside in his field and offered a sum of Rs.3,000/- per month as wages; that a sum of Rs.2,000/- was given to the appellant as advance; that

after 15 days the appellant took Rs.2000/- from him and went to attend the market at Ozar alongwith his wife and children. PW1 – Balkrushna has categorically in his examination-in-chief stated that he did not know when the appellant or the family returned.

10. PW1 – Balkrushna has further in his evidence stated that on the next day there was load shedding and hence he went to his field at about 6:30 a.m. to start the pump set; that after starting the pump set, he did not find anybody near the pump set, and hence, he called out to the appellant; that as none responded, he went towards the shed and saw somebody sleeping with a blanket over the body; that he lifted the blanket and noticed some blood; that he informed the Ozar Police Station of the said fact, pursuant to which, FIR (Exhibit - 15) came to be registered at his behest.

11. In his cross-examination, it has come that after he informed the police, some people gathered at the spot and that in his presence the police enquired with the children present and recorded

their statements. In PW1's cross-examination, there is an omission with respect to the appellant taking a sum of Rs.1,000/- towards his wages, one day prior to the incident, in the FIR. Similarly it is elicited in the cross-examination of PW1 – Balkrushna, that he had not seen the lady (deceased) going to the market at any time. PW1's evidence does not categorically throw light as to whether the children were present at the spot at the relevant time, inasmuch as, it is the prosecution case that the children were present, when the incident took place.

12. Considering the over all evidence as stated aforesaid of PW1 – Balkrushna, the said evidence of 'last seen' evidence appears shaky and doubtful, inasmuch as, PW1 – Balkrushna had stated in his examination-in-chief that he had seen the appellant going to Ozar with his wife and children on the previous day but had not seen when they had returned. PW1 – Balkrushna found the dead body of the appellant's wife on the next day in the morning at 6:30 a.m., on the platform outside the shed situated in PW1's field, when he went to

start the pump set. Accordingly, the said evidence being shaky, implicit reliance cannot be placed on the same.

13. It appears that the learned Judge has essentially convicted the appellant on the basis of the evidence of PW1 – Balkrushna, i.e. the appellant was last seen with the deceased and taking into consideration Section 106 of the Evidence Act. The law as to when Section 106 of the Evidence Act can be relied upon/invoked, is well settled.

14. The Apex Court in the case of ***Nagendra Sah v/s State of Bihar[3],*** has in paras 22 and 23 observed as under:-

> *"22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.*
>
> *23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an*

3 (2021) 10 SCC 725

additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused."

15. One of the main circumstance relied upon by the trial Court whilst convicting the appellant is, that the appellant failed to give any plausible explanation for the death of his wife, inasmuch as, the said facts, were within his knowledge.

16. We have in para 12 of the aforesaid judgment noted that the prosecution evidence vis-a-vis last seen is shaky and doubtful, inasmuch as, there is no evidence to show when the appellant and the deceased returned from Ozar. Even otherwise, the prosecution cannot absolve itself from proving the initial burden cast upon them i.e. of proving its case beyond reasonable doubt against the appellant. Failure to offer a reasonable explanation in discharge of the burden placed on him by Section 106 of the Evidence Act, may be considered as an

additional link to the chain of circumstances. When the prosecution itself has failed to prove the circumstances and its case beyond reasonable doubt *qua* the appellant, failure of the accused to discharge his burden under Section 106 of the Evidence Act, will not be relevant.

17. It is pertinent to note, that it is the prosecution case that the appellant was residing with the deceased and two children. Admittedly, the statement of both the children, one aged about 4 years and other below 4 years were recorded by the police during the course of investigation, however, only one child stepped into the witness box i.e. PW3 – Lalita. A perusal of the evidence of PW3 will reveal that she was asked a few questions, however, as she started weeping, her evidence was not recorded any further. Thus, the evidence of PW3 does not throw any light as to the manner in which the incident took place i.e. alleged assault by the appellant on the deceased. The other child aged below 4 years has not been examined by the prosecution. The evidence of PW4 – Sindhubai (mother of the deceased) is of no assistance to the prosecution. PW4 – Sindhubai's evidence also does

not throw light on any possible motive for the appellant to cause the death of her daughter. PW4 – Sindhubai's evidence only reveals that her deceased daughter was not living with her husband and was staying with them, with her children for 3 years; that there were relations between the appellant and her deceased daughter; that one day, her daughter and her children left the house, when she and other family members had gone to another village to attend a wedding. Thus, no motive has come forth through this witness.

18. The prosecution has also placed reliance on the C.A. report (Exhibit – 35) i.e. the clothes of the accused having blood stains of blood group 'B' i.e. of the deceased. Exhibit – 36 shows that the blood group of the accused was 'O'. As noted in the C.A. report, the blood stains found on the clothes of the accused which he had worn at the time of assault, had blood stains which were found to be of blood group 'B'. The appellant was arrested on 23rd May 2012, and his clothes were seized at the time of arrest.

19. It is pertinent to note, that no evidence has been adduced by the prosecution as to who collected the blood samples of the deceased and when, since the blood group of the appellant is alleged to be of 'O' blood group. Thus, the C.A. report i.e. Exhibit – 36, which shows the blood group of the appellant as 'O', becomes doubtful.

20. Considering the aforesaid, the prosecution has failed to prove the circumstances relied upon by them, as against the appellant, beyond reasonable doubt. The chain of circumstances is far from complete and does not, in all human probability, point to the guilt of the appellant.

21. It is well settled that a false explanation or a false defence can only be considered as an additional link to the chain of circumstances so proved by the prosecution by adducing legal, cogent and admissible evidence. It is well settled that falsity of defence or failure to discharge the burden under Section 106 of the Evidence Act, cannot take the place of proof of facts, which the prosecution has to

establish, in order to succeed.

22. Considering the aforesaid, none of the circumstances can be stated to have been proved by the prosecution beyond reasonable doubt, nor do they form a chain, pointing to the complicity of the appellant, which is consistent only with one hypothesis, which is the guilt of the appellant.

23. Having regard to what is stated aforesaid, we pass the following order:-

ORDER

i) The Appeal is allowed;

ii) The Judgment and Order dated 25th September 2014, passed by the learned Additional Sessions Judge, Niphad, in Sessions Case No.47 of 2012, convicting and sentencing the appellant, is quashed and set aside;

iii) The appellant is acquitted of the offence, with which he is charged. The appellant is set at liberty forthwith, if not required in any other case. Fine amount, if paid, be refunded to the appellant.

24. Appeal is allowed and accordingly disposed of.

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

DR. NEELA GOKHALE, J. *REVATI MOHITE DERE, J.*