

P.D. Pandit

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.586 OF 1997

1. Nanjunda Gauda
Age :24 yrs., Occ: Service,
r/o. Staff-room, Vihar Hotel,
Nehru Road, Santacruz (E),
Mumbai 400 054.
2. Krishna Ulha Gauda
Age : 26 yrs., Occ: Service,
r/o. Staff-room, Vihar Hote,
Nehru Road, Santacruz (E),
Mumbai 400 054.

.. Appellants
(Org. Accd. Nos.1 & 2)

V/s.

State of Maharashtra
(At the instance of Sr. Inspector
of Police, Vakola Police Station,
Santacruz, Bombay)

.. Respondent

Mr. S. V. Marwadi for the Appellants.
Smt. V. R. Bhonsale, Addl. P.P. for the Respondent-State.

**CORAM : B. P. DHARMADHIKARI &
A.S. GADKARI, JJ.**

DATE : 23RD JULY, 2015.

ORAL JUDGMENT [Per B. P. Dharmadhikari, J.] :

1. By this appeal, filed under Section 374 of the Cr. P.C.,
appellant nos.1 and 2, who were Original Accused in Sessions Case
No. 1062 of 1994, challenge their conviction vide judgment delivered on

28/8/1997 by the Additional Sessions Judge, Greater Bombay under Section 302 read with Section 34 of the Indian Penal Code, sentencing them to life imprisonment.

2. The case of prosecution is, after getting information about a commotion near Hotel Vihar, Nehru Road, Santacruz (West), Mumbai on 17/6/1994 on telephone from unknown person, PSI Deepak Sawant proceeded to the spot. Police Inspector Thakur had also gone in connection with some other incident in that area and he received information about a murder which had taken place at Vihar Hotel. After reaching spot, in presence of PI Thakur, PSI Deepak Sawant recorded statement of complainant, which is taken as FIR (Exhibit 7) and gave intimation thereof to Vakola Police Station on telephone, an offence came to be registered vide Crime No. 405 of 1994. Necessary inquest panchanama of the dead body was drawn, spot panchanama was also prepared and after collecting necessary samples and completing investigation, the police submitted charge-sheet. The matter was in due course made over to the Sessions Court.

3. The charge against the appellants read as under :-

“That you accused Nos.1 and 2 on or about 17.6.1994 at or about 2.00 hrs. at Centre, on the Ofla of L.K. Wine Shop,

Near Vihar Hotel, Nehru Road, Santacruz (East), Mumbai – 400 055 in furtherance of common intention of you both did commit murder by intentionally and/or knowingly causing the death of Mr. Sadananda Shetty by assaulting him with iron pipe and piece of floor-tile and thereby committed an offence punishable under section 302 r/w sec. 34 of the Indian Penal Code and within my cognizance.”

4. The conviction is mainly based upon circumstantial evidence. The trial court has in its judgment mentioned the list of circumstances. After hearing respective counsel, as we find some of the circumstances relied upon by trial court not relevant, it is appropriate to reproduce those circumstances here:-

- (i) Deceased Sadananda Shetty had beaten accused No.1 with an iron pipe during a quarrel that had ensued between accused Nos.1 and 2 and the deceased at about 11.45 p.m. in Vihar Hotel.
- (ii) The place of sleeping of deceased Sadananda Shetty near Vihar Hotel in front of L.K. Wine Shop, as appearing in the evidence.
- (iii) Normally all the hotel servants used to reside on the back side of the hotel in a room meant for residence of servants and both the accused were having their place of taking rest there only as being servants.
- (iv) Sixteen workers were working in Vihar Hotel and the deceased was the supervisor and they all were knowing each other.

- (v) The working in the hotel goes on till late hours in the night for cleaning utensils, floor tiles, slitters etc. after their usual business hours are over and possibility of knowing about the assault on the victim i.e. the supervisor of the hotel was known to every one cannot be ruled out.
- (vi) Inspite of the above position, the incident of attack on the victim was not informed by anyone till the police took the statement on the spot in the morning time. This silent on the part of the servants or the owner of the hotel or any person concerned with the hotel or L.K. Wine Shop is “very much speaking and indicative” especially when the deceased supervisor of the Hotel was attacked and ultimately murdered.
- (vii) Though the deceased had beaten accused No.1 with an iron pipe in the earlier quarrel with accused Nos.1 and 2 and in that attack accused No.1 had sustained an injury due to that beating, nobody gave report to the Police authorities and complete silence was maintained over that point.
- (viii) in the morning when the Police arrived on the spot on a telephone call given by some unknown person, the evidence does not show that anybody voluntarily came forward to report the matter and on inquiry by the Police PW 1 gave the FIR wherein the fact of assault on accused No.1 by the deceased in the hotel at about 11.45 p.m. finds place and so also it is seen that both accused Nos.1 and 2 assaulted the deceased by

means of an iron pipe and a piece of tile.

- (ix) From the recitals in the FIR a clue is available that both the accused had a motive to assault the supervisor Sadananda Shetty due to their previous quarrel and assault on accused No.1.
- (x) Both the accused were immediately arrested on the spot and taken in custody.
- (xi) Being the incident of night time there could not be any eye witness and so no eye witness was available to the police.
- (xii) On the very same day at about 12 noon accused No.1 gave a discovery statement and discovered piece of tile (Article 1), iron pipe (Article 6) and his clothes, so also accused No.1, as per his discovery statement, discovered his clothes and those articles were found to be blood stained with human blood in the ultimate result which is available in Chemical Analyzer's report which is before the Court at Exh.23.
- (xiii) Accused No.1 himself admitted in his statement under Section 313 of the Cr. P. C. before the Court that he was assaulted by the deceased with an iron pipe at about 11.45 p.m. during the earlier quarrel.
- (xiv) The doctor has given the possibility that the injury found on the person of the deceased can be caused by a hard and blunt object like piece of tile and pipe.
- (xv) All the clothes of the deceased were found stained with human blood.

5. Advocate Marwadi in this background has submitted that merely because accused had some motive, it cannot be said that they have committed murder of deceased. The fact that deceased was Supervisor of a Hotel in which accused persons were working or that he hit accused no.1 with iron rod on head on 17/6/1994 is not in dispute. He submits that merely because there was quarrel between the two, that does not mean that appellants have killed deceased. He invites attention to evidence of PW 1 – Dayanand who has reported the matter to police that he was informed by one Deoraj Gauda and said Deoraj Gauda claimed that present appellants assaulted deceased with iron pipe and piece of a floor-tile. This Deoraj had also gone to police station along with PW 1 – Dayanand, however, police have not recorded statement of Deoraj Gauda and he has not been examined as prosecution witness. Hence, this witness is insufficient to connect the appellants with the crime.

6. He has thereafter invited attention to the fact that PW 2 – Dr. Shinde is witness on postmortem and in cross-examination, this witness has accepted that injuries mentioned by him in Clause No.17 of postmortem report could be caused by fall of a person on a stony surface or surface with edge due to loss of balance. Internal injuries were also possible by fall on ground. PW 3 – Shri Pathak is witness on recovery of

a piece of tile and iron rod as also his clothes by appellant no.1. He submits that recovery of alleged tile is from an open public place. The clothes were also not concealed and were placed on nylon rope along with clothes of others. His cross-examination also shows that he did not see any bandage on the head of accused no.1. PW 4 – A. S. Thakur is Police Inspector while PW 5 – Shri Tambe, watchman, is panch on seizure of clothes of accused no.2. The witness has stated that he was not aware about the part of clothes on which blood stains were seen. He could not explain why blood stains were not mentioned in panchanama. He has also accepted that he made all signatures in police station only. He has invited attention to panchanama of seizure of clothes of accused no.1 and accused no.2 to submit that clothes seized were not sealed properly. He points out that PW 4 – Thakur, Investigation Officer, did not seize the pipe with which deceased had attacked appellant no.1 and also did not make any enquiry as to why deceased was then sleeping outside the wine shop and not at his usual place. He states that Investigation Officer, however, accepted that he did not send accused no.1 for medical examination, though he was assaulted by iron pipe and there was injury on his head. Investigation Officer explained that owner of the Hotel told him that accused no.1 was taken by him to Dr. Gupta. He also invites attention to the fact that Investigation Officer accepted that persons by name Deoraj

Gauda and Ranja Gauda were in existence.

7. Advocate Marwadi submits that as appellant no.1 himself was hurt, finding of blood on his clothes or on an iron pipe cannot be a decisive circumstance. Similarly, as deceased did not sleep with others at his usual place, the fact that others were not knowing about his death or did not report his death, cannot be used as an adverse circumstance. He submits that as there is no clinching evidence to complete the chain, the conviction of appellants by trial court is unsustainable.

8. Learned APP has heavily relied upon the circumstances mentioned by trial court in its judgment and discussion in relation thereto. He points out that accused were arrested on spot itself. Our attention is also invited to answer by accused persons to Question Nos.21 and 23 to urge that accused persons did not explain how blood stains were seen or found on their clothes. Motive in this situation is stated to be a strong circumstance.

9. The fact that accused persons, as also deceased, used to sleep at their assigned place in Hotel in a room behind it is not in dispute. Fact that body of deceased was not found in that room but outside the

Hotel and in front of an adjacent wine shop is also not in dispute. Prosecution has not come up with the case that deceased was killed in room in which he always used to sleep. Why the deceased changed his place of sleeping and went to sleep in front of a wine shop has not been explained by the prosecution. In view of these facts, the finding that there was silence on the part of staff of hotel and they did not report the commission of offence to police is, therefore, not an incriminating factor at all.

10. Perusal of evidence of PW 1 – Dayanand shows that deceased used to drink excessively and he used to fall down also on occasions under influence. It is urged that after beating appellant no.1, deceased may have drunk excessively and, therefore, slept in front of wine shop or may have also fallen down somewhere. It is not necessary for us to go into these contingencies. The fact that deceased was not killed in a room assigned to staff for sleeping is sufficient to hold that theory of alleged silence on the part of such labours and, therefore, adverse inference drawn against them by trial court is unsustainable.

11. PW 1 himself has not seen appellants attacking deceased. He reported to police that he got that information from one Deoraj Gauda, who has allegedly told PW 1 that he (Deoraj Gauda) saw appellants

beating deceased with iron pipe and piece of floor-tile. In cross-examination, he has stated that said Deoraj Gauda had accompanied him to police station to lodge report. In that situation, why police did not obtain statement of Deoraj Gauda either in police station or thereafter, is not explained by prosecution. Absence of statement of that person and prosecution not examining him is a factor of which benefit must be given to appellants/accused persons.

12. Reverting to circumstances relied on by the trial court, Circumstance Nos. (i) and (xiii) are about motive. Circumstance Nos. (xii) and (xv) are about recovery of clothes or weapons and human blood on it.

13. Circumstance No. (ii) is about place of sleeping of deceased Sadananda. The said circumstance itself lacks roots in the evidence in as much as in paragraph 5 of his cross-examination, PW 1 – Dayanand has stated that the deponent was sleeping in staff room behind the Hotel. All members of staff could sleep in that room. Supervisor – Sadananda was sleeping at front place. Therefore, there is no evidence on record that deceased Sadananda used to sleep in front of L.K. Wine Shop. Circumstance No.(iii) is about Hotel staff sleeping in back room normally and Circumstance No. (iv) is about number of workers in Vihar Hotel. Circumstance No. (v) is about working hours or pattern of said Hotel.

How these circumstances constitute an incriminating material is not explained. In our view even if all these facts are accepted to be correct, the same cannot be construed as a circumstance to complete the chain.

14. Circumstance Nos. (vi) and (vii) are about silence of Hotel staff or not reporting attack by deceased on accused no.1. We have already commented upon this aspect in earlier part of the judgment. Circumstance No.(viii) is about nobody voluntarily coming forward to report the matter to police and again this circumstance cannot be used against the appellants. Arrest of accused persons from spot immediately looked into as circumstance No.(x) may be viewed as a circumstance in favour of appellants/accused. Had they any ill-intention, they could have absconded. Circumstance No. (xi) is about the time of incident and, therefore, absence of eye witness. This, therefore, cannot constitute an incriminating circumstance.

15. Circumstance No. (xiv) is possibility of injuries as inflicted on deceased with the help of blunt object like piece of tile and iron pipe. PW 2 - Doctor has also pointed out that such injuries can be caused by loss of balance and fall on hard surface.

16. Circumstance No. (xii) is about the discovery of piece of tile,

iron pipe or blood stained clothes of accused no.1 and report of Chemical Analyzer about it. Chemical Analyzer has only found human blood. Deceased had assaulted accused no.1 with iron pipe and prosecution has not brought that iron pipe on record. Nature of injury suffered by accused no.1 has also not brought on record. If by attack on head with such iron pipe, there is bleeding, clothes of appellant no.1 / accused no.1 would have blood stains. Pipe also in that event may have blood stains. Hence this circumstance also is not conclusive as against appellant no.1. Circumstance No. (xv) is about blood stains on clothes of deceased. The death of deceased is homicidal and as such this cannot be a circumstance to be used against the accused. Prosecution could not prove that blood of deceased was found on clothes of any of the accused. Chemical Analyzer could not determine blood group of accused no.1. Blood group of accused no.2 is found to be "A". The report dated 10/10/1994 is mostly on group of blood found on deceased or his clothes. Blood group "O" has been found on shirt and underwear of deceased and on articles seized from that spot. None of these articles are connected with accused persons. Hence, this circumstance also is not sufficient.

17. In so far as motive part is concerned, in this situation, in the absence of any other material to show involvement or participation of appellants in the crime, motive by itself cannot be the circumstance valid

enough to find their complicity.

18. In this situation, we find that prosecution has failed to place on record circumstances incriminating in nature and constituting a chain so complete as to lead to an irresistible conclusion of guilt of appellants or to rule out possibility of involvement of any third person. The injury sustained by accused no.1 and investigation necessary with reference thereto has been avoided by the police. Thus a circumstance which could have explained blood stains on clothes of accused no.1 or an iron pipe has been overlooked. Finding on it might have been incompatible with finding of guilt of appellant/accused no.1. In panchanama of seizure of clothes of accused no.1 drawn by police, it has been expressly mentioned that shirt was blood stained. There is no such observation in seizure panchanama of clothes of accused no.2. This panchanama is not duly proved and supported by PW 5 – Shri Tambe. In the light of this discussion, we find that prosecution has failed to bring home the charge against appellants/accused.

19. Hence, following order :

- (a) In the light of the discussion, the judgment dated 28th August, 1997 delivered by the Additional Sessions

Judge, Greater Bombay in Sessions Case No. 1062 of 1994 is quashed and set aside.

- (b) Appellant Nos.1 and 2 are acquitted of the offences punishable under Section 302 read with Section 34 of the Indian Penal Code.
- (c) Their bail bonds are cancelled.

It appears from the note recorded by the Additional Sessions Judge below the impugned judgment that muddemal being worthless was directed to be destroyed after the appeal period is over. The note put up by the Registry shows that it is already destroyed.

[A. S. GADKARI, J.]

[B. P. DHARMADHIKARI, J.]