

(2022) 06 BOM CK 0041
In the Bombay High Court
Case No : Criminal Appeal No. 99 Of 2014

Roshan Anant Sawant

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 10-06-2022

Acts Referred:

Indian Penal Code, 1860 — Section 201, 302, 392, 460
Code Of Criminal Procedure, 1973 — Section 313, 315

Citation : (2022) 06 BOM CK 0041

Hon'ble Judges : Sadhana S. Jadhav, J; Milind N. Jadhav, J

Bench : Division Bench

Advocate : Payoshi Roy, Anush Shetty, Dr. Yug Mohit Chaudhry, P.P. Shinde

Final Decision : Allowed

Judgement

Sadhana S. Jadhav, J

1 The appellant is convicted for the offence punishable under section 302, 460, 392 and 201 of the Indian Penal Code by the Sessions Judge, Sindhudurg-Oros vide Judgment and Order dated 21st December, 2013 in Sessions Case No. 20 of 2013. The appellant is sentenced to suffer life imprisonment and to pay fine of Rs. 500/- in default to suffer R.I. for one month, for the offence punishable under section 302 of the Indian Penal Code. The appellant is sentenced to suffer R.I. of five years and to pay fine of Rs. 500/- in default to suffer R.I. for one month, for the offence punishable under section 460 of the Indian Penal Code. The appellant is further sentenced to suffer R.I. for five years and to pay fine of Rs. 500/- in default to suffer R.I. for one month, for the offence punishable under section 392 of the Indian Penal Code. The appellant is also sentenced to suffer R.I. for one year and to pay fine of Rs. 500/-, in default to suffer R.I. for one month, for the offence punishable under section 201 of the Indian Penal Code. Hence, these appeals.

2 Such of the facts necessary for the decision of this appeal are as follows:

(i) On 7th February, 2013 Arun Jogale lodged the report at Kankavali Police Station alleging therein that his wife Manisha happens to be the daughter of Alakamai Atmaram Sawant. That Alkamai was a mother of 4 daughters. That his mother-in-law Alkamai resides alone at village Kasvan, Sawantwadi. That he and his wife used to regularly enquire about her welfare. They had met her on 3rd February, 2013 and enquired about her well-being.

(ii) That on 7/2/2013 he received a phone call from Satyawar Sawant informing him that Alkamai was lying alone in injured condition in her residential house and probably she is no more. He passed on the said information to his co-brothers. He saw that there are marks of strangulation on her neck. There was bleeding from her mouth, her face was swollen and there was an injury on her eyebrow. She had injuries on pinna of both the ears. and it appeared that she was assaulted by someone. The ornaments adorned by her were missing.

(iii) Some unknown person had passed on the said information to the police. The police arrived at the spot and after conducting inquest panchanama, the body was sent for autopsy. He suspected that his mother-in-law had met a homicidal death at the hands of some thieves who had snatched away the ornaments. According to him, the incident had occurred during the period between 8.30 p.m. of 6/2/2013 and 9.15 a.m. of 7/2/2013.

(iv) Ghanshyam Rane had lodged a report about the sudden death of his mother in law on the basis of which A.D. enquiry was registered as A.D. No. 21/2013.

(v) On the basis of the said information Crime No. 16 of 2013 was registered against unknown person for the offence punishable under section 302 and 460 of the Indian Penal Code. The accused were arrested on suspicion.

(vi) On 8th February, 2013 at about 9.30 a.m. accused Roshan Sawant was arrested. Two more accused were also arrested by the investigating machinery. On 11/2/2013 the golden ornaments allegedly belonging to the deceased had been recovered at the instance of the accused. Charge-sheet was filed against the accused on 17/6/2013. At the trial the prosecution examined 14 witnesses to bring home the guilt of the accused.

3 P.W. 1 Arun Jogale has proved the contents of FIR which is marked as Exh. 14. He has also identified the ornaments adorned by the deceased. It is elicited in the cross examination that his mother in law the deceased Alkamai was residing at a distance of 6 to 7 km. from his house. Her source of income was from the agricultural yield and pension amount received by her under the scheme "Sanjay Gandhi Niradhar Yojana". The construction work of the house of the deceased was in progress. After the demise of Alkamai, the construction work was stalled. According to him, he had given the weight and value of the golden ornaments as he had seen the said ornaments on the person of Alkamai.

4 P.W.3 Sanjay Sawant has acted as a panch for the scene of offence panchanama. Martina Sawant has also acted as a panch. The police has seized a

handset from the scene of offence. That according to him, after the panchanama was over, the family of the deceased had put on the ornaments on the person of the deceased. The said panchanama is at Ex. 20. The second panch was Subhash Gaikwad. That P.W. 3 is an owner of tempo No. MH-07 1325. According to him, on 6/2/2013 accused Roshan Sawant and Malhar had taken his tempo to Kankavali at 7.30 a.m. At about 2 p.m. he had called upon the accused person, but there was no reply. P.W. 3 had contacted to Malhar on cell phone. He told him that he was unloading tin at the residence of Narayan Narsale. The tempo was not seized by the police. It appears from the tenor of his cross-examination that P.W. 3 was sarpanch of village Kasvan in the year 2011. He runs a pan stall. There is a dispute between Roshan Sawant and Ulhas Sawant and Vijay Sawant. Civil and criminal cases are pending against each other. On 7th February, 2013 police dog squad had visited the scene of offence. P.W. 3 has feigned ignorance about the presence of Vithoba Vaigankar. The police dog has not suspected Vithoba or Roshan Sawant.

5 P.W. 4 Satish Masurkar was the panch for the recovery of articles at the instance of accused Roshan Sawant. A pair of bentex bangles were recovered.

P.W. 4 happens to be the proprietor of Saisidhi Jewellers at Kankavali. P.W. 4 has admitted to have put five to six signatures on blank papers. At the police station only one accused was present.

6 P.W. 5 Dr. Dilip Ambole had performed autopsy on the dead body of Alkamai. Following injuries are found :

"1) Echymoses and bluish discolouration and contusion and bruising over neck anteriorly and both sides of neck extending up to mastoid region on both sides.

2) Fracture of hyoid bone.

3) Contusion and bruising, bluish discolouration over manubrium sternum and both clavicular and infraclavicular region.

4) Contused lacerated wound on left earlobe. Earlobule cut and torn Clotted blood present. Swelling present.

5) Contused lacerated wound over right earlobe, Earlobule cut and torn. Clotted blood present. Swelling present.

6) Abrasion over left maxillary area.

7) Contused lacerated wound over medial canthus of left eye of size ½ cm. x ½ cm. clotted blood present.

8) Abrasion over right scapula. Redish in colour.

9) Wheal mark and abrasion over neck on right and left side of size 2 to 3 cm. in breadth and 6 to 7 cm. long. Oozing present.

Tongue was bitten between teeth and swollen. Part of the tongue was outside

gum margin. Blood stains were both ears and both sides of neck and shoulder. Rigor mortis was well marked over upper and lower extremities.”

The probable time of the death was before 18 to 24 hours prior to post mortem examination. The cause of death was cardio respiratory arrest due asphexia due to strangulation. It is admitted in the cross-examination that the probable time of death is not mentioned in the post mortem notes.

7 P.W. 8 Prashant Sawant happens to be the nephew of deceased Alkamai. According to him, there is dispute between Roshan Sawant, Ulhas Sawant and Vijay Sawant on account of landed property. Prashant Sawant had acted as a panch for the scene of offence panchanama and also panch for recovery of clothes of accused Roshan Sawant. It is admitted that Grampanchayat number of the house is not mentioned in the scene of offence panchanama. All the accused are owners of their respective houses.

8 P.W.9 Mahesh Amberkar is the owner of Sumo Jeep No. MH 07/28403 and he runs the business of plying vehicles. On 7/2/2013 there was no customer and therefore, he returned home at about 2 p.m. At 4 p.m. he again went to petrol pump in his vehicle. At about 5 p.m. his friend Vinayak Patil approached and informed him that mother of his friend is ill and therefore he was in need of money and hence, he wanted to raise funds. He had with him his mother's two ear tops, one necklace and two bangles. P.W. 9 suggested that they should approach Dhananjay Kasvankar, goldsmith. Roshan Sawant was also present at that time. As per the suggestion of P.W. 9, Vinayak Patil, Roshan Sawant and Amol Sawant and P.W. 9 went to the shop of Dhananjay Kasvankar. The ornaments were handed over to Dhananjay. After examining the ornaments, Dhananjay told them that the bangles were not original golden bangles. Since they were in need of money, Dhananjay agreed to pledge the ornaments and pay Rs. 26,000/- on the condition that they would return the amount on the next day and take away their ornaments. When negotiations were going on, Amol Sawant and Roshan Sawant were seated in the rickshaw of Vinayak Patil. Amol Sawant accepted the said proposal. The necklace and ear tops were handed over to Dhanajay against which they received Rs. 26,000/-. The said amount was paid to Amol Sawant. That bentex bangles were returned to Amol. On 9/2/2013 P.W. 9 had learnt from Vinayak Patil that an old woman was murdered at Kasvan and the description of stolen ornaments was similar to the ornaments which were given to Dhananjay. On 8/2/2013 Vinayak Patil informed P.W. 9 that Amol Sawant returned the money and got the ornaments released from Dhananjay. The witness was declared hostile. P.W.9 had identified the ornaments which were in the possession of Amol Sawant. He had seen the ornaments for the first time before the court. On 9/2/2013 Amol and Roshan Sawant were arrested. P.W.9 has deposed that he had not suspected the involvement of the accused in the homicidal death of deceased Alkamai.

9 P.W. 10 Prakash Shinde owns Auto rickshaw and a Maruti van. He plies rickshaw from Patkidevi, Kankavali. According to P.W. 10, on 6/2/2013 at about

12.30 pm. Amol Sawant, who was just an acquaintance, approached him and asked him as to whether he could sell two gold chains which were in his possession. Amol Sawant had approached him asking him to give his Omni Maruti van to bring some gold chains. Amol Sawant had shown him the golden ornaments such as ear tops, necklace and bangles. He was suspicious about Amol Sawant and therefore, he approached Kohinoor Bar where Amol and Roshan were present. He has admitted that he was not called in police station for identification of the ornaments. He was acquainted with Amol Sawant for more than 3 years and therefore, he did not inquire with Amol who is the owner of the said ornaments.

10 P.W. 11 Dhananjay Kasvankar is a goldsmith by profession. According to him, on 7/2/2013 Vinayak Patil and Mahesh Amberkar had approached him and told him that the ornaments were to be sold urgently for the treatment of his friend's mother and their friend was in need of Rs. 26,000/-. He informed them that the bentex bangles would fetch no value. He had agreed to pay Rs. 26,000/- only for one day subject to the condition that they would return Rs. 26,000/- on the next day and take away the ornaments. Since the said condition was acceptable, he retained the ornaments. On 8/2/2013 at about 9.30 a.m. Vinayak Patil returned Rs. 26,000/- and took away the said ornaments. On the same day, he had learnt from the newspaper that a lady was murdered at Kasvan and her ornaments were stolen. He therefore, enquired with Mahesh Amberkar, who feigned ignorance. He deposed that the incident dated 7th and 8th February, 2013 was suspicious. He was called to the police station on 11/2/2013. He had seen those ornaments in the police station on 3rd day of arrest of the accused and on second occasion he has seen the ornaments at the Tahasil office after 15 days of the arrest of the accused. He had no documentary evidence to show that he has paid Rs. 26,000/- to Vinayak Patil and Mahesh Sawant after retaining the ornaments.

11 P.W. 12 Manisha Jogale happens to be the wife of P.W. 1. According to her, all the four daughters of Alkamai and their husbands used to meet her intermittently and enquire about her health. According to her, her mother had kept her golden bangles with P.W. 12 and in lieu of the same, she had given her two bentex bangles. The golden ornaments of her mother were made after demise of her father. Accused Vithoba Waingankar used to live in cattle shed of her mother after his residential house was collapsed. That at the instance of P.W. 12 and her sister, Alkamai had asked Vithoba to vacate the cattle shed and thereafter, Vithoba had started living in the shed of Prashant Sawant. That all 4 sisters had gifted one mobile phone to Alkamai. On 6/2/2013 at about 8.30 p.m. P.W. 12 had talked with Alkamai and on 7/2/2013 in the morning at about 8.30 a.m. she has received a telephonic call from her sister Shweta Rane informing her about the incident. According to P.W. 12 construction of second house of Alkamai was going on by the side of her residential house. The construction work had started just 8 days before the incident. She has reiterated that the ornaments were not made by purchasing new gold but was made by melting old

ornaments. That her statement was recorded on 8/2/2013.

12 P.W. 13 Ravindra Bavaskar was officiating as Tahsildar at Kankavali. That pursuant to the order passed by JMFC Kankavali and a letter by police station, he had conducted the identification of ornaments in his chamber. He had followed the procedure. He had mixed the said ornaments with five sets of imitation ornaments of identical appearance on his table. The witnesses to identify the ornaments were Manisha Jogale, Sujata Rane, and Dhananjay Kasvankar. A memorandum of the witnesses were made. That the names of witnesses were informed to him by PSI Jadhav. The panchas to the said identification were Gopal Supal and Mahesh Harne. The witness was also prosecuted under the prevention of corruption act, when he was attached Tasildar Office Diodamarg. It is admitted in the cross-examination that at the time of panchanama, none of the witness told as to who was the owner of the identified ornaments and when they had occasion to see that ornaments.

13 P.W.14 Arun Jadhav is the investigating officer. He has deposed before the court about the steps taken by him at the time of investigation of the case of murder of Alkamai. According to P.W. 14, on 7/2/2013 he reached spot of incident at about 11.30 a.m. to 12 noon. Villagers had already gathered on the spot. He conducted the inquest panchanama but did not prepare the hand sketch of the spot of the incident. He received the map of the scene of offence after 8 to 10 days of the incident. No date is mentioned on the map.

14 According to P.W. 14, Chandrakant Sawant was the first person to see the dead body at about 7 a.m. Chandrakant Sawant had told the police that the dead body was lying in the midst of the house. The son-in-law of the deceased (P.W.1) told that he had seen the dead body by removing saree from the neck of the deceased. There was no information that the dead body was moved from its original place. P.W. 14 has categorically admitted that on 7/2/2013 there was no suspicion against anybody either by the relatives or by the police. But news and photographs of the incidents were published in the daily newspapers. That Arun Jogale, son-in-law of the deceased was the driver of Tahasildar.

15 That Accused Vithoba was arrested on 9/2/2013. Roshan Sawant was in police custody from 10/2/2013 to 18/8/2013. That he had arrested Vithoba Waingankar because Chandrakant Sawant and Mandakini Sawant had expressed their suspicion about Vithoba. In the course of investigation, it had transpired that brother in law and nephew of Alkamai were co-sharer in the property. There is dispute between brother in law and Alkamai on account of landed property. Construction of railing was going on near the house of Alkamai. That P.W. 14 had not seen any labour at the construction site.

16 That there is no material to show that there is any enmity between Roshan, Ulhas and Vijay Sawant. P.W.14 had not tried to collect any information in that respect because he did not feel it necessary to do so. There was no material to show that there was any dispute between the family members of Roshan Sawant

and any villagers. Although Ghanshyam Rane was the first person to know about the incident, Arun Jogale has lodged the report. In the course of investigation, he had cell phone numbers of the deceased, accused and all witnesses. But no records are collected. During investigation, no witness expressed suspicion about the involvement of Amol Sawant, Prakash Shinde, Vinayak Patil and Mahesh Amberkar.

17 Learned Counsel for the appellant has vehemently submitted that in fact, the accused appellant was arrested on suspicion. However, there is no material worth its name to connect the accused appellant with the homicidal death of Alkamai. It is submitted that in fact, labours were working on the construction site and there is no investigation in that direction, even to ascertain as to whether it could be a case of theft by any of the labour. That no one has seen the accused either proceeding towards the house of the deceased or leaving the house of the deceased at the relevant time. That the accused has been convicted on the basis of the following material:

(I) Recovery of blood stained clothes.

(II) Recovery of the ornaments adorned by deceased Alkamai before her death.

That in fact, there is material to show that it was Vinayak Patil and Mahesh Amberkar, who had met the goldsmith and attempted to sell the ornaments.

That there is no material to show that the amount of Rs. 26,000/- was paid by accused Roshan Sawant and thereafter, the ornaments were retained by him. In fact, the amount was also returned by Vinayak Patil and Mahesh Amberkar. Even according to P.W. 9, accused Roshan Sawant was sitting in the rickshaw of Vinayak Patil when they were negotiating with the goldsmith. It is pertinent to note that Vinayak Patil has not been examined by the prosecution. Hence, the accused deserves to be acquitted.

18 Per contra learned APP submitted that the accused was found to be in possession of the ornaments adorned by the deceased before her death. The said ornaments had identified by the daughters of the deceased. That blood stained clothes were recovered at the instance of the accused and he has no plausible explanation for the same. Hence, the prosecution has proved its case beyond reasonable doubt.

19 With the help of the learned Counsel, we have perused the evidence adduced by the prosecution. It is seen from Exh. 17 the recovery panchanama at the instance of accused No. 2 that the said ornaments were concealed below a stone in the open place. The panch was the goldsmith. He had verified the genuineness of the golden ornaments. According to prosecution, Alkamai was killed in the course of commission of theft of ornaments. It would be naturally for the benefit of the accused. However, in the present case, it is seen from the material on record that the said ornaments were given to Vinayak Patil and Mahesh Amberkar for selling. That an amount of Rs. 26,000/- was raised only for one

night and on the very next day, the amount of Rs. 26,000/- was returned, the ornaments were returned through Vinayak Patil and Mahesh Amberkar. They took the ornaments in their custody and they returned it to the accused. The accused appellant had not even met the goldsmith and the said transaction does not appeal to a prudent mind. Goldsmith Dhananjay has not identified the accused as the person who attempted to sell the gold stolen ornaments. It is not the case of Mahesh Amberkar that the amount of Rs. 26,000/- was given to Roshan Sawant. In fact, the amount was given to Amol Sawant (acquitted accused). There is no nexus between Amol Sawant and Roshan Sawant. Moreover, P.W. 9 has been declared hostile. The evidence of Vinayak Patil has not been recorded.

20 Question No. 85 of the statement under section 313 Cr. P.C. reads thus:

Que. No. 85: It reveals from C.A. Report Exh. 63 that the pistachio coloured full sleeves shirt, seized from Roshan Sawant was having human blood of "O" blood group. What do you want to say about it? Answer : I do not know.

Question No. 87 of the 313 Cr. P.C. statement shows that the blood group of Alka Sawant was O-Rh negative.

21 Exh. 63 would show that there was no blood detected on Exh. 2, 6, 7, 8, 9, 11 and 12. Exh. 10 i.e. full shirt has bloodstains. The blood group of the accused Roshan Sawant could not be determined as the results were inconclusive. Whereas the blood group of Amol Sawant is 'A'. This evidence would by itself show that recovery of bloodstained clothes by itself would not be sufficient to establish the guilt of the accused and yet the conviction is based on the recovery of blood-stained clothes.

22 It would be appropriate to place implicit reliance on the judgment of the Apex Court in the case of Shaikh Maqsood v/s. State of Maharashtra 2009(6) SCC 583, wherein it is held as follows :

"6. The purpose of Section 313 of the Code is set out in its opening words- 'for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.' In *Hate Singh, Bhagat Singh v. State of Madhya Pradesh* (AIR 1953 SC 468) it has been laid down by Bose, J that the statements of accused persons recorded under Section 313 of the Code 'are among the most important matters to be considered at the trial'. It was pointed out that the statements of the accused recorded by the committing magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness box and that they have to be received in evidence and treated as evidence and be duly considered at the trial. This position remains unaltered even after the insertion of Section 315 in the Code and any statement under Section 313 has to be considered in the same way as if Section 315 is not there.

7. The object of examination under this Section is to give the accused an opportunity to explain the case made against him. This statement can be taken

into consideration in judging his innocence or guilt. Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus."

The Supreme Court has further held that -

"The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give."

23 In the present case, misleading questions were put to the accused. All this would clearly show that the recovery of stolen articles as well as recovery of blood stained clothes by itself, in the facts of the present case would not lead to a definite inference that the accused appellant has caused the homicidal death of Alkamai.

24 In view of the above discussion, the appellant deserves to be acquitted.

Hence, following order is passed :

ORDER

(i) The Criminal Appeal is allowed.

(ii) The conviction and sentence imposed upon the appellant vide Judgment and Order dated 21st December, 2013 passed by the learned Sessions Judge, Sindhudurg-Oros in Sessions Case No. 20 of 2013 is hereby quashed and set aside. The appellant is acquitted of all the charges levelled against him.

(iii) The appellant be released forthwith if not required in any other offence.

(iv) Fine amount if paid be refunded.

(v) The Criminal Appeal is disposed of accordingly.