

(2017) 02 BOM CK 0077

In the Bombay High Court

Case No : Criminal Appeal No. 362 of 2014

Shri Siddharth Bhagwan Wankhede

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 01-02-2017

Acts Referred:

Evidence Act, 1872 — Section 3

Penal Code, 1860 (IPC) — Section 120B, Section 300, Section 364

Citation : (2017) 1 AIRBomRCri 895 : (2017) ALLMRCri 2183

Hon'ble Judges : B.R. Gavai and Kum. Indira Jain, JJ.

Bench : Division Bench

Advocate : Dr. U.K. Kalsi, Advocate, for the Appellants in Criminal Appeal No. 362 of 2014; Mr. R.S. Nayak, APP, for the Respondent in Criminal Appeal No. 362 of 2014; Mr. N.A. Badar with Dr. U.K. Kalsi, Advocates, for the Appellant in Criminal Appeal No. 609 of 2014; Mr. R.S. Nayak, APP, for the Respondent in Criminal Appeal No. 609 of 2014

Final Decision : Allowed

Judgement

B.R. Gavai, J. (Oral) - Being aggrieved by the judgment and order passed by the learned Additional Sessions Judge, Akot in Sessions Trial No.20/2011 dated 8.5.2014 thereby convicting the appellants for the offences punishable under Sections 302, 364 and 201 read with Section 34 of the Indian Penal Code and Section 120- B of the Indian Penal Code and sentencing them to suffer imprisonment for life and to pay fine of Rs.1,000/- in default of payment of fine to suffer R.I. for six months for the offence punishable under Section 302 read with 34 of the I.P.C. and further sentencing them to suffer R.I. for 10 years and to pay a fine of Rs.500/- in default of payment of fine to suffer further R.I. for two months for the offence punishable under Section 364 read with 34 of the I.P.C. and further sentencing them to suffer R.I. for 5 years and to pay a fine of Rs.700/- and in default of payment of fine to suffer further R.I. for 4 months for the offence publishable under Section 201 read with Section 34 of the I.P.C. and also sentencing them to suffer imprisonment for life and to pay a fine of

Rs.1000/- and in default of payment of fine to suffer further R.I. for 6 months for the offence punishable under Section 120-B of the I.P.C., the appellants have approached this Court.

2. The prosecution story as could be gathered from the material placed on record is thus:-

The first informant PW1 Ananta and PW5 Madhusudan are the real brothers and reside jointly at village Wadgaon Rothe, taluka Telhara. Madhusudan was blessed with a son namely Atharva, aged 5 years and a daughter Sanvi. Atharva was studying in K.G.II. On 27.12.2010, some guests were to arrive in respect of marriage proposal of Ananta. As such Atharva was not sent to the school. The guests left the house at around 4 p.m. Since Atharva did not come to home, they started searching for him till 9 p.m. Since he was not found, Ananta went to Police Station, Telhara to lodge the missing report.

3. When PW1 Ananta was coming back, he received phone call from Nagorao informing him that the dead body of Atharva was found in a gunny bag lying in a stream on Nimbhora road. He along with others reached the spot at 10.30 p.m. and saw the dead body of Atharva. He again went to Police Station Telhara and lodged the report of murder against an unknown person. On the basis of the said oral report, an offence came to be registered at 00.30 a.m. on 28.12.2010. After registration of the first information report, PW1 along with the Police came to the spot. Spot panchanama and inquest panchanama were prepared and the body was sent for post mortem. On 28.12.2010 in the morning, a dog squad was called from the Control Room, Akola. Smell of the gunny bag was given to the dog, however, same could not lead to any clue. Similarly smell of T-shirt was given to dog. However, that also did not lead to any clue.

4. The accused came to be arrested on 29.12.2010. According to the prosecution, on 1.1.2011 on the memorandum of the accused under Section 27 of the Indian Evidence Act, the incriminating materials were recovered. After completion of the investigation, the charge sheet came to be filed in the Court of the learned Judicial Magistrate First Class, Telhara. Since the case was exclusively triable by the Sessions Court, same came to be committed to the learned Sessions Judge, Akot.

5. The learned trial Judge framed the charges below Exh.10 for the offence punishable under Sections 302, 364, 201 read with Section 34 of the Indian Penal Code and under Section 120-B of the Indian Penal Code. The accused pleaded not guilty and claimed to be tried. At the conclusion of the trial, the learned trial Judge passed the order of conviction and sentenced the appellants as aforesaid. Being aggrieved thereby, the present appeal.

6. Mr. Badar, the learned counsel appearing on behalf of the appellants submits that the learned trial Judge has grossly erred in convicting the appellants. He submits that the witnesses who allegedly deposed to have lastly seen the deceased in the company of the appellants, are all relatives of PW1 Ananta and

PW5 Madhusudan. He further submits that from their testimony itself, it would reveal that they cannot be said to be truthful witnesses. He submits that the alleged discovery and recovery on a memorandum under Section 27 of the Evidence Act are all fabricated. The learned counsel submits that the appellants have been falsely implicated in the crime. The learned counsel, therefore, submits that the appeals deserve to be allowed and the order of conviction and sentence needs to be set aside.

7. The learned Additional Public Prosecutor on the contrary submits that the learned trial Judge has given the sound and cogent reasons for passing the order of conviction. He submits that the prosecution has proved all the incriminating circumstances beyond reasonable doubt. As such no interference is warranted in the facts of the present case.

8. With the assistance of the learned counsel appearing for the appellants and the learned Additional Public Prosecutor, we have scrutinized the entire evidence on the record.

9. The present case is a case based on a circumstantial evidence. The law with regard to the parameters which are required to be taken into consideration in a case based on circumstantial evidence has been very well crystallized by Their Lordships of the Apex Court in the case of Sharad Birdhichand Sarda v. State of Maharashtra reported in (1984) 4 Supreme Court Cases 116.

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. The State of Madhya Pradesh.⁽¹⁾ 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⁽¹⁷⁾ and Ramgopal v. State of Maharashtra⁽¹⁸⁾. It may be useful to extract what Mahajan, J. has laid down in Hanumant's case :

"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 & Anr. v. State of Maharashtra(19) 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.

10. It could thus be seen that in a case based on circumstantial evidence, before an order of conviction is passed, the prosecution will have to prove beyond reasonable doubt each and every incriminating circumstances. Not only that but the prosecution will have to establish the chain of proven circumstances which leads to no other conclusion than the guilt of the accused. In the light of these guiding principles, we will have to examine the present case.

11. The learned trial Judge has come to the conclusion that the prosecution has proved the following incriminating circumstances:-

1. the deceased Atharva caused homicidal death,

2. the accused persons have motive for committing the crime viz-

(a) suspicion of having an illicit relation of Janabai d/o Sadashiv Wankhade (the sister of accused no.4 Vikram), with Madhusudan Baringe (the father of deceased) and, therefore, stopping to call the accused persons and Janabai for labour work by Madhusudan,

(b) refusal to pay Rs.5000/- by Madhusudan to accused no.1 Ramesh for the

treatment of his son &

(c) refusal to lead evidence by Madhusudan in a case lodged against Santosh Bramhadeo Rothe, Bramhadeo Kisan Rothe, Vijay Bramhadeo Rothe and Prakash Bramhadeo Rothe, All R/o Wadgaon Rothe, on the report of accused no.1 Ramesh vide Crime No. 3013/2007 (Exh.136).

3. On 27.12.2010 at about 2.30 to 2.45 P.M. the witnesses namely Ananta Shriram Hatekar (P W 2), Sunil Purushottam Baringe (P W 7) and Bharat Baringe (not examined) have seen Atharva in the company of accused No.1 Ramesh and other accused persons, when was taken away.

4. On 27.12.2010 at noon the witness Pramod Tulshsiram Aghadate (P W 4) and Bharat Baringe (not examined) had seen all the accused persons while coming and going in the dilapidated house of Jagdeo Wankhade.

5. On 27.12.2010 at about 03.30 to 04.00 P.M. while returning from nature's call, witness Santosh Ambadas Baringe (P W 12) had seen accused no.1 Ramesh while carrying a gunny bag on his shoulder and all other accused were accompanying him on the bridge of a stream on Nimbhora Road.

6. On 27.12.2010 at about 09.30 to 10.00 P.M. the dead body of Atharva was found by witnesses Nagorao Ramdas Nemade (P.W. 8) and Surendra Punjabrao Borse (not examined) in a gunny bag in the stream, as was shown by accused no.4 Vikram and No.5 Parmeshwar in the light of torch and other accused no.3 Nagesh, No.6 Rahul & No.7 Mahendra were also present there.

7. On 27.12.2010 after about 09.00 P.M. accused no.1 Ramesh and No.2 Siddharth came from some where and sat for a while on the platform of the house of Gajanan Baringe, which is situated in front of house of Madhusudan Baringe, and when a lady Gumphabai was passing by the road Siddharth told to Ramesh that, "Atharva is missing, then there will be a Maharabharat on tomorrow and see the Mahabharat of tomorrow" and this fact is heard by Madhusudan Baringe (P.W.5).

8. On 1.1.2011 accused No.1 Ramesh while in police custody confessed the crime and weapons ? spear-blade and the screw-driver having blood stains of Group "B" and seized on its discovery by him.

9. On the same day, the spots where the deceased was killed (in a dilapidated house), where the accused no.1 Ramesh put the gunny bag for a while and the spot where the gunny containing dead body of Atharva was put in the stream, were shown by accused No.1 Ramesh to the police.

10. The cotton gauze found at the dilapidated house of Jadgeo Wankhade and at the stream were stained with blood of Group "B".

11. The blood group of deceased Atharva is also "B".

12. Atharva was missing on 27.12.2010 since 1.30 P.M."

12. Insofar as the first circumstance regarding the death of the deceased being homicidal, the same is not questioned by the defence and as such it will not be necessary for us to discuss the medical evidence.

13. From the judgment of the learned trial Judge, it would reveal that the most important circumstance on which the prosecution relies and which the learned trial Judge finds to be proved, would be the circumstance no.3 which is of the deceased last seen in the company of the accused. We would first scrutinise the evidence in that regard.

14. The prosecution in this respect relies on the evidence of PW2 Ananta Shriram Hatekar and PW7 Sunil Purushottam Baringe.

PW2 states that on 27.12.2010 he was working in cattle-shed till 2.30 p.m. At 2.30 p.m. he was going towards his home for taking meal. He states that, that time he saw Ramesh Wankhade i.e. accused no.1 taking Atharva with him. He further states that behind him, all other accused were also passing. He states that thereafter he had gone to his elder father at Babhulgaon and stayed there for a night. He further states that on next day when he returned back, he came to know that Atharva was missing from 2.30 p.m. and his body was found on Nimbhora road besides the bridge in a gunny bag. Taking the evidence of this witness at its face value, he had returned to the village on 28.12.2010 at around 9 to 10 a.m. From the evidence of various witnesses including the Investigating Officer PW14 Ramkrushna Malghane, it would be clear that everybody in the village was aware about the death of the deceased. Not only this, but the dog squad had also arrived in the village to make investigation with regard to the crime. In that event, he could have immediately informed the Police about he seeing the accused in the company of the deceased on the previous day and the accused who were the villagers of the same village, could have been arrested on the very same day.

15. The next witness on this point is PW7 Sunil Purushottam Baringe. In his evidence, he states that while he was returning from his field on 27.12.2010 at around 2.30 to 2.45 p.m. , he saw Ramesh Wankhade -accused no.1 taking Atharva. Rest of the accused were also with him. He states that then he went to home, took a meal and went to his sister's village at Kalkhed. He states that on the next day when he returned home, he came to know that Atharva was missing since last noon, he was killed, put in a gunny bag and kept in a stream. He states that thereafter he went to Madhusudan and told him the incident witnessed by him on the earlier day. This witness has flatly denied that he has relationship with PW1 Ananta and PW5 Madhusudan. However, from the evidence of investigating officer it has been proved that this witness in his statement under Section 161 of Cr.P.C. at more than one places has stated that Madhusudan was his cousin. It would thus show that what value this witness has for truth. Even accepting for a moment that this witness has also left the village on 27th and had returned on 28th, when he arrived the Police Patil was very much available in the village. However, he states that he does not recollect as to

whether on 28th when he had been to PW5 Madhusudan, the Police were present there. His statement is also shown to have been recorded on 28.12.2010. If that be so, the question again arises as to why the accused were not arrested on the same day and are arrested on the next day i.e. on 29.12.2010 and that too in the evening hours at 19.15 hours. We are of the considered view that it will not be safe to arrive at the conclusion on the basis of the evidence of these two witnesses that the prosecution has proved beyond reasonable doubt that the accused were last seen in the company of the deceased in the afternoon of 27.12.2010.

16. The next circumstance on which the prosecution relies is that the accused were seen while coming and going in the dilapidated house of Jagdeo Wankhade. The prosecution in this respect relies on the evidence of PW4 Pramod Tulshiram Agadate. He states in his evidence that on 27.12.2010 he had been to graze goats by Nimbhora road. When he returned back at noon, in the dilapidated house of Jagdeo Wankhade he had seen all the accused persons coming and going in the said house. This witness has admitted that he had accompanied Madhusudan in search of Atharva between 3 p.m. and 5 p.m. on 27.12.2010. He also states in his evidence that the relations between the accused persons and Madhusudan Baringe were on bad terms. If that be so, there was no reason as to why he should not have disclosed the suspicion act of the accused persons to PW5 Madhusudan, which could have found place in the missing report as well as the first information report lodged by PW1 Ananta below Exh.59. However, the perusal of the first information report would reveal that it is lodged against an unknown person. It is further to be noted that the conduct of the witness as could be found from the perusal of the cross-examination is unnatural. He states that on 28.12.2010 at around 9 to 10 a.m. he went to graze goats and returned back in the evening. It is unnatural that in a village if such an unfortunate incident happens and the witness who is very well known to the father of the deceased, would go to graze the goats. In any case there is no reason as to why when the police were very much present in the village on 28th, he should not have disclosed this incident to the Police.

17. The next circumstance on which the prosecution relies is that the accused no.1 was seen carrying a gunny bag and all other accused were accompanying him on the bridge of a stream on Nimbhora road. In this regard, the prosecution relies on the evidence of PW12 Santosh Ambadas Baringe. This witness states that on 27.12.2010 when at around 3.30 to 4 p.m. he was returning home after answering nature's call from Nimbhora road, on the bridge of stream he saw accused no.1 Ramesh Wankhede while carrying gunny bag on shoulder and rest of the accused were going on foot. Coincidentally this witness also states that thereafter he went to Shegaon to meet his aunt. Next day at around 9 to 10 a.m., he returned to the village. Then he went to the house of Madhusudan Baringe. Villagers were present there. PW2 Ananta and PW7 Sunil told him that they had seen Ramesh Wankhede while taking Atharva and all other accused were present with him. This witness has categorically denied that Madhusudan is

his cousin. From the perusal of his cross-examination, it reveals that he is also related to PW1 and PW5. He has further admitted that Ukali road and Nimbhora road are different roads.

18. It could thus be seen that there are various mysteries in the present case. Incidentally all the three witnesses i.e. PW2 Ananta and PW7 Sunil who claimed to have seen the deceased lastly in the company of the accused and PW12 Santosh who claims to have seen the accused no.1 carrying a gunny bag and the other accused accompanying him, go out of the village on 27th after seeing the incident and come back on 28th. On 28th, they disclosed this fact to the Police. However, the Police did not find it necessary to arrest the accused even on the same day and waited till 19.15 hours of the next to arrest them. It is further to be noted that the house of Jagdeo Wankhade where according to the prosecution the deceased was done away to death is in the midst of the village. However, according to PW2 and PW7, they have seen the deceased catching the finger of accused no.1 followed by the other accused going outside the village. It is to be noted that according to PW7 he was returning from his field which is on Ukali road whereas according to PW12 the accused were seen along with the gunny bag on the shoulder of Ramesh Wankhade on Nimbhora road. We find that these inconsistencies create a serious doubt with regard to the genuineness of the prosecution case. It is further to be noted that the witnesses who are relatives of PW1 and PW5, deny the same.

19. In the light of the aforesaid position, it will be appropriate to refer to the evidence of PW14 Ramkrushna Malghane-Investigating Officer. This witness has categorically admitted in his evidence that the information with regard to the death of the deceased was received on phone from the Police Patil Rothe, in respect of which the entry no. 35 below Exh.141 is taken. In spite of this, he did not find it necessary to record the statement of the said Police Patil. He has further admitted that while registering the first information report he had asked Ananta about the suspicion and enmity with anybody. However, he could not get any information. As such he registered the offence against an unknown person. He further admits that till 28th, it was not clear as to who had firstly seen the dead body. He further admits that though he has recorded the statement of Bharat Shankar Baringe who resides near the dilapidated house of Jagdeo Wankhade, he has not recorded the statement of Prakash Pralhad Wankhade who also resides near the said house. He further admits that during investigation it revealed that accused Ramesh and Siddharth had been to the field of Suresh Baringe with bullock-cart. He further admits that though the name of Suresh Baringe is included in the witness list, he was not examined. He further admits that though the three witnesses namely PW2 Ananta, PW7 Sunil Baringe and PW12 Santosh Baringe had informed him that they had left the village on 27th, he did not find it necessary to verify this fact. He further admits that though there were guests in the house of PW5 Madhusudan on the date of the incident, he had not recorded their statements.

20. The next circumstance on which the learned trial Judge relies is with regard to the evidence of PW8 Nagorao that the accused Parmeshwar, Vikram, Rahul, Mahindra and Nagesh had shown the gunny bag containing the body of the deceased in the stream. He states that when on 27th Atharva could not be found, they were going to Maharaj of Paturda for search of missing person. He further states that when they were before stream, the aforesaid accused stopped them and asked as to where they were going. He answered that they were going to Maharaj. However, Parmeshwar said that they need not to go to Paturda and they should see in the stream. He further states that Parmeshwar and Vikram in the light of the torch had shown the gunny bag and the gunny bag was taken out, in which the body of the deceased was found. However, it is to be noted that though this witness admits that he had called PW1 Ananta on his cell number, he did not find it necessary to inform the aforesaid fact to him. If the version of this witness is believed to be true, then there is no reason as to why a suspicion could not have been raised against the present appellants in the first information report. Further the conduct of this witness also appears to be unnatural. This witness in cross-examination states that though he was trying to find the deceased till the night of 27th, he did not find it necessary to go to the house of PW1 and PW5 on 28th and 29th.

21. The next circumstance which the learned trial Judge finds to have been proved on the basis of evidence of PW5 Madhusudan, is with regard to suspicious utterances of accused no.1 Ramesh and accused No.2 Siddharth. This witness states that he heard the noise of one lady on 27th at around 9 p.m. He saw accused Siddharth Wankhade inquiring with one lady "Wahini Kai Gadbad Ahe". Thereupon she said that "Atharva Disun Nahi Rahila Ani Tyala Shodhanyachi Gadbad Sure Ahe". He states that at that time accused Siddharth Wankhade told him that "Atharva Disun Rahala Nihi, Udya Tule Mahabharat Disel. Tu Fakta Udyache Sakalche Mahabharat Paha" and then accused Siddharth and Ramesh ran away. If this was so, then there is no reason as to why the said fact was not brought to the notice of the Police when the first information report was lodged. From the material placed on record, there is a reason to believe that the Investigating Officer has first drafted the script and thereafter recorded the statements of the witnesses so as to suit the script.

22. The next circumstances i.e. circumstance Nos. 8 to 12 are with regard to discovery and recovery of incriminating materials at the behest of accused no.1 Ramesh. Insofar as recovery of spear-blade and the screw-driver from the house of accused no.1 Ramesh is concerned, from the perusal of the panchanama itself, it would reveal that same was from the house inhabited by other persons. It could thus be seen that the said recovery was not from the place solely within the knowledge of the accused. Insofar as the discovery of the place of crime i.e. the dilapidated house of Jagdeo Wankhade is concerned, the perusal of the evidence of PW14 itself would reveal that when dog squad was brought to the place, he had taken the dog squad to the said house and that a cotton gauze was found there. However, the Investigating Officer did not find it necessary to seize

the same. In that view of the matter, the memorandum below Exh.69 is of no use. It is further to be noted that though the said memorandum dated 1.1.2011 at 2 p.m. is shown to have been recorded in Telhara Police Station, PW14 has in unequivocal terms admitted that on the said date, accused no.1 was not in Telhara Police Station but was in Akot Police Station. Coupled with this, the fact that PW3 Janardan is a panch on all the panchanamas creates a serious doubt with regard to the genuineness of the same. As such we find that the learned trial Judge has grossly erred in coming to the conclusion that the circumstances from 8 to 12 stand duly proved.

23. That leaves us with the last circumstance regarding motive. Firstly in the case of circumstantial evidence, only on the basis of motive the conviction could not be maintained. Apart from that three motives which have been found to be proved, in our considered view, would not take the prosecution case any further. The first one is with regard to illicit relationship between one Janabai Sadashiv Wankhade with PW5. It is said that said Janabai is a sister of accused no.4 Vikram and, therefore, on this count the accused have committed the crime. However, defence witness no.1 Sheela who is sister of accused no.4 Vikram totally falsifies the said claim. Insofar as refusal to pay Rs.5000/- to accused no.1 Ramesh for the treatment of his son is concerned, no cogent evidence is placed on record in support of the said case. Insofar as the third motive is concerned, which is refusal to lead evidence by PW5 in a case lodged against Santosh Rothe is concerned, it is to be noted that the case was of the year 2007 and the incident in question is of December, 2010. In any case at the most the said motive would be attributed to accused no.1 Ramesh and not to the other accused.

24. In that view of the matter, we find that the prosecution has utterly failed to prove any of the incriminating circumstances and in any case a chain of circumstances which is so interlinked to each other which leads no other conclusion than the guilt of the accused.

25. We further find that insofar as conviction under Section 120-B of the Indian Penal Code is concerned, there is no material at all on the basis of which conviction under Section 120-B of the I.P.C. could have been recorded. We failed to understand as to on what basis the learned trial Judge has passed the order of conviction for the offence punishable under Section 120-B of the I.P.C.

26. In the result, the appeals are allowed. The appellants are acquitted of the charges charged with. The appellants are directed to be set at liberty forthwith, if not required in any other case. Fine amount, if any paid, be refunded to the appellants.