

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,

NAGPUR BENCH, NAGPUR

CRIMINAL APPEAL NO.471 OF 2009

State of Maharashtra,
through Police Station Officer,
Police Station, Ganeshpeth,
Nagpur.

..... **APPELLANT**

// VERSUS //

1. Rajendra Gulabrao Boldhan,
Aged about 38 years, r/o.
Chhaoni Police Quarter,
Nagpur.
2. Jiralal Narmadaprasad Dubey,
Aged 40 years, r/o. Gandhibag
Policy Colony, Nagpur.
3. Arvind Pralhadrao Saraf,
Aged 47 years, r/o. Jawahar
Nagar, Manewada Road,
Nagpur.

4. Vasant Kawaduji Ade,
Aged 51 years, r/o. Buldhana,
Distt. Buldhana.

..... RESPONDENTS

Mr.T.A.Mirza, A.P.P. for Appellant/State.
Mr.R.M.Daga, Advocate for Respondent Nos. 1 & 2.
Mr.C.H.Jaltare, Advocate for Respondent Nos. 3 and 4.

CORAM : B.R.GAVAI
AND
M.G.GIRATKAR, JJ.

DATED : 20TH MARCH, 2018.

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

1. Present appeal filed by the State takes an exception to the Judgment and Order passed by the learned Sessions Judge in Sessions Trial No.229 of 2005 acquitting the respondents/accused of the offences punishable under Sections 304 Part-I and 109 r/w. 34 of the Indian Penal Code.

2. The prosecution case, as could be gathered from the material placed on record, is thus :

On 28.10.2003, all the accused were posted in Police Station, Ganeshpeth. Accused no.1 Rajendra Gulabrao Boldhan was posted as a Constable, accused no.2 Jiralal Narmadaprasad Dubey was posted as a Head Constable. Accused no.3 Arvind Pralhadrao Saraf was posted as a Police Sub-Inspector and accused no.4 Vasant Kawaduji Ade was posted as a Police Inspector. At around 6.00 p.m., accused no.3 Arvind received a telephonic intimation from Police Control room, Nagpur that quarrel was going on near Bajpeyee Temple in Bajeria, Nagpur and therefore, staff should be deputed to the spot. Accordingly, accused no.3 Arvind took entry of the intimation in the station diary and then sent accused no.1 Rajendra and accused no.2 Jiralal to the spot in the vehicle driven by police driver Purushottam Madavi. Both these accused went to the spot and took Manoj Varma in their custody and took him to the Police Station and produced him before accused no.4 Vasant, who was Police Station Officer, Ganeshpeth Police Station. After making inquiry, he handed over said Manoj Varma to accused no.3 Arvind, who was on duty as a Day Officer. Accused no.3 Arvind sent said Manoj along with accused no.1 Rajendra and Police Constable Subhash to Medical College for medical examination. An entry in the Station Diary to that effect was taken. Manoj was examined by Casualty Medical

Officer Dr.Pramod Revale (PW-7). He found that Manoj Varma had no external injury on his body and had no complaint about his health. Accordingly, Dr.Revale issued Certificate. Thereafter, Manoj was brought back to Police Station along with Medical Certificate on the same day, at around 8.00 p.m. On the basis of report lodged by informant Rajesh Yadao, offences punishable under Sections 294 and 506 of the Indian Penal Code came to be registered against said Manoj Varma. He was arrested and kept in the lock-up.

3. At around 8.15 p.m., Manoj Varma made a complaint that he had pain in his chest and therefore, accused no.3 Arvind took entry thereof in the station diary and sent Manoj Varma to Medical College Hospital, Nagpur for medical examination along with accused no.2 Jiralal. At around 9.30 p.m., the Medical Officer in the Medical College Hospital, Nagpur declared Manoj Varma as dead. Accordingly, on the basis of information received from accused no.2, an entry with regard to accidental death came to be recorded. Thereafter, Sujit Varma, brother of deceased lodged report in Police Station, Ganeshpeth at about 10.45 p.m. on 29.10.2003. On the basis of that report, offence against four unknown persons was registered

in Police Station, Ganeshpeth. Investigation was carried out by Mr.V.P.Shirbhate, Dy.S.P., C.I.D., Nagpur.

4. On the basis of requisition to the Medical College Hospital, Nagpur, autopsy was conducted on the body of deceased Manoj Varma. Four external injuries were found on his body. The Medical Officer gave the opinion that the deceased died due to head injury. A Board of experts was also established to submit the report in the matter. The Board gave the opinion that if the head of a person is banged against hard and blunt surface with considerable force, internal injury can occur. On the basis of report of Investigating Officer, offence came to be registered against the aforesaid four accused persons. Further investigation was carried out by the Deputy Superintendent of Police Shirbhate. After completion of investigation, charge sheet came to be filed before the Court of learned Judicial Magistrate, First Class, Nagpur. Since the case was exclusively triable by the learned Sessions Judge, the same came to be committed to the Sessions Court, Nagpur. Learned trial Judge framed charge below Exh.5. The accused pleaded not guilty and claimed to be tried.

5. Mr.T.A.Mirza, learned A.P.P. appearing on behalf of State submits that when the evidence of Dr.Pramod Revale (PW-7), who had examined the deceased after he was arrested, shows that he did not have injuries, then the onus is shifted on the present respondents/accused to discharge the burden of proving as to how the death of deceased had occurred. Learned A.P.P. submits that the deceased was throughout in the company of accused persons. It is further proved that his death is homicidal. It is, therefore, submitted that when the death is caused in the custody of accused, it was for the accused to have discharged the burden of proving as to how the death occurred. It is submitted that, on failure to discharge the said burden, the appeal deserves to be allowed and the accused deserve to be convicted of the charges charged with.

6. Learned Counsel Mr.Jaltare and Mr.Daga, appearing on behalf of the accused, on the contrary, submit that the learned trial Judge has given sound and cogent reasons for acquitting the accused and as such, no interference is warranted in the present appeal.

7. The scope of interference in an appeal against acquittal is very well crystalised. Unless finding is found to be perverse or impossible, it is not possible for this Court to interfere with the same.

8. Learned trial Judge, after considering the evidence of witnesses, who are relatives of the deceased, as well as the evidence of Purshottam (PW-12) and Rajesh (PW-6) has come to the conclusion that prosecution has failed to prove that the deceased was beaten by accused while he was brought in a police jeep to Police Station. We find that even the evidence of Dr.Revale (PW-7) who had examined the deceased after his arrest, would fortify the said finding. Dr.Revale (PW-7) specifically states that, on examining the deceased, at around 7.30 p.m., he found no injury or external mark on his body. He has also stated that the deceased had told that he had no complaint.

9. The evidence of Manisha Dhawane (PW-10) would reveal that, after receipt of information at the Police Station, accused no.3 Arvind had sent accused no.2 Jiralal and accused no.1 Rajendra to Bajeriya area. After sometime, they brought the deceased to Police Station and produced him before accused no.4 Vasant Ade. The

evidence of Manisha (PW-10) further shows that thereafter Manoj was sent for medical examination to Medical College. Though she does not specify the time when Manoj was brought back, she states that she had taken entries in the Arrest Register and Lock-up Register about the arrest and about putting Manoj Varma in the lock-up as per the directions of accused no.3 Arvind. She further states that, thereafter, Manoj was abusing from the lock-up. Thereafter, after sometime, she heard shouts that Manoj Varma fell down. Thereafter, accused no.3 Arvind ran towards the lock-up and he sent Manoj for medical examination. In her cross-examination, she has admitted that nobody had beaten Manoj. It could thus be seen that, the injury which has caused death of deceased, had occurred between the period when the deceased was brought to the lock-up after his medical examination by Dr. Revale (PW-7) and when Manisha (PW-10) heard the shouts that Manoj had fallen down and was taken to the Medical Hospital where he was declared dead.

10. Nodoubt that the learned A.P.P. is right in contending that if it is proved that the deceased was in the custody of the accused, then burden would shift on the accused persons to explain as to how death of the deceased had occurred.

11. The Apex Court in the case of **Vikramjit Singh .vs. State of Punjab**, 2006 (12) SCC 306 : [2007 ALL SCR 2094], has held that, before the burden shifts on the accused persons under Section 106 of the Evidence Act, 1872, prosecution is initially required to discharge it's burden. We find that, in the present case, unless prosecution proves that, during the aforesaid period, which we have mentioned in the foregoing paragraphs, deceased was exclusively in the company of the accused persons, the burden would not shift on the accused persons.

12. It will be relevant to refer to the evidence of Surajpalsingh Harasingh Rajput (PW-13), who was posted as a Head Constable in Police Section, Ganeshpeth on the relevant date. He states that, on 28.10.2003, he was helping PSI Salunke in the investigation in Crime No. 196 of 2003. He states that, he had taken four accused that day in the Court for obtaining their P.C.R. and their names were Sukhdeo Kaikade, Kawadu Padole, Shahu Borkar and Suresh Kawale. He further states that P.C.R. was granted till 1.11.2003. He further states that thereafter they took these four persons in the lock-up at about 7.50 p.m. The entries of putting them

in the lock-up were taken in the lock-up register. He further states that when those four persons were put in the lock-up, there was no other person in the lock-up.

13. In the cross-examination, Vasant Pundlikrao Shirbhate (PW-19), who was posted as a Dy.S.P., C.I.D., Nagpur at the relevant time, has stated that deceased Manoj Varma was put in the lock-up after required entries were taken for the same. He has further admitted that, before he was put up in the lock-up, four other accused in other crime were in that lock-up. He has further admitted that it is true that he had recorded statement of four inmates of the lock-up to verify whether there was beating to Manoj Varma in the lock-up and the names of those inmates were Shahurao Borkar, Suresh Kawle, Sukhdeo Kaikade and Kawdu Padole. He further admits that statements of these persons show that there was no beating to Manoj in the lock-up.

14. It could thus be seen from the evidence of prosecution witnesses itself, that the deceased was in the lock-up along with four other inmates, who were accused in another crime. We find that prosecution has utterly failed to establish that, during the relevant

period, when the injury was caused to the deceased, which has resulted in his death, the deceased was exclusively in the company of the accused persons.

15. We are of the considered view that unless prosecution had discharged its burden of proving that, during the period when the appellant was brought to the lock-up room after his examination by Dr.Revale (PW-7) and the period when Manisha (PW-10) notices the sound of his falling down, the deceased was solely in the company of accused, the burden would not have shifted to the accused persons. We are of the considered view that prosecution has failed to discharge the said burden.

16. In the result, no perversity or impossibility could be found with the approach adopted by the learned trial Judge warranting interference. Hence, the appeal is dismissed.

JUDGE

JUDGE

[jaiswal]

