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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 256 OF 2010

Ashokkumar Ganeshwram Mahanand
Aged about 20 years,
Residing at Village Bhainshmundi,
Post Sarabong, District Nupada,
State of Orissa 766 105

.. Appellant

Vs.

State of Maharashtra

.. Respondent

Mr. Sandeep Singh for appellant.
Mrs. U. V. Kejriwal, APP for State.

**CORAM: P. V. HARDAS &
DR. SHALINI PHANSALKAR-JOSHI, JJ.**

JANUARY 09, 2015.

ORAL JUDGMENT [Per P. V. Hardas, J.]:

The Appellant, who stands convicted for offence punishable under Sections 302 and 392 of the Indian Penal Code and sentenced to imprisonment for life and to pay a fine of Rs.2000/-, in default of which to undergo further RI for three months and RI for five years and to pay a fine

of Rs.1000/-, in default of which to undergo further RI for one month, with a direction that substantive sentences shall run concurrently, by the 4th Ad-hoc Additional Sessions Judge, City Sessions Court, Sewree, Bombay, by judgment dated 30/09/2009, in Sessions Case No. 174 of 2007, by this appeal questions the correctness of his conviction and sentence.

2. Facts, as are necessary for the decision of this appeal may be stated thus:-

PW-9 PSI Uday Desai, who was attached to the Gaondevi Police Station and was on duty on 3.10.2008 recorded the report of PW-1 Abdul Sattar at Exhibit 8. On the basis of the said report at Exhibit 8, he registered an offence vide Crime No.215 of 2008. Upon registration of the offence, PW-9 PSI Desai alongwith other Police Staff went to the hotel of the Complainant. In the presence of panchas, a scene of the incident panchnama was drawn at Exhibit 9. The Medical Officer was asked to examine the deceased and the Medical Officer pronounced him dead. The dead body was then referred for postmortem examination. A chopper and sample of the blood stains were seized from the scene of the incident.

PW-10 API Sanjay Kate, who was also attached to the Gaondevi Police Station carried out further investigation in Crime No.215 of 2008. He had accompanied PW-8 PSI Desai to the scene of the incident. He forwarded the dead body to J.J. Hospital for postmortem examination. The clothes of the deceased were seized under seizure memorandum at Exhibit 18.

PW-11 PSI Vinay Patankar, who was also attached to the Gaondevi Police Station had carried out further investigation in Crime No.215 of 2008. He received information on 3.10.2008 that the Appellant had been apprehended by the Railway Police at Igatpuri. PW-11 Patankar alongwith the Police Staff went to the Igatpuri Railway Station and noticed the two accused who had been apprehended by the Police. Search of the accused was taken in the presence of panchas. In the right trouser pocket of the Appellant, cash of Rs.13,095/- kept in a plastic bag was found. In a leather packet which was found in the back pocket of the trouser visiting card of New Heroes Hotel and two Railway tickets from Dadar to Raipur were found. In the left hand pocket of the trouser, one Nokia Mobile Hand Set without any SIM card was found. The Appellant was found to be carrying one gray colour bag in his hand. On taking the search of the

bag, nothing incriminating was found. The clothes of the accused were seized under the panchnama at Exhibit 11. The accused were arrested. The arrest panchnamas are at Exhibits 12 to 14.

PW-12 PI Sudhir Mali, who was attached to the Gaondevi Police Station was entrusted with the further investigation of Crime No.215 of 2008. During custodial Interrogation, the Appellant expressed his willingness to point out the baniyan and the SIM card of the deceased. A memorandum to that effect was recorded at Exhibit 20. The accused then led the Police and the Panch to the Hotel where the deceased had been killed and from the funnel near the staff room removed the baniyan which was blood stained and also produced a SIM card. The said articles were seized under the panchnama at Exhibit 21. Further to the completion of investigation, a charge-sheet against the accused was submitted.

3. Postmortem on the dead body of deceased Haroon was performed by PW 7 – Dr. Sunanda Katake, who notice the following external injuries :-

- (i) Incised wound on left forehead 8.5 cm. x 1.5 cm. x 0.7

cm, red colour with clean margin 3 cm above left eyebrow.

- (ii) Incised wound on left parietal bone 5 cm x 1.5 cm x 1 cm with clean margin, red.
- (iii) Incised wound extending from left cheek to 3 cm lateral nose upto left parietal bone and lateral to injury No.2 17 cm x 3 cm x 2 cm with clean margin, red.
- (iv) Irregular incised wound with cut of left ear, vertical upto pinna of ear 6 cm x 1 cm x 0.5 cm, red colour.
- (v) Three incised wounds mixed irregularly from left occipital bone 4 cm above the nape of neck as (a) 17 cm x 2.5 cm x bd, red with clear margin, (b) just above (a) 2.5 cm. x 1 cm x bd red colour, clean margin and (c) horizontal incised wound behind left ear 9 cm x 2 cm x bd blood clot.
- (vi) “V” shaped incised wound over occipital bone with fracture bone 8 cm x 1.5 cm x bd & 6 cm x 1.5 cm x bd, red colour with clean margin.
- (vii) Horizontal incised wound over left cheek below left ear pinna upto neck hair line 7 cm x 1.5 cm. x bd clean

margin.

- (viii) “L” shaped incised wound on right parietal and occipital bone 11 cm x 2 cm x 1.5 cm and 8 cm x 2 cm x 1.5 cm. with fracture clean margin.
- (ix) Three horizontal parellel on occipital bone above hair line as, (a) 5 cm x 2 cm x bd with clean margin & 8 cm above hair line, rend, (b) Horizontal 8 cm x 2 cm x bd, red colour with clean margin and (c) Horizontal, 4 cm x 2 cm x bd, red colour and width 5 cm between (a) to (b) and (b) to (c) each.
- (x) Oblique incised wound between injury No.8 and 9, three in number as (a) 6 cm x 1.5 cm x 1 cm, red with clean edge, (b) 4 cm x 1 cm x 1 cm, red with clean edge and (c) 6 cm x 1 cm x 1 cm, red, clean margin gap between (a) to (b) is 0.5 cm. and between (b) to (c) is 0.5 cm. each.
- (xi) Three parallel incised wounds, 5 cm above injury no.10 on occipital area & 7 cm from right ear lobe, (a) 4 cm x 1 cm x 1 cm (upper), red & clean margin, (b) 3 cm x 1 cm x 1 cm (middle), red & clean margin and (c)

3 cm x 1 cm x 1 cm (lower), red with clean margin and gap between injury (a) & (b) is 1.5 cm. and (b) and (c) is 1 cm.

- (xii) Inverted “U” shaped incised wound below mandible, 8 cm x 2 cm x 1.5 cm red colour & clean margin.
- (xiii) Incised wound just below injury no. 12 1.75 cm x 1 cm x 1.5 cm on neck with clean margin, red, anteriorly.
- (xiv) Incised wound on left arm with exposing # head of humerus 10 cm x 4.5 cm x 4 cm with clean margin, red colour.
- (xv) Incised wound over left forearm anteriorly 5 cm x 1.5 cm x 1 cm, red with clean margin & 7 cm below left elbow.
- (xvi) Incised wound over left hand on medial aspect 7 cm x 2 cm x muscle deep (1.5 cm and 11 cm below wound no.15 red with clean margin.
- (xvii) Multiple abrasions on all fingers on back side with incised wound on left middle finger with # distal metacarpal 1 x 0.5 x 0.25 cm. on back aspect red with clean margin.

- (xviii) Incised wound on chest 8 cm x 2.5 cm x 2.5 cm & 7 cm medial to right nipple & 7 cm below supra-sternal notch, red.
- (xix) Incised wound on chest 8 cm x 1 cm x 1 cm on left side & 8.5 cm above left nipple & 5 cm lateral to injury no.10.
- (xx) Incised wound on right arm laterally 3 cm x 1 cm x 0.5 cm & 9 cm from axilla red with clean margin.
- (xxi) Incised wound on right elbow, 8.5 cm x 3 cm x 1.5 cm & 4 cm medial to elbow on back side, red with clean margin.
- (xxii) Horizontal incised wound on right forearm 3 cm x 1 cm x 0.5 cm and 8 cm above wrist joint back side, red.
- (xxiii) Incised wound on right lateral forearm 9 cm x 6 cm x 0.5 cm & 2.5 cm above right wrist, red with clean margin.
- (xxiv) Horizontal incised wound on all knuckles and base of left finger 9 cm x 2.5 cm x 1 cm with # all base of knuckle red colour with clean margin.
- (xxv) Multiple small abrasions on left shoulder back side &

above scapula 4.05 cm red colour.

(xxvi) Multiple small abrasions all over right arm, forearms, red colour.

On internal examination, PW 7 – Dr. Sunanda noticed all cranial bones were fractured into multiple fragments with compound fracture. Brain meninges was oedematous and lacerated. Intracranial heamorrhage was noticed. She therefore opined that deceased Haroon had died due to heamorrhage and shock due to head injuries with multiple injuries (unnatural). The postmortem report is at Exh. 31.

4. On the case being committed to the Court of Sessions, trial court vide Exh. 2 framed charge against the appellant for offence punishable under Sections 302, 394, 392 read with 397 of the IPC and under Section 37(1)(a) r/w 135 of the Bombay Police Act. The appellant denied his guilt and claimed to be tried. Prosecution, in support of its case examined 12 witnesses. The defence of the appellant was of denial. The Trial Court, upon appreciation of the evidence of the prosecution witnesses, convicted and sentenced the appellant as afore-stated.

5. We have heard Mr. Sandeep Singh, learned counsel for the appellant and the learned APP for the State and in order to effectively deal with the submissions advanced before us by the learned counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

6. Prosecution has examined PW-1 Abdul Sattar who deposes that he was employed at the New Heroes Hotel which was owned by one Yasin. According to him, deceased Haroon was also employed as a servant in the same hotel. PW-1 Abdul Sattar was managing the Paan Kiosk of the Hotel. The Appellant and one Hemsagar were also working in the hotel. According to Abdul Sattar, on 2.10.2008 he closed the Pan Kiosk at about 12.00 midnight on 1.10.2008 and thereafter, had gone to the house of his employer Yasin at about 1.15 a.m. on 2.10.2008. He remained in the house of his employer for the entire day and on 3.10.2008 at about 5.30 a.m. returned to the hotel. The shutter of the hotel was closed and therefore, he knocked on the shutter in order to awaken Haroon, who used to sleep in the hotel. Since there was no response, he went to the rear of the hotel and noticed the door of the hotel to be ajar. He entered the hotel

and noticed Haroon lying in a pool of blood. There were blood stains in the wash basin and he also noticed a knife which was blood stained lying near the Refrigerator. He then went to the cash counter and noticed that it was opened. Key of the safe was on the table. Cash from the counter was missing. The chappals of Haroon were also noticed lying at the scene of the incident. Abdul Sattar therefore informed his employer on telephone who then advised Abdul Sattar to inform the Police. Abdul Sattar accordingly went to the Gaondevi Police Station and lodged his report at Exhibit 8. He returned back to the hotel alongwith the Police and noticed two employees were not present. The two employees were the Appellant and Hemsagar.

7. In cross-examination he has admitted that some employees used to sleep in the hotel while some employees used to sleep on the foot path and in the open space to the rear of the hotel. He has further admitted that the employees who used to sleep in the hotel used to close the rear door at night. He has also admitted that none of the employees who were present in the hotel had informed him about hearing any cries at night.

8. Prosecution has examined PW-5 Mikdad Haider, who was working as a Hotel Manager. According to PW-5 Mikdad, deceased Haroon used to manage the counter of the Hotel and was working as a Cashier. The Appellant was employed in the hotel as a waiter and used to sleep in the room of the hotel located towards the rear while deceased Haroon used to sleep in the main portion of the hotel. He has admitted that he used to leave the hotel at about 1.00 to 1.15 a.m. According to him, on 3.10.2008, he was proceeding to his house at about 1.00 to 1.15 a.m. He had noticed deceased Haroon taking his dinner. According to him when he came out of the hotel, he noticed the Appellant standing on the foot path. He had asked the Appellant as to why the Appellant had not gone to sleep and the Appellant had replied that since he could not sleep so he was standing on the foot path. PW-5 Mikdad further deposes that he received a telephone call at about 6.00 a.m. from Yasin, owner of the hotel. Yasin informed him about some incident which had occurred in the hotel and asked PW-5 Mikdad to go to the hotel. Accordingly, PW-5 Mikdad rushed to the hotel and reached the hotel at 6.15 a.m. He noticed the presence of police in the hotel and inquired from them as to what had happened. The police had informed him about the murder of the Cashier Haroon. According to him, he noticed Haroon lying in a pool of blood and also saw

a knife lying at the scene of the incident which was blood stained. He also noticed that the cash in the counter was missing. According to PW-5 Mikdad he had kept about Rs.14,000/- to Rs. 15,000/- in the counter while leaving the hotel. He also noticed that the Appellant and one Hemsagar were missing. He learnt in the evening that the Appellant and Hemsagar had been arrested at Igatpuri.

9. In cross-examination he has admitted that Hemsagar was scheduled to go to his native place. He has also admitted that Haroon used to retain the key of the counter with him. He has also admitted that Haroon was healthy and stout and it was difficult for one person to over-power him. Omission has been elicited that he had not stated in his previous statement that when he left the hotel, he had noticed Haroon taking his dinner.

10. Prosecution has examined PW-6 Anil Sharma, who was employed in the New Heroes Hotel. According to him, he was sleeping in the hotel alongwith the other employees. The Appellant was also employed in the hotel and used to sleep in the hotel at night. According to

him, on the day of the incident PW-1 Abdul Sattar had gone to the house of his relatives and was not present in the hotel. Deceased Haroon was alone sleeping in the hotel. According to him, he had given the key of the hotel to deceased Haroon and had gone to the rear of the hotel for sleeping. He learnt about the murder of deceased Haroon. According to him, the police had inquired from him about the train going to Orissa from where Ashokkumar and Hemsagar were hailing. He had accompanied the police to the Railway Station for searching for the accused. In the C.C. T.V. Footage at the Railway Station they had noticed the Appellant and Hemsagar at the Railway Station. He had then accompanied the Police to Igatpuri where the accused had been detained.

11. In cross-examination he has admitted that when he had gone out of the hotel at 1.20 a.m. Hemsagar and deceased Haroon were present in the hotel. He has admitted that the Appellant was not present in the hotel. He has admitted that Hemsagar was preparing for going to his native place since prior to the incident. The suitcase belonged to Hemsagar.

12. The case against the Appellant is based on circumstantial evidence. Prosecution in order to succeed must prove each and every

circumstance on which it proposes to rely. The circumstances so proved should be of a conclusive nature that is they should have a definite tendency of implicating the accused. The circumstances so proved should form a complete chain which should exclude every hypothesis of the innocence of the accused and should unerringly point to the guilt of the accused. In other words, circumstances should be capable of only one inference and that is that the accused alone has committed the offence.

13. In the present case the prosecution has relied upon the disclosure memorandum of the Appellant leading to the discovery of a blood stained baniyan and a SIM card. The prosecution also relies on the circumstance that cash of Rs.13,095/- was found with the accused. The prosecution has also relied upon the circumstance that the Appellant had absconded.

14. In respect of the first discovery of the disclosure memorandum, none of the prosecution witnesses have deposed that the SIM card which was discovered by the accused was the SIM card of deceased Haroon. Prosecution has not examined any person from the mobile company for proving that the SIM card of deceased Haroon was the

same card which was discovered by the Appellant. PW-4 Mohd. Azim Salilm Qureshi, a panch to the disclosure memorandum of the Appellant has admitted in the cross-examination that the police had informed him that blood stained baniyan and SIM card was to be seized. Since the Police were aware about the exact place where the baniyan and the SIM card were located and this fact was informed to the panch witness before the disclosure memorandum of the accused, in our opinion, no reliance can be placed on the disclosure memorandum. The mobile seized from him also has not been proved by any witness to be the mobile hand set of deceased Haroon. The alleged baniyan discovered by the Appellant is also not established by any witness to be the baniyan of the Appellant. The first circumstance therefore, in our opinion, has not been proved at all. The first circumstance in the light of what has been observed by us cannot be said to be an incriminating circumstance. In respect of the second circumstance that cash was found with the Appellant when he was arrested, the prosecution has utterly failed to establish that the cash amount was the same cash which was stolen by the Appellant from the hotel. Though prosecution has examined PW-1 Abdul Sattar and PW-5 Mikdad, these witnesses do not refer to the cash being the same cash which was stolen from the hotel. In the absence of any nexus between the theft of the cash

and the cash recovered from the Appellant, failure of the Appellant to offer any explanation would not be a substitute for proof of theft. We further find that the incriminating circumstances from the report of the Chemical Analyzer have also not been put to the accused and consequently, the report of the Chemical Analyzer cannot be of any assistance to the prosecution. The sole circumstance that the Appellant had left the hotel cannot be used as a circumstance for sustaining the conviction of the Appellant for offence punishable under Section 302 of the Indian Penal Code. In our opinion therefore, the Appellant is entitled to be given the benefit of doubt.

15. Accordingly, Criminal Appeal is allowed and the conviction and sentence of the Appellant/Original Accused is hereby quashed and set aside and he is acquitted of the offence with which he was charged and convicted. Fine, if paid by the accused, be refunded to him. Since the Appellant/Accused is in jail, he be released forthwith if not required in any other case.

(DR. SHALINI PHANSALKAR-JOSHI,J.)

(P. V. HARDAS,J.)