
(2015) 09 BOM CK 0309
In the Bombay High Court
Case No : Cri. Appeal No. 39 of 2013

Nilesh @ Nilikrao Ukarda Jadhav

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 22-09-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 201, Section 302

Citation : (2016) 3 MhLJCrI 177

Hon'ble Judges : B.R. Gavai and Prasanna B. Varale, JJ.

Bench : Division Bench

Advocate : Dr. (Mrs.) U.K. Kalsi with S.D. Chande, Advocates, for the Appellant;
T.A. Mirza, Additional Public Prosecutor, for the Respondent/State

Final Decision : Dismissed

Judgement

Prasanna B. Varale, J. (Oral) - By the present appeal, the appellant challenges the judgment and order passed by the learned Additional Sessions Judge, Akola, dated 17-12-2012 in Sessions Trial No. 107/2010, thereby convicting the appellant/accused for the offences punishable under sections 302 and 201 of the Indian Penal Code and sentencing to suffer life imprisonment along with fine of Rs.10,000/-, in default to undergo simple imprisonment for six months the offence punishable under section 302 of Indian Penal Code and to suffer rigorous imprisonment for two years along with fine of Rs.10,000/- in default to undergo simple imprisonment for six months for the offence punishable under section 201 of Indian Penal Code. The appellant/accused has been acquitted of the other offences viz. sections 376 read with section 511, 379, 403, 507 of the Indian Penal Code and under section 3(2)(v) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

2. The brief facts giving rise to the present appeal can be summarized as follows :

A dead body of an unknown female was found lying in a nala near Kothari Watika No. 8, Khadgi, Akola on 24-4-2010 at about 7.30 am. The village Sarpanch

informed this fact to Police Station, Khadan, Akola. Shri Thosare, PSI, attached to Police Station, Khadan at the relevant time, on receiving the information, rushed to the spot. He found that the dead body was having ligature marks on the neck and injury on head and abrasions on chest, hands and other parts of the dead body. One lady police constable Talsa identified the dead body. It was the dead body of a lady police constable by name Sheetal Sardar. ASI Thosare lodged the complaint at Khadan Police Station. The same was treated as Crime No. 126/2010. As the investigation agency was set in motion, necessary formalities of investigation were conducted. It was revealed that the accused, who is also a police personnel and was a colleague of deceased Sheetal Sardar, was having an intimacy with the deceased. The prosecution alleges that the inclination and the intimacy towards the deceased was a matter of one sided intimacy. Deceased Sheetal Sardar apprehending that the accused was having evil eye, had objected his intimacy and informed this fact to her husband and her sister. The husband of Sheetal cautioned her not to visit his house.

3. On 23-4-2010, Sheetal was allotted "Tapal" duty. At about 14.00 hours, she left Patur so as to reach the "tapal" at S.D.P.O. office at Balapur and Akola. As Sheetal did not return for quite some time, even in the late hours of the day, her husband Deepak made an attempt to search her out. He tried to contact her on her mobile phone, but he could not receive any response. As stated above, on the next day, a dead body was found and the investigation was set in motion. As a part of investigation process, the spot panchanama and inquest panchanama were drawn. The statements of witnesses were recorded. The dead body was referred for post-mortem examination. A team of medical officers conducted the postmortem. The post-mortem notes were prepared and the medical officers arrived at a conclusion that the cause of death was strangulation. In the process of investigation, call details reports of the mobile communication were also collected. Arrest of the appellant/accused was effected on 25-4-2010. In his disclosure statement, the appellant/accused lead the investigating agency to one house at Khadki budruk. Certain blood stains were found on the wall and floor in the kitchen of that house. The blood samples were drawn and panchanama was prepared. The apparels worn by the accused were seized and the blood samples of the accused was also collected. During investigation, it was revealed that the deceased was belonging to Scheduled Caste, whereas the appellant/accused was a member of non-scheduled caste. Accordingly, the provisions of the Atrocities Act were added. In view of the provisions of the Atrocities Act, the investigation was conducted by the SDPO Shri Nitram Kumre (PW29) and subsequently, it was handed over to Shri Anwar Shaikh, Dy. S.P., CID Crimes (PW30). On conclusion of the investigation, charge-sheet was filed. As the case was exclusively triable by the Court of Sessions, the same was committed to the Sessions Court. The accused was charged for the offences punishable under sections 302, 201, 379, 376 read with sections 511, 403, 506 of the Indian Penal Code and under section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. The accused pleaded not guilty and claimed trial. His defence was of total

denial. The prosecution in support of its case relied on the version of number of witnesses as well as scientific evidence such as postmortem report, chemical analyser's report, call details reports etc. The learned Sessions Judge, on an appreciation of the evidence, passed the judgment and order referred to above. Being aggrieved by the same, the appellant/accused is before this Court by way of this appeal.

4. Dr. (Mrs.) Kalsi with Mr. Chande, the learned counsel for the appellant/accused vehemently submitted that the prosecution case is wholly based on the circumstantial evidence. The learned counsel submitted that in view of the settled position of law, in case of circumstantial evidence, the prosecution has to establish each and every circumstance against the accused forming a complete chain leaving every hypothesis of innocence of the accused and pointing out a finger towards the accused to show that it is the accused and the accused only, who is the author of the crime. The learned counsel submitted that though, the prosecution alleges bunch of circumstances and the learned trial Court also refers to many circumstances, none of the circumstance is established by the prosecution with a positive evidence. It is further submitted that there are so many missing links in the case of prosecution making the story of the prosecution wholly unreliable and far away from the truth. The learned counsel submits that on such weak evidence, the conviction and sentence awarded to the appellant/accused is unsustainable. The learned counsel, therefore, prays for allowing the appeal.

The learned counsel for the appellant placed heavy reliance on the judgment of the Apex Court in the case of *Sharad Birdhichand Sarda v. State of Maharashtra*, reported in (1984) 4 SCC 116 in support of her submissions.

5. Per contra, the learned Additional Public Prosecutor for the State vehemently submitted that the investigating agency conducted in depth and thorough investigation thereby leaving no stone unturned in the process of investigation. The learned APP further submitted that each of the circumstance against the accused is a strong circumstance supported with an adequate material showing involvement of the accused in the crime. The learned APP further submitted that the accused, who himself was a police personnel, had developed an intimacy towards the deceased, who was also a police personnel and this relationship being objected by the victim and her husband, enraged by this objection, he committed murder of victim Sheetal Sardar. The learned APP submitted that it is the settled position that the person may lie, but the documents and the record cannot lie. The learned APP submitted that in the present case as the material collected by the investigating agency is mostly in the form of scientific evidence, there is no reason to discard this material. Thus, the learned APP prays for dismissal of the appeal.

6. With the assistance of both the learned counsel, we have gone through the material placed on record. On a perusal of the material as well as the judgment passed by the learned Sessions Judge, what emerges is though, the learned

Sessions Judge referred to many circumstances for holding the appellant/accused guilty of the Charge under sections 302 and 201 of the Indian Penal Code, these circumstances can be summarized in following four broad categories.

1] The death of deceased/victim Shital Sardar is a homicidal death.

2] The accused was attracted towards deceased and was having an evil eye on her. Certain circumstances, which are referred to by the learned Sessions Judge, such as accused taking a house on rent, accused showing the house of PW3 Ramesh Rathod, neighbour hearing quarrel between male and female in the said house, can be said to be the sub-categories of the main circumstance of accused having attracted towards the deceased and was claiming an intimacy towards her.

3] The accused was in touch with the deceased for a considerable period prior to her death. This is the main circumstance on which the learned Sessions Judge found the case of the prosecution acceptable. In support of this circumstance, the prosecution has placed on record the call details report and also relied on the witness i.e. an officer from the service provider company.

4] The next circumstance is, the accused, though was on duty on the fateful day on record, he was not attending his duty at police station. The next circumstance is the blood stains found on the tiles of kitchen in the house shown by the accused and the blood stained clothes of the accused.

7. The prosecution has examined in all 31 witnesses. Out of these 31 witnesses, the material witnesses would be P.W.9 Dr. Ranjit Korde, the Medical Officer, who conducted the post-mortem, P.W.1 API Arjun Thosare, P.W.13 PI Bhaskar Tawar, P.W.29 SDPO Nitram Kumre, P.W.30 Dy. SP Anwar Sheikh, CID Crime branch, Akola and investigating officer, P.W.11 Sachin Jadhav, watchman of ATM center of Union Bank of India and P.W.26 Ravi Pardesi, Nodal Officer in Vodafone mobile company.

8. Insofar as death of the victim is concerned, certain facts which are not in dispute are namely, the victim and the accused are the police personnel; a dead body was found in a Nala on 24-4-2010 and the same being identified as the dead body of Sheetal Sardar. The victim/deceased and the accused were attached to Patur Police Station at the relevant time. Insofar as factum of death of the victim is concerned, the prosecution has examined P.W.7 Dr. Aparna Wahane, who was one of the team members, who conducted post-mortem on the dead body and P.W.9 Dr. Ranjit Korde. It will be useful for our purposes to refer to the version of P.W.9 Dr. Korde.

9. P.W.9 Dr. Korde in his substantive evidence deposed that on 24-4-2010, a dead body was brought for post-mortem. He further deposed that post-mortem examination was conducted by a team of Medical Officers, including Dr. Mrs. Wahane, Dr. Dharmendra Raut, Dr. Ambhore and himself. He deposed that the post-mortem was conducted by himself whereas team of doctors namely Dr. Mrs. Wahane, Dr. Dharmendra Raut, Dr. Ambhore were present throughout. This

witness deposed that on an external examination he found the injuries namely -

- 1] CLW over forehead, size 4 cm. 1 cm. Bone deep, oblique.
- 2] CLW, on right temporal region, size 8 cm x 3 cm. Bone deep, transverse.
- 3] CLW on right occipital region, size 3 x 1 cm, bone deep and oblique.
- 4] Hematoma on right eye, black eye present.
- 5] Abrasion over right clavicle, size 3 x 1 inch, reddish, brown in colour.
- 6] Nail markings over middle of neck, five in numbers, crescentic "c" shaped of size 2 cm x ? cm, reddish in colour.

There was fracture of left 3rd to 7th ribs, in midclavicular line and there was deformity present. All the injuries were ante mortem. Rigor mortis was marked on limbs, both upper and lower, neck, trunk and all over the body. There were no signs of decomposition.

10. He further deposed that on an internal examination, the team found Hematoma on frontal region, right temporal and occipital region, about 80 ml. Clots were present. These injuries were corresponding to the external injuries No. 1 to 3 mentioned in Col. No. 17. PW9 Dr. Korde states that the cause of death was strangulation. In cross-examination of this witness it was elicited that injury Nos. 1 to 3 in Col. No. 17 were not sufficient in ordinary course of nature to cause death. He further states that in the cross-examination that death was not possible due to scalp injury. The death was not caused due to head injuries or edematous or congestion of brain in this case. It was also brought on record in the cross-examination of the said witness that in case of strangulation the face gets puffy, sinuous and marks with petechiae. No such signs were present in this case. He further states that in case of strangulation lips are found blue and bloody froth escapes from mouth and nostrils. This was not noticed in the present case. He further states that in case of strangulation, frothy mucous is found in larynx and trachea. It was not noticed. This witness also admits in the cross-examination that thumb marks or fingers marks were not noticed on the neck. He further admits that in case of pressing of neck with both the hands, such marks would appear on the neck. Though, in the cross-examination, certain admissions were brought on record as referred to above in challenge to the strangulation theory of the prosecution, in view of the evidence of P.W.9 Dr. Korde, in our opinion, the conclusion drawn by the learned Sessions Judge that the death of victim Sheetal was homicidal death, cannot be faulted with.

11. The next important question for our consideration is about the authorship of the crime. The question posed to us is whether the material on record brought by the prosecution is sufficient enough to establish the complicity of the accused in the crime. The prosecution relied on the circumstances in support of its case referred to above. The first circumstance is the attraction, inclination and intimacy of the appellant/accused towards victim Sheetal. The prosecution relied

on the evidence of P.W.22 Waman Solanke, ASI, attached to Patur Police Station at the relevant time. It was an attempt of the prosecution to submit that though, the accused and deceased Shital were attached to one Channi police station, there after the accused was transferred to Telhara police station and the accused was not willing to join Telhara police station. With a mutual consent of a colleague Sanjay Potey, the appellant got transferred to Patur. On an appreciation of the evidence of P.W.22 Waman Solanke, the learned trial Court found that there was no evidence to suggest that the accused made any special attempts to get himself transferred at Patur. It was suggested by the prosecution that the accused was Duty Assistant and he was giving concession to the deceased in allotment of the duties. It came on record in the evidence of P.W.13 PSI Bhaskar Tawar that the Police Station In-charge is the officer who is allotting the duties. He further deposed in the cross-examination that it is the prerogative of the Police Station In-charge to allot the duties to the subordinates. He further deposed that the duties used to be allotted as per his directions. Thus, it is clear from the perusal of the evidence of this witness that the accused had no role to play in allotment of the duties. A passing reference is made in the evidence of P.W.5 LPHC Pradnya Ahir that the accused used to give concession to deceased Shital in allotment of the duties. P.W.4 ASI Sahadeo Wankhede admits in his cross-examination that the duties are fixed by the Police Station Officer and the Assistant only reads out the duties. Thus, considering the evidence of these two witnesses, it is clear that the accused had hardly any role to play in assignment of duties to the subordinate staff in the police station. Merely because the accused used to remain in the police station when the deceased was on duty, cannot be a circumstance to say that the accused had an extreme intimacy and evil eye towards the deceased and with this intention, the appellant/accused has done away the victim. It will not be out of place to state that the Apex Court in various judgments settled a principle that howsoever the suspicion may be strong, the same cannot take place of proof. Thus, in our opinion, this circumstance is not sufficient enough to establish the guilt of the accused in commission of a serious offence under section 302 of the Indian Penal Code.

12. Insofar as the circumstance in the nature of the appellant/accused having been in touch with the deceased for a considerable period prior to death and more particularly, soon before death of deceased, we will consider that aspect lateron. Now, we will consider the circumstance that the appellant though, was on duty at the relevant time, he failed to attend the police station. The prosecution on this aspect relied on the evidence of P.W.13 PSI Bhakar Tawar and P.W.11 Sachin Jadhav, Watchman of the ATM center. P.W.13 PSI Tawar states that he was attached to Police Station, Patur from June 2008 to May, 2010. He then states that on 23-4-2010, deceased Sheetal was given "Tapal" duty for Balapur and Akola and accordingly, entry was taken in the Duty Register. He further states that the accused was on reserve duty during day time. He then states that at about 4.00 p.m., he along with staff went to Chikhalgaon for "bandobast" and while leaving the police station, he did not see the accused in the police station.

He then states that in that night ASI Sahadeo and accused were posted at Sarafa fixed point. He states in his examination-in-chief that at 11.30 pm when he visited police station, he found ASI Sahadeo and two police men in the rest room of the police station, whereas, the accused was going out on motorcycle. He further states that after some time, he visited the fixed points on motorcycle with Constable Suresh. He further states that at Sarafa point, he found ASI Sahadeo, however, the accused was not present. He then states that though he made an attempt to contact the accused on his mobile phone, his phone was switched of. He then states that he directed Constable Suresh to go to the house of the accused and call him at Sarafa fixed point. In the cross-examination, PW13 PSI Tawar states that on 23-4-2010, he had not taken station diary entries. This witness in his examination-in-chief admits that as per the procedure relevant pages of station diary containing events mentioned in it of each day are taken out from the station diary book and they are forwarded on the next day to the SDPO. He further states that the carbon copies are retained at the police station. This witness in cross-examination admits that the station diary of 23-4-2010 was sent to the S.D.P.O., Balapur on 27-4-2010. He further states that the station diaries of 23rd and 24th April, 2010 were sent on 26-4-2010. It is also brought on record by way of an omission that ATM Watchman Jadhav accompanied this witness for patrolling. It will be useful to refer to the testimony of P.W.11 Sachin Jadhav, the watchman of ATM centre of Union Bank of India, Patur. This witness in his examination-in-chief states that in the intervening night of 23rd and 24th April, 2010, he was on duty at the ATM from 10.00 p.m. to 6.00 a.m. The ATM center is at Sarafa, patur. Head Constable Wankhede was on duty in that night at Sarafa. At about 3.30 to 3.45 am, accused Nilesh came to ATM center and requested him to tell at police station that he was sleeping in the ATM center in the night. Accordingly, he made such statement before HC Wankhede. In the cross-examination, this witness in clear words admits that his statement was recorded after two months of the incident. He then states that police has no concern with the ATM center. He then states that police told him about the time and accordingly, he mentioned the time and he did not maintain diary to note the names of the persons visiting ATM center. He also admits in his cross-examination that he had no special acquaintance with the accused. Thus, the evidence of P.W.13 PSI Tawar and P.W.11 Sachin Jadhav lead to a conclusion that the prosecution failed to establish the circumstances against the appellant/accused viz. the appellant, though on record was on duty on the fateful day, but in fact he failed to attend the duty. We have no hesitation to say that the prosecution has failed to establish this circumstance beyond reasonable doubt against the appellant/accused.

13. The next circumstance is about the blood stains found on the tiles and the floor of the kitchen of the house hired on rent by the accused. P.W.3 Ramesh Rathod is also a police personnel. The case of the prosecution is the house hired on rent by the accused is of this witness. It will be material to refer to the oral evidence of this witness. P.W.3 Ramesh Rathod states that on 7-4-2010, he

received a phone call from the accused making a request to him for letting out his house. He then states that he obliged the accused by conceding to his request. He then states that on 13-4-2010, the house was shown by him to the accused and on the very day, the accused took over the possession of the house. He further states that on 14-6-2010, he was called by the police and the house was inspected. He further states that on inspection of the house, at some places red spots were seen on the walls at kitchen and latrine. He states in the cross-examination that the house was inspected on 14-6-2010 and he handed over the keys of the house to CID police after 14-6-2010. He states that on 25-4-2010, his statement was recorded. Thus, what emerges from the perusal of the record is the dead body of the victim was found on 24-4-2010. this witness states of finding faint red spots on the wall of kitchen and latrine. The Investigating Officer P.W.28 Uttam Jadhav states that samples of blood stains were taken by scratching and by cotton swap on 26-4-2010. It further reveals that P.W.28 Jadhav kept these samples with him till 30-4-2010. It further reveals that the blood samples along with other articles were forwarded for chemical analysis on 21-5-2010 by the other investigating officer P.W.29 SDPO Kumre. Thus, perusal of the material on record further shows that the evidence is lacking on the aspect of sealing i.e. as to whether the seals of these samples were intact when they were in the police station and till they reached the office of the Chemical Analyser. The learned trial Court, on an appreciation of the evidence found that there was inordinate and unexplained delay in forwarding the request to the Chemical Analyser. The evidence is lacking on the aspect of proper sealing and as such, the learned trial Court arrived at a conclusion that it is not safe to rely on the C.A. reports so as to conclude that the blood found on the spot was of "O" group. Thus, this scientific evidence is of no help to the prosecution to suggest that the samples of blood stains drawn from the spot were of blood group "O" i.e. of the deceased. Thus, even this circumstance is not established by the prosecution beyond reasonable doubt.

14. Though, one of the circumstance put up by the prosecution against the accused is in the nature of neighbour having heard the quarrel between a male and a female in the intervening night of 23rd and 24th April, 2010, the prosecution wanted to establish this circumstance by examining P.W.18 Sushila Tayde. This witness is resident of Khadki and neighbour P.W.3 Ramesh Tayde. As stated above, the prosecution alleged that the accused sought the house of P.W.3 Ramesh Tayde on rent and it is the case of the prosecution that the accused was meeting the deceased in that house. Firstly, there is absolutely no evidence brought by the prosecution that the said house was a meeting place of the victim and the accused. Secondly, it was brought on record by way of an omission that P.W.18 Sushila heard a quarrel between a male and a female in the intervening night of 23rd and 24th April, 2010. The learned trial Judge has rightly held that the prosecution failed to prove this circumstance against the accused. We see no reason to take any other view or a different view than the view of the learned trial Judge.

15. Now, we will deal with the most important circumstance on which the learned trial Judge placed heavy reliance and according to the learned Additional Public Prosecutor, this circumstance is a clinching evidence against the accused. The said circumstance is referred to as circumstance "C" by the learned trial Judge, which reads thus :

"Before death Sheetal and the accused were in contact with each other on mobile phone between 3.00 p.m. to 4.00 p.m. and his phone location was at Khadki Bk., Akola."

16. It is the case of the prosecution that victim Sheetal was assigned with "Tapal" duty on the relevant date. She was to collect "Tapal" and to reach the same in the office of SDPO, Balapur and then Akola. The further case of the prosecution is victim Sheetal in stead of returning back to Parur police station, where she was attached, had been to Khadki. The accused also reached at Khadki. It is the further case of the prosecution that accused and the deceased were in touch with each other on their mobile phones. There is an additional angle to this circumstance and that is, accused apart from his own cell number, was using two other cell numbers to contact Sheetal. For considering this circumstance, it will be useful to firstly refer to the oral testimony of P.W.17 Deepak Sardar, who is the husband of victim Sheetal. He states that on 23-4-2010, Sheetal was having "Tapal" duty and he dropped her at Patur bus station at about 2.00 p.m. He then states that Sheetal boarded a taxi jeep for going to Balapur. He states that in the evening he tried to contact Sheetal on mobile phone, but her mobile phone was switched of. Then he gives the details of mobile phone numbers of Sheetal. He states that mobile number of Sheetal was 9823216185 and the SIM card was of "Vodafone" company. Then he states that as Sheetal did not return till late in the night, he went to police station and informed Shri Tawar. He states that on the next day he went to the office of Superintendent of Police at Akola and made enquiry. He further states that on the next day morning at about 6.00 am, he made a phone call to the accused and enquired as to whether "Tapal" was given to Sheetal from Patur police station. P.W.17 Deepak then states about phone number of the accused i.e. 9637387023. The investigating agency has collected the call details record from the service provider company. P.W.26 Ravi Pardesi is the officer of Vodafone company. It will be useful to refer to his version. P.W.26 Ravi Pardesi states that he was working as Alternate Nodal Officer in Vodafone company and was specially appointed for giving C.D.R. (Call Details Record) locations, names and address of customers, tower locations etc. to the authorities such as police department. He then states about receiving communication from the Superintendent of Police, CID Crimes for providing CDR. Then he states about giving CDR. He further states that cell No. 9637387023 was allotted to Nilesh Jadhav, Patur (i.e. appellant/accused). Then he states that cell No. 9823216185 was allotted to Sheetal Deepak Sardar i.e. deceased. Then he states that cell No. 8007625327 was allotted to one Abdul Sadik Abdul Hamid, R/o Mahuli Jahagir. Then he states that cell No. 9764748243 was allotted to one Mohan Rajaram

Pajai of Malrajurr, Tah. Patur.

17. As stated above, it is the case of the prosecution that apart from his own cell number, the accused was also using another two phone numbers to establish contact with Sheetal. The requisition to the Nodal Officer of the service provider company dated 5-10-2010 is at Exh.101. The details provided by the service provider company namely Cell Site details and CDR details in tabular form are at Exh.102 and 103, respectively. It is the case of the prosecution that the accused was using the phone numbers of Abdul Sadiq and Mohan Pajai for establishing contact with Sheetal. Though, the prosecution in support of its case examined P.W.14 Sopan Choudhari, this witness in his cross-examination has shown his ignorance about the entry in station diary or in arrest register of the articles found during the personal search. This witness is a retired police personnel. The next witness is P.W.15 Mohd. Ashfaq. He states that on 12-3- 2010, he was travelling along with other eight passengers to Patur by a tractor and a jeep gave dash to that tractor. The driver of the jeep came to the spot along with police personnel. The police staff took this witness and other persons to police station, Patur and conducted personal search. The articles found in the search were taken by the police personnel. He states that he was having mobile of China H-1 company and it was having SIM card in the name of his maternal uncle Mohd. Sadiq. The number was 8007625327. He then states that the mobile was taken from him by the police. He then states that thereafter he was produced before the Magistrate and then was sent to jail. After his release, he went to Police Station, Patur and requested for his mobile phone. He then states that the accused was the person, who took his personal search and had taken out his mobile phone. In the cross-examination, he states that he did not produce the bill of the SIM card before police. Then he states that there were many policemen in the police station and he was not aware of the names of all the police men. He then states that his statement was recorded after four months of the incident. Then he states that he had not seen the accused prior to the incident and on that day, for the first time he had seen the accused. Thus, the material brought by the prosecution to suggest that accused was using cell phone numbers of Abdul Sadiq and Mohan Pajai is not free from doubt. It cannot be said that the circumstance that the accused was using aforesaid two phone numbers apart from his own number, is proved by the prosecution beyond reasonable doubt. The prosecution also examined one witness namely P.W.16 Kailash Dambre to suggest that accused was the person, who conducted personal search of P.W. 15 Mohd. Ashfaq, but from the version of P.W.16 Kailash, it cannot be said that the prosecution proved the factum that the accused was using SIM card of maternal uncle of Mohd. Ashfaq i.e. Mohd. Sadiq and of Moha. Pajai.

18. To scrutinize and assess the material in the form of Call Details Record, we have gone through the evidence of P.W.26 Ravi Pardesi and chart of call details, in depth. On a perusal of the call data of mobile No. 8007625327 (Exh.103) and mobile No. 9823216185, what emerges is it is not the case that deceased Sheetal had received phone calls only from cell numbers of the accused. The call

data further reveals that the last phone call received by the deceased was from phone number of her husband i.e. at 16.15 hrs. The location chart show that the husband of deceased was also in the same area. It will not be out of place to refer to the evidence of P.W.28 Uttam Jadhav. P.W.28 Uttam Jadhav deposed that he was attached to Local Crime Branch at the relevant time and he had conducted part investigation. He admits in the cross-examination that as per the remand report, on 23-4-2010, deceased Sheetal had received last call on her mobile phone from her husband at 16.15 hours. On scrutinizing the material in the form of CDR and location chart, we find considerable merit in the submission of the learned counsel for the appellant. It is submitted by the learned counsel that this material cannot be used against the appellant as there is a possibility of an error in this material. The learned counsel submits that the material shows the location of one call at the same point at two different places i.e. at Khadki and also at Gorakshan, Akola. The submission is as there is vagueness in the material, it will not be safe to rely on such a material to base the conviction. Thus, though the learned trial Judge has laid much emphasis on this circumstance, as stated above, in our opinion, this circumstance by itself is not sufficient to establish authorship of the applicant in commission of the crime.

19. The other circumstance is offering no explanation by the accused. In our opinion, merely because accused offers no explanation or a false explanation, cannot be a ground to sustain the conviction. It is the settled position of law that non-explanation or false explanation can be an additional link, but that by itself cannot be a circumstance to base the conviction. It is the duty of the prosecution to discharge its burden by reliable, trustworthy and cogent evidence against the accused. In the matters of circumstantial evidence, the prosecution has to discharge its burden more effectively by establishing each circumstance against the accused and forming unbroken chain of circumstances, leading to conclusion that it is the accused and the accused only, who is the author of the crime. It will not be out of place to refer to the judgment of the Apex Court in the case of *Sharad Birdhichand Sarda v. State of Maharashtra* (supra) crystallizing the appreciation of circumstantial evidence and also on the aspect of accused offering no explanation or false explanation. The relevant observations of the Apex Court are thus :

"152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is *Hanumant v. State of Madhya Pradesh*. This case has been uniformly followed and applied by this Court in a large number of later decisions upto date, for instance, the cases of *Tufail (Alias) Simmi v. State of Uttar Pradesh* and *Ramgopal v. State of Maharashtra*. It may be useful to extract what Mahajan, J. has laid down in *Hanumant's* case (supra) :

"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."

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 and anr. v. State of Maharashtra 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

(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.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

158. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying on a decision of this Court in Deonandan Mishra v. State of Bihar, to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant

portion of which may be extracted thus :

But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation,....such absence of explanation or false explanation would itself be an additional link which completes the chain."

159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied :

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved.

(2) the said circumstance point to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

160. If these conditions are fulfilled only then a Court can use a false explanation or a false defence as an additional link to lend an assurance to the Court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal's case (supra) where this Court observed thus : [SCC para 30, p. 43 : SCC (Cri) p. 322]

Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused.

161. This Court, therefore, has in no way departed from the five conditions laid down in Hanumant's case. Unfortunately, however, the High Court also seems to have misconstrued this decision and used the so-called false defence put up by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the Court. Where the prosecution is unable to prove any of the essential principles laid down in Hanumant's case, the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General.

20. As observed by us, the prosecution has failed to establish its case by cogent and reliable evidence against the accused. Therefore, the appeal deserves to be allowed.

21. In the result, the criminal appeal is allowed. The judgment and order of conviction and sentence passed by the Additional Sessions Judge, Akola, dated 17-12-2012 in Sessions Trial No. 107/2010 against the appellant is set aside. The appellant is acquitted of the charges framed against him.

22. The appellant is directed to be set at liberty forthwith, if not required in any other crime.