



**ORAL JUDGMENT: (Per B.R. Gavai, J.)**

1] Both these appeals challenge the Judgment and Order of conviction and sentence, as recorded by the learned Sessions Judge, Mumbai on 09/07/2009 in Sessions Case No.796 of 2002.

2] The facts, in brief, relating to present appeals are as under:-

3] P.W. 2 – Taslim Ali Khan is an Advocate as well as social worker and Chairman of Bandra Reclamation SRA Co-operative Housing Society. He received phone from his mother on 22/03/2002 at around 8.15 P.M that residents of Al Ilhad building had assembled and he should come there. When he reached that building, he noticed that a grill of Flat No.5 situated on the first floor was broken and the sliding glass of the window was open and a foul smell was coming from the said Flat. He therefore informed PSI Bhosle about the incident at about 8.40 P.M. The staff of Bandra Police Station reached there and found the flat to be closed. The door was forcibly opened. It was found that one boy, aged 5 years was present in the house alongwith two dead bodies, one of Hanif Baig and the other was

of Zarina Baig. It was noticed that both the dead bodies were in the pool of blood. The flat was ransacked. The cupboards were found open and other articles were scattered. It was noticed that screw driver, blade, one ball pen and a piece of news paper were lying at the spot. On the basis of oral report of P.W.2, an offence came to be registered vide Crime No.93 of 2002.

4] During investigation, P.W.21 – Mr. Kisan Shengal, Investigation Officer, received an information from Khar Police Station on 30/03/2002 that, the Accused in the present crime were arrested by Khar Police Station. On obtaining the production warrant, present Appellants were brought to the Police Station and taken in custody. It is the prosecution case that Accused No.2 - Vijay Kumar Ramprasad Chaudhari made disclosure statement under Section 27 of the Indian Evidence Act and on the basis of the said memorandum, the articles which were stolen from the house of the deceased were recovered and seized. It is the prosecution case that, on the basis of the memorandum, the clothes which were used by Accused No.2 at the time of crime were also recovered from the laundry. The articles so seized i.e. jewelry, according to the prosecution, have been identified

by P.W. 13 – Mrs. Ayesha Baig, who is sister of the deceased Hanif Baig and sister-in-law of the deceased Zarina Baig.

5] Upon completion of the investigation, charge-sheet came to be filed in the Court of learned Metropolitan Magistrate. Since the case was exclusively triable by the learned Sessions Judge, it came to be committed to the learned Sessions Judge. The learned Sessions Judge framed charges below Exhibit-11 for the offence punishable under Sections 302, 392, 394 read with Section 397 of the Indian Penal Code. The Accused pleaded not guilty and claimed to be tried.

6] At the conclusion of the trial, the learned Sessions Judge convicted the appellants/accused for the offence punishable under section 460 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for seven years and to pay fine of Rs 500/- and in default of payment of fine to further suffer rigorous imprisonment for one year. The accused were also convicted for the offence punishable under Section 397 read with Section 34 of the Indian Penal Code and were sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs 500/- and in default of payment of fine to

suffer further rigorous imprisonment for one year. The accused were also convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs 1000/- and in default of payment of fine, to further suffer rigorous imprisonment for three years.

7] Being aggrieved thereby, the present two appeals are filed by both the original Accused.

8] None is present on behalf of the Appellants. We have heard Mr. Patil, learned APP appearing on behalf of the State. Learned APP submitted that, the learned Sessions Judge has given sound and cogent reasons for holding that, the Accused have committed the crime in question. He submitted that, P.W.1 – Ibrahim Baig, son of the deceased persons, has identified Accused No.2 as the person who had assaulted the deceased persons. He further submitted that, the Memorandum under Section 27 and subsequent recoveries made pursuant to the said Memorandum under Section 27, of the jewelry and other articles as well as weapons used in the crime, would clearly

show that it is the present appellants who have committed the crime.

9] Since, none is appearing on behalf of the Appellants, we have scrutinized the entire evidence with the assistance of the learned APP.

10] Perusal of the evidence would reveal that except evidence of P.W.1 – Ibrahim Baig, the case is one which would rest on circumstantial evidence. P.W. 1- Ibrahim Baig had identified only Accused No.2. It is to be noted that, at the time of incident, P.W. 1 – Ibrahim Baig was aged five years. No doubt, that merely because the witness is a child witness, cannot be a ground for discarding his testimony. However, evidence of child witness will have to be scrutinized with greater caution and circumspection and reliance could be placed on such evidence only if such evidence is found to be trustworthy, reliable and cogent. No doubt, that in his examination-in-chief, P.W. 1 has stated that he has identified Accused No.2 – Vijay Kumar Ramprasad Chaudhari in the test identification parade. However, in his cross-examination, he has also admitted that the Police Personnel were present when the test identification parade was being held. It would also be relevant to peruse the testimony of P.W.

12 - Mrs. Kavita Lodricks, Special Executive Officer, who has

conducted the test identification parade. The perusal of her cross-examination would reveal that, it was her first test identification parade which was conducted by her and, prior to that, she had not conducted the test identification parade. Her evidence would further reveal that, though this witness has admitted that physical features of both the Accused were different, dummies which were kept in the identification parade for both the accused were same, particularly in view of the fact that it was the first test identification parade conducted by P.W.12 and also in view of admission of P.W. 1 – Ibrahim Baig in his cross-examination that Police Personnel were present when the test identification parade was being carried out, we find that it would not be safe to rely on such identification parade.

11] In that view of the matter, the case is clearly based on circumstantial evidence. Their Lordships of the Supreme Court in the case of *Sharad Birdichand Sarda vs. State of Maharashtra*<sup>1</sup>, have substantially laid down the principles which are to be followed while considering the case based on circumstantial evidence. It would be relevant to refer to the following paragraphs from the said judgment:-

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1 (1984) 4 SCC 116

“153. A close analysis of this decision show that the following conditions must be fulfilled before a case against an accused can be said to be fully established.

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

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade & Anr v. State of Maharashtra where the following observations were made:

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and must be' is long and divides vague conjectures from sure conclusions.”

(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.

154. These five golden principles, if we may say so, constitute panchsheel of the proof of a case based on circumstantial evidence.”

Following the observations of Their Lordships, it can thus be clearly seen that, for resting the conviction based on circumstantial evidence, the prosecution will have to establish each and every circumstance beyond reasonable doubt. Not only that, the prosecution will have to establish the chain of proven circumstances which lead to no other conclusion than that of the guilt of the accused. As held by Their Lordships, hypothesis inconsistent with the guilt of the Accused will have to be ruled out. As has been held by Their Lordships, there is not only grammatical distinction between “may” and “must” but also a legal distinction. A suspicion, howsoever strong, cannot be substituted for a case proved beyond reasonable doubt.

12] In the light of these guiding principles, we have to examine the

evidence, as led by the prosecution in the present case.

**13]** Perusal of evidence of P.W. 21 – Mr. Kisan Shengal, Investigating Officer, would show that he had received information from Khar Police Station that the Accused who were involved in the present crime were arrested by them. However, the prosecution has placed nothing on record to show as to how the aforesaid two persons were arrested by Khar Police Station and as to on what basis they came to know that the present Appellants were also involved in the present crime.

**14]** The main circumstance on which the prosecution relies is memorandum under Section 27 of Accused No.2 to the effect that he had stolen earrings of the deceased and that he was ready to produce the same. However, the evidence of panch witness as well as Investigating Officer would reveal that, the statement that was made by Accused No.2 was that he had kept the said earrings with one Mr. Rathod. After the memorandum was recorded, police party and panch were led by Accused No.2 to the place where they met one Rathod. He took them to P.W. 9 - Manju Gupta. The perusal of panchanama

would reveal that P.W.9 – Manju Gupta had brought the said ornaments from inside her house and gave it to the Investigating Officer. It could thus be clearly seen that, the prosecution has failed to prove that the said articles were seized from the place which was exclusively within the knowledge of Accused No.2. P.W. 9 – Manju Gupta has turned hostile and not supported the prosecution case. In any case, evidence of P.W. 13 – Mrs. Ayesha Baig as well as evidence of Investigating Officer, would reveal that it cannot be held beyond reasonable doubt that the the said ornaments were stolen from the house of the deceased persons. It could be seen that the Investigating Officer as well as P.W. 13 – Mrs. Ayesha Baig, sister of the deceased Hanif Baig and sister-in-law of the deceased Zarina Baig, have clearly admitted that neither in the First Information Report nor in the statement of P.W.13 recorded under Section 161 of IPC, there is mention with regard to the stolen articles. As such, only on the basis of evidence of P.W.13 of identifying the said jewelry after its seizure, to be one belonging to deceased persons, cannot be said to be the circumstance proved beyond reasonable doubt, that the said jewelry belonged to the deceased persons. In any event, we have already observed hereinabove that, the memorandum under Section 27 and

consequent recovery cannot be said to be the circumstance proved beyond reasonable doubt against Accused No.2. Insofar as other recoveries are concerned, the same are also from places which are open and accessible to one and all. As such, no reliance could be placed on the said recoveries.

15] In that view of the matter, we find that the conviction as recorded would not be sustainable since the prosecution has not been in a position to establish the incriminating circumstances beyond reasonable doubt. In any case, the prosecution has failed to establish the chain of proven circumstances which leads to no other conclusion than that of the guilt of the Accused. We may also observe that, though there may have been some material in the form of identification parade against Accused No.2, the conviction recorded by the learned Sessions Judge insofar as Accused No.1 is concerned is wholly based on conjecture and surmises.

16] We therefore pass the following order :-

**ORDER**

In the result, both the appeals are allowed. The Judgment and Order of conviction and sentence is set aside. The Appellants/Accused are acquitted of the charges levelled against them. Appellants/Accused are directed to be released forthwith, if not required in any other case.

**(SARANG V. KOTWAL, J.)**

**(B. R. GAVAI, J.)**