

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

CRIMINAL APPEAL NO. 541 OF 2002

Pandurang S/o. Narayan Kadam,
Age : 30 Yrs., Occu. Education,
R/o. Village Hasapur, Tal. Bhokhar,
Dist. Nanded.
(At present in Central Prison,
Nashik Road, Nashik).

... **APPELLANT**

VERSUS

The State of Maharashtra.

... **RESPONDENT**

...
Mr. Satej Jadhav, Advocate for Appellant.
Mr. P. G. Borade, APP for Respondent.
...

CORAM : **T. V. NALAWADE &
K. L. WADANE, JJ.**

DATE : 19th June, 2018.

JUDGMENT: (Per T. V. Nalawade, J.)

. The appeal is filed against the judgment and order of Sessions Case No.72 of 1997, which was pending in the Court of learned Sessions Judge, Nanded. The Trial Court has convicted and sentenced the Appellant for the offence punishable under Section 302 of the Indian Penal Code.

2 Both the sides are heard.

3 Deceased Balaji was unmarried youngster and he was the son of first informant Irba Shinde, who is the resident of Hasapur, Taluka Bhokar. Balaji was in search of work. One Datta Mang, whose native place is Hasapur, is working in Mumbai and Balaji went to Mumbai for getting work with the help of Datta. He left village on 25th August, 1996.

4 In Mumbai, the present Appellant, who is resident of same village, approached Balaji and gave false information to Balaji that his father and brother were injured and Balaji needs to return to Hasapur immediately. Accused took Balaji with him. Datta Mang helped both Balaji and present Appellant-Accused Pandurang in boarding the train for Nanded and he saw to it that both together boarded the same train for Nanded.

5 Balaji and Appellant left Mumbai on the night of 2nd September, 1996. Somebody contacted Datta to make inquiry about

Balaji and Appellant and due to that, Datta contacted a xerox shop owner of Bhokar, who had telephone facility and requested him to give message to the first informant Irba that Balaji and present Appellant had left Mumbai together for the village. As Balaji had not reached village till 5th September, 1996 when he ought to have reached on 3rd September, 1996 itself, Irba became anxious and he contacted after 08:00 pm on 5th September, 1996 to Datta on phone. Irba had taken with him some villagers. It was informed to Irba by Datta that on the night of 2nd September, 1996, Balaji had left Mumbai with Appellant for village. After getting specific information from Datta, Irba and others returned to village from Bhokar to make inquiry with Appellant. On 5th September, 1996 in the night time, when Irba and others made inquiry with Appellant, initially he gave evasive answers. He, first informed that Balaji was with his company upto Nasik and at Nasik Balaji had left his company. When Irba and the persons of village told Appellant that they had specific information from Datta that he had purchased tickets for both Balaji and Appellant for Nanded and there was no reason for Balaji to take a halt at Nasik and when they said that Pandurang, Appellant was supplying false information, the Appellant admitted to Irba and others that Balaji had kept illicit

relations with the wife of Appellant and due to that he was angry with Balaji. He further informed that due to this anger and the relationship, he picked up Balaji at Mumbai and he took Balaji to Nanded and from there by other train, he had brought Balaji to Umri. He disclosed that he wanted to take Balaji to Sawargaon and they had boarded a jeep for that, but on the road of Sawargaon, Balaji said that he was not ready to go to Sawargaon and so from that point on foot they started for village. He disclosed that in Kamangaon, he took Balaji to Government land where there was nursery and forest and there he finished Balaji by strangulating him by using towel. He disclosed that he had left the dead body near a tree. This information was given in the late hours of the night. Irba went to Bhokar Police Station on 6th September, 1996 and gave report. On the basis of this report, Crime No.218 of 1996 came to be registered in Bhokar Police Station at 08:30 am.

6 On 6th September, 1996, Police took Appellant in custody. While in police custody, in the presence of Irba, Panch witnesses and others, the Appellant gave the statement to police that he had kept the dead body of Balaji in Shivar of Kamangaon. The Appellant then

took Police, Panchas and others to the spot where he had kept the dead body. Irba also went with them as the dead body was to be identified. Appellant took police and these persons to a small hill top of Kamangaon. This land belongs to the Government and the Government has planted trees on the hill. He took police to the tree where the dead body was lying. The dead body was in decomposed condition. Police prepared memorandum of statement and prepared Panchanama of the spot where the dead body was found. Inquest Panchanama was also prepared and dead body was referred for postmortem examination. Postmortem was conducted on 6th September, 1996 and doctor gave opinion that there was injury to chest, which had caused fracture of ribs and hemorrhage in thoracic cavity and there was laceration on left lung and the death took place due to shock due to injury to lung and intra thoracic hemorrhage.

7 While in police custody, the Appellant gave one more statement in presence of Panchas and he showed willingness to produce the stone, which was used by him to cause the aforesaid injury to Balaji. Memorandum of statement was prepared. The Appellant then took Police and Panchas to aforesaid hill top and he

produced the stone, which was lying at a distance of about 20 to 30 feet from the place where the dead body was found. This stone came to be seized under Panchanama.

8 During the course of investigation, the Police recorded the statements of some villagers before whom the confession was given by the Appellant. Statement of Datta, resident of Mumbai also came to be recorded. After completion of investigation, charge-sheet came to be filed against the Appellant. To the charge, the Appellant pleaded not guilty. Prosecution examined in all 9 witnesses for proving the offence. The Trial Court has believed the father of Balaji, witness Datta and has held that there is convincing evidence on extra judicial confession and on circumstance of "last seen" and this evidence has corroboration of other circumstances. The Trial Court has held that there is evidence of discovery of dead body on the basis of statement given by the Appellant and there is also evidence on motive.

9 The defence has not disputed that Balaji died homicidal death. Dr. Manoorkar (PW-5), who conducted postmortem

examination on the dead body has given evidence that postmortem was conducted at 03:30 pm on 6th September, 1996. The deceased was aged about 22 years and he was a healthy boy. The dead body was badly decomposed and swollen. There was maggots formation all over the dead body. Tongue was protruding out of the mouth. The stomach contained semidigested material. In the cross-examination, opinion is given by the doctor that the death took place 72 to 84 hours prior to the postmortem examination. Thus, the evidence shows that death took place on 3rd September, 1996 or few hours prior to that day. This circumstance needs to be kept in mind as the prosecution is relying on mostly circumstantial evidence and the evidence of extra judicial confession.

10 Dr. Manoorkar (PW-5) has given evidence that there were five ante-mortem injuries on the dead body and they were as follows:

- “i) Abrasion with contusion on left wrist, 5 cm x 2 cm.
- ii) Multiple abrasions on dorsal aspect of left palm.
- iii) Contusion with abrasion on dorsal aspect of right palm, 6 cm x 5 cm.
- iv) Contusion, 10 cm x 8 cm, on middle of sternum.

- v) Contusion, 10 cm x 10 cm, on left side of the chest in mid clavicular line in 2nd and 3rd and 4th intercostal space.”

11 Dr. Manoorkar (PW-5) found that the thoracic cavity contained blood and there was a fracture of third rib on left side in middle clavicular line. There was evidence of hemorrhage, laceration on left lung of the size of 10 x 5 x 5 cm. The doctor has given evidence that death took place due to shock due to injury to lung and intra thoracic hemorrhage. It can be said that in examination-in-chief, he had not given specific opinion about the substance, which must have caused this injury. In the cross-examination, it is brought on record that injury, which was found on the chest proved to be fatal as that caused fracture of third rib on the left side. It is already observed that the defence is not disputing that Balaji died homicidal death. It is not suggested to the doctor that such injury can be caused due to accidental fall.

12 Irba (PW-3) is the main witness of prosecution. Some villagers are also examined by the prosecution as they were expected to give evidence on extra judicial confession. But they have not

supported the case of the prosecution on extra judicial confession. However, their evidence, which is on other aspects cannot be ignored only because they have turned hostile.

13 Irba (PW-3) has deposed that initially, he was out of station and when he returned to village, he learnt that Balaji had gone to Mumbai. He has given evidence that after one week of leaving of Balaji for Mumbai, a message was sent to Rejesh Xerox Center situated at Bhokar by a villager from Mumbai and he was asked as to whether Balaji had returned to village. He has given evidence that on the same evening, he and villagers like Mohan Jadhav, Bhagwan Patil and others went to Rajesh Xerox Center and there they waited for the telephone call of Datta, who was living in Mumbai. He has deposed that at 09:00 pm he received the call of Datta and on phone Datta informed to him that Balaji and present Appellant had together visited his house in Mumbai and both of them together had left Mumbai for Nanded by train. Datta again inquired with Irba as to whether Balaji had reached the village and Irba answered in negative. The evidence of Irba shows that Datta had informed on that day that Balaji had left Mumbai 2-3 days before. Irba has given evidence that from Bhokar

he and other villagers returned to village and on the same night they went to the house of Appellant to make inquiry about Balaji.

14 Irba (PW-3) has given evidence that first he made inquiry with the Appellant in the presence of villagers like Jalba, Mohan and Bhagwan, but accused avoided to tell anything and vaguely denied everything. Irba has given evidence that three villagers then made inquiry with Appellant for some time and then Appellant / Accused admitted that in forest area of village Kamangaon, he had killed Balaji. He has given evidence that after learning that from accused they went to Bhokar Police Station and gave report against the Accused. The report is duly proved as Exhibit 22 in the evidence of Irba.

15 Exhibit 22 is consistent with the version of Irba on material points. Much was argued by the learned counsel for Appellant on the circumstances that the crime was registered at 08:30 am on 6th September, 1996. The learned counsel submitted that the crime was registered late and there is doubt about the story given by Irba to police and everything appears to be concocted. This submission is not acceptable. The evidence of Irba in the cross-examination shows

that around one hour is required for returning to Hasapur from Bhokar. The evidence of Irba shows that he had a talk with Datta of Mumbai at about 09:00 pm on 5th September, 1996 and after that they returned to Hasapur. Thus, they reached Hasapur after 10:00 pm. The evidence shows that they were required to make inquiry repeatedly with the Appellant and only after that the Appellant admitted that he had finished Balaji. Thus, on the night between 5th September, 1996 and 6th September, 1996, Irba learnt about the incident. The report was given to Bhokar Police Station and it can be said that they required time again to come to Bhokar. In view of these circumstances and as police must have taken some time to record the FIR, the circumstance that the crime was registered at 08:30 am on 6th September, 1996 has not created reasonable doubt about the version given by Irba and it cannot be said that the delay has created suspicion about the version of Irba.

16 The learned counsel for Appellant submitted that as per the version of Irba (PW-3), the so-called extra judicial confession was given in presence of three more villagers, but the other witnesses, who were expected to give evidence on extra judicial confession have

turned hostile and so there is no corroboration to the version of Irba in respect of extra judicial confession. The learned counsel submitted that for this reason, the evidence of Irba on extra judicial confession needs to be discarded. This submission is not acceptable. It is true that extra judicial confession by itself is a very weak type of evidence. However, when there are surrounding circumstance corroborating the extra judicial confession and when there is nothing on record to create doubt about the voluntary nature of extra judicial confession, the evidence of extra judicial confession can be safely relied upon. In the present matter, the defence of only total denial is taken by the accused in the statement under Section 313 of the Cod of Criminal Procedure and during the cross-examination of witnesses. There is other evidence in the present matter for corroboration of the evidence of extra judicial confession. Thus, the evidence available on confession is not hit by Section 24 of the Evidence Act. If such confession is not hit by the circumstances mentioned in Section 24 of the Evidence Act, extra judicial confession can be used if the other circumstances show that extra judicial confession was made and only after that further things revealed. There is evidence of that nature in the present matter and so the evidence of extra judicial confession of

the present matter can be safely used against the accused.

17 Datta (PW-8) a person from village Hasapur, who is living in Mumbai to earn livelihood, is examined to prove the circumstance of “last seen” in the present matter. The cross-examination of this witness shows that the defence is not disputing that both deceased Balaji and Appellant Pandurang were known to him as he was from their village.

18 Datta (PW-8) has given evidence that 5-6 days prior to the death of Balaji, Balaji had come to him and he had informed that he had started doing labour work in Mumbai. The place of work of Balaji was in the vicinity of the place of work of Datta. He has given evidence that he had seen accused and deceased together as they wanted to proceed to native place Hasapur. He has given evidence that accused had come to him to make inquiry about Balaji and he had told that the father and brother of Balaji had sustained injuries in an assault and so his presence in the village was necessary. Datta has given evidence that he had taken accused to the work site of Balaji and he had given them company upto Dadar railway station and

he had purchased railway tickets for them and he had seen them off when they boarded the train. He has given evidence that after about 4 days of leaving of Balaji and Appellant, brother of Datta had come to Mumbai and he had made inquiry as to whether Balaji and accused had come to him. Laxman was making inquiry on the request made by the parents of accused as per the version of Datta. Datta has deposed that he then made telephone call to xerox center Bhokar to give news that he had seen off both Balaji and accused in Mumbai few days back. He has given evidence that the father of Balaji then contacted him and he informed Irba that Balaji had left Mumbai with Accused.

19 In the cross-examination it is only suggested to Datta (PW-8) that the aforesaid evidence given by him is false. Thus, the evidence of Datta remained unshattered in cross-examination. The learned counsel for Appellant argued on the circumstance that the statement of Datta was recorded by police after about a month of incident. It was submitted that due to this belated disclosure of Datta, his evidence cannot be believed. This submission is not acceptable. In the FIR given by Irba (PW-3) he had mentioned the name of Datta

and thus, on 6th September, 1996, everybody knew that Datta had vital information. That information was mentioned in FIR at Exhibit-22 itself and evidence is given by Irba (PW-3) on that information, which he had received from Datta. Due to this circumstance, the delay caused in recording the police statement of Datta cannot make much difference in the present matter. It cannot be said that he is afterthought witness. He is a labour. It can be said that as he was residing in Mumbai and police of Nanded were making investigation, they had taken time to approach Datta. This Court holds that the evidence of Datta cannot be discarded due to the aforesaid ground.

20 The evidence of Datta (PW-8) is vital link in the circumstantial evidence of present matter. His evidence shows that deceased and Appellant / Accused had left Mumbai together and after that nobody had seen Balaji alive. The evidence of "last seen" needs to be believed as there is other evidence in the nature of extra judicial confession and also the evidence of statement given to police, which can be used under Section 27 of the Evidence Act against the accused. Due to other circumstances, this Court holds that the evidence of Datta can be safely relied in the present matter.

21 Irba (PW-3) has given evidence that after registration of crime, police came to his village, Hasapur from Bhokar with him and then the accused came to be arrested. He has given evidence about the incident in which the dead body of Balaji was recovered on the basis of information supplied by accused. The arrest Panchanama of accused is duly proved in the evidence of Shivaji Patil (PW-9) at Exhibit 39. This document shows that the accused was arrested at 09:00 am on 6th September, 1996. Cross-examination of Patil (PW-9) shows that it is not disputed that the accused came to be arrested on 6th September, 1996 at about 09:00 am. He was cross-examined on the circumstance like in the case diary the date of probable return of Balaji was mentioned as the night of 1st September, 1996 when in the FIR the date of leaving Mumbai is mentioned as 2nd September, 1996. It was suggested to him that he subsequently corrected dates shown on the arrest Panchanama and inquest Panchanama, but these suggestions are denied by him. In the FIR, everything was clear and so not much can be made out on the basis of this circumstance, some overwriting, pointed out to the investigating officer by the defence counsel.

22 The prosecution has examined Panch witness Mohan Jadhav (PW-6). This witness has not specifically given evidence on the statement given by accused to police on 6th September, 1996. However, Mohan Jadhav is of Hasapur and his evidence is there to the effect that he had gone to the place where the dead body was lying and it was recovered from hilly area of village Kamangaon. He was declared hostile. But, his evidence in respect of Exhibit 33 remained there and it was prepared in Kamangaon Shivar in Government land between 10:35 am and 11:15 am on 6th September, 1996. There is evidence of Patil (PW-9) on the statement given by accused under Section 27 of the Evidence Act. This witness has deposed that on inquiry in the presence of Panch witnesses, the accused agreed to show the place where the dead body of Balaji was concealed. Memorandum of statement is proved as Exhibit 40 and it bears the signature of the investigating officer (PW-9) and also of two Panch witnesses including Mohan Jadhav. In the statement there is a mentioned of village Kamangaon and particularly the Government forest of Kamangaon. There is also mention of a tree.

23 Patil (PW-9) has given evidence that after giving the statement, the accused took police to Kamangaon Shivar where there is a forest area. He has deposed that accused took them to a remote place in the forest and the spot is situated on small hill. He has deposed that a place, which was in shrubs and below a tree was pointed by the accused and the dead body was lying under shrubs and bushes. He has given evidence that the dead body was identified by the father of Balaji on that spot and then Panchanama was prepared. He has given evidence that after preparing the Panchanama at Exhibit 41 of recovery, the inquest Panchanama at Exhibit 33 was prepared. He has given evidence that the spot Panchanama at Exhibit 42 was also prepared by him in the presence of Panch witnesses. The same Panch witnesses were used on the spot Panchanama.

24 The Panchanama at Exhibit 41 and the spot Panchanama show that the spot is situated on eastern side of approach road for Kamangaon and the spot is situated in Kamangaon Shivar. There were many trees in the vicinity and the Police Patil had informed that the space was belonging to the Government. Articles of Balaji

including identity card were lying there. All these articles were taken over under the spot Panchanama.

25 The learned counsel for Appellant submitted that the spot is situated in the vicinity of approach road and so it cannot be said that the spot was not visible to others and it was not known that the dead body was lying there. This submission is not at all acceptable. No probability is created by the defence in the cross-examination of all the witnesses of that nature. It is clear that there were trees and the dead body was lying near a tree under shrubs, bushes and away from the road.

26 The aforesaid evidence shows that in the presence of Panch witnesses and also in the presence of Irba (PW-3), the accused took them to the spot where the dead body was lying and he showed the exact place. The dead body was recovered from that place. Thus, the aforesaid evidence is admissible under Section 27 of the Evidence Act.

27 The learned counsel for Appellant submitted that if

information was supplied by accused to Irba (PW-3) that the dead body was lying in the Shivar of Kamangaon, it cannot be said that the place where the dead body was lying was not known to police. This submission is not acceptable. The aforesaid evidence shows that the information about village Kamangaon was there to Irba but the exact place was known to only the accused and the accused took police and witnesses to the said spot. Thus, the place was discovered on the basis of information supplied by the accused and so that evidence is admissible under Section 27 of the Evidence Act. It cannot be said on the basis of evidence of Irba (PW-3) that the fact was already discovered.

28 In the case reported as **(2014) 11 SCC 129 (Lalit Kumar Yadav alias Kuri Vs. State of Uttar Pradesh)**, the scope and ambit of provisions of Section 27 of the Evidence Act is discussed by the Apex Court by referring the relevant other provisions and the observations are in paragraphs 29 and 31, which read as under:

“**29.** In *Anter Singh v. State of Rajasthan*, this Court noticed the scope and ambit of Section 27 of the Evidence Act and observed: (SCC p.665, para 16)

“16. The various requirements of the section can be summed up as follows:

(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.

(4) The person giving the information must be accused of any offence.

(5) He must be in the custody of a police officer.

(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible.

31. In *Bodhraj v. State of J & K*, it was held that a statement even by way of confession made in police custody which distinctly relates to the facts discovered is admissible in evidence against the accused. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus what is admissible being the information, same has to be proved and not the opinion formed on it by the police officer. The exact information given by the accused while in custody which led to the recovery of the article has to be proved; the exact information must be adduced through evidence.”

There can be no dispute over the proposition made by the Apex Court in the case cited supra.

29 In the present matter, this Court has quoted the information supplied by the accused and then actual discovery of the place where the dead body was kept by the accused. In view of the facts and circumstances of the present matter, this Court holds that the evidence given by the prosecution falls under Section 27 of the Evidence Act and that is available for basing conviction. In murder case, the discovery of dead body on the basis of information supplied

by Accused is very important piece of evidence.

30 The aforesaid evidence shows that after receiving the information from Irba (PW-3), Police arrested the Appellant. Only after arrest of the Appellant, more information could be collected and then the dead body was discovered. Due to these circumstances, this Court holds that there was an extra judicial confession given by the Appellant and then the Appellant gave statement under Section 27 of the Evidence Act also. These pieces of evidence corroborate each other and under both provisions, this evidence is admissible.

31 The evidence of investigating officer (PW-9) is also on recovery of one stone, weapon from the vicinity of the aforesaid spot. Memorandum of statement of accused dated 13th September, 1996 is proved at Exhibit 43 and Panchanama of seizure is at Exhibit 44. This record is proved in the evidence of the investigating officer. There is no other circumstantial evidence in respect of this stone and there is no evidence of doctor on the probability of use of such weapon and so there is no necessity of discussion of the evidence given in respect of this recovery in detail.

32 There is evidence of Laxman Kadam (PW-2), but it is on the disclosure made by Irba (PW-3) about the information, which he received from Datta. To that extent, the evidence is relevant.

33 Mohan Jadhav (PW-6) has given evidence on motive also. He has given evidence that there used to be quarrels between Balaji and accused and he had tried to convince accused to behave well and not to quarrel with deceased. He has given evidence that the incident in question took place after 8-10 days of his attempt to convince the accused. His evidence shows that he learnt that there was grievance of the accused that Balaji was trying to molest the wife of Appellant. He was virtually not cross-examined by the defence counsel in respect of this evidence. Some evidence is given by Kishan (PW-7), brother of deceased Balaji on this motive. But he has deposed that accused was making false allegations against Balaji. Some of the evidence of this witness is on the information supplied by Datta and that evidence is already discussed.

34 The aforesaid evidence is discussed by the Trial Court

and on that basis the Trial Court has drawn inference that the accused committed murder of Balaji. The aforesaid evidence is more than sufficient to complete the chain of circumstances. Evidence is there from starting point like “last seen” and then discovery of dead body at the instance of accused. Further, there is evidence of the nature of extra judicial confession and there is also evidence on motive. The provisions of Section 106 read with 114 of the Evidence Act is also applicable and due to that it was necessary for the accused to offer some explanation. No explanation at all is offered by the accused.

35 The learned counsel for Appellant placed reliance on some observations made by the Apex Court in the case reported as **(2012) 6 Supreme Court Cases 403 (Sahadevan and another Vs. State of Tamil Nadu)**. The Apex Court has laid down that the extra judicial confession is a weak piece of evidence and it is the duty of the Court to ensure that such evidence inspires confidence and it is corroborated by other prosecution evidence. There is no doubt over this proposition. In the present matter, the evidence of extra judicial confession is convincing in nature and has corroboration. Further,

there is evidence of “last seen” together also. If this evidence is considered in sequence, it can be safely inferred that it is the accused who has committed the murder of Balaji. This Court holds that interference is not possible in the decision given by the Trial Court. In the result, the appeal stands dismissed.

[K. L. WADANE, J.]

[T. V. NALAWADE, J.]

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