

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.1346 OF 2008

1. Maruti Ananda Gosavi
Age : 23 years, Occu : Labour Work
(Private Service), R/O : Yavluj,
Tal : Panhala
 2. Limbapuri Ananda Gosavi
Age 20 years, Occu : Labour Work
R/o : Ramnagar – Shiye,
Tal : Karvi
- ... Appellants
(Orig. Accd. Nos.1 and 2)
- versus

The State of Maharashtra
(At the instance of
M.I.D.C. Police Station)

... Respondent

.....

- Ms. Payushi Roy a/w Dr.Yug Chaudhary, for the Appellants.
- Ms. R.M. Gadhvi, APP for the State/Respondent.

**CORAM : A.A. SAYED &
SARANG V. KOTWAL, JJ.**
RESERVED ON : 31st AUGUST, 2017
PRONOUNCED ON : 14th SEPTEMBER, 2017

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

1. The present Appeal is preferred by the original Accused
Nos.1 and 2, challenging the judgment and order dated

23/04/2008 passed by the 3rd Additional Sessions Judge, Kolhapur, whereby both the Appellants were convicted for commission of offence punishable u/s 302 r/w 34 of the Indian Penal Code and each of them was sentenced to suffer imprisonment for life and to pay a fine of Rs.3,000/- and in default of payment of fine to suffer rigorous imprisonment for one year. Out of the fine amount, an amount of Rs.5,000/- was directed to be paid to Smt.Ruksana Sadruddin Khan towards compensation.

2. The prosecution case in brief is as follows;

The deceased Sadruddin Khan was a labour supplier and was working as a Supervisor in Shagun Casting Company. The Appellant No.1 was also working in the same company. The deceased Sadruddin was known to both the Appellants and in the past was residing as their tenant at village Shiye, District Kolhapur. Subsequently Sadruddin shifted to village Shirol. But the Appellants were on visiting terms with the deceased. On 21/12/2006 at about 01.00 p.m. both Appellants came to the

house of the deceased and left together with the deceased in a Maruti Van at about 01.00 p.m. Thereafter the deceased was never found alive. The relatives took search for him in the night and in the morning, since he did not return. Finally at 02.00 p.m. his dead body was found in the ditch along the road from Village Shirol, towards Ram Nagar. Accordingly, the FIR was lodged by his near relative Mohd. Kamran Khan, P.W.1, at about 03.05 p.m. on 22/12/2006 at Shirol, MIDC Police Station, vide C.R.No.93/06 u/s 302 of the Indian Penal Code against unknown persons.

3. Thereafter investigation commenced. The post-mortem was conducted on the dead body and it was found that there were about 20 injuries. The Medical Officer opined that death was caused between 24-36 hours prior to the conduct of post-mortem examination. The post-mortem examination was conducted between 08.40 p.m. to 09.40 p.m. on 22/12/2006. That means, approximate period of offence as per the Doctor's opinion was from 08.40 a.m. to 08.40 p.m. on 21/12/2006.

Since the deceased was seen alive at about 01.00 p.m., then it means that the death could have occurred between 01.00 p.m. to 08.40 p.m. or approximately up to 09.00 p.m. on 21/12/2006. The post-mortem also mentioned that death could have occurred within six hours of last meals. But since his whereabouts from 01.00 p.m. and his activities were not known, that aspect will not assist in arriving at an approximate time of commission of offence.

4. The accused were arrested, statements of various witnesses were recorded, different panchanamas were conducted. As per the prosecution case, the murder weapon i.e. a long pointed rod was recovered at the instance of Appellant No.1. It is the case of prosecution that blood stained clothes worn by the accused and Maruti Van were recovered at the instance of Accused No.2. After the investigation was completed, the charge-sheet was filed before the Judicial Magistrate First Class, Kolhapur and thereafter the case was committed to the Court of Sessions. The charge u/s 302 r/w 34 was framed

against both the Appellants to which they pleaded not guilty and claimed to be tried. At the conclusion of the trial, the Appellants were convicted and sentenced as mentioned hereinabove.

5. In its support, the prosecution examined 10 witnesses on different aspects as follows :

P.W.1 Mohd. Kamran Khan had lodged the FIR and was a relative of the deceased. He had seen the Appellants leaving with the deceased in a Maruti Van at 01.00 p.m. on 21/12/2006.

P.W.2 Babasaheb Dhindiram Powar was examined a Panch witness for recovery of iron rod (Salai) at the instance of the Accused No.1, but he did not support the prosecution case and was declared hostile.

P.W.3 Sunil Appaso Savant was also a pancha to the same panchanama. Even he did not support the prosecution case.

P.W.4 Narendra Rangrao Bhosale was a witness to whom the Appellant No.1 had allegedly made extra judicial confession in the late evening on 21/12/2006.

P.W.5 Rajendra Nagu Parit was a Panch for recovery of Maruti Van and clothes at the instance of the Accused No.2 on 23/12/2006.

P.W.6 Vilas Ramchandra Gayakwad was the Driver attached to Shirol Police Station and has deposed about the recovery at the instance of both the Appellants.

P.W.7 Dr. Pravin Ganpatrao Naik had conducted post-mortem examination.

P.W.8 Police Constable Chandrakant Dinkar Mhasake, was the carrier who had carried Muddemal Articles to C.A.

P.W.9 Sudhir Prabhakar Aspat was the Investigating Officer.

P.W.10 Digvijay Dhondiram Sutar was an employee in Shagun Casting Company, where the deceased and the Appellant No.1 both were working.

6. We have heard Ms. Payushi Roy, learned Counsel for the Appellants and Ms. R. M. Gadhvi, learned APP for State. With

their assistance, we have read the entire evidence and we have gone through the record and proceedings.

7. The prosecution case rests only on the circumstantial evidence. The circumstances, which the prosecution has tried to establish to prove the guilt of the accused are as follows;

- (i) Motive
- (ii) Last seen together
- (iii) Extra judicial confession
- (iv) Various recoveries

8. It is well settled that in the case of circumstantial evidence, the prosecution has to establish each of the circumstance beyond reasonable doubt and then form a complete chain establishing guilt of the accused beyond reasonable doubt and has to eliminate all the possibilities and hypothesis of innocence of the accused.

9. **Motive** -:

Learned Counsel Ms.Payushi Roy submitted that the

prosecution has failed to establish any motive on the part of the Appellants to commit the murder of the deceased. She submitted that in this particular case, the motive was an important circumstance because all other circumstances were either weak or were not proved by the prosecution and therefore since the prosecution has not established the motive, benefit should go to the Appellants. The importance and weightage which is required to be given to the possible motive, depends on facts and circumstances of each case. Generally, when there is a reliable direct evidence or in the case of circumstantial evidence, where other circumstances are strong enough to establish the guilt of the accused, the motive may not play a major part, but in case, where other circumstances are either weak or not established and the chain of the circumstances is not complete, then the motive has its importance. We find in the present case it was necessary for the prosecution to have established the motive and in our opinion the prosecution has failed in this aspect.

10. For establishing motive, the prosecution has relied on the evidence of P.W.1 Mohd. Kamran Khan, P.W.4 Narendra Bhosale and P.W.10 Digvijay Sutar. Though P.W.10 deposed in his examination-in-chief that the Appellant No.1 was repeatedly demanding money from the deceased and since the deceased was not paying any money, the accused threatened to kill him. However P.W.1 has admitted that he has not stated so before the Police. Therefore this allegation in respect of motive has appeared in the evidence of P.W.1 in the form of an improvement. Similarly, P.W.4 has deposed that the Appellant No.1 used to demand money from the deceased and used to threaten him, that he would commit his murder on that count. However, even this part has been proved as an omission from the statement given by this witness to the police during the investigation. P.W.10 Digvijay Sutar in his deposition has stated that the Appellant No.1 was asking for money from the deceased. But in the cross-examination he has admitted that the Appellant No.1 never demanded money from the deceased in his presence.

11. Thus, this demand of money and threats on that count is an improvement by the prosecution witnesses and cannot be relied on. Moreover, if the Appellant No.1 used to frequently threaten to commit his murder, the deceased would not have entertained the Appellant at his house or would not have gone with him. Even P.W.1 has not expressed any suspicion against both Appellants in his FIR. If there was real apprehension to the deceased at the hands of the Appellant No.1, the P.W.1 would not have failed to express strong suspicion against the Appellant No.1. Taking all these factors into account, we find that the prosecution has failed to establish the motive for commission of the murder.

12. **Last seen together** -:

The next circumstance relied on by the prosecution is the 'last seen together' theory. In this connection, the only evidence led by the prosecution is that of the P.W.1 Mohd. Kamran Khan. The said witness was a near relative of the

deceased and he has deposed that he himself used to reside in the house of Appellants in the past in Ram Nagar and therefore he knew the Appellants. He has stated that at about 11.30 a.m. he had gone to the house of the deceased on 21/12/2016. The deceased had come to his house at 12 noon for meals. After that at 01.00 p.m., the Appellants came to his house in a white Maruti Van and the Appellants left the place with the deceased. He has stated that he did not ask them where they were going. He has further stated that the deceased thereafter did not return. The phone call made by him about 09.00 p.m. was unanswered. On the next morning at 09.00 a.m. at 09.00 a.m. he went to the house of the deceased, but found that he had not returned. It is his case that, thereafter he went to the house of Appellant No.1 and there the father of the Appellant No.1 informed him that even the Appellants had not come home in the night. Thereafter this witness alongwith his friends and relatives searched for the deceased and finally at 02.00 p.m. they found the dead body of the deceased lying in ditch along the road going towards Ram Nagar area. He saw that there were

various injuries on the dead body on stomach, head and chest. Accordingly P.W.1 lodged his FIR as mentioned earlier. In any case the deceased was on normal terms with the Appellants and therefore there was nothing unusual if the Appellants had gone together with the deceased at 01.00 p.m. on 21/12/2006.

13. The learned Counsel Ms.Roy submitted that though the Appellants have left the place of the deceased at 01.00 p.m., taking approximate time of death into consideration, which as discussed earlier, was roughly between 01.00 p.m. to 09.00 p.m. There was no proximity of time from the time when they were last seen together and the approximate time of death. The dead body was found even later i.e. at 02.00 p.m. on the next day. Therefore in the absence of the positive evidence in respect of the proximity of time from the time when they were last seen together, this circumstance is not incriminating. We agree with the submissions of Ms.Roy in that behalf because from 01.00 p.m. to 09.00 p.m. on 21/12/2006, is a long period and it cannot be said that there was a proximity of time when they

were last seen together and when the death could have occurred.

14. Moreover, it is not clear as to at what spot, the deceased was assaulted to death. Because the road where he was found was a regular road with ordinary traffic between two villages and therefore it was unusual that nobody would have noticed the dead body on the next day till 02.00 p.m. in the afternoon. There is nothing to show that after committing his murder at some other point, he was carried to the spot where the dead body was found. The Maruti Van recovered at the instance of the Appellant No.2 did not show any blood stains. Nobody had seen the Appellants carrying the dead body at the spot. Considering all these factors, we are of the opinion that the Appellants leaving together with the deceased at 01.00 p.m. on 21/12/2006 is not an incriminating circumstance against the Appellants.

15. **Extra judicial confession** -:

The circumstance of extra judicial confession is another circumstance which the prosecution has relied on. In a given case, extra judicial confession can be the sole basis for conviction provided it is reliable and trustworthy. Ordinarily it is considered to be a weak piece of evidence.

16. To establish this circumstance, the prosecution has examined P.W.4 Narendra Bhosale. According to this witness, the Appellant No.1 was working as a Helper and this witness was working as a Moulder in the same company and they were working in the night shift. This witness was knowing the deceased Sadruddin. He has stated that on 21/12/2006 when he was proceeding for his duty at 07.00 p.m., he saw the Appellant No.1 standing near Shriram Foundry at the bus stop. He further deposed that the Appellant No.1 himself called him and told him that he had committed murder of Sadruddin with the help of iron Salai. This witness has further stated that since he was getting late to join the duty and since the Appellant No.1 used to

say something like this quite often, he proceeded for his duty. He has further stated that the Appellant No.1 did not attend his duty in that night. He has further stated that, on the next morning he went back to his house. In the evening he came to know that Sadruddin was murdered. Then he went to the said spot. Again he came to his house and went for his duty in the company. But since a holiday was declared on account of Sadruddin's death, he went to the house of deceased. In his cross-examination he has stated that his statement was recorded on 28/12/2006 when the police had come to his company for investigation.

17. The evidence of this witness is very unnatural. There was no earthly reason for the Appellant No.1 to call this witness on his own and inform him that he had committed the murder. The prosecution has not established any special friendly relationship between this witness and the Appellant No.1. After getting the information about the incident, the conduct of this witness is even more unnatural, as this witness had not reacted

to such information and he had attended his duty as usual. Then he had gone back to his house and had slept. On the next day evening, he was prepared to go back to join duty, even after becoming aware of the death of the deceased. Subsequently his statement was recorded after 7 days on 28/12/2006. He was aware of the confession made by the Appellant No.1 on 21/12/2006 itself. He has tried to explain his silence by deposing that he was scared of the Appellant No.1 and therefore remained silent till 28/10/2006. However, the Appellant No.1 was already arrested on 23/12/2006 and for a period of 7 days, this witness has not uttered a word about the knowledge he possessed in respect of the confession made by the Appellant No.1. Therefore in these circumstances we are not inclined to rely on his evidence and we do not find this circumstance having being proved by the prosecution.

18. **Various recoveries** -:

The next circumstance is recovery of murder weapon at the instance of the present Appellant No.1. According to

prosecution case, the alleged murder weapon i.e. a pointed iron rod was recovered at the instance of the Appellant No.1 on 24/12/2006. It is alleged that the said weapon was recovered from a heap of stone in a quarry near Shirol village. The said rod was 22 inches in length with quarter of an inch diameter and one side of rod was having a point of about 2 inches length. According to prosecution case, after seizure labels containing signatures of the panchas were pasted on it. The prosecution tried to examine P.W.2 and P.W.3 to establish said recovery. However, both of them turned hostile and did not support the prosecution case.

19. Thereafter the prosecution examined P.W.6 Vilas Gayakwad, who was the Driver attached to Shirol Police Station and who accompanied the Appellants and police party alongwith Panchas when the recovery was effected at their instance. However, his evidence could not prove the statement recorded u/s 27 which lead to the alleged recovery. Therefore his evidence cannot be of much importance for establishing the

prosecution case. He has not produced any supporting documents in the nature of extract of the log-book to prove that he had accompanied the accused and others when the recovery was effected. In any case, the C.A. reports show that the said iron rod showed presence of human blood, but the blood grouping was inconclusive. Since the prosecution has not adduced cogent evidence to show that it was properly sealed after the recovery, it is difficult to rely on such evidence to connect the present Appellants with the said weapon. Moreover, it is difficult to believe that this iron rod could be the murder weapon. In this behalf the reference can be made to the post mortem notes and in column No.17, the dimensions of the injuries are given. Very surprisingly, the post-mortem notes show that each of the injury was having same dimensions of 3 cm x 2 cm x cavity deep. Now this itself is impossible because it is difficult to believe that the assailants caused all these 20 injuries with the same dimensions with precision. The injuries are appearing from the head upto the abdomen. Therefore the Medical Officer's evidence that all the injuries could have been

caused by the iron rod shown to him in the Court cannot be believed. Thus in any case, we are not inclined to rely on this evidence of recovery at the instance of Appellant No.1.

20. The prosecution has relied on the recovery of blood stained clothes and Maruti Van at the instance of Appellant No.2. For this purpose the prosecution has examined P.W.5 Rajendra Parit. According to him, the clothes were seized from the house of the Appellant No.2 at his instance. He has stated that paper label was affixed by them. There is nothing to show that these are the clothes which were worn by the Appellant at the time of commission of the offence. The C.A. report in respect of these clothes show that there was presence of human blood, on full shirt of Appellant No.2 and on full pant of the Appellant No.1. However, the blood group was inconclusive. The prosecution has not eliminated possibility that the blood found on those clothes was not that of the accused themselves. Therefore it is difficult to rely on such recovery. The recovery of Van is an other innocuous circumstance because the Van also

did not reveal any blood attached to it.

21. The last circumstance the prosecution has tried to prove that the present Appellant No.1 had not attended his duties in the night between 21/12/2006 and 22/12/2006. In that behalf prosecution has examined P.W.10 Digvijay Dhondiram Sutar. However, his statement was not recorded during investigation and he was suddenly examined during the trial. He was not even issued the witness summons. He clearly seems to be a got up witness brought by the prosecution in its last ditch efforts to salvage its case. The documents regarding the presence of the labourers in various shifts is not properly proved and there is overwriting, corrections through whiteners etc. The attendance sheet is not countersigned by the Factory Inspector. Even his evidence does not take the prosecution case any further.

22. Thus, in conclusion, we find that the prosecution has failed to prove its case against the Appellants beyond reasonable

doubt and the individual circumstances are not proved beyond reasonable doubt. The chain of circumstances establishing the guilt of the accused is not complete. The prosecution has not ruled out the hypothesis and possibility of the innocence of the Appellants and therefore the Appellants deserve to be acquitted.

23. Before parting with the judgment we would like to refer to the payment of compensation awarded to Smt. Ruksana Sadruddin Khan. During the course of the arguments it was noticed that by the operative part of the order, the compensation amount of Rs.5,000/- was directed to paid to Smt. Ruksana Sadruddin Khan. In such circumstances it was necessary that she should have been made a party. However, she was not made a party. The Registry of this Court did not take out any objection and the matter proceeded till the final hearing stage. Ordinarily we would have issued notice to her. However, we are taking into account the fact that the Appellants are in custody since 23/12/2006. Ms.Roy has submitted that the Appellants have already paid the fine and they shall not ask for

the refund of the same. Since we are acquitting the Appellants, there is no question of payment of fine. But however since Smt. Ruksana Khan was not made a party, we direct that the said amount of fine which is deposited by the Appellants shall be treated as costs awarded against them. Smt.Ruksana Khan shall be paid the amount of Rs.5,000/- deposited by the Appellants (if not already paid to her). Hence no prejudice would be caused to Smt.Ruksana Khan and since Ms.Roy has also rightly submitted that her right to appear in the Appeal would be limited to defending the compensation awarded to her and since no prejudice is caused to her, in that behalf, there is no impediment in proceeding with the Appeal, particularly when the Appellants are in custody for such a long period. We agree with the submissions and award costs against the Appellant in favour of Smt.Ruksana Sadruddin Khan. Hence the following order:

ORDER

1. The Appeal is allowed.
2. The conviction and sentence awarded to Appellants vide the judgment and order dated

23/04/2008 passed by the 3rd Additional Sessions Judge, Kolhapur, in Sessions Case No.93/07 are set aside.

3. The Appellants are acquitted of the charges framed against them.
4. There shall be costs of Rs.6,000/- against the Appellants and Smt. Ruksana Sadruddin Khan shall be paid the amount of Rs.5,000/- out of that amount of Rs.6,000/-.
5. The Appellants shall be released forthwith, if not required in any other case.

(SARANG V. KOTWAL, J.)

(A. A. SAYED, J.)