

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CRIMINAL APPELLATE JURISDICTION*****CRIMINAL APPEAL NO.76 OF 2010**

Surdas Balkrishna Kirgat.]
Age - 20 years, Occu - Labourer,]
Through Nashik Road Central Prison,]
Convict No.7173.] ... Appellant

Versus

The State of Maharashtra] ... Respondent

Mr. Shyam Mehta, Senior Advocate for Appellant.
Ms. R. M. Gadhvi, APP for State.

**CORAM :- A. A. SAYED &
SARANG V. KOTWAL, JJ.**

RESERVED ON :- 24 AUGUST, 2017
PRONOUNCED ON :- 06 SEPTEMBER, 2017

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. By this Appeal, the Appellant has challenged the Judgment and Order dated 04/12/2006 passed in Sessions Case No.164 of 2006 by which the learned Principal Sessions Judge, Sangli has convicted the Appellant for commission of the offence punishable under Section 302 of the IPC and the Appellant was sentenced to suffer life imprisonment and to pay a fine of Rs.1,000/- and in default of payment of fine, to suffer R.I. for three months. The Appellant was the sole accused in the said case.

2. The prosecution case is that the Appellant was son of the deceased Balkrishna Kirgat. The deceased had two sons including the present Appellant who was the younger son from his first marriage. The deceased contracted the second marriage with his own niece 20 years prior to the incident which took place on 01/03/2006. According to the prosecution case, on that day the Appellant had gone to village Karnal at about 1.30 p.m. where the deceased was residing with his second wife and two daughters. It is the prosecution case that between 4.00 p.m. to 6.00 p.m., the Appellant assaulted the deceased with a big iron rod and a big flat grinding stone ('Pata') on the head and committed his murder. At about 6.30 p.m., the wife of the deceased came home to find the deceased lying on the floor with blood oozing from his injuries. She raised shouts. The neighbours gathered there. She was taken to Sangli Rural Police Station where her FIR was lodged at about 10.10 p.m. on 01/03/2006 vide C.R.No.17 of 2006 under Section 302 of the IPC. The appellant was arrested on 03/03/2006. The clothes which he was wearing at the time of the arrest were seized and sent to the CA. A big iron rod admeasuring about 58 inches in length and 3 inches in diameter was recovered at the instance of the Appellant and that too was sent to the CA. The clothes of the deceased and the blood collected from the spot were sent to the CA and all these articles showed the presence of blood of 'B' group. During investigation, various panchanamas were carried out. Statements of various witnesses were recorded and at the conclusion of the investigation, charge-sheet was filed and thereafter the case was committed to the Court of Sessions for trial and was tried

as Sessions Case No.164 of 2006 before the learned Principal Sessions Judge, Sangli.

3. During the trial, the prosecution examined 9 witnesses. PW 1 Ranjana Balasaheb Patil is the widow of the deceased who had lodged the FIR. She had also deposed about the possible motive. PW 2 Motiram Suratarm Sonar was the panch for spot panchanama which was conducted on the next day i.e. 02/03/2006 between 8.30 a.m. to 9.45 a.m. PW 3 Pradeep Bhagwan Waghmare was examined as the panch in whose presence the iron rod admeasuring 58 inches in length and 3 inches in diameter was recovered. PW 4 Anil Jagannath Mane was examined as a panch who was present when the clothes of the Appellant were seized at the police station on 03/03/2006 at about 6.00 p.m. PW 5 Swati Balasaheb Patil was the child witness and was daughter of the deceased and she was examined to prove the fact that the Appellant had come to her school at about 1.30 p.m. on 01/03/2006 to make inquiries about the deceased and the PW 1 and to find their address. PW 6 Nanda Mahadeo Bad was the neighbour of the deceased who had seen the Appellant in the house with the deceased where the deceased was residing at about 4.00 p.m. on 01/03/2006. PW 7 Jaywant Hindurao Patil was a teacher in the school where PW 5 Swati was studying and who had accompanied the PW 5 when the Appellant was making inquiries with her. PW 8 Dr. Sangita Rangrao Gurav had conducted the post-mortem examination on the dead body of the deceased. PW 9 Dilip Shripatrao Chougule was the Investigating Officer.

4. PW 8 Dr. Sangita Rangrao Gurav conducted post-mortem on the dead body of the deceased. During the post-mortem examination, she found the following injuries on the dead body of the deceased :

- (i) CLW over parietal region admeasuring 7 cm X 2 cm X bone deep,
- (ii) CLW between two eyebrows and above left eye measuring 5 X 3 cm X fracture frontal bone. Broken fragments are seen.
- (iii) Abrasion 2 X 1 cm, left zygomatic region.

PW 8 Dr. Gurav also noticed 6 fractured injuries corresponding to Injury No.(ii) mentioned above. PW 8 has opined that the probable cause of death was due to shock due to cranio-cerebral injury.

5. We have heard Mr. Shyam Mehta, learned Senior Counsel for the Appellant and Ms. R. M. Gadhvi, learned APP for the State. With their assistance, we have gone through the entire record and proceedings.

6. The prosecution case rests on circumstantial evidence. It is a well-settled principle that in the cases of circumstantial evidence, the prosecution has to establish each of the circumstances beyond reasonable doubt and then complete the chain of circumstances which points only to the guilt of the accused eliminating all the possibilities of the innocence of the accused. Mr. Shyam Mehta, learned Senior Counsel for the Appellant, relied on the Judgment of the Hon'ble

Supreme Court in the case of **Krishnan Vs. State**¹. In para 15 of the said Judgment, the Hon'ble Supreme Court has summarized as to what should be the approach of the Courts in deciding the cases based on circumstantial evidence. The observations of the Hon'ble Supreme Court in the said para are thus :-

“15. This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests :

- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
- (ii) those circumstances should be of definite tendency unerringly pointing towards guilt of the accused;*
- (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and*
- (iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”*

In the present case, the following are the circumstances which the prosecution has tried to establish and by interlinking them together, has tried to form a complete chain of circumstances :

- i) Motive,
- ii) The Appellant coming to the village where the deceased was residing at about 1.30 p.m. and making inquiries angrily regarding the whereabouts of the deceased,
- iii) The deceased was last seen together in the company of the accused at about 4.00 p.m. and his dead body was

¹ (2008) 15 Supreme Court Cases 430

found at about 6.00 p.m.,

- iv) Seizure of the bloodstained clothes worn by the Appellant with 'B' group.
- v) Recovery of a bloodstained iron rod at the instance of the Appellant. This also shows presence of blood of 'B' group.

7. To prove the first circumstance of possible motive, the prosecution has relied mainly on the evidence of PW 1 Ranjana Patil who is the widow of the deceased and has lodged the FIR. According to her, she was residing at village Karnal with the deceased and their two daughters. She has stated that she had got married with the deceased about 20 years before the incident and her deceased husband was related to her as her maternal uncle. She has deposed that from the first marriage, the deceased had two sons namely Dadasaheb and Suryakant, who is the present Appellant. According to her, these two sons used to frequently visit their house and used to quarrel with the deceased on the ground of his contracting the second marriage and also on the ground that the deceased had sold their ancestral agricultural land. In her deposition, she further narrates that when she reached her house at about 7.00 p.m., she saw the dead body of the deceased lying with the injuries on his head. She has further deposed that when her daughter Swati returned from the school, Swati told her that the Appellant was making inquiries about the deceased in the school at about 2.00 p.m. and that thereafter she lodged her FIR.

Thus, to prove the motive, the prosecution has relied on the evidence of PW 1. No doubt, the motive is an important circumstance and the importance which can be attached to the possible motive varies from case to case. Generally, when there is a direct evidence of an eye witness or in the cases based on circumstantial evidence, if the circumstances other than the motive are so strong that conviction can safely be based on them, then the motive may not play a major role in determining the guilt of the accused but when the case is based purely on circumstantial evidence and when such circumstances are not strong enough by themselves to prove the guilt of the accused, due consideration will have to be bestowed upon the existence of motive and as to whether that motive was strong enough leading the accused to take this step of committing murder. Mr. Shyam Mehta, learned Senior Counsel for the Appellant, has relied on the case of *State Through Central Bureau of Investigation Vs. Mahender Singh Dahiya*². In the said case, the Hon'ble Supreme Court has held that where the case of the prosecution has been proved beyond reasonable doubt on the basis of the material produced before the Court, the motive loses its significance. But in other cases based on circumstantial evidence, motive for committing the crime assumes great importance. In such circumstances, absence of motive would put the Court on its guard to scrutinize the evidence very closely to ensure that suspicion, emotion or conjecture do not take the place of proof.

² (2011) 3 Supreme Court Cases 109

8. In the present case, the prosecution, through the PW 1, has established that the Appellant was unhappy with the deceased because the deceased had contracted second marriage. In this context, it is worthwhile to note that the deceased and the PW 1 had got married 20 years before the incident dated 01/03/2006. Therefore, it cannot be said that this motive was the immediate reason for the Appellant to take this drastic step. The prosecution has not brought on record any immediate or proximate cause which had led the Appellant to commit the murder of his own father. The second possible motive was selling of the ancestral agricultural land by the deceased. Here again, the PW 1 or the prosecution evidence has not elaborated as to which land was sold, when it was sold and to whom it was sold and except for a vague statement that there used to be quarrels on account of selling of such land, there is nothing on record. Moreover, these two possible motives are mentioned in general narration that there used to be quarrels on these two grounds when the sons used to visit the deceased. Therefore, in our opinion, the prosecution has not established the motive or the immediate cause for commission of the murder. The prosecution evidence indicates that the Appellant and his brother used to visit the deceased within a gap of couple of months. The prosecution evidence does not indicate as to when the last visit was made and when such quarrel took place between the sons and the deceased on the last occasion. There is another factor which needs to be considered in this connection and that is the questions put to the Appellant in his examination under Section 313 of the Cr.P.C. Significantly, none of these questions

pertain to the possible motive for commission of the murder and since the Appellant is not given an opportunity to explain the alleged motive for commission of murder against him, this circumstance, in any case, cannot be held against the present Appellant. Therefore, in such circumstances, we hold that the prosecution has failed to establish the motive for commission of murder.

9. The second circumstance is regarding the inquiries made by the Appellant with the PW 5 at about 1.30 p.m. on the date of the incident. In this connection, the prosecution has examined PW 5 Swati who is the daughter of the deceased and PW 7 Jayant Patil who was the school teacher who was present when the Appellant had made such inquiries. PW 5 Swati was a child witness and at the time of deposing before the Court, she was about 11 years of age. She was administered oath, she being a child witness, her evidence needs to be appreciated carefully. She has deposed that the Appellant used to regularly visit their house. She has deposed that the Appellant was working at Jaisingpur. Evidence shows that the Appellant was not a resident of the village Karnal where the deceased used to reside. She has deposed about the Appellant questioning the deceased regarding his second marriage and quarreling on that ground. She has further deposed that on 01/03/2006, the Appellant had been to her school at 1.30 p.m. and he was angrily inquiring about the whereabouts of the deceased and PW 1. At that time, this witness had informed him that they were residing by the side of the road leading to Sangli. Thereafter, this witness had gone to her house at about 6.30 p.m. and

found the tragic scene in respect of the death of her father. The evidence of this witness indicates that since the last visit of the Appellant to their house, they possibly had changed their residence and therefore, the Appellant was not knowing the new address. This witness PW 5 had told the Appellant regarding their new address. The evidence of this witness is to a limited fact that the Appellant was present in the village Karnal at about 1.30 p.m. and was making inquiries about the deceased. A suggestion to this witness was given that she was deposing falsely at the instance of her mother. To be on a safer side, the prosecution has examined PW 7 Jayant Patil who was a school teacher and who was present with this witness when the Appellant was making such inquiries. However, this witness was not knowing the Appellant and no identification parade was held to enable him to identify that it was only the Appellant who was making the inquiries. However, his evidence does go on to show that some person was making inquiries with the PW 5 regarding the whereabouts of the deceased. We find that, at the highest, this circumstance indicates that the Appellant was present in that village at 1.30 p.m. and was making inquiries about the whereabouts of the deceased. The contention that he was making inquiries in angry state of mind is doubtful because though the PW 5 says that he made inquiries angrily, the PW 7 does not say that the Appellant was making the inquiries in an angry tone. This circumstance will have to be decided in the background and context of other circumstances.

10. The most important circumstance the prosecution has relied on is the theory of the deceased having been seen together with the Appellant soon before his dead body was found. In this connection, the prosecution has examined PW 6 Nanda Bad. According to her, at around 1.30 p.m. one boy aged about 20 to 22 years came to the house of deceased Balasaheb. She has further deposed that deceased Balasaheb introduced that boy to one Sakharam Rajput as his son from his first wife and that the boy was wearing blue coloured shirt and gray coloured pant. She further deposed that accused before the Court was the same boy. According to her, the said boy was questioning deceased Balasaheb as to why he had sold their house and was also questioning Balasaheb on his remarriage and both were talking in raised voices. She has further deposed that at about 4.00 p.m. she saw Balasaheb and that boy in the house and thereafter she left the place and when she returned at about 6.00 p.m., she saw the dead body of the deceased. Thus, the prosecution has tried to rely on her evidence to show that the present Appellant was in the company of the deceased inside the house at about 4.00 p.m. and soon after within two hours, the dead body of the deceased was found in that same house. According to the learned APP, this is a strong circumstance which should enable the Court to convict the Appellant. The evidence of this witness clearly shows that she was not knowing the said boy before the incident. It was for the first time that she had seen him and she claimed that the said boy was Balasaheb's son because Balasaheb had introduced that boy as his son from his first wife to one Rajput. Balasaheb had two sons. This

Rajput is not examined to corroborate her version. This introduction was not made to her. She had overheard the conversation. Therefore, it is difficult to attach too much weightage to this introduction. The most important aspect of this case is that this witness was not made to identify the said boy. The police had arrested the Appellant within two days and therefore it was not difficult for them to have conducted an identification parade. When a suspect / accused is not known to any witness, it is desirable to hold an identification parade to enable such witness to identify such suspect or the accused. In this case, no identification parade was held and later on for the first time in Court after about more than 7 months this witness had identified the Appellant in the Court as being the same boy who had visited the deceased and was in his house at about 4.00 p.m. The Appellant was the sole accused in the present case. Therefore, it was very easy for this witness to tell the Court that he was the same person. This can hardly be described as a safe mode of identification. In the Courtrooms, the accused are made to sit at a particular place during trials and therefore it is not difficult for witnesses to identify the accused, particularly when there is only one accused facing the trial. Therefore, it is not safe to rely on such identification made for the first time in Court. In this connection, Mr. Shyam Mehta, learned Senior Counsel for the Appellant, has relied on the Judgment in the case of ***Dana Yadav alias Dahu and Others Vs. State of Bihar***³. In this case, the Hon'ble Supreme Court has, in para 38 of the said Judgment, analyzed the necessity of the identification parade as thus :-

3 (2002) 7 Supreme Court Cases 295

“38. In view of the law analysed above, we conclude thus :-

(a) If an accused is well known to the prosecution witnesses from before, no test identification parade is called for and it would be meaningless and sheer waste of public time to hold the same.

(b) In cases where according to the prosecution the accused is known to the prosecution witnesses from before, but the said fact is denied by him and he challenges his identity by the prosecution witnesses by filing a petition for holding test identification parade, a court while dealing with such a prayer, should consider without holding a mini-inquiry as to whether the denial is bona fide or a mere pretence and / or made with an ulterior motive to delay the investigation. In case the court comes to the conclusion that the denial is bona fide, it may accede to the prayer, but if, however, it is of the view that the same is a mere pretence and / or made with an ulterior motive to delay the investigation, question for grant of such a prayer would not arise. Unjustified grant or refusal of such a prayer would not necessarily enure to the benefit of either party nor the same would be detrimental to their interest. In case prayer is granted and test identification parade is held in which a witness fails to identify the accused, his so-called claim that the accused was known to him from before and the evidence of identification in court should not be accepted. But in case either prayer is not granted or granted but no test identification parade held, the same ipso facto can not be a ground for throwing out evidence of identification of an accused in court when evidence of the witness, on the question of identity of the accused from before, is found to be credible. The main thrust should be on answer to the question as to whether evidence of a witness in court to the identity of the accused from before is trustworthy or not. In case the answer is in the affirmative, the fact that prayer for holding test identification parade was rejected or although granted, but no such parade was held, would not in any manner affect the evidence adduced in court in relation to identity of the accused. But if, however, such an evidence is not free from doubt, the same may be a relevant material while appreciating the evidence of identification adduced in court.

(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification

in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in court.

(d) Identification parades are held during the course of investigation ordinarily at the instance of investigating agencies and should be held with reasonable despatch for the purpose of enabling the witnesses to identify either the properties which are subject matter of alleged offence or the accused persons involved in the offence so as to provide it with materials to assure itself if the investigation is proceeding on right lines and the persons whom it suspects to have committed the offence were the real culprits.

(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form the basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the accused before the police, but to this general rule there may be exceptions as enumerated above."

Hence, in the present case, we are of the view that even this circumstance of last seen together is not proved by the prosecution beyond any reasonable doubt.

11. The next circumstance which is relied on by the prosecution is in respect of seizure of the Appellant's bloodstained clothes. In this context, the prosecution has examined PW 4 Anil Mane as the panch who was present when the clothes were seized and the said panchanama is exhibited vide Exh.15. According to this witness PW 4, on 03/03/2006 at about 6.00 p.m., he was called at the Sangli Gramin Police Station and was told that they wanted to arrest a person in the police station. Thereon, he saw the present Appellant present there who was wearing bloodstained clothes. He was given fresh clothes and his clothes were seized in his presence. Thereafter, the panchanama was drawn. He has identified those clothes when they were produced in the Court. Significantly, this witness, in his deposition, has not stated that while seizing those clothes, they were sealed or that labels containing his signatures were pasted. Mr. Mehta submitted that it was highly unlikely that the Appellant would wear the same clothes for two days though he had an opportunity to go to his house, have them changed and washed. There is some force in his submission. Moreover, there is no evidence to show from where and at what time the Appellant was arrested. The evidence throws light only from the point when the Appellant was seen present in the police station. Even the I.O. has not elaborated as at what point of time, from which place and in what condition the Appellant was arrested and no explanation was given as to why arrest panchanama at the point of arrest was not carried out. The CA report shows that those clothes were showing the bloodstains of human origin having 'B' group. The clothes of the deceased also show the presence of blood of

'B' group. Therefore, the prosecution alleges that the blood found on the clothes of the Appellant was that of the deceased. However, the record shows that the blood group of the Appellant himself was also 'B' and therefore, the prosecution could not eliminate the possibility that the blood on his clothes was not that of the Appellant himself. In this context, Mr. Mehta has relied on the observations of the Hon'ble Supreme Court in the case of ***Prakash Vs. State of Karnataka***⁴. In para 41 of the said Judgment, the Hon'ble Supreme Court has held thus :

“41. In any event, the recovery of the bloodstained clothes of Prakash do not advance the case of the prosecution. The reason is that all that the prosecution sought to prove thereby is that the blood group of Gangamma was AB and the bloodstains on Prakash's seized clothes also belong to blood group AB. In our opinion, this does not lead to any conclusion that the bloodstains on Prakash's clothes were those of Gangamma's blood. There are millions of people who have the blood group AB and it is quite possible that even Prakash had the blood group AB. In this context, it is important to mention that a blood sample was taken from Prakash and this was sent for examination. The report received from the forensic science laboratory (Ext.P-27) was to the effect that the blood sample was decomposed and therefore its origin and grouping could not be determined. It is, therefore, quite possible that the bloodstains on Prakash's clothes were his own bloodstains and that is blood group was also AB.”

Considering these aspects, even this circumstance is doubtful and does not help the prosecution case in any manner.

4 (2014) 12 Supreme Court Cases 133

12. The last circumstance relied on by the prosecution was recovery of the big iron rod at the instance of the present Appellant and in this connection, the prosecution has examined PW 3 Pradeep Waghmare who was the panch for the said recovery. According to him on 06/03/2006, he was called at Sangli Gramin Police Station at 10.00 a.m. and was told to listen to what the Appellant had to state. According to him, the Appellant showed willingness to lead to the place where he had concealed the murder weapon i.e. an iron rod. After recording his memorandum, the police party and the panchas were led by the Appellant to village Karnal in the plot of one Bhimrao Patil and from behind one shed, an iron bar having length of 58 inches and diameter of 3 inches was excavated which was concealed under the ground. During his cross-examination, he has stated that he did not remember as to by using which instrument the Appellant excavated and removed the iron rod. The memorandum and panchanama are exhibited at Exh.13 and Exh.13A respectively. The I.O. has not explained as to how the earth was excavated and how the iron rod was removed. Importantly, this witness PW 3, in his deposition, has not stated that the iron rod was kept in a packet or was wrapped in paper. He merely says that the labels signed by the panchas were pasted on the iron rod. He has not further stated that the weapon was sealed in some packet. The CA report at Exh.27 shows that the CA had received the iron rod and at that time it was wrapped in paper and was labeled as Article 13. The CA report also mentions that 11 sealed parcels with seals intact were received by the CA. Therefore, sealing of this iron rod assumes importance whereas

this witness PW 3 has not stated anything about sealing of the iron rod. In this case, therefore, the tampering of the iron rod cannot be ruled out. In this context, Mr. Mehta has relied on the Judgment of this Court in this case of ***Parshuram Alias Parshu Ganpat Nalwade Vs. State of Maharashtra***⁵. In para 12 of the said Judgment, the Division Bench of this Court has observed thus :

“12. The second reason due to which we are not inclined to place reliance on recovery of firearm is that, none of the prosecution witnesses have stated that weapon was sealed when it was produced by the accused. The Supreme Court in the case of Amarjit Singh Alias Babbu V. State of Punjab⁶ has observed that the non-sealing of the revolver at the spot is a serious infirmity because the possibility of tampering with the weapon cannot be ruled out.”

Therefore, though the iron rod shows the presence of blood group 'B', considering the infirmities in respect of sealing of the same, we do not find it safe to hold this circumstance against the Appellant.

13. Thus, taking into consideration all the above circumstances separately, we find that the only circumstance which the prosecution has proved to some reasonable extent is that the Appellant was in the village Karnal at 1.30 p.m. and had visited the school of PW 5 Swati asking for the deceased. All the other circumstances are not proved by the prosecution beyond reasonable doubt. Therefore, this solitary link will not form a complete chain of circumstances. This circumstance by itself will not point to the only

⁵ 2015 SCC OnLine Bom 4824

⁶ 1995 Supp (3) SCC 217

hypothesis of the guilt of the Appellant. Therefore, we hold that the prosecution has failed to prove the circumstances beyond reasonable doubt to form a complete chain which would unerringly point only to the guilt of the Appellant. With the result, we allow this Appeal. Hence the following order :-

ORDER

- (i) The Appeal is allowed.
- (ii) The conviction and sentence awarded to the Appellant vide the Judgment and Order dated 04/12/2006 passed by the learned Principal Sessions Judge, Sangli, in Sessions Case No.164 of 2006 are hereby set aside. The Appellant is acquitted of the charge framed against him.
- (iii) The Appellant shall be released forthwith, if not required in any other case.

(SARANG V. KOTWAL, J.)

(A. A. SAYED, J.)