

**(2012) 12 BOM CK 0137**

**In the Bombay High Court**

**Case No :** Criminal Appeal No. 1378 of 2004

Shri Sunil Shripal Sarde, Convict No. C-2537, Kolhapur  
Central Prison, Kalamba

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

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**Date of Decision :** 17-12-2012

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 302, 34

**Citation :** (2013) 1 ABR 771 : (2013) ALLMR(Cri) 1750 : (2013) 2 BomCR(Cri) 252

**Hon'ble Judges :** V.K. Tahilramani, J;A.R. Joshi, J

**Bench :** Division Bench

**Advocate :** B.P. Jakhade in Cri. Appeal No. 1378 /2004 and Mr. Arfan Sait in Cri. Appeal No. 1320 of 2012, for the Appellant; D.P. Adsule, APP for the State in both Appeals, for the Respondent

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## **Judgement**

A.R. Joshi, J.—Heard rival submissions on both the appeals which are respectively preferred by original accused No. 1 and original accused No. 2 challenging the judgment and order of conviction dated 27th February, 2004 passed by III Adhoc Additional Sessions Judge, Sangli in Sessions Case No. 87 of 2003. Both the accused were convicted of the offence punishable u/s 302 read with Section 34 of IPC and they were sentenced to suffer imprisonment for life and to pay fine of Rs. 1000/ & Rs. 500/ respectively, in default to undergo further sentence for six months each. Initially Criminal Appeal No. 1378 of 2004 was preferred by orig. accused No. 1. When the said appeal was taken up for final hearing before this Bench and when it was partly heard, it was revealed that original accused No. 2 who is in jail custody has also preferred separate appeal challenging the same judgment and order. She preferred appeal along with application for condonation of delay as her appeal was belatedly preferred in the year 2012. By separate order, said application for condonation of delay was heard and allowed by us and said Criminal Appeal No. 1320 of 2012 was also heard along with part heard Criminal Appeal No. 1378 of 2004 and both the

appeals are being disposed of by this common judgment and order.

2. The case of the prosecution, in nutshell, is as under :-

Initially the victim Dipak Pawar, his wife Baby Pawar (Appellant/accused No. 2) and his children - including PW-3 Manisha and PW-5 Dipali were residing together at Koregaon Bhima, District - Pune. That time, Dipak Pawar was working as a compounder and was also selling medicines from his house. That time, marriage of PW-5 Dipali was performed and she started residing at her matrimonial home. Thereafter victim Dipak had fallen ill and could not recover from the illness and, therefore, all the family members changed the place of residence and came to Kupwad, District - Sangli, where the sister and other relatives of victim were residing. The family started residing in one rented room belonging to PW-6 landlord one Mahadev.

3. According to the case of prosecution when victim and his wife (accused No. 2) and their children were residing at Kupwad, victim continued to have ill health and as such was not doing any job. Due to this, appellant/accused No. 2 (his wife Baby) started working as maid-servant in one hotel Barbi Garden. At this place of work, she got acquainted with present appellant/accused No. 1 Sunil Sarde. He was working in the said hotel as a watchman. Both had developed some illicit relations and appellant/accused No. 1 started visiting the house of victim on many occasions. At occasions, he and accused No. 2 used to take the victim for treatment in the hospital. The illicit relations between both the accused were revealed to the victim and also to their children including PW-3 & PW-5. Such illicit relations were also known to other relatives of the family. However, both the accused were not giving any heed to the advice given by relatives and continued to have illicit relations with each other. Even on this count, both daughters of victim i.e. PW-3 & PW-5 had reprimanded their mother i.e. accused No. 2, but in vain.

4. According to the case of prosecution, sometime on the day of Anant Chaturdashi in the year 2000, victim Dipak, who was ill, was taken in an autorikshaw for admitting in the hospital. He was taken by both the accused. PW-3 Manisha also took ride in the autorikshaw on her way to school. She was dropped at her school and the autorikshaw went ahead. At that time itself PW-3 Manisha went to workplace of her sister Dipali (PW-5) and informed her regarding taking of their father to the hospital by both the accused. On that night at about 10:30 p.m. or so both the accused returned and told that victim Dipak Pawar was admitted in the hospital. Even for four-five days, no steps were taken for taking said victim back to the house though PW-3 Manisha asked her mother regarding whereabouts of her father (the victim). On this, appellant/accused No. 2 told her that her father had been to the place of his sister at Shirole Kolhapur. Thereafter also, for 10-12 days there was no news regarding victim Dipak and thereafter appellant/accused No. 2 told her children that their father was missing and his whereabouts are not known. According to the case of prosecution, then for about two years, nothing happened in the matter, much less, filing of any

missing complaint by accused No. 2 or her daughters PW-3 & PW-5. Subsequently, some time in December, 2002 appellant/accused No. 2 made proposal to her daughter PW-3 Manisha that Manisha should get marry to appellant/accused No. 1. During all these years, after missing of Dipak, appellant/accused No. 1 was residing in the house of accused No. 2. PW-3 Manisha negated the proposal of marrying with appellant/accused No. 1 who was then twice in age. However, appellant/accused No. 2 gave threats of dire consequences to her young daughter and was compelling her to marry with appellant/accused No. 1. This fact was informed by PW-3 to her sister PW-5 and thereafter both the sisters approached Mahila Nyay Andolan Samiti, Sangli and gave written submission that their mother is coercing PW-3 to get marry with appellant/accused No. 1 - a rather aged person. On this submission, requests were made to Superintendent of Police, Sangli through the said Mahila Nyay Andolan Samiti, Sangli and during which both the appellants/accused were brought to MIDC Kupwad police station and they were interrogated. In the roving enquiry made with both the appellants/accused it was revealed that they were giving evasive answers and during that time the factum of missing of Dipak since the year 2000 was revealed and then further enquiries were made with both the accused. During interrogation it was revealed through both the accused that they had killed victim Dipak Pawar after taking him from the house in the year 2000 on the pretext of taking him to the hospital for treatment. On revealing this disclosure, PW-4 Police Nayak Vitthal Koli lodged the First Information Report (Exh.23) with MIDC Kupwad Police Station.

5. Accordingly offence was registered against both the appellants/accused for the offence punishable u/s 302 read with Section 34 of IPC. Investigation was handed over to API Bhapkar. Both the appellants/accused were arrested. API Bhapkar (PW-8) took over the investigation and recorded the statements of both the daughters of victim i.e. PW-3 Manisha and PW-5 Dipali. According to police appellant/accused No. 1 made a voluntary statement to show the place where the dead body of Dipak Pawar was concealed. Said place was shown by both the appellants/accused and detailed panchnama was conducted. During investigation, API Bhapkar and other police staff visited the MIDC Shirole police station within which jurisdiction the incident of murder took place. From that police station, it was revealed that one accidental death No. 40 of 2000 was registered with MIDC Shirole police station on 13.9.2000. On finding dead body of one unknown person and after obtaining photographs of dead body and taking charge of cloths from the dead body, body was disposed of after inquest panchnama and postmortem and the matter remained pending as undetected. All those case papers were taken charge of by the MIDC Kupwad police on 14.1.2003 along with Muddemal Articles. The clothes and the photographs of the victim were shown to PW-3 & PW-5. These witnesses identified them as of their father Dipak Pawar. After completion of investigation charge-sheet was filed against both the appellants/accused and the matter was committed to the Court of Sessions. Both the accused were tried and convicted, as mentioned above.

6. Admittedly entire case of prosecution is based on circumstantial evidence. The circumstances are :

[I] on the day of Ganesh Visharjan in the year 2000 both the accused took victim Dipak Pawar in an autorikshaw and thereafter said victim was missing.

[II] both the accused had illicit relations with each other and appellant/accused No. 1 was frequently visiting the house of victim even prior to and after missing of victim.

[III] the spot of offence where allegedly victim Dipak Pawar was done away was shown by both the appellants to the police

7. So far as the first circumstance is concerned, it is curious to note that though according to case of prosecution PW-3 & PW-5 mentioned as to both appellants/accused taking the victim in an autorikshaw during Anant Chaturdashi of the year 2000, there was no any complaint lodged with any police station regarding missing of Dipak Pawar. In our considered view, the time gap between the last seen together circumstance and revealing of the offence of murder in December, 2002, is required to be construed as a mitigating circumstance to the case of prosecution. In other words there is much remote relation between the circumstance of last seen together and alleged knowledge of MIDC Kupwad police regarding commission of offence of murder by both the appellants through their alleged memorandum statement and alleged confession before the police officer.

8. So far as the illicit relations between both the appellants/accused inter se, the silence on the part of PW-3 & PW-5 is of much significance inasmuch as there is no any complaint or any accusation made by said witnesses against their own mother. Apart from their testimonies, there is nothing on record to show that both the appellants/accused had illicit relations between them. If for the sake of argument, this circumstance is accepted as truthful still it will be far fetched to link them to the offence of murder, mainly due to long lapse of time of about two years from the missing of victim and revealing of the commission of offence from the accused persons themselves. Regarding the third circumstance, in our considered view, showing of a place by both the accused as to allegedly at that place the victim was done away, is not such a circumstance pointing towards the accused so far as their involvement in the offence of murder and concealing the dead body. Again it must be said that the silence on the part of PW-3 & PW-5 till insistence of appellant/accused No. 2 for PW-3 to get marry with appellant/accused No. 1, is speaking volumes. Considering the circumstances and unearthing of the mystery of missing of victim only because of insistence of accused No. 2 insisting her daughter PW-3 to marry with appellant/accused No. 1, though there is a grave doubt against both the accused as to having done away with victim, there is no any cognate circumstance to link both the appellants/accused with the offence of murder, beyond reasonable doubt and in that view benefit of doubt is required to be given in favour of the appellants/accused. Consequently, the impugned judgment and order is required to be set

aside and both the present appeals are required to be allowed. Hence, the following order : -

::ORDER::

I. Criminal Appeal Nos. 1378 of 2004 & 1320 of 2012 are allowed.

II. The impugned judgment and order of conviction dated 27th February, 2004 passed by III Adhoc Additional Sessions Judge, Sangli in Sessions Case No. 87 of 2003 is set aside. Appellants/accused are acquitted of the offence punishable under Sections 302 read with Section 34 of IPC

III. The appellants/accused be set at liberty, if not required in any other matter.

IV. If fine amount is already paid, it shall be refunded back to appellants/accused.

V. Writ of order is expedited.

VI. Present judgment and order be communicated to the appellants through concerned jail authorities where the appellants/accused are presently lodged.

VII. At this stage, we wish to place on record our appreciation for the way in which Mr. Arfan Sait, learned appointed Advocate appearing for the appellant has conducted the matter. He was thoroughly prepared with the matter and he has very ably argued the matter. We quantify his fees to be paid by the High Court Legal Services Committee, Bombay at Rs. 2500/-(Rupees Two Thousand Five Hundred Only). The same to be paid to the learned Advocate Mr. Arfan Sait within two months from today.