

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.572 OF 1993

The State of Maharashtra] Appellant

Versus

1. Mahindar Tilakdhari Yadhav,	]	
22 Yrs., Occ.: Labour,	]	
R/o. Mulshahapur, Tahsil Phulpur,	]	
Dist. Ajamgardh, Uttar Pradesh	]	
	]	
2. Mahadeo Niranjana Yadav,	]	
22 Yrs., Occ.:	]	
R/o. Gajanpur, Tahasil Musai-Khana,	]	
Dist. Sultanpur, Uttar Pradesh	]	
	]	
Both now r/o. In the Stable of Akil Kokani,	]	
Ghas Bazar, Nasik	]	 Respondents

Mrs. G.P. Mulekar, A.P.P., for the
Appellant-State.

Mr. B.G. Vaidya for Respondent No.1.

CORAM : SMT. V.K. TAHILRAMANI &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

DATE : 23RD JUNE, 2015.

ORAL JUDGMENT : [Per Dr. Shalini Phansalkar-Joshi, J.]

1. This Appeal takes an exception to the Judgment dated 20th
July, 1993, of the Sessions Judge, Nashik in Sessions Case No.253

of 1992. By the said Judgment, Accused Nos.1 and 2 are acquitted for the offences punishable under Sections 302 and 201 r/w. 34 of the IPC.

2. Facts, as are necessary, for deciding this Appeal may be stated thus :-

PW-6 Akil owned She Buffaloes and stable. Accused No.2- Mahadeo and PW-2 Dashrath were working in his stable. Accused No.1 Mahindar and PW-1 Lorik were also residing in his stable along with Accused No.2 Mahadeo, though they were not in the service of PW-6 Akil.

3. On 10th May, 1992, at about 8 pm, while PW-6 Akil was in Ghass Bazar, PW-1 Lorik approached him and informed him that Accused Nos.1 and 2 had committed the murder of one Bohora on the previous night, in the stable. On receiving this information from PW-1 Lorik, PW-6 Akil went to Bhadrakali Police Station and narrated the same to PW-11 PI Surendra Patil, who reduced the said information in writing vide complaint (Exhibit-24). On this complaint, PW-11 PI Patil registered C.R. No.121 of 1992 against the Accused. Further investigation of the case was taken over by

PW-12 ACP Makarand Ranade. He arrested both the Accused on the same day at about 10:15 pm.

4. During custodial interrogation, Accused No.2 Mahadeo expressed his willingness to show the dead body, which was concealed behind the stable. His statement was reduced to Memorandum Panchanama (Exhibit-19). Thereafter, Accused No.2 Mahadeo laid the Police and the Panch to the spot, which was behind the stable. There, he dug the heap of rubbish and produced one gunny bag containing the truncated body without head. Thereafter, he again dug upto some more distance and took out one bundle of tarpaulin, which was containing two more gunny bags; one gunny bag was containing string, tarpaulin, lungi and stone, whereas, the other gunny bag was containing the head. Two calendars having blood stains thereon were also found kept in the gunny bag. All these articles and the dead body were seized under Panchanama (Exhibit-20). The persons gathered there identified the dead body that of Bohora. The Inquest Panchanama (Exhibit-30) was made on the spot and the dead body was sent for postmortem examination.

5. During custodial interrogation of Accused No.1 Mahindar,

on 11th May, 1992, he expressed his willingness to show the place where he has concealed the chopper used in commission of the offence. His statement was reduced to Memorandum Panchanama (Exhibit-22). Thereafter, Accused No.1 Mahindar guided PW-12 ACP Ranade and the Panch to the loft in the stable of PW-6 Akil. There he produced the blood stained chopper, which was concealed behind the wooden rack. It was seized under Panchanama (Exhibit-23).

6. During further interrogation of Accused No.2 Mahadeo, his blood stained clothes, which he was wearing at the time of incident, came to be seized from the same loft under Panchanama (Exhibit-27), in pursuance of the Memorandum Panchanama (Exhibit-26).

7. Thereafter, PW-12 ACP Ranade went to the spot along with Accused No.1 Mahindar and from there he seized one calendar hanging on the wooden wall. The said calendar was having blood stains thereon. There was dried blood on the wooden floor of the loft. The Panchanama (Exhibit-29) was prepared accordingly and by the said Panchanama, the blood sample was collected.

8. On the same day, PW-12 ACP Ranade recorded the statement of PW-1 Lorik and PW-2 Dashrath. He also seized blood stained clothes of deceased Bohora under Panchanama (Exhibit-15). Thereafter he recorded the statements of other witnesses, like, PW-7 Abdul Raheman, PW-8 Jakir Shaikh and PW-9 Afzal Khan. He also got recorded the statements of PW-1 Lorik and PW-2 Dashrath, under Section 164(5) of the Cr.P.C. from PW-10 Arun Bhawsar, Judicial Magistrate, First Class, on 12th May, 1992. On 13th May, 1992, he forwarded the seized muddemal articles to Chemical Analyzer vide requisition (Exhibit-35). The C.A. Report is produced at Exhibit-37. Further to completion of investigation, he filed Charge-Sheet in the Court against the Accused.

9. On committal of the case to the Sessions Court, the Trial Court framed charge against the Accused vide Exhibit-1. The Accused pleaded not guilty and claimed trial. In support of its case, therefore, the Prosecution examined in all 13 witnesses and on appreciation of their evidence, the Trial Court acquitted the Accused of both the offences. Being aggrieved by the same, the State has preferred this Appeal.

10. During pendency of the Appeal, despite efforts made by the State to trace Accused No.2 Mahadeo, he could not be found. Hence, as per order passed on 4th September, 1995, the case of Accused No.2 Mahadeo is kept on dormant file; case against Accused No.1 Mahindar is separated and is proceeded in this Appeal.

11. We have heard learned A.P.P. for the Appellant-State and learned Counsel for Respondent No.1/Accused No.1 and we will deal with those submissions at appropriate place in further course of Judgment.

12. The Prosecution case stands on circumstantial evidence alone. The circumstances relied upon by the Prosecution are as follows :-

- (i) Homicidal death of Bohora.
- (ii) Extra-Judicial Confession made by Accused No.1 Mahindar before PW-1 Lorik.
- (iii) Discovery of the dead body of Bohora at the instance of Accused No.2 Mahadeo.
- (iv) Discovery of weapon of assault, the chopper, at the instance of Accused No.1 Mahindar.

- (v) Discovery of the blood stained clothes of both the Accused.
- (vi) The C.A. Report (Exhibit-37) proving that the blood stains found on the chopper and the clothes of the Accused are matching with the blood group of the deceased.
- (vii) The deceased last seen by PW-8 Jakir Shaikh and PW-9 Afzal Khan in the company of the Accused.
- (viii) The motive, for committing the murder, of Accused, proved through the evidence of PW-3 Deoshankarsing.

13. To prove the first circumstance of homicidal death of deceased Bohora, Prosecution has produced on record the Postmortem Report at Exhibit-14, which is admitted in evidence by the Defence under Section 294 of the Cr.P.C. and hence Trial Court dispensed with evidence of the Medical Officer, who has conducted postmortem. As per the said Postmortem Report, the cause of the death of Bohora was *"shock due to haemorrhage due to cutting of big vessels of neck and spine injury"*. The evidence on record also goes to prove that the dead body was totally dismantled. Both head and remaining part of the body were found wrapped in separate gunny bags. Therefore, as regards the cause of death, it has to be held that the Prosecution

has succeeded in proving the first circumstance of Bohora's death being homicidal in nature.

14. The second circumstance relied upon by the Prosecution is that of the extra-judicial confession made by Accused No.1 Mahindar to PW-1 Lorik. As a matter of fact, PW-1 Lorik is the star witness for the Prosecution. However, he has not supported the Prosecution case. He has denied that one and a half months before the incident, a quarrel had taken place between deceased and Accused No.1 Mahindar. He has also denied that eight days prior to the incident, Accused No.2 Mahadeo told him that, as deceased has beaten Accused No.1 Mahindar, he and Accused No.1 Mahindar had decided to commit murder of the deceased. This witness has also denied that on the date of incident, at 6:30 pm, Accused No.2 Mahadeo had told him that they had planned to murder Bohora on that night and, therefore, they asked him to go for circus. He has further denied that when he returned from the circus, he climbed the loft and made enquiry with Accused why there was no light and then Accused No.1 Mahindar took him to the ground floor and told him that they have committed murder of Bohora. He has further denied that he again climbed

the loft and verified that there were blood stains on the calender hanging on the wall.

15. This witness has also denied the contents of his statement recorded under Section 164(5) of the Cr.P.C. by PW-10 Arun Bhawsar, Judicial Magistrate, First Class. He has further denied that he had informed PW-2 Dashrath what Accused No.1 Mahindar has told him that they had committed murder of Bohora. He has also denied that when Accused No.1 Mahindar told him about the said fact, PW-2 Dashrath was also with him. In his cross-examination by the Defence, he has admitted that he learnt about the murder of Bohora from others and not from Accused No.1 Mahindar. Further he has deposed that he was instructed by the Police as to what statement to be given before the Magistrate and, accordingly, he has given the statement.

16. Thus evidence of PW-1 Lorik, the star witness for the Prosecution, not only fails to prove the extra-judicial confession made by Accused No.1 Mahindar to him but also to prove the other corroborating pieces of evidence. Conversely, to some extent, he has damaged the Prosecution case, as he has denied to have even disclosed the fact of extra-judicial confession to

PW-2 Dashrath also. Hence, though the Prosecution has heavily relied upon the evidence of PW-2 Dashrath, it is not proving of much help to the Prosecution case.

17. As per evidence of PW-2 Dashrath, when he and PW-1 Lorik returned from circus on that night, Accused No.1 Mahindar took aside PW-1 Lorik and had some talk, but he does not know what they talked. As per his further evidence, on that night he slept on the tin roof of the loft. After about half an hour, he heard the sound of something being thrown over the wall. He suspected that it might have been the dead body of Goat. Then, at about 4 am, he got up from the sleep and found bed cover on the bed of PW-1 Mahindar missing. He also noticed some blood stains on the calendar hanging on the wall. Thereafter, at about 8 am, Accused No.2 Mahadeo came to the stable and made enquiry with him, three to four times, whether he has witnessed anything during night. According to his evidence, in the afternoon, at about 2 pm, when PW-1 Lorik came, he asked him what has happened during the night and PW-1 Lorik told him that they are not concerned with it. However, in the evening, at about 6 pm to 6:30 pm, PW-1 Lorik took him for snacks and told him that

Accused had committed murder of Bohora during night. Then, he contacted PW-6 Akil and narrated the incidence to him. He himself went to the movie thereafter.

18. This witness has, however, made material improvements in his evidence, because an omission is elicited from his cross-examination that in his statement recorded by the Police and PW-10 Arun Bhawsar, Judicial Magistrate, First Class, he has not stated that he had seen blood stains on the calendar hanging on the wall. Further, he has also admitted that he did not mention in his statement recorded by the Police that Accused No.1 Mahindar took PW-1 Lorik aside and there was some talk between them. Further, he has admitted that he had not narrated the entire incident in detail to PW-6 Akil, who has lodged the complaint about this incident and the complaint contains all the details of the incident. Therefore, the question is '*who has told PW-6 Akil about this incident ?*'.

19. Further, as per his cross-examination, he required about 30 to 35 minutes to sleep, after lying on the bed. Hence, it follows that he has not seen the Accused throwing anything from the loft. It was merely his suspicion that Accused might have thrown

something from the loft. He has further admitted that he has not seen the Accused climbing from the wall to throw something from the loft. Further, according to him, he did not try to ascertain as to what was thrown and buried beyond the wall during the night. Moreover, if there was any suspicion in his mind that Accused had done something wrong, like, committing the murder of Bohora, there was no reason for him to keep quiet till the next day. As stated above, PW-1 Lorik is not deposing at all that he has given information of the incident to this witness in the evening. Therefore, the Trial Court has rightly held that the evidence of this witness is also not worth placing reliance to accept the facts, as deposed by him.

20. The next circumstance relied upon by the Prosecution is of the discovery of dead body of Bohora, at the instance of Accused No.2 Mahadeo. The Prosecution, to prove its case, has relied upon the evidence of PW-4 Abdul Kadir, who has acted as Panch to the Memorandum Panchanama (Exhibit-19) and the Discovery Panchanama (Exhibit-20). However, as the case of Accused No.2 Mahadeo is separated, that evidence need not be considered in this Appeal. Secondly, the evidence of PW-4 Abdul Kadir goes to

prove that, at the time of the alleged memorandum and discovery, Accused No.2 Mahadeo was in handcuffs. The Trial Court has also rightly considered the timing of the arrest of the Accused, which was at 10 pm, the Memorandum Panchanama is in between 10 pm to 10:15 pm and discovery of dead body at 11 pm, which indirectly rules out the inescapable inference that it was within the exclusive knowledge of the Accused; that the dead body of Bohora was concealed in the pit behind the stable. The possibility of Police and other witnesses already knowing about the place where the dead body was buried, cannot be ruled out.

21. The fourth circumstance relied upon by the Prosecution is that of the discovery of weapon of assault, the chopper, at the instance of the present Accused No.1 Mahindar. To prove this circumstance, the Prosecution has relied on the evidence of PW-5 Salim Shaikh. According to his evidence, in pursuance of the Memorandum Statement given by Accused No.1 Mahindar, the chopper was discovered, which was kept behind the wooden rack on the loft and the said chopper was having blood stains thereon. However, his cross-examination reveals that at the time

of Memorandum Panchanama and Seizure Panchanama, Accused No.1 Mahindar was in handcuffs and, therefore, there is a question mark as to '*whether the said statement was voluntary one?*'. Secondly, there is no evidence to prove that the chopper was seized with wax seal and at the time of examination by Chemical Analyzer, it was in the same sealed condition in which it was seized. Hence, though the C.A. Report (Exhibit-37) reveals that there were blood stains of the blood group "A", in the absence of the evidence relating to the sealing of the weapon, the necessary link is not established. Moreover, there is no conclusive evidence on record to prove that the blood group of the deceased was "A", the blood stains of which were found on the chopper.

22. As regards the seizure of the blood stained clothes of the Accused, the recovery itself is in doubt. According to the evidence of PW-7 Abdul Raheman, it was Accused No.2 Mahadeo, who led them to the stable and produced his own blood stained clothes and the blood stained clothes of Accused No.1 Mahindar. However, again in the absence of the evidence relating to the clothes being sealed properly with wax and in the absence of the

conclusive evidence relating to the blood group of the deceased, this circumstance, being not established beyond reasonable doubt, is also of no avail to the Prosecution.

23. Prosecution has also relied on the evidence of PW-8 Jakir Shaikh and PW-9 Afzal Khan to prove that deceased Bohora was last seen in the company of the Accused. As per evidence of PW-8 Jakir Shaikh, on the date of incident, at about 8:30 pm to 8:45 pm, he has seen both the Accused and deceased Bohora proceeding to the stable of PW-6 Akil. However, in his cross-examination, it is brought on record that he has not stated this fact in his statement recorded by the Police. In such situation, this part of his evidence, being in the nature of omission, cannot be relied upon.

24. PW-9 Afzal Khan, who is serving in the Liquor Shop, has deposed that on the date of incident, at about 7:30 pm to 8 pm, Accused No.2 Mahadeo and deceased Bohora came to his shop for consuming liquor. After about half an hour, Accused No.2 Mahadeo again came to his shop to purchase a quarter bottle of Liquor. Therefore, he is not stating anything about the presence of Accused No.1 Mahindar with deceased Bohora in his Liquor

Shop. Hence, this circumstance is also not of any help to the Prosecution.

25. The last circumstance relied upon by the Prosecution is that of the alleged motive. According to the evidence of PW-3 Deoshankarsing, about one and a half month prior to the incident, there was quarrel between Walmik and Accused No.1 Mahindar and in the said quarrel, deceased Bohora asked Accused No.1 Mahindar, '*why he was quarreling with Walmik?*'. Hence, fighting took place between Accused No.1 Mahindar and deceased Bohora. However, in his cross-examination, he has admitted that he does not remember the date, day and time of the said fighting. Moreover, even assuming that there was some such incident of fighting between Accused No.1 Mahindar and deceased Bohora, it has happened about one and a half month prior to the incident and, secondly, thereafter also, deceased and the Accused were on cordial terms. Otherwise, as per the Prosecution case itself, deceased Bohora would not have accompanied Accused No.2 Mahadeo to consume alcohol. Moreover, there was no reason for Accused No.2 Mahadeo, in that situation, to commit the murder of deceased Bohora. Motive

otherwise also is not an incriminating circumstance as such.

26. To sum up, therefore, it has to be held that the Prosecution has not established the chain of incriminating circumstances by bringing cogent and reliable evidence on record, to lead to an unerring and inescapable conclusion that it was none else than the Accused, who had committed the murder of deceased Bohora. In our considered opinion, the Judgment of the Trial Court, therefore, calls for no interference, as, after proper appreciation of evidence on record and giving sound reasoning, the Trial Court has disbelieved the Prosecution case. No illegality, much less, any perversity is found in the reasoning and approach adopted by the Trial Court in acquitting the Accused. Hence, the Appeal stands dismissed.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [SMT. V.K. TAHILRAMANI, J.]