

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 21ST DAY OF MARCH, 2025

PRESENT

THE HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR

AND

THE HON'BLE MR. JUSTICE K. V. ARAVIND

CRIMINAL APPEAL No. 1559/2023

C/W

CRIMINAL APPEAL No. 1940/2023

IN CRL.A No.1559/2023

BETWEEN:

1 . MANOJ M @ MANU,
S/O MUNIRAJ,
AGED ABOUT 19 YEARS,
R/AT No. 16, MUNISWAMAPPA ROAD,
NEAR USHA CLINIC, R. S. PALYA,
BENGALURU - 560 033.

(NOW IS IN JUDICIAL CUSTODY
CENTRAL PRISON, BANGALORE)

...APPELLANT

(BY SRI HASHMATH PASHA, SENIOR COUNSEL FOR
SRI KARIAPPA N. A., ADVOCATE)

AND:

1 . STATE OF KARNATAKA,
BANASWADI POLICE STATION,
BANGALORE - 560043.

(REPRESENTED BY LEARNED
STATE PUBLIC PROSECUTOR
HIGH COURT OF KARNATAKA,
BANGALORE- 560001)

...RESPONDENT

(BY SRI VIJAYKUMAR MAJAGE, SPP-II)

THIS CRL.A IS FILED UNDER SECTION 374(2) OF
CR.PC BY THE ADVOCATE FOR THE APPELLANT PRAYING TO
SET ASIDE THE JUDGMENT AND ORDER OF CONVICTION
DATED 28.06.2023 AND SENTENCE DATED 10.07.2023
PASSED BY THE LX ADDL.CITY CIVIL AND SESSIONS JUDGE,
BENGALURU IN S.C.No.1335/2018, CONVICTING THE
APPELLANT/ACCUSED No.1 FOR THE OFFENCE P/U/S 302
R/W 34 OF IPC.

IN CRL.A No.1940/2023

BETWEEN:

1 . DHARMA R @ DALU,
S/O RAJA,
AGED ABOUT 19 YEARS,
R/AT No.4/1,
C/O RENTED HOUSE OF CHETTI,
1ST CROSS, ITC ROAD,
R. S. PALYA, KAMMANAHALLI,
BENGALURU-560033.

NOW IS IN JUDICIAL CUSTODY,
CENTRAL PRISON, BANGALORE

...APPELLANT

(BY SRI HASHMATH PASHA, SENIOR COUNSEL FOR
SRI KARIAPPA N. A., ADVOCATE)

AND:

1 . STATE OF KARNATAKA,
BANASWADI POLICE STATION,
BANGALORE-560043.

REPRESENTED BY LEARNED
STATE PUBLIC PROSECUTOR,
HIGH COURT OF KARNATAKA,
BANGALORE 560001.

...RESPONDENT

(BY SRI VIJAYKUMAR MAJAGE, SPP-II)

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374(2) OF CR.PC BY THE ADVOCATE FOR THE APPELLANT PRAYING TO SET ASIDE THE JUDGEMENT DATED 28.06.2023 IN S.C.No.1335/2018 BY THE COURT OF THE HON'BLE LX ADDITIONAL CITY CIVIL AND SESSIONS JUDGE, BANGALORE CITY AND CONSEQUENTLY ACQUIT HIM FROM THE ALLEGED CHARGES AND HE MAY BE SET AT LIBERTY, CONVICTING THE APPELLANT / ACCUSED No.3, FOR THE OFFENCE U/S 302 OF IPC.

<i>DATE ON WHICH THE APPEALS WERE RESERVED FOR JUDGMENT</i>	27.01.2025
<i>DATE ON WHICH THE JUDGMENT WAS PRONOUNCED</i>	21.03.2025

THESE APPEALS HAVING BEEN HEARD AND RESERVED FOR JUDGMENT, COMING ON FOR PRONOUNCEMENT THIS DAY, JUDGMENT WAS PRONOUNCED AS UNDER:

CORAM: HON'BLE MR. JUSTICE SREENIVAS HARISH KUMAR
and
HON'BLE MR. JUSTICE K. V. ARAVIND

C.A.V. JUDGMENT

(PER: HON'BLE MR. JUSTICE K. V. ARAVIND)

Accused Nos.1 & 3 in S.C.No.1335/2018 are in appeal against the judgment of conviction and order on sentence dated 28.06.2023 passed by the LX Additional City Civil & Sessions Judge, Bangalore. Accused Nos.1 & 3 are convicted for offences punishable under Section 302 read with Section 34 of Indian Penal Code, 1860(for short 'IPC') and sentenced to undergo rigorous imprisonment for life besides fine of Rs.15,000/- each and in default of payment of fine, to undergo imprisonment for six months. Further, accused Nos.1 & 3 are directed to pay Rs.25,000/- each to kith and kin of the deceased.

2. CrI.A.No.1559/2023 is by Accused No.1, while CrI.A.No.1940/2023 is filed by Accused No.3. Though separate appeals have been filed, common arguments were advanced, and a common paper book was referred

to. Hence, both appeals were heard together and are disposed of by a common judgment.

3. The case of the prosecution is that the deceased, Sanjay Tamang, was employed at Delicious Momos Restaurant, owned by P.W.1, who had also provided accommodation to his hotel workers near Kammanahalli Church. On 06.10.2017, the restaurant was closed at 11:00 P.M. On 07.10.2017, at 01:55 A.M., hotel worker Sabin attempted to contact P.W.1, but the call went unanswered. P.W.1 returned the call at 02:15 A.M., and Sabin informed him that Sanjay Tamang had not returned to the room. P.W.1 instructed Sabin and other roommates to check the hotel premises. Upon inspection, it was confirmed that Sanjay Tamang was not present at the hotel, and P.W.1 was accordingly informed. P.W.1 arrived at the hotel at 02:40 A.M. and observed bloodstains on the road near the hotel. He then noticed that Sanjay Tamang was lying unconscious on the road with injuries. P.W.1 attempted to shift him to the hospital; however, he

succumbed to his injuries. The death was reported to the police station, and an FIR was registered.

4. Further, during the course of the investigation conducted by the Hennur Police in Crime No. 430/2017, the accused disclosed their involvement in the murder of Sanjay Tamang, which had been registered with the Banaswadi Police in Crime No. 561/2017. The prosecution also recovered the weapon allegedly used in the commission of the offence.

5. The trial court, based on the evidence of P.W.2, who testified to having witnessed Accused Nos. 1 to 3 inflicting fatal injuries on the deceased while attempting to commit robbery and murder, held that the accused had committed an offence punishable under Section 302 of the IPC and sentenced them to undergo rigorous imprisonment for life.

6. Heard Hashmath Pasha, learned Senior Counsel appearing for the appellants-accused and Shri Vijaykumar Majage, learned SPP-II for the respondent-State.

7. Shri Hashmath Pasha, learned Senior Counsel made the following submissions:

(i) P.W.1 filed a complaint as per Ex.P1, which was received at 3:30 A.M. on 07.10.2017. According to the evidence of P.W.2, the incident occurred between 12:00 to 12:30 A.M. on 06.10.2017. The FIR was registered on 07.10.2017 at 3:30 A.M. and was sent to the Magistrate at 4:30 A.M. The inquest mahazar, as per Ex.P30, was drawn on 07.10.2017 between 8:30 A.M. and 10:30 A.M., recording the presence of the dead body. It is further noted that the dead body would be sent for post-mortem examination to Ambedkar Medical College through P.C. 7086 with Form No. 146(1)(ii) after 10:30 A.M. on 07.10.2017. However, the unidentified dead body was sent to the mortuary at Ambedkar Medical College at 4:45 A.M. by the Police Inspector of Banasawadi Police Station.

(ii) P.W.2 was considered as an eyewitness to the crime. However, his statement was not recorded on the date of the incident. If P.W.2 had been present at the crime scene, he would have witnessed the inquest mahazar.

(iii) The deceased was found wearing a hotel uniform. It is likely that the incident occurred inside the hotel and the body was later placed on the road.

(iv) The knife, allegedly used in the commission of the crime, was recovered. However, no bloodstains were found on it.

(v) Exs.P3 to P5 are photographs of the deceased. However, these photographs were taken in the hospital mortuary and not at the crime scene.

(vi) There is no requisition on record to establish the shifting of the dead body after the preparation of the inquest mahazar (Ex.P30). If the letter at page 59 of the record bearing an acknowledgment issued by Ambedkar Medical College for the preservation of the dead body in the mortuary is to be treated as a requisition, certain discrepancies arise as Ex.P30 records the name and age of the deceased, whereas the letter at page 59 does not mention the name. Furthermore, the age appears to have been left blank initially and filled in later.

Additionally, while Ex.P30 records that the dead body was sent to Ambedkar Medical College through P.C. 7086, the relevant portion in the document at page 59 has been left blank.

(vii) P.W.1 has admitted that the hotel was equipped with CCTV surveillance and a biometric attendance system. However, the police did not examine the CCTV recordings or biometric data. These records could have provided crucial evidence regarding the true facts of the case. The CCTV recording was seized by the police. The deceased, who was employed by P.W.1, was found dead while still wearing the hotel uniform. By not producing this critical evidence, Investigating Officer has withheld the best available proof. Therefore, an adverse inference is to be drawn against him.

(viii) P.W.1 stated that he received a call from his employee at 1:55 A.M. on 07.10.2017, which he missed, and that upon calling back, he was informed that Sanjay Tamang had not returned to the room. However, to

substantiate this claim, the mobile phone of P.W.1 and call details were not recovered.

(ix) Ex.P2, the spot mahazar, records the presence of the dead body and bloodstains on the road. It further records the position of the dead body as found and the injuries sustained. Additionally, it evidences that the body was sent to Ambedkar Medical College for autopsy along with the necessary authorization. The time of recording the mahazar is noted as between 4:30 A.M. and 6:00 A.M. However, there is an alteration in the recorded timing in Ex.P2.

(x) The test identification parade was conducted by P.W.7. However, all three accused were presented together instead of being shown separately, as required. Furthermore, the accused were exposed prior to the conduct of the test identification parade, which is contrary to the prescribed procedure.

(xi) Ex.P28 is the spot sketch, wherein only the location is marked. However, the position of the dead body has not

been indicated in the sketch, thereby failing to establish the presence of the dead body at the scene.

(xii) P.W.2 stated that he witnessed the incident on 06.10.2017 at 12:00 to 12:30 A.M. As per his evidence, he remained at the spot until the Hoysala Police arrived. However, this statement contradicts the evidence of P.W.1.

(xiii) The time gap between the incident and P.W.2 returning back to the crime scene has not been explained. This omission raises doubt regarding testimony of P.W.2.

(xiv) The evidence of P.W.2 mentions the presence of the Hoysala Police and the ambulance at the scene. However, neither the Hoysala Police personnel nor the ambulance staff was examined. Furthermore, P.W.2 stated that Mr. Prashanth was present with him at the scene. The examination of Mr. Prashanth is essential to corroborate the testimony of P.W.2. Mr. Prashanth is not examined by prosecution.

(xv) The incident was reported on 07.10.2017, whereas the accused were connected to the crime in December 2017, resulting in a delay of about two months. The prosecution has not offered any explanation regarding the investigation carried during this period in relation to the alleged death of Sanjay Tamang.

8. Shri Vijayakumar Majage, learned SPP-II for the respondent-State made the following submissions:

(i) The letter dated 17.10.2017 at page 59 of the record is not authentic and hence, cannot be considered.

(ii) The complaint was received as per Ex.P1 at 3:30 A.M. on 07.10.2017. The FIR was registered and forwarded to the Magistrate by 6:00 A.M. The FIR explicitly records P.W.2 as an eyewitness to the crime. Hence, there is no delay in the registration of the FIR.

(iii) In the inquest mahazar (Ex.P30), P.W.2 has been recorded as an eyewitness; however, he was not made a witness to the inquest proceedings.

(iv) P.W.2 identified the accused in the test identification parade and his testimony remained consistent during cross-examination.

(v) The evidence of P.W.2 establishes the presence of Prashanth at the scene, making him an eyewitness to the incident. However, the prosecution has not examined Prashanth. This omission is not of significant consequence, as one eyewitness has been examined.

(vi) The rough sketch (Ex.P28) was prepared to identify the location of the incident. The marking of the dead position of dead body in the sketch is not a legal necessity. Any procedural lapses in the investigation cannot be construed to the advantage of the accused.

9. We have considered the submissions of learned Counsel on both sides and perused the record.

10. The entire controversy centers around the death of Sanjay Tamang. The evidence presented by the prosecution is inconsistent regarding both the cause of death and the identity of the perpetrator. However, the

fact that the deceased Sanjay Tamang suffered a homicidal death remains undisputed. Ex.P17, the post-mortem report, confirms the presence of injuries on the body. The injuries are certified as ante-mortem, fresh, and homicidal in nature. The report further states that the injuries were inflicted using a double-edged sharp weapon, such as a knife, along with a fairly heavy blunt object. The cause of death is certified as due to shock and hemorrhage resulting from the homicidal injuries sustained. In light of the above, the prosecution has successfully established that the death of Sanjay Tamang was homicidal.

11. The accused are linked to the crime based on their voluntary statements and the testimony of P.W.2. However, the voluntary statements of the accused are inadmissible as evidence, except to the extent permitted under Section 27 of the Indian Evidence Act, 1872. Therefore, the evidence of P.W.2 must be evaluated to determine whether it sufficiently establishes the involvement of accused in the crime as alleged by the prosecution.

12. The prosecution has examined P.W.2 as an eyewitness to the incident. P.W.2 stated that he witnessed two individuals assaulting the deceased while a third person was holding a motorcycle. He observed this incident while returning from Sherlock Hotel with his friend Prashanth on 06.10.2017 at approximately 12:00 to 12.30 A.M. P.W.2 further deposed that he chased the three individuals on his Honda Activa for about 200 meters. He stated that one of the accused was using a stone and another was wielding a knife to attack the deceased. After an unsuccessful chase, he returned to the spot and found the deceased was bleeding from injuries sustained on his stomach and head. While attempting to contact the Hoysala police and an ambulance, the Hoysala police arrived at the scene. Subsequently, other individuals gathered at the spot and informed him that the deceased was a worker at Delicious Momos. The body was then shifted in a 108 ambulance. His statement was recorded by the police the following day. He identified the accused in the test identification parade conducted at

Parappana Agrahara Central Prison on 19.01.2018. He admitted his signature on Ex.P11 and further identified the accused in open court.

13. The presence of P.W.2 at the crime scene is seriously disputed by the defence. P.W.2 has admitted that he approached the scene from behind the assailants but later turned and saw them. This raises doubts regarding his presence and his claim of witnessing the incident more particularly the identity of accused. P.W.2 has stated that he saw the accused by turning back while he was riding his motor cycle between 12.30 A.M. to 1.00 A.M. i.e., in the midnight. The prosecution has led evidence to prove that there was no power cut of electricity supply in the area of crime scene during the alleged time of incident. However, there is no evidence to prove that there was sufficient light to enable PW.2 to clearly see and remember the face of the accused. In the absence of evidence to prove any possible error in P.W.2 seeing the accused, the reliability of evidence of P.W.2 would be doubtful. Furthermore, there are contradictions in

narration of the incident by PW.2 when compared to the evidence of P.W.1. According to P.W.2, another individual, his friend Prashanth, was also an eyewitness to the incident. However, the prosecution has not examined Prashanth as a witness. Having regard to the inconsistencies in testimony of PW.2, the non-examination of Prashanth assumes considerable significance, as his testimony could have corroborated or contradicted the version of P.W.2.

14. Ex.P1 is the complaint lodged by P.W.1, who is the employer of the deceased. P.W.1 arrived at the crime scene at approximately 2:40 a.m., where P.W.2 informed him that three unidentified individuals had stabbed injured Sanjay Tamang using a knife and stones. According to P.W.2, the incident took place between 12:30 a.m. and 1:00 a.m., and he left the scene at around 1:45 a.m. However, P.W.2 has not explained how he came to know that the deceased was an employee of Delicious Momos. P.W.1, the employer of deceased, reached the crime scene at approximately 2:40 a.m. and, in his complaint (Ex.P1),

stated that P.W.2 had informed him that the deceased was assaulted and stabbed by three unidentified individuals. The prosecution failed to clarify how P.W.2 could provide this information regarding the assailants to P.W.1 when P.W.2 had already left the crime scene before P.W.1 arrived. This inconsistency casts doubt on the version of events as explained by prosecution and the credibility of P.W.2 testimony.

15. The discrepancy in the evidence of P.Ws.1 and 2 assumes much significance as not corroborated with other evidence. Ex.P30, the inquest mahazar, was drawn between 8:30 a.m. and 10:30 a.m. on 07.10.2017. Column No.3 of Ex.P30 records that P.W.1, along with P.W.2, was the first to notice the dead body at approximately 2:30 a.m. Additionally, Column No.10 of Ex.P30 records the presence of P.W.2 and his narration of the incident. However, two significant omissions are noticeable. Firstly, when P.W.2 claims to have left the crime scene at 1:45 a.m., the prosecution has not explained how his presence was secured while drawing the

inquest mahazar. Secondly, if Ex.P30 was prepared in the presence of P.W.2, he has not been made a witness to the document. These discrepancies raise serious doubts about the actual presence of P.W.2 at the crime scene.

16. Furthermore, P.W.2 stated that he was 10 to 15 feet away from the scene of the incident and observed the assailants from behind. He further deposed that the motorcycle used by the accused was a Dio scooter; however, he did not mention its color. During the trial, he identified the bike through Ex.P12, a photograph. Despite claiming to have chased the accused for over 200 meters, he failed to note the vehicle registration number and colour. This inconsistency further weakens the case of prosecution and casts doubt on the reliability of the testimony of PW.2.

17. Ex.P2, the spot mahazar, was prepared between 4:30 a.m. and 6:00 a.m. on 07.10.2017, recording the position of the dead body, the description of the deceased clothing and the injuries found on the body. According to Ex.P2, the mahazar was conducted with the assistance of

streetlights and emergency lights. The prosecution has produced spot photographs under Ex.P5; however, these photographs appear to have been taken during day time in natural sun light and without any markings and blood stains. Notably, Ex.P2 is silent regarding the taking of photographs at the scene during the mahazar. There is no explanation as to why it was practically difficult to capture photographs at the spot. A significant omission is that the photographs of the deceased body, marked as Exs.P3, P4, and P5, were taken in the hospital mortuary. In the absence of any evidence establishing the presence of the dead body at the alleged crime scene, the case of prosecution that the deceased was killed at a specific location is not free from doubt. Furthermore, the prosecution has not provided any explanation as to why photographs were not taken before the dead body was shifted.

18. The credibility of Ex.P2 is further questioned by the contents of the document at page 59 of the records, which state that the unidentified dead body, in reference to

Crime No.561/2017, was kept in the mortuary at Ambedkar Medical College at 4:45 a.m. on 07.10.2017. Ex.P2 was prepared in the presence of P.W.1, an employee of the deceased. If the details in Ex.P2 were to be considered reliable, then the document at page 59 should have recorded the name of the deceased. Additionally, the age of the unidentified dead body in the document at page 59 was initially left blank and later filled in, whereas Ex.P2 records the age of deceased as 35 years. Moreover, the time recorded in Ex.P2 appears to have been inserted later, as it is evident from the different handwriting and ink used. These discrepancies raise serious doubts regarding the prosecution case.

19. The prosecution relies on the testimony of P.W.1 as material evidence. P.W.1 stated that the hotel operated between 10:30 a.m. and 11:00 p.m. On 07.10.2017, he received a call from his worker at 1:55 a.m., which he did not attend. Later, he returned the call at 2:15 a.m. and was informed that one of his workers, Sanjay Tamang, had not returned to his room. He then instructed his other

workers to search for Sanjay Tamang in the hotel. Upon being informed that he was not found, P.W.1 reached the hotel at approximately 2:40 a.m. Upon his arrival, he noticed bloodstains on the road and found Sanjay Tamang lying with severe injuries just a short distance away from the hotel. However, the testimony of P.W.1 version raises doubts regarding its credibility. According to him, before his arrival, his workers had already searched for the deceased at the hotel. It is highly improbable that the workers failed to notice the bloodstains and the injured body, yet P.W.1 was able to locate them upon his arrival. This discrepancy raises doubt on his testimony. Furthermore, P.W.2 has deposed that he saw the accused assaulting the deceased, following which Hoysala Police arrived at the spot, and the deceased was shifted to the hospital in a 108 Ambulance. P.W.2 also stated that he left the crime scene at 1:45 a.m. The prosecution primarily relies on the testimonies of P.Ws.1 and 2, yet their statements are inconsistent and contradictory. The alleged meeting between P.Ws.1 and 2 and their exchange of

information, as projected by the prosecution, appears to be doubtful and improbable.

20. P.W.1 deposed that he locked the hotel at 11:00 p.m. when Sanjay Tamang and other co-workers left the premises. He further stated that he later instructed the workers to search for Sanjay Tamang inside the hotel. However, there is no evidence to corroborate the testimony of PW.1. In the absence of any evidence adduced by the prosecution regarding how the hotel was reopened to facilitate the search for the deceased, this aspect of the testimony remains improbable and unconvincing.

21. P.W.1 stated that his hotel was equipped with biometric attendance and CCTV cameras. The DVR of the CCTV camera was seized by the police. The CCTV footage would have corroborated the version of P.W.1 that the deceased left the hotel along with other co-workers at 11:00 p.m. on 06.10.2017. This footage would have been a crucial and valuable piece of evidence to support the prosecution. However, the prosecution has not produced

or relied upon the CCTV footage, raising doubts about the completeness of the investigation and reliability of the version of the prosecution.

22. Furthermore, the testimony of P.W.10 contradicts that of P.W.1 regarding the presence of CCTV footage. While P.W.10 deposed that no CCTV cameras were found near the crime scene, P.W.1 admitted that the DVR containing CCTV footage from Delicious Momos, a hotel owned by him, was seized by the police. Notably, the prosecution failed to record any mahazar documenting the seizure of the CCTV footage. Despite admission of PW.1 regarding the DVR, the prosecution has not provided any further clarification on this aspect. This omission gives rise to an adverse inference that the CCTV footage obtained from the hotel premises has been withheld from the Court.

23. The Hon'ble Supreme Court in the case of ***Tomaso Bruno and another v. State of U.P., (2015) 7 SCC 178*** held as,

26. *The trial court in its judgment held that non-collection of CCTV footage, incomplete site plan, non-inclusion of all*

records and sim details of mobile phones seized from the accused are instances of faulty investigation and the same would not affect the prosecution case. Non-production of CCTV footage, non-collection of call records (details) and sim details of mobile phones seized from the accused cannot be said to be mere instances of faulty investigation but amount to withholding of best evidence. It is not the case of the prosecution that CCTV footage could not be lifted or a CD copy could not be made.

.....

28. *The High Court held that even though the appellants alleged that the footage of CCTV is being concealed by the prosecution for the reasons best known to the prosecution, the accused did not invoke Section 233 CrPC and they did not make any application for production of CCTV camera footage. The High Court further observed that the accused were not able to discredit the testimony of PW 1, PW 12 and PW 13 qua there being no relevant material in the CCTV camera footage. Notwithstanding the fact that the burden lies upon the accused to establish the defence plea of alibi in the facts and circumstances of the case, in our view, the prosecution in possession of the best evidence, CCTV footage ought to have produced the same. In our considered view, it is a fit case to draw an adverse inference against the prosecution under Section 114 Illustration (g) of the Evidence Act that the prosecution withheld the same as it would be unfavourable to them had it been produced.*"

24. The evidence of P.W.1 indicates that he was informed by Sabin Pujari that Sanjay Tamang had not reached his room. However, the prosecution has not examined Sabin Pujari as a witness. Furthermore, the mobile phone used by P.W.1 to receive and make calls to Sabin Pujari has not been examined, nor have the call detail records been produced. This evidence would have been crucial in corroborating the version of P.W.1 and supporting the prosecution. Additionally, P.W.1 has stated that the deceased left the hotel at 11:00 p.m. on 06.10.2017 along with other co-workers. Despite this, the prosecution has not examined any co-worker to corroborate evidence of PW.1. Their testimony would have been vital, particularly since the deceased was found wearing the hotel apron. Ordinarily, a worker would remove the apron upon leaving the hotel unless there was a specific reason to retain it. The prosecution or PW.1 has not explained why the deceased was still wearing the apron at the time of his death as it was after closure of Hotel. This omission raises serious doubts regarding the testimony of P.Ws.1 and 2, as well as the overall case of the prosecution.

25. P.W.10 is the Investigating Officer who explains the course of the investigation and the process of gathering evidence. He has deposed that he visited the crime scene at 4:00 a.m. and found P.W.2 present at the spot. He observed that the crime scene was bloodstained and that the dead body was still at the location. He further stated that photographs of the dead body were taken at the crime scene, which was marked as Ex.P3 to Ex.P5, before the body was shifted to Ambedkar Medical College. He also stated that an inquest mahazar was conducted on 07.10.2017 and that Ex.P2 was prepared at the crime scene in the presence of P.W.2. However, the evidence of P.W.10 is inconsistent and contradictory. According to his testimony, the dead body was present at the crime scene, and photographs were taken there. However, Ex.P3, Ex.P4, and Ex.P5 depict the dead body placed on a stretcher in the hospital, rather than at the alleged crime scene. Furthermore, the second photograph, marked as Ex.P5, is produced to establish the crime scene. A comparison of Ex.P2, testimony of PW10, and Ex.P5

discredits his version, as there are no visible bloodstains in Ex.P5, despite his claim that the crime scene was blood stained. Additionally, P.W.10 stated that the description of the accused was provided by P.W.2 and that P.W.2 was present when he visited the crime scene at 4:00 a.m. However, this contradicts the evidence of P.W.2, who categorically stated that he left the crime scene at 1:45 a.m. This contradiction raises doubts about the reliability of P.W.10 testimony. P.W.10 further deposed that after Ex.P2 was drawn, the dead body was shifted to Ambedkar Medical College along with Form 145 (Ex.P31). However, Ex.P31 is not the requisition as claimed by P.W.10. The document at Page No.59 of the record contradicts his statement, as it proves that an unidentified dead body was kept in the mortuary at Ambedkar Medical College at 4:45 a.m. on 07.10.2017. The prosecution has not provided any explanation regarding this document, further weakening the credibility of the testimony of PW.10. These inconsistencies and contradictions raise serious doubts regarding the acceptability of the evidence of P.W.10 and the overall case presented by the prosecution.

26. Ex.P2 is the spot mahazar, witnessed by P.W.1. However, P.W.1 has admitted that Ex.P2 was prepared at the police station. Ex.P2 records the presence of the dead body at the crime scene, along with its position and the nature of injuries observed. In light of admission of PW.1, Ex.P2 cannot be given significant evidentiary value.

27. The prosecution conducted test identification parade of the accused by P.W.2. The test identification parade report, Ex.P11, is one of the pieces of circumstantial evidence relied upon by the prosecution. However, Ex.P11 suffers from irregularities, the nature of which cannot be ignored. The statement of the accused was recorded on 06.12.2017, following which they were taken to the crime scene for the recovery of the knife, as per Ex.P13. The evidence of P.W.1 further indicates that the accused were taken to the crime scene on 24.12.2017, where they allegedly confessed to committing the murder of Sanjay Tamang. However, the test identification parade was conducted much later, on 19.01.2018, raising doubts about its reliability.

28. The Hon'ble Supreme Court in the case of ***Gireesan Nair and others v. State of Kerala*** reported in **(2023) 1 SCC 180** has laid down the parameters to evaluate the evidence of test identification parade. Paragraph No.31 reads as,

31. In cases where the witnesses have had ample opportunity to see the accused before the identification parade is held, it may adversely affect the trial. It is the duty of the prosecution to establish before the court that right from the day of arrest, the accused was kept "baparda" to rule out the possibility of their face being seen while in police custody. If the witnesses had the opportunity to see the accused before the TIP, be it in any form i.e. physically, through photographs or via media (newspapers, television, etc.), the evidence of the TIP is not admissible as a valid piece of evidence (Lal Singh v. State of U.P. [Lal Singh v. State of U.P., (2003) 12 SCC 554] and Suryamoorthi v. Govindaswamy, (1989) 3 SCC 24.

29. In the present case, the test identification parade was conducted one month after the arrest of the accused. During this period, the accused were taken to the crime scene. The evidence of P.W.1 clearly establishes that the

accused were exposed to the public well before the test identification parade. Under such circumstances, the possibility of P.W.2 having seen the accused prior to the parade cannot be ruled out. This assumes importance in light of the testimony of P.W.2, who is the sole eyewitness examined by the prosecution. Notably, P.W.2 did not provide any description of the accused. Given these omissions and contradictions, the test identification parade cannot be relied upon to establish the guilt of the accused beyond reasonable doubt.

30. M.O.3 and M.O.8 are the objects allegedly used to inflict injuries on the deceased. M.O.3 is a stone, and M.O.8 is a knife. The FSL report (Ex.P51) records the presence of B-group human blood on M.O.3. However, no bloodstains were found on M.O.8. The post-mortem report (Ex.P17) certifies that the cause of death was due to shock and hemorrhage resulting from homicidal injuries sustained by the deceased. The report further states that the injuries could have been caused by a sharp, double-edged weapon like a knife and a fairly heavy blunt

weapon. While Ex.P17 and Ex.P51 establish the homicidal nature of the death, they do not conclusively link the accused to the crime.

31. Ex.P1, the complaint lodged by P.W.1, identifies the vehicle involved as a white Honda Dio. P.W.1 has consistently maintained in his evidence that the vehicle in question was a white Honda Dio. The source of this information, as stated by P.W.1, is P.W.2. The prosecution has examined P.W.2 as an eyewitness. However, P.W.2 identified the vehicle as a black and orange Honda Dio. Ex.P12, which is a photograph of the vehicle, confirms that the vehicle is indeed a black and orange Honda Dio. Furthermore, Ex.P20, the requisition sent to the Tahsildar to conduct a test identification parade dated 11.01.2018, also refers to a white Honda Dio. The prosecution has not produced the registration details of the vehicle. When the evidence of P.Ws.1 and 2 is considered alongside Ex.P20, Ex.P12, and Ex.P53, the involvement of the vehicle in the alleged incident becomes doubtful. Ex.P53 is the list of

properties sent to the Magistrate in Crime No.103/2017 by Hennur Police.

32. The motive for causing death of deceased as narrated by the prosecution is the robbery. Though prosecution alleged robbery as motive to the crime, no articles are recovered from the accused. There is no attempt by the prosecution to explain the articles robbed by the accused. It is not the case of prosecution that the deceased and accused were known to each other and there exists an enmity between them. Even, this possibility to consider as motive to cause death of the deceased is not possible to be viewed. In that view, the prosecution has failed to prove any motive that exists to cause death of deceased by the accused.

33. The trial court accepted the testimony of the eyewitness, P.W.2, in identifying the accused as the persons who assaulted the deceased. M.O.8 was accepted as the weapon used to inflict injuries on Sanjay Tamang based on the evidence of P.W.2. The presence of P.W.2 at the scene of the crime, as well as the use of a Honda Dio

scooter by the accused with the alleged intention to commit robbery against Sanjay Tamang, was also accepted by the trial court.

34. Upon analyzing the corroboration of testimonies of P.Ws.1, 2 and 10, along with the documentary evidence, including Exs.P1, P2, the document at page No.59 of the record, Ex.P20, and Ex.P12, it is evident that the prosecution has failed to establish the offence committed by the accused beyond reasonable doubt. While the recovery of M.O.8 may raise some suspicion, mere suspicion or doubt is insufficient to sustain a conviction. Any doubt arising from the evidence presented by the prosecution must be resolved in favour of the accused. In light of the above discussion, the prosecution has failed to prove that the accused committed the murder of the deceased, Sanjay Tamang. The findings recorded by the trial court is contrary to the evidence on record and is, therefore, unsustainable.

35. Accordingly, the following,

ORDER

- (i) Crl.A.No.1559/2023 filed by accused No.1 and Crl.A.No.1940/2023 filed by accused No.3 are *allowed*;
- (ii) The judgment of conviction and order of sentence dated 28.06.2023 passed by the LX Additional City Civil & Sessions Judge, Bengaluru City, in S.C.No.1335/2018 is set aside;
- (iii) Accused Nos.1 & 3 are hereby acquitted of the charges leveled against them for the offence punishable under Section 302 read with Section 34 of IPC.
- (iv) The Registry is directed to communicate this order to the concerned Jail Authorities and the Jail Authorities are hereby directed to release the appellant/accused No.1 forthwith, if he is not required in any other cases.

- (v) The bail and surety bond executed by the accused No.3 is hereby cancelled.
- (vi) If the accused have deposited the fine amount before the trial Court, the same shall be refunded to them on proper identification.
- (vii) Registry is directed to send back the trial court records with a copy of this judgment.

Sd/-
(SREENIVAS HARISH KUMAR)
JUDGE

Sd/-
(K. V. ARAVIND)
JUDGE

Yn/vbs