

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL APPEAL NO.256 OF 2009**

Naruddin Murtujaali Shaikh
An adult aged about 35 years,
R/a Behind Building No.4,
Near alli Mallai, Ali Shramik Nagar,
Kurla (E),
Mumbai 400 024.
(Presently lodged at
Nasik Central Prison)

...Appellant.

versus

The State of Maharashtra
(At the instance of Nehru Nagar
Police Station C.R. No.31/07)

..Respondent.

.....
Mr. P.B. Kakade and Mr. R.V. Kolge for the Appellant.
Mrs. A.S.Pai, Addl.P.P. for the State.

.....
**CORAM : SMT V.K. TAHILRAMANI &
A.S. GADKARI, JJ.**

24th/ 25th August, 2015.

ORAL JUDGMENT (PER SMT V.K. TAHILRAMANI, J.) :

The Appellant - original accused has preferred this Appeal against the judgment and order dated 18th December, 2008 passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No.451 of 2007. By the said judgment and order the learned Sessions Judge convicted the Appellant under Sections 302, 452 and 394 of the Indian Penal Code. For the offence punishable under Section 302, the Appellant was sentenced to suffer rigorous

imprisonment for life and fine of Rs.1,000/-, in default further rigorous imprisonment for one year. For the offence punishable under Sections 452 and 394 of the Indian Penal Code, the Appellant was separately sentenced under each count to suffer rigorous imprisonment for three years and fine of Rs.500/-, in default rigorous imprisonment for six months. The learned Sessions Judge directed that the substantive sentences of imprisonment shall run concurrently.

2. The prosecution case briefly stated is as under :

Deceased Sudhakar was the father of P.W.1 – Aashish. Sudhakar was a doctor by profession. He was running a clinic on the ground floor of building No.36 situated at Nehru Nagar, Kurla. Sudhakar used to reside at Vashi with his family. Sudhakar used to go to the clinic at about 6.00 p.m. and used to return home at about 11.30 p.m. It was his usual practice that at about 8.00 p.m. he used to call his wife. On 18th January, 2007 Sudhakar as usual went to his clinic. At about 4.00 p.m. he called his wife on telephone. However, at 8.00 p.m. on that day he did not give a call to his wife. Aashish, son of Sudhakar used to return home at about 10 to 10.30 p.m. When he returned home that day, he found that his mother was waiting for him and his father. They both waited till 11.30 p.m. However, his father did not come home. Then Aashish went to building No.36 at about 3 to 3.15 a.m. on 19th January, 2007. He met the watchman who was on duty since 7 to

7.30 p.m. of the earlier night. On enquiry the watchman told Aashish that he had not seen his father. However, light in the clinic was on. There was a lock to the clinic from outside. As Sudhakar had one room in building No.30 which was situated nearby, Aashish went to building No.30. But his father could not be found. Then he searched for his father in various places, but his father was not found. Eventually, Aashish returned home at about 5.30 a.m. He then called his sister and her husband who resided at Andheri. His brother-in-law came at about 8 to 8.30 a.m. to the house of Aashish at Vashi. Then they went to Vashi Police Station and lodged a missing report. At about 11.15 a.m. Aashish and his brother-in-law i.e. P.W.6 - Hemant came to building No.36. They opened the lock of the clinic. They went inside and saw that light in the bathroom was on. The bathroom was bolted from outside. On opening the bolt of the bathroom from outside, they saw the dead body of Sudhakar lying in the bathroom. There were bloodstains on the forehead and below the ear. There were bleeding injuries on his person. Then Aashish went to Kurla Police Station and lodged FIR (Exhibit 8). Thereafter investigation commenced. The Appellant was arrested. Bloodstained clothes of the Appellant and other articles came to be recovered at the instance of the Appellant.

3. The dead body of Sudhakar was referred for postmortem. P.W.5 - Dr. Prakash Shinde conducted the postmortem on the dead body of

Sudhakar. He found 10 injuries on the dead body of Sudhakar, out of which 5 were contused lacerated wounds, 3 were contusions and the rest were abrasions. Injury Nos.1, 2 and 4 were contused lacerated wounds on the head. Injury Nos.3 and 7 were contusions on the head. According to Dr. Shinde the probable cause of death was due to head injury (unnatural). According to Dr. Shinde injury Nos.1, 2, 3, 4 and 7 were fatal injuries and these injuries could be caused by stick or by wooden stool (Article 12). After completion of investigation, charge-sheet came to be filed.

4. Charge came to be framed against the Appellant under Sections 452, 394 and under Section 302 of the Indian Penal Code. The Appellant pleaded not guilty to the said charge and claimed to be tried. His defence is that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge convicted and sentenced the Appellant as stated in paragraph 1 above, hence, this Appeal.

5. We have heard learned counsel for the Appellant and the learned APP for the State. We have carefully considered their submissions, the facts and and circumstances of this case, the judgment and order passed by the learned Sessions Judge and evidence in this case. After carefully considering the matter, for the below mentioned reasons, we

are of the opinion that the prosecution has not proved its case against the Appellant beyond reasonable doubt.

6. There is no eye-witness in the present case and the case is totally based on circumstantial evidence. The circumstances against the Appellant are as under :

- i) He was seen locking the clinic of the deceased at about 6.00 p.m. on 18th January, 2007;
- ii) Recovery of bloodstained clothes at the instance of the Appellant;
- iii) Recovery of pass-book, cheque-book and keys at the instance of the Appellant.

7. As far as the first circumstance is concerned, P.W.2 – Siraj and P.W.3 – Rauf Khan @ Chandbhai have deposed about it. P.W.2 – Siraj has stated that he was working as a watchman in building No.36 in Nehru Nagar, Kurla. He used to work as a watchman in the day time and there was another watchman who was on duty during the night. He knew Dr. Phadke (deceased) as Dr. Phadke was running a dispensary on the ground floor of building No.36. The doctor used to reside elsewhere, however, Siraj did not know the residential address of Dr. Phadke. Siraj has stated that he knew the Appellant because the Appellant was residing in his chawl. According to Siraj on 18th January,

2007 Dr. Phadke came and told him that he wanted to shift his dispensary articles from building No.36 to another place. In the meantime the Appellant came there. There was talk between Dr. Phadke and the Appellant about shifting of the articles and accordingly work of shifting of articles was done by Appellant - Nuruddin. Thereafter Appellant - Nuruddin locked the dispensary of Dr. Phadke. Siraj asked Nuruddin after Nuruddin locked the room as to how Nuruddin got the key of the room of Dr. Phadke. Thereupon the Appellant told Siraj that Dr. Phadke had given him the key. On 19th January, 2007 when Siraj came on duty, he came to know that Dr. Phadke was murdered. He also came to know that the murder had taken place in the clinic.

8. P.W.3 - Rauf Khan @ Chandbhai has stated that he used to reside near the house of P.W.2 - Siraj and Siraj was his friend. Siraj was working as a watchman in building No.36. Rauf has stated that he also knew the Appellant. Thereafter Rauf has stated that on 18th January, 2007 he went to building No.36 to meet Siraj. While he was sitting with Siraj he went to sleep. He woke up at 6.00 p.m. Thereafter he and Siraj were sitting together in the premises of the watchman. He saw the Appellant locking the door of the dispensary of Dr. Phadke. Thereupon Rauf asked P.W.2 - Siraj that Nuruddin had locked room of Dr. Phadke, hence, Rauf made enquiry in respect of

whereabouts of Dr. Phadke. P.W.2 – Siraj then told Rauf that Dr. Phadke might have given the key to Nuruddin. The Appellant after locking the room left the place.

9. Learned counsel for the Appellant attacked the evidence of P.W.3 – Rauf on the ground that Rauf was a fruit seller and he used to start selling fruits at 11.00 a.m. and return in the evening. This has been elicited in the cross-examination of Rauf. It has further been elicited in his cross-examination that for selling fruits Rauf used to wander at different places. Mr. Kakde submitted that in such case, it cannot be believed that on the date of incident Rauf casually came to meet Siraj where Siraj was on duty in building No.36 and thereafter Rauf went to sleep and got up at 6.00 p.m. and saw the Appellant locking the clinic of Dr. Phadke and going away. Thereafter Mr. Kakade pointed out that though according to the prosecution P.W.3 – Rauf and P.W.2 – Siraj were sitting together in the premises meant for watchman, yet P.W.2 – Siraj has made no reference at all to the presence of Rauf at the relevant time. The evidence of Siraj is totally silent about the presence of Rauf. Though Siraj has stated that he knew P.W.3 Chandbhai (Rauf) as he was residing in his chawl, however, he makes no reference at all to the presence of P.W.3 – Rauf near building No.36 on 18th January, 2007 i.e. the date of the incident. This raises some doubt about the presence of P.W.3 – Rauf at the scene of incident.

10. Thereafter learned counsel for the Appellant submitted that there are discrepancies in the evidence of P.W.2 – Siraj and P.W.3 – Rauf which show that both of them may not have seen the Appellant locking the door of the clinic. He pointed out that Siraj has stated that on 18th January, 2007 he saw the Appellant locking the room of Dr. Phadke, hence, he asked the Appellant how he got the key of the room of Dr. Phadke. According to Siraj, the Appellant replied that Dr. Phadke had given him the key. Mr. Kakade pointed out that Rauf who claims that he was sitting together with Siraj, on the other hand, has stated that he saw the Appellant locking the door of the dispensary of Dr. Phadke, hence, he (Rauf) made enquiry with the Appellant about the whereabouts of Dr. Phadke. Thereupon Siraj told him that Dr. Phadke might have given key to the Appellant. The evidence of Siraj does not show that any such enquiry was made by Rauf or that any such conversation took place between him and Rauf. In fact as stated earlier, nowhere in the evidence of Siraj there is mention of the presence of Rauf at the spot at the relevant time. Rauf has stated that Siraj told him that Dr. Phadke might have given the key to the Appellant. However, according to Rauf, Siraj and he were sitting together. Siraj states that he has asked the Appellant how he got the key whereupon the Appellant told him that Dr. Phadke had given him the key. If Rauf was present at the spot, Rauf would have heard Siraj

making an enquiry with the Appellant and the reply of the Appellant. There was no question of Siraj again telling Rauf that Dr. Phadke "might" have given the key to the Appellant. Looking to the discrepancy in the evidence of both these witnesses and the other facts stated above, it affects their credibility and we do not find it safe to rely on the evidence of P.W.2 - Siraj as well as P.W.3 - Rauf.

11. The second circumstance against the Appellant is that there is recovery of bloodstained clothes at his instance. Panch witness P.W.9 - Mahendra Kamble has deposed on this aspect. Mahendra Kamble has stated that the Appellant made a statement in their presence that he is ready to produce his clothes. The Appellant then led police and panchas and produced one white colour shirt and black colour pant, memorandum panchanamas of which are at Exhibit 24 and 24-A. There were bloodstains on the shirt. Mahendra Kamble has admitted that he had acted as a panch in two cases earlier. However, it is seen that Mahendra has acted as a panch witness to panchanama Exhibit 27 which is a panchanama in relation to the key which was recovered at the instance of the Appellant fitting the lock of the dispensary of the deceased. However, Mahendra is totally silent about panchanama Exhibit 27. No panch witness has been examined in relation to panchanama Exhibit 27 and only the Investigating Officer has deposed about it. We noted a very strange fact. It is noticed that Mahendra

Kamble on panchanama Exhibits 24 and 24A has signed in English. However, on panchanama Exhibit 27 which pertains to the lock and key he has signed in Marathi. The signature on Exhibit 24 has only three alphabets which appear to be A S K. It could be argued by the prosecution that Mahendra used to sign in this particular manner in English. However, we are not inclined to believe this contention because there is another panchanama in this case. i.e. Exhibit 26 which also bears the very same signature A S K and to this panchanama Mahendra Kamble is not a witness. The signatures which appear as ASK in panchanama Exhibit 24 and panchanama Exhibit 26 are identical. In panchanama Exhibit 26 Anil Kamble and Javed Shaikh Nisar Mohammed are the panch witnesses. Yet the same signature which according to the prosecution Mahendra Kamble has put on Exhibit 24, is the very same signature which appears on Exhibit 26 to which Mahendra Kamble is not a witness. Exhibit 26 is the panchanama relating to seizure of clothes of the deceased. All these facts raise doubt about the panchanama Exhibit 24/24A, Exhibit 26 and Exhibit 27. It appears that all these panchanamas were made at the police station and thereafter signatures of the panchas were obtained thereon. Hence, there is mistake in obtaining signatures of the panchas. The signatures on the panchanamas is of different persons than the one mentioned in the panchanama. All these facts make the entire prosecution case suspect.

12. Thereafter prosecution has placed reliance on the evidence of recovery of passbook, cheque-book and a bunch of keys at the instance of the Appellant. It is the prosecution case that the passbook and cheque-book belong to Aashish, son of the deceased. P.W.1 - Aashish has stated that his father was running a clinic in building No.36. On the date of incident his father did not return home till 11.30 p.m., hence, he went to the dispensary and found that it was locked. Then he searched for his father till morning. Then he lodged a missing complaint. At about 11.15 a.m. on the next day, he came back with a key and opened the lock. On going inside, he saw his father lying dead with injuries on his forehead and below the ear. He noticed that the cheque-book, passbook and an amount of Rs.1,000/- which was kept in bag was missing. He then lodged F.I.R.

13. According to the prosecution the above mentioned cheque-book and passbook were recovered at the instance of the Appellant. P.W.4 panch witness Anil has deposed on this aspect. Anil has stated that the Appellant made a statement in their presence that he will produce the cheque book, passbook and a bunch of keys and other articles. This witness has stated that all the articles were wrapped and sealed in his presence. Panchanama Exhibit 12 shows that four articles i.e. keys, watch, passbook and cheque book were sealed with the labels on

which panchas signatures were obtained. However, P.W.4 panch witness Anil has admitted in his cross-examination that the wrapper did not bear his signature. This raises doubt about the genuineness of the recovery of these articles at the instance of the Appellant.

14. According to the prosecution one of the main recovery at the instance of the Appellant was the key to the lock which was put on the dispensary of Dr. Phadke. P.W.10 Investigating Officer P.I. Salunkhe has stated that on 21st January, 2007 a panchanama was made in relation to whether the key produced by the Appellant matched with the lock which was put on the premises of Dr. Phadke. This was done in the presence of panch witness. One of the panch witnesses to this panchanama is Mahendra Kamble. However, though Mahendra Kamble is examined as P.W.9, he has not deposed about the panchanama in relation to matching the key with the lock. His evidence is totally silent on this aspect. Panch witness Mahendra Kamble has only deposed about recovery of clothes of the Appellant at the instance of the Appellant. Though according to P.W.4 panch witness Anil the keys and other articles were sealed on the spot, panchanama Exhibit 27 shows that in fact the articles were lying in open condition on the table. There is no mention in the panchanama about the seal being broken or opened and the panchanama only straightaway states that the keys were lying on the table. All these

facts raise doubt about the prosecution case.

15. According to the prosecution the deceased was found lying dead in his dispensary with a shirt on his face and some hair was attached to the shirt. According to the prosecution this hair was of the Appellant, hence, it was sent to the Chemical Analyser along with sample of hair of the Appellant. However, the Chemical Analysis report Exhibit 29/4 clearly belies this fact. It is clearly stated in the said C.A. report that though Exhibit 13 is human hair, it is dissimilar to Exhibit 1 which is the sample of hair of the Appellant. This again raises a doubt about the prosecution case.

16. On going through the record, we are of the opinion that the prosecution has not brought on record any cogent, reliable and convincing evidence to prove beyond reasonable doubt that the Appellant committed murder of Dr.Phadke. In this view of the matter, we are inclined to give benefit of doubt to the Appellant. Hence, the following order :

- (i) The impugned judgment and order dated 18th December 2008 passed by the learned Additional Sessions Judge, Greater Bombay in Sessions Case No.451 of 2007 convicting the Appellant under Sections 302, 452 and 394 of the Indian Penal

Code is set aside. The Appellant is acquitted thereunder.

(ii) The Appellant be released from jail forthwith, if not required in any other case.

(iii) The fine amount, if any, paid by the Appellant be refunded.

(A.S. Gadkari, J.)

(Smt. V.K. Tahilramani, J.)