

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 638 OF 1993**

1. Amar Nagnath Sabale, age 22,
resident of Solapur
(At present in Yervada Central
Prison, Pune)
2. Rabbani Ismail Shaikh, age 26,
resident of Solapur ...Appellants
(*Appeal dismissed qua him vide Ori. Accused Nos.1 & 2*
order dated 5th September, 2014,
as he had expired)
Versus
The State of Maharashtra ...Respondent

Ms. Rohini M. Dandekar, Advocate appointed for the Appellant

Mr. H. J. Dedia, A.P.P for the Respondents-State

**CORAM : SMT. V. K. TAHILRAMANI &
REVATI MOHITE DERE, JJ.
THURSDAY, 2nd FEBRUARY, 2017**

JUDGMENT (Per Revati Mohite Dere, J.) :

1. By this appeal, the appellant has impugned the judgment and order dated 3rd November, 1993 passed by the learned Additional Sessions Judge, Solapur, in Sessions Case No. 337 of 1992, convicting him for the offence punishable under Section 302 r/w 34 of the Indian Penal Code ('IPC') and

sentencing him to undergo RI for life and to pay fine of Rs. 2,000/-, in default, to suffer RI for 6 months.

2. Although, the aforesaid appeal was preferred by both, Amar Sable and Rabbani Ismail Shaikh, it may be noted that during the pendency of this appeal, Rabbani Ismail Shaikh expired and hence, the appeal was dismissed *qua* him vide order dated 5th September, 2014. Hence, this appeal is being decided only *qua* appellant-Amar Sabale.

3. The prosecution case in brief is as under :

The appellant-Amar, co-accused Rabbani and deceased Riyaz were known to each other. On 13th July, 1992 at about 7:00 p.m., Amar and Rabbani visited Riyaz's house at the Old Mill Chawl, Solapur. Riyaz went with Amar and Rabbani to Yadav Katul's (PW 9) tailoring shop, where Riyaz got a new zip fixed on his old pant. At the said place, all are stated to have consumed alcohol. Riyaz (deceased), appellant-Amar and Rabbani (original accused No. 2) are stated to have come back to Riyaz's house and after some time, are again stated to have

left in an auto-rickshaw, driven by Rafique (original accused No. 3). At about 10:00 p.m, Shivaji Garad (PW 5) heard some sound, when he was studying in the Maratha Mandir Hostel and hence looked out of the Hostel and found a man lying on the road. He accordingly informed his teacher and went with him to the Sadar Bazar Police Station at about 10:30 p.m., and disclosed the same to PI Subhash Patel (PW 12). The information was entered in the Station Diary (Exhibit 45). PI Patel (PW 12) rushed to the spot and found a dead body lying at the spot. He called for the photographer at 11:00 p.m. and photographs were taken of the spot. Inquest panchanama (Exhibit 10) was drawn and the dead body was handed over for post-mortem examination. On 14th July, 1992, at about 12:30 a.m., PW 12 – PI Subhash Patel lodged a report (Exhibit 37) on the basis of which C.R. No. 121 of 1992 was registered with the Sadar Bazar Police Station, Solapur, as against unknown person. Thereafter, investigation commenced. The appellant-Amar and other accused were arrested on suspicion and their blood stained clothes were seized from their person. A blood-stained stone was also recovered at the instance of appellant-Amar.

After investigation, charge-sheet was filed as against the appellant-Amar and two other co-accused i.e. Rabbani and Rafique in the Court of the Judicial Magistrate First Class, for the offence punishable under Section 302 r/w 34 of the IPC. Since the offence was sessions triable, the case was committed to the Court of Sessions.

4. The defence of the appellant was that of denial and false implication.

5. The prosecution, in support of its case, examined 13 witnesses. PW 1- Usman Vijapure (panch to the inquest panchanama); PW 2-Mohammad Rafik Shaikh, panch to the discovery panchanama (discovery of stone at the instance of appellant-Amar); PW 3-Ismail Khan Shamsheer Khan, panch to the seizure of a piece of red cloth and button; PW 4-Dattatraya Huljanthiwale, panch to the seizure of blood-stained clothes from appellant's person, and deceased's clothes after the post-mortem was performed; PW 5-Shivaji Garad, a student staying in

the Maratha Mandir Hostel, who heard a bang and saw a man lying on the road and accordingly informed the police; PW 6-Dr. Nandkumar Deshpande, the Medical Officer, who conducted the post-mortem; PW 7-Imtiaz Ahmed Shaikh, brother of deceased Riyaz, (witness with respect to last seen evidence); PW 8-Machindra Shinde, an auto-rickshaw driver to whom an extra judicial confession was made; PW 9-Yadav Katul, the tailor; PW 10-Vasudeo Jadhav, the police constable who carried the articles to the Chemical Analyser; PW 11-Subhash Pote, the photographer who took the photographs soon after the incident; PW 12- Subhash Patel, the Investigating Officer (complainant); and PW 13-Dr. Pandurang Babasaheb, the Medical Officer, who collected the blood samples of the accused.

6. The learned Additional Sessions Judge, Solapur, after hearing the parties was pleased to convict the appellant-Amar Sable and Rabbani Ismail Shaikh for the offence punishable under Section 302 r/w 34 of the IPC, but was pleased to acquit co-accused Rafique Babulal Reshimwale of the said offence.

7. We have heard learned Counsel for the appellant and the learned A.P.P for the State and with their assistance, have perused the evidence and the relevant documents.

8. At the outset, we may note that the prosecution case rests entirely on circumstantial evidence and that there are no eye-witnesses to the incident of assault on deceased Riyaz. As far as the inquest panchanama and the post-mortem report are concerned, the same have not been disputed by the defence. Dr. Deshpande (PW 6), who conducted the post-mortem examination has opined the probable cause of death as “shock and hemorrhage due to fracture of the skull with subdural hematoma with throttling”. Thus, the fact that deceased Riyaz died a homicidal death, is not in dispute. The question that arises for consideration is, whether the appellant was responsible for causing Riyaz's death and whether the prosecution has proved all the circumstances as against the appellant-Amar, beyond reasonable doubt.

9. In ***Sharad Birdhichand Sarda v. State of Maharashtra***¹, the Apex Court held that the onus is on the prosecution to prove that the chain of circumstances is complete and that falsity or untenability of the defence set up by the accused cannot be made the basis for ignoring any serious infirmity or lacuna in the case of the prosecution. The Apex Court then proceeded to indicate the conditions which must be fully established before a conviction can be made on the basis of the circumstantial evidence. These are :-

“(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

1 (1984) 4 SCC 116

Thus, in a case of circumstantial evidence, the prosecution must establish each incriminating circumstance, by way of reliable and clinching evidence, and the circumstances so proved must form a complete chain of events, on the basis of which, no conclusion other than one of guilt of the accused can be reached.

10. We have given our anxious considerations to the submissions made by the learned counsel for the Appellant and the learned APP for the State and after going through the evidence on record and keeping in mind the cardinal principles to be considered in a case resting on circumstantial evidence, we find that the prosecution has failed to prove the circumstances as against the appellant, beyond reasonable doubt. In the present case, we find that the prosecution has failed to forge a chain of circumstances which would exclude every hypothesis of the innocence of the appellant. We will elaborate the reasons for the same.

11. According to the prosecution, the circumstances as against the appellant are- (i) motive, (ii) evidence of last seen, (iii) extra judicial confession, (iv) recovery of blood-stained stone at the instance of the appellant-Amar; and (v) seizure of blood-stained clothes from the appellant's person.

12. As far as the motive is concerned, we may note that no evidence has been placed on record by the prosecution to show, that there was any dispute between deceased Riyaz and the appellant. Infact, even the dispute suggested between Riyaz and Rabbani, appears to be extremely vague and sketchy. According to Imtiaz Shaikh (PW 7), brother of deceased Riyaz, about 6 to 7 months prior to the incident of 13th July, 1992, there was a quarrel between Riyaz and Rabbani (original accused No. 2) on the rickshaw stand. He has stated that he had not witnessed the said incident, however, the same was narrated to him by his cousin Kayyum. It is pertinent to note, that as far as the quarrel, which is alleged to have taken place about 6 to 7 months prior to the incident, there is an omission with respect to the same, in Imtiaz's police statement. The said omission is a

material omission. Infact, not a single witness, much less, PW 7-Imtiaz Shaikh has attributed any motive to the appellant, nor is there any evidence on record to show that any quarrel had taken place between the accused and deceased-Riyaz, on the day of the incident i.e. on 13th July, 1992 or prior thereto. Considering the same, we are of the opinion that the prosecution has failed to prove 'motive' in the said case, for the accused, including the appellant to cause the death of Riyaz.

13. As far as the evidence of 'last seen' is concerned, the prosecution has examined PW 9-Yadav Katul (Tailor) and PW 7-Imtiaz Shaikh (brother of deceased Riyaz). According to Yadav Katul (PW 9), he was running a tailoring shop and knew deceased-Riyaz, as he was a resident of Old Mill Chawl, which was opposite his shop. He has stated that Riyaz would get his clothes stitched from him and that he also knew all the accused. He has stated that he knew accused No. 2-Rabbani by name and others by face. He has stated that on 13th July, 1992, at about 7:30 p.m., all the accused and Riyaz came to his shop; that Riyaz had brought a pant and a zip for replacing it with an old zip; that

they called for three glasses of water; that three glasses of water were brought; liquor from a quarter bottle was poured in the glasses of water; and that they had liquor. He has stated that after the zip was replaced with a new one, Riyaz and the accused left from his shop.

A perusal of the evidence of the said witness shows, that no quarrel nor any incident took place between deceased-Riyaz and any of the accused, before him. It appears from his evidence that the accused and Riyaz consumed alcohol and left the spot at about 7:30 p.m. and that all of them were together.

14. As far as PW 7-Imtiaz Shaikh, brother of deceased-Riyaz is concerned, he has stated that he was living along with his other brothers and parents in a joint family. He has stated that Riyaz used to drive an auto-rickshaw and that he knew all the accused. He has stated that Rabbani (original accused No. 2) would purchase old auto-rickshaws and resell them and would also drive an auto-rickshaw, and that, the appellant-Amar and Rafique would also drive auto-rickshaws.

PW 7-Imtiaz Shaikh has further stated that on 13th July, 1992 at about 7 to 8 pm, when he was at home, the appellant-Amar and Rabbani came there and took his brother Riyaz. He has stated that Riyaz was wearing a baniyan and lungi and that he had taken his pant for repair. He has stated that after some time, Riyaz, appellant-Amar and Rabbani returned home and again left together. He has stated that all three went in an auto-rickshaw, driven by Rafique (original accused No. 3), at about 7:30 - 8:00 p.m. He has stated that thereafter, Riyaz never returned home. According to PW 7-Imtiaz Shaikh, at about 10:30 to 11:00 p.m., the police informed them that Riyaz was admitted in the Civil Hospital and that he had died. On reaching the Civil Hospital, the Doctors also informed them that Riyaz had expired.

PW 7-Imtiaz Shaikh has admitted in his cross-examination, that the appellant-Amar and Rabbani were Riyaz's friends and therefore they would visit their house; and that on the second occasion, when they returned from the tailoring shop, he was in the house. Imtiaz has admitted that he was in

the house, when the accused called out to Riyaz from the ground floor, and that from inside the house, the ground floor was not visible. An omission was also brought on record, with regard to the disclosure made by appellant-Amar and Rabbani to Riyaz, on the second occasion, that he should accompany them for preparation of *Khichada*. A perusal of the cross-examination of PW 7-Imtiaz shows, that there were some murder and assault cases pending against him. Suggestions were also made to the said witness, that deceased-Riyaz had many enemies, as he was a criminal, and as he would rob and extort money from people. The said suggestions, however, were denied by him.

15. It appears from the evidence of this witness, that although on the first occasion, he had seen his brother Riyaz leaving with the appellant-Amar and Rabbani at about 7 to 8 p.m. to go to the tailor; it is doubtful whether on the second occasion, Imtiaz had seen Riyaz accompany the accused, considering Imtiaz's admission, that he was inside the house and that from inside, the ground floor is not visible. Considering the admissions and some material omissions in his statement,

we are of the opinion that it is unsafe to rely on the testimony of this witness and as such on the evidence of last seen.

16. As far as the evidence of 'extra-judicial confession', made to PW 8-Machindra Shinde is concerned, we find the said evidence does not inspire confidence and is not free from suspicion. PW 8-Machindra Shinde is an auto-rickshaw driver, known to the appellant-Amar. He has stated that a year and three months ago, at about 10:00 p.m. when he was standing with his rickshaw outside Wadia Hospital, appellant-Amar and Rabbani came in an auto-rickshaw and disclosed to him that the petrol in their rickshaw was over and left the rickshaw there. He has stated that both, the appellant and Rabbani told him that they had killed a person by throttling him and had left him at Haribhai School. He has stated that the appellant and Rabbani had asked him to start his rickshaw and take them to the said spot, as their wrist watch had fallen at the said spot. He has stated that initially he refused, however, the appellant and Rabbani threatened him and asked him to take the rickshaw to Haribhai School. He has stated that at their insistence, he took

the auto-rickshaw near Haribhai School, where a man was lying dead, in a dark place. According to him, the appellant tried to get down, but he did not give him an opportunity to get down and instead increased the speed of the auto-rickshaw, and took it to Rangbhuvan. He has further stated that thereafter, he took them to the Railway Station and dropped them.

From a perusal of the cross-examination of this witness, it is evident that the appellant and Rabbani were not very well acquainted with the said witness and that they would meet occasionally. It is also evident, that Machindra had not disclosed the name of the appellant, in his police statement, but has referred to him as a driver, and for the first time in his evidence, has stated that the driver was the appellant. There is also an omission with respect to the threats allegedly given by the appellant and Rabbani to the said witness. It is pertinent to note, that according to PW 5-Shivaji the incident took place at 10.00 p.m., when he heard the noise, pursuant to which he informed the police, who reached the spot at about 10:30 p.m., followed by a photographer at 11:00 p.m., and that there were

sufficient street lights at the spot, whereas, according to PW 8-Machindra Shinde, the place was dark. It is highly improbable, that soon after the incident, the appellant and Rabbani would dispose of a blood stained stone and then go in their auto-rickshaw, meet Machindra Shinde (PW 8), make an extra-judicial confession to him and ask him to take them back to the spot, for collecting the wrist watch, as the police had already reached the spot. It also appears that despite several opportunities, Machindra has not disclosed the same to any person, till his statement was recorded on 15th July, 1992. Infact, the prosecution case of even finding the wrist watch on the spot, is extremely doubtful. We may note, that the inquest panchanama was done on 13th July, 1992 at 11.30 p.m. and photographs were taken around the same time. It is difficult to believe that the police had seen nothing on the spot on 13th July, 1992, and that on the next day i.e. 14th July, 1992 at 7.00 a.m., they saw a wrist watch and cloth lying around 3 - 4 ft away, from where the dead body was lying. It is highly improbable that the police and panchas had not witnessed the cloth and

wrist watch on the day, when the inquest panchanama of the dead body was done. It is also pertinent to note, that it is not the prosecution case that the wrist watch belonged to the appellant. Under these circumstances, we do not find it safe to rely on the testimony of PW 8 – Machindra, that the appellant- Amar and Rabbani made an extra-judicial confession to him.

17. Before we proceed to consider the evidence of recovery of a blood stained stone, at the instance of the appellant, it would be necessary to consider the evidence of PW 5 – Shivaji Garad. According to Shivaji, he was training at I.T.I., Solapur and was staying at the Maratha Mandir Hostel at the relevant time. He has stated that on 13th July, 1992 at about 10:00 p.m., he heard a sound of dash and hence, came down from the first floor of the hostel building and from a distance, saw a man lying on the road. He has stated that he saw the man in the light of the street lights. Sensing something wrong, he informed his teacher, Shri Yewale and went with him to the Police Station and narrated the aforesaid to the police. It is pertinent to note, that this witness has not seen any of the

accused or any persons on the spot, apart from the dead body. Shivaji (PW 5) has admitted in his cross that he had seen a stone lying near the dead body and that it was a round stone, which could be taken in hand.

18. According to the prosecution, a blood-stained stone was discovered under Section 27 of the Evidence Act, at the instance of appellant-Amar. We find the said discovery evidence extremely doubtful. Firstly, it is difficult to comprehend why the appellant would carry one stone with him and hide it in the bushes near the church, as admittedly, another blood-stained stone was found at the spot, where the dead body was lying. The finding of a blood-stained stone at the spot, has not only been deposed to by PW 5-Shivaji Garad, but is also evident from the photographs produced by the prosecution through PW 11-Subhash Pote. PW 2-Mohammad Rafik Shaikh, panch to the recovery of blood stained stone, does not depose about the disclosure statement made in his presence. It is also not the case of the prosecution, that the stone had the appellant's finger

prints. In these circumstances, the recovery evidence also does not inspire confidence and as such appears doubtful.

19. Now coming to the blood-stained clothes found on the person of the appellant, we find it difficult to rely on the said circumstance, though the Chemical Analyser's report shows that the blood group on the shirt of the appellant, was the blood group of the deceased. The evidence of PW 4 – Dattatraya, panch to the said panchanama shows, that he is a habitual panch. There is nothing in his evidence to show that the articles were sealed. It is also pertinent to note that the articles were sent to the Chemical Analyser only on 27th July, 1992.

20. Having regard to the aforesaid, we find that the prosecution has failed to prove each of the circumstance as against the appellant beyond reasonable doubt and as such are of the opinion that the appellant-Amar ought to be given the benefit of doubt.

21. Accordingly, the appeal is allowed. The impugned judgment and order of conviction and sentence is set-aside.

22. We express our gratitude for the able assistance rendered by the learned appointed Advocate to espouse the cause of the appellant. Legal fees to be paid to the appointed Advocate is quantified at Rs. 5,000/-.

(REVATI MOHITE DERE, J.)

(V. K. TAHILRAMANI, J.)