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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINL APPELLATE JURISDICTION
CRIMINAL APEAL NO.930 OF 2007

Silvaraj Mariya Ramaswami,	]
age 52 years,	]
residing at 2 & 3, 1 st floor,	]
Hindustan Transmission Office Quarters,	] <u>Appellant</u>
Chandivli Farm Road, Sakinaka	] Original
Mumbai 400 072.	] Accused
	] No.1.

V/s.

The State of Maharashtra	]
at the instance of Saki Naka Police Station	] Respondent
Mumbai	]

ALONGWITH
CRIMINAL APEAL NO.1233 OF 2007

Mr. Shahid Nasir Khan	]
age: 30 years, residing at Lohar Chawl No.6,	]
R. No.6, Gafoor Khan Estate, Opp.Kurla Bus	] ... <u>Appellant</u>
Depot, Kurla (W)	] Original
Mumbai 400 070.	] Accused
	] No.2.

V/s.

The State of Maharashtra	]
at the instance of Saki Naka Police Station	] Respondent
Mumbai	]

ALONGWITH
CRIMINAL APEAL NO.1319 OF 2007

1. Mohd. Hussain Siddhiki s/o Abdul	]
Jabbar Siddhiki	]

age: 27 years,	]	
r/o Narayan Nagar, Near Bada Darga	]	
Gaubanshsh Ghatkopar (W)	]	.. <u>Appellants</u>
Mumbai 400 084	]	Original
	]	Accused
2. Laxman Shriram Yadav, (abated)	]	Nos 4 and 5.
age: 25 years, r/o Mohd. Estate Footpath	]	
Opp. City Light Hotel, Kurla (W)	]	
Mumbai	]	

V/s.

The State of Maharashtra	]	
at the instance of Saki Naka Police Station	]	 Respondent
Mumbai	]	

Mr. Sandeep R. Karnik, for the appellant in Criminal Appeal No.930 of 2007

Mr. Rajendra Rathod i/by Mr. O.A. Siddiqui and Ms. Shabana Shah, advocate for the appellant in Criminal Appeal No.1233 of 2007.

Mrs. Nasreen S. K. Ayubi, appointed advocate for the appellant No.1 in Criminal Appeal No.1319 of 2007.

Mr. A.S. Shitole, APP for the Respondent-State.

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

DATE : 15th DECEMBER, 2015.

ORAL JUDGMENT : [PER : DR. SHALINI PHANSALKAR-JOSHI-J.]

1. As these three appeals are arising out of one and the same

judgment and order dated 6th September, 2007, in Sessions Case No.1053 of 2002, of Additional Sessions Judge, Greater Mumbai, they are decided by this common judgment. By the impugned judgment, appellants are convicted for the offence punishable under Section 302 read with 120(b) of Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.5,000/- each, in default to suffer rigorous imprisonment for five months; for the offence punishable under Section 449 read with 120(b) of Indian Penal Code and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.2,000/- each, in default to suffer rigorous imprisonment for two months, for the offence punishable under Section 393 r/w 120(b) of Indian Penal Code and sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.3,000/- each, in default to suffer rigorous imprisonment for three months. By these appeals, they are challenging their conviction and sentence. For the sake of convenience, the appellants herein are referred to in these appeals also by their original nomenclature as accused Nos 1 to 5.

2. Brief facts of the appeals can be stated as follows :-

Deceased Bhaskar Mule was working as Security Guard in Hindustan Transmission Product Private Limited, at Chandivali, Saki Naka, Mumbai. On account of disputes between the workers and the management, the said company was closed since about 10 years. P.W.1 Vijayprasad Pokhariyal, was working there as Security Supervisor and was taking care of old machinery and other articles lying inside the compound of the company. On 11th August, 2002, while P.W.1 Pokhariyal was on duty in third shift from 22.30 onwards alongwith P.W.4 Anant Bansode, P.W.6 Bharatsing Sharma and deceased Bhaskar Mule, at about 2.30 a.m. in the night deceased went on his duty of taking round inside the factory premises. He, however, did not return till 6.30 a.m. Hence P.W.1 Pokhriyal and P.W.4 Anant Bansode, started taking his search. At about 6.45 a.m., they saw his dead body lying on the ground in the Machinery Division of Bobin Godown. His mouth, nose and eyes were covered with the means of towel; whereas his hands were tied with gamcha and rope. P.W.1 Pokhariyal gave information about the same to P.W.2 Trimbak, son of the deceased to the owner of the company and also to Saki Naka Police Station.

3. On the receipt of information, P.W.23 Dy. Superintendent

of Police Kolekar, alongwith P. W. 25 Police Inspector Bhalerao, went to the spot. On the spot itself complaint of P.W.1 Pokhariyal was recorded on which C.R.No.251 of 2002 was registered. They found that the dead body of the deceased was lying at a distance of half kilometer from the main gate of the Bobin Godown of the company. Ligature marks were noticed on the throat of the deceased alongwith other injuries. The inquest panchnama was accordingly prepared vide Exh.39 and the dead body was sent for postmortem. Further they inspected the factory premises and noticed one big hole of approximate 2' x 2' in the compound wall of Bobin Godown. Few suspicious articles like a pair of plastic footwear and the torch were noticed on the spot. These articles were collected and scene of offence panchnama Exh.38 was drawn accordingly.

4. On the same day P.W.23 Dy. SP Kolekar recorded statement of P.W.3 Laxmi Mule, the wife and P.W.2 Trimbaik Mule, the son of the deceased. From their statements, role of accused No.1 Silvaraja, who was Ex-Security Chief in the said company, and of accused No.2 Shahid was transpired. They were arrested accordingly. Accused No.3 Prabhunath Mishra was arrested by P.W.23 Dy SP

Kolekar on 13.8.2002.

5. During the course of further investigation, it was transpired that accused No.1 Silvaraj, with the help of labours from P.W.15 Fakre Hashmi, had carved out one big hole in the compound wall by means of iron rod. The said iron rod was seized under panchnama (Exh.28-A) under Section 27 of the Evidence Act, alongwith one telephone diary from the house of accused No.1. On 15.8.2002, at the instance of accused No.2 Shahid, plastic bag containing one small telephone diary, currency notes and identity card of the deceased came to be seized under panchnama (Exh.25). On 16.8.2002, accused No.4 Mohmed Hussain pointed out shop of Akhtar from which he has purchased two gunny bags used for carrying stolen articles. The clothes which he had worn at the time of incident also came to be seized under panchnama. Accused No.5 Laxman then led the police and panchas to the shop of Poonam Textorium from where he has purchased two gamchas. The statement of shop owner Subhash Chaterji was recorded to that effect. Accused No.4 Mohd. Hussein then produced his clothes from his house which came to be seized under panchnama (Exh.36-B). On 16.8.2002, statement of truck driver by name Vinay Yadav and on 17.8.2002, statement of truck

owner P. W.21 Akbar Ali Chaudhari were recorded to the effect that in the said truck, the stolen articles were carried away. On 17.8.2002, accused No.5 Laxman also led police and panchas to his house and produced his clothes and the coir rope used in the commission of offence. All the seized articles were sent to Chemical Analyzer. Further to completion of investigation, chargesheet was filed in the Court of Metropolitan Magistrate, 22nd Court at Andheri, against in all five accused on 27.10.2002.

6. On committal of the case to the Sessions Court, trial Court framed charge against accused vide Exh.5. Accused pleaded not guilty and claimed trial. In support of its case, prosecution examined in all 26 witnesses and accused No.1 led his own evidence. On appreciation of their evidence, the trial Court was pleased to acquit accused No.3 Prabhunath Mishra of all the charges levelled against him and convicted accused Nos 1, 2, 4 and 5 and sentenced them as aforesaid. This judgment of the trial Court is challenged in these appeals. During pendency of the appeals, accused No.5 Laxman expired. Hence appeal has abated against him.

7. In these appeals, we have heard learned counsel for the appellants and learned APP for the State. In our considered opinion, before advertng to the rival submissions advanced by them, it would be useful to refer to the evidence on record.

8. To prove homicidal death of deceased Bhaskar, prosecution has examined P.W.1 Vijay Pokhariyal and P.W.4 Anant Bansode with whom, on the date of incident, deceased Bhaskar was on duty as security guard in the factory premises of Hindustan Transmission Products Company. According to their evidence, deceased Bhaskar was on duty in the third shift from 11.30 p.m. onwards. At about 2.30 a.m. he went to take round in the compound of the company. However, he did not return till 6.30 a.m., hence they took search and found his dead body near the Bobin Godown. Immediately police were informed. The evidence of P.W.23 Dy. SP, Kolekar and P.W.25 Police Inspector Bhalerao goes to prove that when they visited the spot immediately, they found dead body lying in the compound of Bobin Godown. Th inquest panchnama Exh.59 goes to prove that there were ligature marks on the throat and neck and hands were tied with Gamcha. The dead body was sent for postmortem.

9. P.W.17 Dr. Marathe has conducted postmortem on the dead body and found following external injuries.

- Injury No.1 : Ligature mark on neck, anteriorly placed at and above larynx, going obliquely upwards and backwards, 31 cm x 5 cm.
- Injury No.2: Multiple small fresh abrasions on and below knee anteriorly 0.5 x 0.5 cm which were 8 to 10 in number.
- Injury No.3: Contusion 3 x 1.5 cm on right elbow on extensor aspect bluish black in colour.
- Injury No.4 : Contusion on right upper arm lateral middle 3rd 2/1 cm bluish black in colour.
- Injury No.5 : Contusion on left elbow medially 2 x 1 cm black in colour.
- Injury No.6 : Contusion on right thigh middle third lateral 3 x 1.5 cm bluish black.
- Injury No.7 : Contusion 3 x 5 cm on right infra axillary region, bluish black.
- Injury No.8 : Contusion on right scapular region 2 x 1

cm bluish black in colour.

- Injury No.9 : Contusion on left scapular region 2 x 3 cm bluish black.
- Injury No.10 : Contusions on left thigh, medial lower 1/3rd x 1.5 cm at 3 places .
- Injury No.11 : Ligature marks around left wrist 0.5 cms width with imprint of coir-rope.
- Injury No.12 : Ligature mark on right forearm middle third twice around 0.5 cm in width with imprint of coir-rope.
- Injury No.13 : Contusion on left shoulder posteriorly 3 x 2 cm bluish black in colour.
- Injury No.14 Lower lip bitten by teeth at multiple sites.

According to him, all these injuries were antemortem. He noticed corresponding internal injuries as follows :-

- Subscalp haemorrhage on left occipital region and on right temporal region of 3 x 4 cms.
- Haematoma 2 x 1 cm on right mid axillary region in chest wall.

- Multiple massive haematoma on anterior and lateral side all over larynx.

In his opinion the cause of death was violent asphyxia and it was unnatural. He has further opined that injury No.1, the ligature mark surrounding neck was sufficient in the ordinary course of nature to cause death. Postmortem report is produced on record at Exh.48.

10. Learned counsel for the appellants fairly submitted that they are not disputing the fact of homicidal death, but they are only disputing the involvement of the accused in the said death.

11. It may be stated that the case of prosecution against accused is based on circumstantial evidence. The circumstances alleged against them are, however, only two viz (i) Motive; (ii) recovery of certain incriminating articles.

12. So far as the circumstance relating to motive is concerned, the prosecution has relied upon the evidence of P.W.3 Laxmi, the wife and P.W.2 Trimbak, the son of the deceased. To some extent, the prosecution is placing reliance on the evidence of P.W.4 Anant Bansode

also. As regards P.W.2 Trimbak, he has deposed that he was knowing accused No.1 Silvaraj and accused No.3 Mishra as both were earlier working in the said company. According to him once accused Nos. 1 and 3 had come to their house and had conversation with his father, but he does not know what was actual conversation. Therefore, his evidence is not at all helpful to the prosecution to prove motive.

13. The prosecution is, therefore, mainly relying on the evidence of P.W.3 Laxmi, the wife of the deceased. She has deposed that her husband had told her that accused No. 1 Silvaraj used to threaten him. Accused No.1 Silvaraj had also come to her residence twice. He used to take her husband out of the house and thereafter her husband had told her that the accused No.1 was asking him to take out scrap material from the company. As per her evidence, accused No.2 Shahid had also come to their house and he had also made similar request to her husband. She has deposed that once she had heard hot conversation going on between accused Nos. 1 Silvaraj and 2 Shahid, on one hand and her husband on the other hand. Her husband also used to be in tension. In her cross-examination, she has admitted that her husband has not introduced the accused persons to her and this incident of threatening had taken place about 8 days prior to the incident.

14. According to P.W.4 Anant Bansode, who was also working as Security Guard in the said company alongwith deceased Bhaskar, deceased had told him that some persons were threatening him for taking out copper wire articles lying in the company campus.

15. The question for consideration is whether the evidence of these witnesses can be called as sufficient to constitute motive for commission of the offence or to prove case of conspiracy, as alleged by prosecution against accused. The answer is in negative because the evidence of accused No.1 Silvaraj, who has entered into witness box and deposed on oath goes to prove that he was removed from the service and in respect of accommodation provided to him, there was civil suit pending in the Small Cause Court. He was also fighting with the management of the company in respect of his dues. A specific plea is raised by him that because of this litigation, he has been falsely implicated in this case. In the absence of any other evidence on record, either direct or otherwise, it becomes difficult to accept the evidence of P.W.3 Laxmi, to hold that the accused No.1 Silvaraj, had given threats to her husband and has hatched conspiracy with other accused persons

either to commit robbery or murder of the deceased.

16. In order to prove charge of conspiracy, there has to be a strong clinching evidence on record. Even if the evidence of conspiracy may not be direct, circumstances should be such that an irresistible inference of conspiracy can be drawn from those circumstances. In the instant case, such type of circumstantial evidence is conspicuously lacking either to prove motive or to prove the other circumstance.

17. Moreover, even assuming that prosecution has proved motive, the proof of motive alone is not sufficient to prove guilt of the accused. At the most, motive can raise suspicion, but needless to say that suspicion alone, even if it is strong, cannot be sufficient to prove the guilt of the accused.

18. As to the case based on circumstantial evidence, law is well settled that circumstances from which inference as to the guilt of the accused is to be drawn, have to be established by an independent and reliable evidence, and those circumstances should unerringly point to the guilt of the accused, by forming a chain so complete that no other

inference except that of guilt of the accused can be drawn therefrom. In the instant case, circumstantial evidence brought on record by prosecution is considered, then it cannot be said that the prosecution has succeeded in establishing its case against the accused beyond reasonable doubt.

19. It is pertinent to note that prosecution itself is not clear about its own case. The chargesheet is filed against accused and charge is also framed against them for commission of robbery of the copper wire and scrap material worth Rs.4 lacs, kept in the godown of the company. Conspiracy alleged against them is also of committing robbery of copper wire and scrap material. However, evidence of P.W.12 Nandeshwar, the panch to the spot panchnama of inspection of godown at Exh.38, goes to prove that when on 14.8.2002, godown premises were inspected in his presence, they found that there were 41 bundles of copper wire. As per panchnama Exh.38, the approximate value of the said bundle of copper wire was Rs.4 lacs. Therefore, there was no actual theft or robbery of the copper wire or scrap material. It was merely an attempt to commit such robbery. It is also pertinent to note that though as deposed by P.W.23 Dy SP Kolekar, statements of truck driver and truck

owner in whose truck, the stolen property was carried are recorded, the truck driver is not examined and the truck owner P.W.21 Akbar Ali has disowned the prosecution case. He has not identified the accused. According to him one Vinaykumar Yadav telephoned him in connection with hiring of the truck and the name of party was Pappu. Therefore, the use of his truck for carrying stolen property is also not proved. Thus, the offence of commission of robbery cannot be said to be proved at all, as the articles alleged to be stolen were found in the godown itself.

20. As regards, charge under Section 393 of the IPC, the main reliance of the prosecution is on the evidence of P.W.15 Fakre Hashmi, who has deposed that accused Nos 1 and 2 had come to him to obtain services of labourers for creating a clumsy hole to the boundary wall of the company. If it was so, the evidence of those labourers was essential, but they are not examined by the prosecution. Moreover, as per prosecution, accused No.1 Silvaraj has used iron rod for creating hole and the said rod was recovered at his instance under Section 27 of the Evidence Act. However, if the services of labours were engaged, then there was no question of accused No.1 Silvaraj using iron rod for creating hole.

21. Moreover, the evidence of P. W.7 Munir Ahmed Shaikh, who acted as panch for recovery of the iron rod, proves that it was recovered from the ground floor which was the house belonging to P.W.15 Fakre Alam Hashmi and not from the house of accused No.1 Silvaraj. P.W.18 Madan Nariami, who was working in the said company, at the relevant time has denied that there was any such hole in the compound wall of the company. Hence as regards accused No.1 Silvaraj there is absolutely no incriminating evidence brought on record by the prosecution. Though one diary is alleged to be seized in search of house of accused No.3 Prabhuraj Mishra, containing name of accused No.1, the said diary was not sent to Hand Writing Expert. Though the mobile phones of accused are also seized during the course of investigation, Call Detail Records of said mobiles are not produced or proved on record.

22. Even as regards accused No.2 Shahid, the only evidence alleged against him is that of recovery of one gamcha, coir rope and footwear at his instance. The C.A . report Exh.79, however, does not connect use of those articles in the commission of offence.

23. P.W.22 Yellappa Sonkamble, who has acted as panch towards recovery of torch at the instance of accused No.2 has been declared hostile and has not supported the prosecution case. He is also examined to prove that there was recovery of clothes of accused No.5 Laxman at his instance. Accused No.5 Laxman has also shown the shop from where rope was purchased. In our considered opinion, none of these recoveries are of such a clinching nature so as to connect any of the accused with the commission of the offence. Neither any blood stains were found on any of the clothes of the accused nor presence of the clay on their clothes though matching with the clay at the site is such a clinching piece of evidence to convict the accused on the basis of this sole piece of evidence.

24. Though prosecution has tried to prove some circumstances, like purchase of gunny bags, purchase of coir-rope or torch, the use of those articles is not established in the commission of the offence by conclusive evidence. Thus, the prosecution has left several loose ends in the entire chain of circumstances. The circumstances alleged against accused are neither cogent nor established satisfactorily. They are also

not of any incriminating nature as such. On the basis of those circumstances, it cannot be said that prosecution has succeeded in proving its case against accused beyond reasonable doubt. At the most these circumstances can raise suspicion. Suspicion, howsoever so strong, cannot substitute for the proof. As a result, the impugned judgment of the trial Court convicting appellants is required to be quashed and set aside. Hence order.

- All the three Criminal Appeals are allowed.
- The impugned judgment and order dated 6th September, 2007, passed by trial Court in Session Case No.1053 of 2002, is quashed and set aside.
- Appellants-accused are acquitted of for the offences punishable under Sections 302, 393, 449 read with 120(b) of the Indian Penal Code. Their bail bonds stand cancelled.
- Fees of the appointed advocate are quantified at Rs.5,000/-.

[ACTING CHIEF JUSTICE.]

[DR. SHALINI PHANSALKAR-JOSHI, J.]

C E R T I F I C A T E

Certified to be true and correct copy of the original signed judgment.