

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.40 OF 2008

1. Avdesh Ramhit Rai	]	
Age : 24 Yrs., Occu.: Service	]	
	]	
2. Dharmendra Krupashankar Singh,	]	
Age : 24 Yrs., Occu.: Service	]	
	]	
Both are residing at 2/04, Chandraraj	]	 Appellants /
Building, Chincholi Bunder Road,	]	(Original Accused
Malad (West), Mumbai.	]	Nos.3 and 2)

Versus

The State of Maharashtra	]	
(At the instance of Malad Police Station)	]	 Respondent

Mr. Sanjiv Punalekar for the Appellants.

Mrs. A.S. Pai, A.P.P., for the
Respondent/State.

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

DATE : 16TH JULY, 2015.

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

1. The Appellants, who are Original Accused Nos.3 and 2, stand convicted for the offences punishable under Sections 302

and 201 r/w. 34 of the IPC and sentenced to suffer imprisonment for life and to pay fine of Rs.3,000/- each, in default to suffer further R.I. for one year, on the first count, and R.I. for three years and to pay fine of Rs.1,000/-, in default to suffer R.I. for three months, on the second count, by the Additional Sessions Judge, Greater Bombay, vide Judgment dated 16th November, 2007 in Sessions Case No.911 of 2006, by this Appeal challenge their conviction and sentence.

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

Deceased Vikas was the brother of PW-1 Chandan's wife. On 23rd July, 2006, Vikas, with his family, had come to the house of PW-1 Chandan for dinner. After the dinner, he alone left the house of PW-1 Chandan about 1 am, saying that he would come back. However, on the next day his dead body was found behind Goregaon Sports Club, Dumping Road, Malad (West), Mumbai. It was identified by PW-1 Chandan. On the dead body, he found the ligature mark around the neck caused by nylon rope and some black spots on back, stomach, arm and forehead. Therefore, he lodged complaint (Exhibit-17) against the unknown persons.

3. PW-11 PSI Kshirsagar, who was on duty at Malad Police Station, on receipt of the information about the finding of the dead body, had gone to the spot, found the dead body wrapped in a regxin sheet of dark blue colour. He removed the dead body from the said wrap, made Inquest Panchanama (Exhibit-40) and referred the dead body for postmortem, after it was identified by PW-1 Chandan.

4. On the complaint (Exhibit-17) of PW-1 Chandan, PW-11 PSI Kshirsagar registered C.R. No.446 of 2006 for the offences punishable under Sections 302 and 201 r/w. 34 of the IPC and handed over further investigation of the case to PW-13 PI Manohar Kalekar. He recorded the statements of one Harish Soma Patel and PW-3 Omprakash Pandey, the eye witnesses to the incident, and on the basis of their statements, he arrested in all four Accused, who were serving as Watchmen in Saxeria Industrial Estate. All the four Accused were sent for medical examination on their arrest under Panchanama (Exhibit-55). PW-14 Dr. Ganesh Avhad, who examined them, found some old abrasions on the person of Accused No.2 Dharmendra. He issued the Injury Certificate (Exhibit-61) accordingly.

5. During the course of investigation, Accused No.3 Avdesh expressed his willingness to point out the spot of offence. His statement was reduced to Memorandum Panchanama (Exhibit-43). Then he led the Police and Panchas near the gate of Saxeria Industrial Estate and pointed out the spot of incident, from where the blood mixed soil was collected under Panchanama (Exhibit-43-A).

6. On 30th July, 2006, in pursuance of the disclosure statement given by Accused No.2 Dharmendra, three wooden sticks came to be seized under Panchanama (Exhibit 26-A). Again, in pursuance of the statement given by Accused No.2 Dharmendra, in the presence of the Panch PW-4 Chetan Rathod, the blood stained clothes of all the four Accused came to be seized under Panchanama (Exhibit-23). The seized muddemal articles were sent to Chemical Analyzer vide requisition (Exhibit-58) and the C.A. Reports are produced in the case vide Exhibits "9", "10", "33" and "34". Further to completion of investigation, PW-13 PI Manohar Kalekar filed Charge-Sheet in the Court against the Accused.

7. On committal of the case to the Sessions Court, Trial Court

framed charge against the Accused vide Exhibit-2. Accused pleaded not guilty and claimed trial.

8. In support of its case, Prosecution examined in all 14 witnesses and on appreciation of their evidence, the Trial Court was pleased to acquit Accused No.1 Pritam, whereas Accused No.4 Sonukumar's case was transferred to Juvenile Justice Board. As regards the present Appellants, the Trial Court held the guilt of these Accused to be proved for both the offences punishable under Sections 302 and 201 r/w. 34 of the IPC and convicted and sentenced them, as aforesaid.

9. In this Appeal, we have heard learned Counsel for Appellants Mr. Sanjiv Punalekar and learned A.P.P. for the Respondent/State Mrs. A.S. Pai. In our considered opinion, in order to effectively deal with the rival submissions advanced by them, it would be useful to refer to the evidence on record.

10. This case stands on circumstantial evidence alone, as the only eye witness examined by the Prosecution, namely, PW-3 Omprakash Pandye has turned hostile and has not supported the Prosecution case. Though he is disowned by the Prosecution and

cross examined by learned A.P.P, nothing worthwhile is elicited in his cross-examination to prove the Prosecution case. Similarly, one more eye witness, namely, Harish Soma Patel, who was also working in Saxeria Industrial Estate as a Watchman and who, according to Prosecution, was present at the time of incident and whose statement is recorded by PW-13 PI Manohar Kalekar, could not be examined, as, according to evidence of PW-13 PI Kalekar, he remained untraceable.

11. As a result, the Prosecution case stands on circumstantial evidence alone and to prove the guilt of the Accused, Prosecution has relied on the following circumstances.

12. Firstly, to prove the homicidal death of deceased Vikas, Prosecution has led the evidence of PW-7 Dr. Rambhau Sanap, who has conducted autopsy on his dead body on 24th July, 2006 in between 8 to 9 pm at Bhagwati Hospital, Borivali, Mumbai. On examination, he found following external injuries :-

- (1) *Ligature mark around the neck situated below thyroid cartilage encircling the neck completely of size 35 cm x 1.5 cm grooved and parchment like coloured. On dessection of neck, strap muscles contused.*

- (2) *Multiple contusions over left scapular area 6 cm x 2 cm, over left knee 13 cm x 3 cm and 15 cm x 0.5 cm over right popliteal fossa, 10 cm x 8 cm, over right scapular area 10 cm x 2 cm.*
- (3) *Abrasions over left ankle 0.5 cm x 0.5 cm, over right shoulder 1.5 cm x 2 cm and over right cheek 1.5 cm x 0.5 cm.*

13. On internal examination of head, he found heamatoma under the scalp, lungs congested, oedematus with patechial haemorrhages over pleural surface. Both the internal and external injuries, according to him, were antemortem in nature and the cause of death was "*asphyxia due to strangulation*". He has further opined that Injury No.1, which was the ligature mark, was sufficient in the ordinary course of nature to cause the death. Thus, his evidence proves that Vikas had succumbed to homicidal death.

14. Secondly, the Prosecution has relied upon the evidence of PW-2 Magdum Shah, the Rickshaw Driver, to prove that he has carried the dead body of Vikas in his auto-rickshaw on that night from the gate of Saxeria Industrial Estate. Prosecution has heavily relied on the evidence of this witness. According to him,

on that night, he was proceeding towards 'In Orbit Mall' to get some passengers. At about 1:45 am, when he came in front of Saxeria Industrial Estate, situate on Chincholi Bunder Road, two persons in the uniform of 'watchman' stopped his rickshaw and told him that they wanted to take their household articles, as they were posted at Mind Space Company, situate behind Toyoto Showroom. They agreed to pay the fare of Rs.40/- and, accordingly, he carried both of them in his rickshaw with their luggage contained in blue colour plastic big bag. He took them as per their directions to Mind Space Company. They alighted from his rickshaw with their luggage. Then he left. Thereafter PW-8 Head Constable Shantaram Ghogale has traced him on 31st July, 2006. When he was called for identification of those two Watchmen in the Test Identification Parade conducted by PW-6 Dr. Kirtikant Khergamkar, the Special Executive Officer, on 8th August, 2006, he has identified those two watchmen as Accused Nos.2 and 3.

15. This witness has, however, in his evidence admitted that he could not see as to what was inside the blue colour plastic bag. As per Prosecution case, the dead body was in dark blue colour

regxine sheet and not in the plastic bag. Moreover, though this witness claims to have identified the Accused in the Test Identification Parade, several lacunae and infirmities are brought out from the evidence of PW-6 Dr. Kirtikant Khergamkar, Special Executive Officer, to show that the evidence relating to identification of these Accused in the Test Identification Parade cannot be relied upon.

16. One of the fatal infirmity brought out in the Test Identification Parade is that the Accused were made to stand in the rows in the presence of the Panch, who had gone to bring this witness for identification of the Accused. Therefore, the possibility of witness knowing the positions where the Accused were standing in the Test Identification Parade, cannot be ruled out. Secondly, this witness has admitted that all the four suspects were made to stand at once in the Test Identification Parade.

17. Thirdly, he has not asked before the Test Identification Parade whether the witness had any opportunity to see the Accused before Test Identification Parade. He has also not asked the Accused whether they were shown to any identifying

witness. This was important because PW-13 PI Manohar Kalekar has admitted in his cross-examination that Accused were not produced before the Magistrate for remand in veil. Moreover, the evidence of PW-13 PI Manohar Kalekar reveals that the Accused were arrested on 25th July, 2006 and they were produced before the Police for remand on 26th July, 2006. Further, they were in custody till 2nd August, 2006. The statement of PW-2 Magdum Shah was recorded by the Police on 30th July, 2006 at the Police Station. When, admittedly, at that time, the Accused were in police custody for remand, the possibility of Accused being shown to this witness cannot be ruled out.

18. Further, it is also a serious question as to whether this witness had any sufficient opportunity to observe those two watchmen, when it was night time. He has not given the identifying features of those watchmen. He is a Rickshaw Driver and, therefore, it follows that he must be carrying several passengers in his rickshaw every day. In the absence of any specific cause, which he has not disclosed in the case, there was no reason for him to remember the faces of these two particular watchmen and thereafter to identify them. The crucial

admission, as given by him, that he was not knowing what is being carried in the blue colour wrap takes out the wind out of his entire testimony.

19. Then Prosecution has relied on the circumstance of the recovery of the clothes of all the four Accused at the instance of one Accused. The evidence of the Panch Witness PW-4 Chetan Rathod reveals that the disclosure statement was given by Accused No.2 Dharmendra alone and in pursuance of the said statement, the clothes of all the four Accused came to be recovered from those individual Accused. Thus, as regards recovery of the clothes of Accused No.3 Avdesh, there is no Memorandum Panchanama. Therefore, the recovery of the clothes of Accused No.3 Avdesh is not preceded or in pursuance of the Memorandum Statement given by him. Hence, such recovery also cannot be called as falling within the purview of Section 27 of the Evidence Act. Further, it is pertinent to note that the blood of "B" group matching to the blood group of the deceased was found only on the clothes of Accused No.3 Avdesh. It is also significant to note that the blood group of Accused No.3 Avdesh or any other Accused was not identified. In such

situation, this circumstance is hardly conclusive to connect the Accused to the offence or it can hardly be called as incriminating also.

20. As regards recovery of sticks also, the evidence of the Panch PW-5 Ramgovind Singh shows that the Memorandum Statement was given by Accused No.2 Dharmendra alone and the three sticks were recovered at his instance. No matching blood stains were found on the said sticks to connect them as the weapons of assault.

21. The evidence of the Panch PW-9 Mangesh Sable reveals that the recovery of the sticks was made at the instance of acquitted Accused No.1 Pritam. Therefore, that recovery is also not of much help to the Prosecution.

22. Prosecution has also relied upon the discovery of the spot of incident at the instance of Accused No.3 Avdesh. Accused No.3 Avdesh has given a disclosing statement to show where the incident had taken place. The Memorandum Panchanama (Exhibit-43) was made accordingly. Thereafter, Accused No.3 Avdesh guided him and Police to the spot at Saxeria Industrial

Estate, where he showed the red colour floor stone. The blood mixed soil was collected from the said spot under Panchanama (Exhibit-44). As per evidence of PW-13 PI Manohar Kalekar, the said soil was sent to Chemical Analyzer. However, the evidence of PW-10 Panch Sumit Bakrania goes to show that it was the Police Officer who told him and the other Panch the facts of the crime and also that the Accused would show the spot of incident. He has further admitted that in his garage, he deals with the vehicles of Police Officers. In view of the fact that it was the Police Officer, who had made the statement that Accused would show the spot of incident, it becomes difficult to accept that the discovery of the spot of incident was at the instance of the Accused. Moreover, the C.A. Report does not establish the necessary connection between the blood mixed soil seized from the said spot with the blood group of the deceased. Hence, this circumstance also cannot be said to be established satisfactorily by the Prosecution.

23. The last circumstance relied upon by the Prosecution pertains to the injuries found on the person of Accused No.2 Dharmendra. To prove this circumstance, the Prosecution has led

the evidence of PW-14 Dr. Ganesh Avhad, who has examined Accused No.2 Dharmendra on 25th July, 2006, at about 7:10 pm, and found three old abrasions on right hand and one old abrasion on sternum. According to him, the age of the injury was more than 48 hours. In our opinion, if the incident had taken place on the late night of 23rd July, 2006, after 1 am, then the finding of abrasions with their age above 48 hours does not necessarily connect Accused No.2 Dharmendra to the said incident. Surprisingly, no such injuries were found on the person of the other Accused.

24. Even in respect of the homicidal death also, the evidence of PW-7 Dr. Rambhau Sanap shows that the time of the death was in between 24 to 36 hours before conducting the postmortem at 8 pm on 24th July, 2006. Admittedly, deceased Vikas was in the house of PW-1 Chandan till 1 am on 23rd July, 2006. Therefore, this timing of death is also not consistent with the oral evidence brought on record.

25. These are the only circumstances on which Prosecution is relying and it has to be stated that none of these circumstances is established by the Prosecution with satisfactory evidence.

None of these circumstances, if taken by itself, is incriminating as such, except for the circumstance that PW-2 Magdum Shah has carried Accused Nos.2 and 3 in his rickshaw with their luggage. But in view of his admission that he was not knowing what was in the said luggage and the lacunae in the Test Identification Parade, that circumstance is also not established fully by the Prosecution. Moreover, that circumstance alone cannot lead to the inference of the guilt of the Accused.

26. The Prosecution has also failed to prove the most necessary ingredient; the motive on the part of the Accused to commit the crime. This being a case based on circumstantial evidence alone, the motive assumed significance and the absence of evidence proving motive constitutes a fatal lacunae in the Prosecution case.

27. It is also pertinent to note that PW-1 Chandan has not stated that deceased Vikas has told him while leaving the house that he was going to Saxeria Industrial Estate. How deceased reached there, who has taken him there and what was the cause for the quarrel or the dispute between the deceased and the assailants, none of these facts are explained by the Prosecution.

As a result of it, it becomes difficult to sustain the conviction of the Accused, as recorded by the Trial Court. The evidence brought on record by the Prosecution is too scanty and meager. Hence, it is unsafe and hazardous to base conviction of the Accused on such calculation of evidence. Prosecution has failed to establish the necessary chain of the incriminating circumstances. Several links in the said chain are missing. Hence, the inference of the guilt of the Accused and Accused alone cannot be drawn.

28. Consequently, the Appeal is allowed. The conviction and sentence of the Appellants for the offences punishable under Sections 302 and 201 r/w. 34 of the IPC is quashed and set aside. Appellant Nos.1 and 2 are acquitted for the offences punishable under Sections 302 and 201 of the IPC. They are directed to be released forthwith, if not required in any other offence. Fine amount, if any, paid by the Appellants be refunded to them.

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