



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 551 OF 2014

Jitendrakumar Jogendra Shahu @ Sahu ... Appellant

Versus

The State of Maharashtra ... Respondent

WITH

CRIMINAL APPEAL NO. 356 OF 2015

Ashokkumar Basanturam Jaiswal ... Appellant

Versus

The State of Maharashtra ... Respondent

.....

Mr. Anush Shetty instructed by Dr. Yug Chaudhary for the Appellant in Apeal-551-2014.

Mr. Vishal Kanade, appointed Advocate for the Appellant in Apeal-356-2015.

Ms. M.M. Deshmukh, APP for the State.

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**CORAM : SMT. ANUJA PRABHUDESSAI &
N.R. BORKAR, JJ.**

DATED : 14 & 15 SEPTEMBER 2023

COMMON JUDGMENT (Per : Smt. Anuja Prabhudessai, J.)

1. This is an appeal under Section 374 of the Code of Criminal Procedure, 1973, challenging the Judgment and Order dated 08.05.2014 passed by Learned Additional Sessions Judge, Mumbai in Sessions Case No.292 of 2012.

2. By the impugned Judgment, the learned Sessions Judge convicted and sentenced the appellants (hereinafter referred to as accused nos.1 and 2 respectively) for offence punishable under Section 302 r/w. 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life with fine of Rs.1000/-, in default rigorous imprisonment for six months. The accused are also held guilty of offence under Section 392 r/w. Section 394 r/w. 34 of the Indian Penal Code and sentenced to suffer 07 years rigorous imprisonment with fine of Rs.1000/-, in default rigorous imprisonment for six months.

3. The case of the prosecution in brief is that, the deceased – Tabeta Fonseca, aged about 85 years was residing alone in a ground floor flat of Fonseca Building, Dadar, Mumbai. On 08.09.2011, PW-1- Ruth Edward D'souza, the daughter of the deceased made several phone calls to her mother which went unanswered. Hence, on 09.09.2011 at about 9.00 a.m., she came to the house of the deceased, but found that the door and the windows were shut. There was no response from the deceased. PW-1 collected the spare key from the neighbor and opened the

door. A foul smell was emanating from the room, and her mother was lying on the floor. The safe of the cupboard was open and cash and jewelry were missing. PW-1 called her cousin PW-2- Dr. Malcol Joseph, who examined the deceased and found her to be dead. PW-1 and PW-2 went to Matunga police station and reported the incident, pursuant to which, PW-8- Madhav Mahale, API registered ADR No.66 of 2011 under Section 174 of Cr.PC.

4. PW-8 proceeded to the place of the incident and conducted inquest panchanama (Exhibit 11). He recorded the statement of PW-1- Ruth and registered crime No.388 of 2011 for offences punishable under Sections 302, 394, 397 of Indian Penal Code against an unknown person. The body of the deceased was sent to Sion Hospital for post-mortem. The post-mortem report revealed that the death was due to *“Asphyxia following compression over face associated with neck compression and blunt trauma over head.”*

5. Further investigation was taken over by PW-9 - PI Shridhar Sawant. It is the case of the prosecution that the accused no.1, who was running a PCO booth in the same locality, was

absconding. PW-9 suspected that the accused no.1 was involved in committing the said crime. He contacted accused no.1 through his father and learnt that accused no.1 had been to his native place at Orissa to attend a fair. PW-9 sent a special investigation team to Orissa to trace the accused no.1. PW-10- API Laxman Kamble, who was heading the special investigation team went to Orissa and contacted the local police. He learnt that the accused no.1 had purchased a LIC Policy for the premium of Rs.11,351/- per annum. He collected a copy of the said policy and handed over the same to the investigating officer (PW-9).

6. Both the accused were called to the police station for interrogation. They were placed under arrest on 16.11.2011 under arrest panchanama at Exhibit 51 and 37. It is the case of prosecution that in the course of interrogation, the accused no.1 disclosed that he had melted the stolen gold ornaments with the help of one goldsmith at Jajpur, Orissa and sold the gold ingots to another jeweler at Jajpur, Orissa. The disclosure statement made by the accused no.1 was recorded in presence of panchas. The accused no.1 directed them to Shalimar Refineries at Jajpur i.e. the

place where he had melted the gold ornaments. PW-5 Sandip Nikam, the owner of the said shop confirmed that he had melted the gold ornaments and handed over to the accused no.1 gold ingots weighing 23.80 grams and 8 grams. PW-5 handed over to the police two fake rings given to him by the accused. The said rings and the extract of the register maintained by PW-5 were attached under panchanama (Exhibit 33 and 34). The disclosure statement made by the accused no.1 led to recovery of two gold ingots from PW-4- Diptiranjana Dilip Sahu, the proprietor of Mahima Jewellers, Jajpur. The said ingots were seized under panchanama (Exhibit 43-A), drawn in presence of PW-7- Danvel Kalpund.

7. It is the case of the prosecution that pursuant to the disclosure statement of accused no.2, two wrist watches, three pens, golden colour visiting card of Irvin Fonseca, some earrings and some coins/currency of different countries were recovered and seized under panchanama (Exhibit 37 & 38) drawn in presence of PW-5A- Sayyed Siraj s/o. Sayyed Yusuf and PW-6- Sohil Khan Farid Khan. It is on the basis of said material that the investigating officer filed the charge-sheet against both the accused for

aforestated offence.

8. The accused pleaded not guilty to the charge. The prosecution in support of its case examined 10 witnesses. The statements of accused were recorded under Section 313 of Cr.P.C. The defence of the accused was that of total denial. The learned Sessions Judge held the accused guilty on the basis of the recovery of gold ingots and other articles pursuant to the disclosure statements made by the accused.

9. Mr. Anush Shetty, learned Counsel for accused no.1 and Mr. Vishal Kanade, learned Counsel for the accused no.2 have submitted that the case of prosecution is based on circumstantial evidence. The only circumstance relied upon by the prosecution is the alleged recovery at the behest of the accused. It is stated that the said circumstance does not unequivocally point towards the guilt of the accused. It is submitted that PW-1 had not given description of the gold ornaments which were allegedly stolen from the house of her mother- Tabeta Fonseca. The supplementary statement which was given after considerable delay was based on the information given by her brother, who has not been examined.

It is stated that there is absolutely no evidence to prove that the gold ornaments which were allegedly melted by PW-5 were the ornaments of the deceased or that the gold or watches which were recovered at the instance of accused no.2 belonged to the deceased or her son.

10. Per contra, learned APP submits that the evidence of the investigating officer amply proves that accused no.1 was running a PCO booth and accused no.2 was a rag picker in the same vicinity. accused no.1 was absconding from the date of the incident. He was subsequently placed under arrest and the disclosure statement made by him immediately after his arrest led to recovery of gold ingots. Similarly, gold ornaments, watches, pens and visiting card were recovered pursuant to the disclosure statement made by accused no.2. She submits that the aforesaid circumstances clearly establish the guilt of the accused beyond reasonable doubt.

11. We have perused the record and considered the submissions advanced by the learned Counsels for the respective parties.

12. The case of the prosecution rests mainly on circumstantial evidence. In ***Hanuman Govind Nargudkar and Anr. vs. State of Madhya Pradesh***¹, the Apex Court has observed that “*it is well to remember that in cases where the evidence is of circumstantial nature, the circumstances from which the conclusion of guilt is sought 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 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 probabilities the act must have been done by the accused....*” The aforesaid principle has been followed in ***Ramgopal vs. State of Maharashtra***², ***Sharad Biridhi Chand Sarda vs. State of Maharashtra***³ and ***Munikrishna @***

1 AIR 1952 SC 343

2 AIR 1972 SC 656

3 AIR 1984 SC 1622

Krishna etc. vs. State by Ulsoor P.S.⁴. Reliance is also placed on the decision of ***Shankar vs. State of Maharashtra***⁵.

13. In the instant case, the evidence of PW-1- Ruth D'Souza, as well as PW-2- Dr. Malcol Fonseca proves that the deceased was living alone in her flat in Fonseca building. On 09.09.2011, when PW-1 visited her flat, she noticed that the door and windows were closed. She opened the door of the flat with the help of spare keys and found the deceased lying on the floor, and a foul smell was emanating from the room. The body was sent for post-mortem, and the post-mortem report (Exhibit 14) revealed that the death of the deceased was due to strangulation. The evidence on record thus amply proves that the death of the deceased Tabeta Fonseca was homicidal.

14. The next and most crucial question for consideration is whether the accused were involved in committing the said crime.

15. The incriminating circumstances as against the accused no.1 are (i) that he was absconding immediately after the incident,

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5 2023 SCC OnLine SC 268

(ii) he had melted gold ornaments of the deceased with the help of PW-5- Sandeep Nikam, (iii) He had sold the gold ingots to PW-4- Mr. Diptiranjana Sahu. (iv) recovery of gold ingots at the instance of the accused no.1. Whereas, the only incriminating evidence against the accused no.2 is the recovery of gold ornaments, watches, coins and visiting card of the son of the deceased under Section 27 of the Indian Evidence Act.

16. In regard to the circumstance that the accused no.1 was absconding immediately after the incident, PW-9 has deposed that the accused no.1- Jitendra Shahu who was running a PCO booth in the said locality, was absconding immediately after the incident. He tried to contact accused no.1 through his father. Accused no.1 told him that he was at his native place at Orissa to attend a fair. PW-9- Shreedhar Sawant sent PW-10- Laxman Kamble to Orissa to ascertain the veracity of the statement made by the accused no.1. Accordingly, PW-10 proceeded to Orissa and contacted the accused with the help of the local police. The evidence of PW-10 does not indicate that the statement of the accused no.1 that he had gone to attend a fair was false or that he had absconded after the incident.

In fact, the evidence of PW-9 and PW-10 indicates that the accused no.1 was summoned to the police station for inquiry on 16.11.2011 and that he had remained present on the said date and was placed under arrest.

17. The next circumstance is the recovery of fake rings and two gold ingots pursuant to the disclosure statement made by the accused no.1 and recovery of watches, pens, earrings, coins and visiting card of the son of the deceased, pursuant to the disclosure statement made by the accused no.2. Considering the fact that the case of the prosecution rests mainly on the disclosure statement and resultant recovery, it would be relevant to refer to the decision in ***Bijender @ Mandar vs. State of Haryana***⁶, wherein a three Judge Bench of the Hon'ble Supreme Court has observed that :-

“16... it may be true that at times the court can convict an accused exclusively on the basis of his disclosure statement and the resultant recovery of inculpatory material. However, in order to sustain the guilty of such accused, the recovery should be unimpeachable and not be

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shrouded with elements of doubt. We may hasten to add that circumstances such as : (i) the period of interval between the malfeasance and the disclosure ; (ii) commonality of the recovered object and its availability in the market; (iii) nature of the object and its relevance to the crime; (iv) ease of transferrability of the object ; (v) the testimony and trustworthiness of the attesting witness before the Court and /or other like factors are weighing considerations that aid in gorging intrinsic evidentiary value and credibility of the recovery. (See: Tulsiram Kanu vs. State, Panchu Vs. State of Haryana, State of Rajasthan vs. Talewar and Bharama Parasram Kudachkar vs. State of Karnataka).

17. *Incontrovertibly, where the prosecution fails to inspire confidence in the manner and/or contents in the recovery with regard to its nexus with the alleged offence, the Court ought to stretch the benefit of doubt to the accused. It is nearly three centuries old cardinal principle of criminal jurisprudence that “it is better that ten guilty persons escape, than that one innocent suffer.” The doctrine of extending benefit of*

doubt to an accused, notwithstanding the proof of a strong suspicion holds its fort on the premise that “the acquittal of a guilty person constitutes a miscarriage of justice as much as the conviction of the innocent.”

18. In ***Tulesh Kumar Sahu vs. State of Chhatisgarh, AIR ONLINE 2022 SC 250***, the Hon’ble Supreme Court referred to the decision of Sanwant Khan Vs. State of Rajasthan, wherein it was observed that “*...in the absence of any direct or circumstantial evidence, whatsoever from the solitary circumstance of the unexplained recovery of the two articles from the houses of the two appellants, the only inference that can be raised in view of illustration A to Section 114 to Indian Evidence Act is that they are either receivers of the stolen property or were the person who committed the theft, but it does not necessarily indicate that the theft and the murder took place at one and the same time. In our judgment, Beaumont, C.J. and Sen, J. in Bhikha Gobar v. Emperor, AIR 1943 BOMBAY 458* rightly held that, the mere fact that an accused produced shortly after the murder ornaments, which were on the murdered person is not enough to justify the inference that

the accused must have committed the murder. In our judgment no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstances may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer. Suspicion cannot take the place of proof. In the case of recovery of an article from an accused person when he stands accused of committing offences other than theft also, (in this instance murder), what are the tests : (i) The first thing to be established is that the theft and murder forms part of one transaction. The circumstances may indicate that the theft and murder must have been committed at the same time. But it is not safe to draw the inference that the person in possession of the stolen property was the murderer [Sanwant Khan (supra)]; (ii) The nature of the stolen article; (iii) The manner of its acquisition by the owner; (iv) The nature of evidence about its identification; (v) The manner in which it was dealt with by the accused; (vi) The

place and the circumstances of its recovery; (vii) The length of the intervening period; (viii) Ability or otherwise of the accused to explain its possession [see Baiju v. State of Madhya Pradesh].”

19. Reverting to the facts of the case, the prosecution has sought to establish culpability of accused no.1 by relying on the disclosure statement and the resultant recovery of fake rings from PW-5- Sandeep Nikam and two gold ingots from PW-4- Deeptiranjana Sahu. In this regard, PW-10 has deposed that while the accused no.1 was in custody he had disclosed that he had melted the stolen gold ornaments in a jewelry shop at Jajapur, Orissa and later sold the gold ingots to a goldsmith also from Jajapur. PW-10 has deposed that he had visited Jajapur along with the accused and the panchas and that the accused had shown the shop wherein he had melted the gold ornaments, as well the shop where he had sold the gold ingots. PW-10 has deposed that the gold ingots were recovered as per the disclosure statement made by the accused no.1.

20. PW-5- Sandeep Nikam has deposed that on 17.09.2011 the accused no.1 had visited his shop ‘Shalimar Gold Refinery’ and

told him that he wanted to melt some gold ornaments. The accused no.1 handed over to him two gold bangles, four gold rings and one pair of gold ear rings. He has deposed that two rings were not of gold. He returned the said fake rings to the accused, but the accused threw them in the shop. The witness claims that he kept the said rings in the drawer. He melted the other gold ornaments and handed over to the accused gold ingot of 23.80 grams. The accused paid him Rs.50/- towards labour charges. On 12.10.2011, the accused once again came to his shop and handed over one pair of gold ear rings and a ring for melting. PW-5 melted the gold ornaments and gave to the accused gold ingot of 8 grams. PW-5 has deposed that he had handed over two fake rings (Art. J) to the police for investigation purpose.

21. PW-4- Diptiranjana Sahu is the proprietor of a jewellery shop, 'Mahima Jewellers' at Jajpur. This witness deposed that on 22.11.2011, the police alongwith accused no.1 and the panchas had come to his shop. This witness identified the accused no.1 and stated that accused no.1 had come to his shop and informed him that he is a merchant of Singapur and wanted to purchase gold ring

weighing around 1-1.5 gm. The accused no.1 gave an advance of Rs.1000/-. The accused no.1 also told him that he wanted to sell two gold ingots weighing about 23 grams and 8 grams each. This witness has deposed that he had purchased the said two ingots from the accused no.1 for Rs.39,600/-. The accused no.1 came to his shop once again during evening hours and told him to cancel the order for purchase of ring. Accordingly, this witness cancelled the order and returned to the accused no.1 an amount of Rs.1000/-. He handed over to the police the two gold ingots at Articles H and I, which were purchased from the accused no.1.

22. PW-7- Danvel Kalpund is the witness to the recovery panchanama at Exhibit 43 and 43A under which the gold ingots were recovered and seized. He has deposed that while the accused was in police custody he had disclosed that he had melted the gold ornaments which had come to his share and sold the same to a jeweler in Orissa. The disclosure statement made by the accused no.1 was recorded in his presence. PW-7 has deposed that he along with the accused and the police team proceeded to Orissa and with the help of the local police and as per the directions given by the

accused no.1 they went to a shop at Jajpur. One person who disclosed his name as Nikam admitted having melted the gold given by the accused no.1. He handed over to the police an extract of the register maintained by him and three jewelry items which were not of gold. The said extract of the register and the said fake jewellery (Article-J) were seized in his presence. PW-7 has further deposed that thereafter the accused no.1 led them to another jewelry shop. The proprietor of the said shop admitted having purchased two gold ingots from the accused no.1 and handed over the same to the police. The said gold ingots were seized under panchanama drawn in his presence. The disclosure/recovery panchanama is at Exhibit 43 and 43A.

23. The incriminating circumstance against the accused no.2, is that on 19.11.2011 two watches, pens, one visiting card and some coins were recovered pursuant to the disclosure statement made by accused no.2 while he was in police custody. The evidence of PW-9- PI. Shreedhar Sawant vis-a-vis the evidence of the panch witnesses PW-5A- Sayyed Siraj s/o. Sayyed Yusuf and PW-6- Sohil Khan Farid Khan indicates that accused no.2 had

disclosed that he had concealed the stolen articles at some place and that he would show the said place. The accused no.1 took them to a lavatory in front of Shram-Sadhana Building, near Hindu Colony. The accused no.2 removed one plastic bag which was kept on the sintex water tank and handed over the same to the Investigating Officer. The said plastic bag contained three pens, 4-5 earrings, two wrist watches, 1 golden colour visiting card in the name of Irvin and some coins. These articles (Article C, Article D, Article E, Article F and Article G) were seized under panchanama (Exhibit 37A). PW-7 has deposed that PW-1- Ruth D'Souza had identified the said items viz. Visiting card, pens, coins, etc. in his presence and that a memorandum of identification (Exhibit 44) was prepared in his presence.

24. The aforesaid evidence indicates that two fake rings and two gold ingots were recovered from PW-5 and PW-4 pursuant to the disclosure statement made by accused no.1, whereas some watches, pens, gold earrings, etc. were recovered from a public lavatory pursuant to the statement made by the accused no.2. In order to establish this circumstance the prosecution was required to

prove that the said fake rings as well as jewelry melted by PW-5 and the articles recovered at the instance of accused no.2 belonged to the deceased and the same were stolen at the time of commission of the murder.

25. In this regard, it is pertinent to note that though the evidence of PW-5 indicates that he had melted some gold ornaments given to him by the accused no.1, he has admitted in the cross examination that he had not recorded the description of the ornaments as well as the name and address of the customer in the register (Exhibit 34) maintained by him. The fake rings (Article J) which were given by the accused to this witness and seized under panchnama have not been identified by PW-1. There is no evidence to prove that the said rings as well as the jewelry melted by PW-5 and the other articles recovered at the instance of accused no.2 belonged to the deceased or that the gold ingots recovered from PW-4 had any nexus with the stolen jewelry.

26. It is also pertinent to note that PW-1- Ruth D'Souza had not given details of the gold ornaments and the other stolen items in the first information report. Her evidence indicates that the

deceased was living alone in the house and that Irvin and his wife i.e. son and daughter-in-law of the deceased were residing at South Korea. They came to India after learning about the death of their mother and they checked their belongings. She states that her brother had told her that two wrist watches of the Byke and Cartier make, some pens, three gold bangles, diamond ear rings, four gold diamond rings and one golden colour visiting card were missing. On 13.11.2011, she and her brother went to the police station and gave further information regarding the stolen articles. She states that the police called her to the police station on 01.11.2011 and recorded her supplementary statement, wherein she gave the list and description of the stolen articles. She was called again on 27.11.2011 to identify the articles and that she had identified the wrist watches, two ball pens, one ink pen, coins, ear rings and a golden colour visiting card of her brother.

27. As indicated above, PW-1 had not given details of the stolen articles in the FIR. It was only after her brother – Irvin returned to India that he disclosed to her the details of the missing items. Though she claims that she and her brother had gone to the

police station on 13.09.2011 and given the details of the stolen articles to the police, the investigating officer did not record their statement. No reasons are assigned for not recording the statement of PW-1 on 13.09.2011 and no explanation has been given for calling her to the police station almost after a lapse of two months. Though PW-1 states that she had given the list of stolen articles in her supplementary statement recorded on 01.11.2011, she has not given description of the stolen articles in her evidence before the court.

28. PW-1 claims to have identified the stolen articles viz. gold ornaments, watches and pens recovered at the instance of the accused no.2, however her evidence does not indicate that she had seen these items prior to the incident. In such circumstances, the identification of the articles would not be of much importance. There is no other evidence to prove that these items which were allegedly recovered at the instance of the accused belonged either to the deceased or her son. It is also relevant to note that the articles, which were allegedly recovered pursuant to the disclosure statements are otherwise easily available in the market. Moreover,

there is considerable time gap between the date of the incident and the alleged recovery. Furthermore, the story propounded by the prosecution that the accused no.2 had kept the stolen ornaments and other items including the visiting card of the son of the deceased, in a public lavatory for over a period of two months itself appears to be improbable and doubtful.

29. The evidence of PW-5A- Sayyed Siraj, who is one of the panch witnesses indicates that he had not entered the lavatory. He had not seen who had removed the said plastic bag from the lavatory. He claims that the plastic bag contained two wrist watches, two pens, a single ear ring, coins and a golden colour visiting card. He had also not seen the writing on the visiting card. He claims that his signatures on the panchanama at Exhibit 37 and 37A i.e. disclosure statement and recovery panchanama were taken at the police station. Whereas PW-6- Sohil Khan Farid Khan who was the second pancha witness claims that the plastic bag contained two wrist watches, four to five ear rings and three pens. PW-9 claims that two watches, pens, coins and some ear rings were found in the plastic bag. There is discrepancy as regards the

number of gold earrings recovered at the instance of accused no.2. The recovery panchanama at Exhibit 37A also does not mention the number of earrings but only states that earrings of different shapes weighing 5 gms, value of which approximately Rs.15,000/- were recovered at the instance of accused no.2. These discrepancies make the recovery doubtful.

30. The prosecution has failed to prove that the jewelry and other articles recovered at the behest of the accused belonged to the deceased. There is no other evidence on record which even remotely points towards the guilt of the accused. In such circumstances, the Trial Court was not justified in holding the accused guilty of the charge. Resultantly, the impugned judgment cannot be sustained. Hence, the following order :-

I] The Appeals are allowed.

II] The Judgment and Order dated 08.05.2014 passed by Learned Additional Sessions Judge, Mumbai in Sessions Case No.292 of 2012 is set aside. The accused are acquitted of the offence punishable under sections 302 and 392 r/w. 394 of IPC.

III] The accused be set at liberty forthwith unless their custody is wanted in any other case.

(N.R. BORKAR, J.)

(SMT. ANUJA PRABHUDESSAI, J.)