

IN THE HIGH COURT OF BOMBAY AT GOA***CRIMINAL APPEAL NO.28 OF 2017***

Snehal Dias,
s/o Vincent Dias,
R/o H.No.91/1,
Non Mon, Vasco Goa.
Presently undergoing sentence
at Central Jail, Colvale. ... Appellant

Versus

S T A T E
Through P.P.
High Court of Bombay at
Panaji Goa. ... Respondent

Mr. Arun Bras De Sa with Mr. Siddesh Shet, Advocates for the Appellant.

Mr. S. R. Rivankar, Public Prosecutor for the Respondent.

***Coram : M.S. Sonak &
Nutan D. Sardesai, JJ.***

Reserved on : 20th July, 2019

Pronounced on : 9th August, 2019

JUDGMENT (Per M. S. Sonak, J)

This appeal is directed against the judgment and order dated 28th February, 2017 / 2nd March, 2017 passed by the Court of the Special Judge, NDPS, Mapusa, in Sessions Case No. 38/2010 (Old) renumbered as Sessions Case No.18/2016 (New), by which

the Appellant herein was convicted for the offence of murder punishable under Section 302 of the Indian Penal Code (IPC) and sentenced to life imprisonment and to pay a fine of ₹25,000/- and in default to undergo rigorous imprisonment for a period of two months. The appellant was also convicted for the offence of robbery under Section 392 of IPC and sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of ₹10,000/- and in default to undergo rigorous imprisonment for two months. Since the appellant was arrested on 03/09/2010 and has been in custody since the said date, the appellant was held entitled to the benefit of set off in terms of law. Besides, it was directed that the substantive sentences were to run concurrently.

2. The case of the prosecution is that, on 2nd August, 2010 prior to noon, the appellant murdered Naresh Dourado by stabbing him with knife and robbed his car, laptop, hard disc, music speaker etc. Accordingly the appellant was charged for offence punishable under Sections 302 and 392 of IPC and by the impugned judgment and order, the learned Sessions Judge had convicted and sentenced the appellant. Hence the, present appeal.

3. Mr. Arun Bras De Sa, learned Counsel for the appellant has assailed the conviction on various grounds. He submits that since this was a case based on circumstantial evidence, the principles

relating to evaluation of circumstantial evidence ought to have been followed but have not been followed by the learned Sessions Judge. He submits that the recoveries of certain incriminating articles have not at all been proved and in any case, based upon such recoveries, the appellant could never have been convicted for offences under Sections 302 and 392 of IPC.

4. Mr. De Sa submits that the circumstance relating to DNA profiling, has not at all been established. He submits that there is no dispute that the blood group of the appellant and the deceased is one and the same. He submits that Pancha witness Stanley Fernandes (PW5) has nowhere deposed to the collection and sealing of sample from the washroom of the apartment where the crime is alleged to have been committed. He submits that there are serious discrepancies in the version of Investigating Officer (PW54) and the Forensic expert (PW45). He submits that there is no evidence as to when the appellant was precisely arrested, may be in connection with a separate case, before his custody was transferred to hold investigation in the present case. He submits that medical examination reports at the time of appellant's first arrest, have been suppressed by the prosecution. He submits that the so called old injuries on the person of the appellant have no nexus whatsoever with the crime in question. He submits that all this calls for drawal of adverse inference against the prosecution. In

any case, he submits that on the basis of all these it cannot be said that the circumstance relating to DNA profile stands proved.

5. Mr. De Sa, submits that there was no good ground to declare Xavier Koshy (PW19) as hostile. In any case, the prosecution, even after declaring him hostile, has not made dent to his testimony which is clear, cogent and offers alibi to the appellant. He submits that the appellant's specific defence of being alongwith PW19 raised in the course of record of his 313 Cr.P.C. statement, has been totally ignored by the learned Sessions Judge. He submits that the total non-consideration of such defence vitiates the impugned judgment and order and the conviction recorded therein.

6. Mr. De Sa submits that the crucial call detail records though called for, were not tendered in evidence. He submits that even this calls for drawal of an adverse inference. He submits that the aspects that the appellant and the deceased were known to each other or that this was not the case of any forcible entry at the apartment where the alleged crime took place or that the circumstance of '*last seen*' was absent, have been completely ignored by the learned Sessions Judge. He submits that all this vitiates the conviction recorded against the appellant.

7. Mr. De Sa, submits that the so called recoveries do not

attract the provisions of Section 27 of the Evidence Act. He submits that even the factum of recovery is not at all established as required under law. He submits that there are gross discrepancies, contradictions and omissions brought on record to which, the learned Sessions Judge has not paid sufficient regard. He submits that the conviction is based, at the highest, on suspicion, when it is settled law that mere suspicion can never take place of proof. For all these reasons, Mr. De Sa, submits that the impugned judgment and order and the conviction recorded therein deserves to be set aside.

8. Mr. Rivankar, learned Public Prosecutor defends the impugned judgment and order on the basis of reasoning reflected therein. In particular, he emphasizes upon the circumstance of DNA profiling to submit that this is clinching evidence linking the appellant with the crime. He submits that minor discrepancies like reference to bandage and not a gauze, are liable to be ignored and have been rightly ignored by the learned Sessions Judge. He submits that the appellant has offered no explanation for this clinching circumstance in his statement recorded under Section 313 of Cr.P.C. He submits that on the basis of this circumstance alone, the conviction, is required to be upheld.

9. Mr. Rivankar, submits that recovery of stolen articles

belonging to the deceased is yet circumstance, which has rightly been held against the appellant by the learned Sessions Judge. He submits that the circumstance, which has been proved by the prosecution beyond reasonable doubt, in any case, corroborates the evidence based upon the DNA profiling. Mr. Rivankar, again submits that minor discrepancies here and there or minor flaws in the investigation process, are by no means sufficient to overturn the conviction recorded by the learned Sessions Judge. He submits that if the evidence on record is considered in its totality, then, the same is more than sufficient to sustain the conviction recorded against the appellant. For all these reasons, Mr. Rivankar, submits that this appeal be dismissed.

10. Mr. De Sa relied upon several rulings of the Hon'ble Apex Court and of this Court in support of his contentions. Relevant out of such rulings will be considered in the course of this judgment and order.

11. Mr. Rivonkar relied on *Dharam Deo Yadav Vs State of U. P.*¹ and *Rohtash Kumar Vs State of Haryana*² in support of his contentions, which will be considered in the course of this judgment and order.

1(2014) 5 SCC 509

2(2013) ALL MR (Cri.) 2620 (S.C.)

12. The rival contentions now fall for our determination.

13. In this case, the charge was framed by the learned Sessions Judge on 24th January, 2011 and the same reads thus :

CHARGE

(Sections 221, 222, 223 Cr. P.C.)

I, Smt. Vijaya D. Pol, Additional Sessions Judge, FTC-I, South Goa, Margao, hereby charge you Snehal Dias r/o Non-Mon, Vasco-da-Gama, Goa as follows :

That you on 02.08.2010 prior to 12.55 hours at Flat No.5, Shalom Crest Building, Chicalim, Vasco did commit murder by intentionally causing the death of Naresh Dourado with knives on his body causing him multiple stab injuries and thereby committed an offence punishable under Section 302 I.P.C. and within the cognizance of this Court.

That you, on the same day and aforesaid time and at the same place, after committing the murder of Naresh Dourado, committed theft of Laptop make Toshiba, Bose Woofer, Nokia Mobile Phone, Hard Disk, Vivitar Camera, Computer Ram from the said flat and fled away with Chevrolet grey colour car bearing No.GA-06-D-4306 belonging to the deceased and all the property worth Rs.4 lakhs to Rs.5 lakhs, approximately and thereby committed offence punishable under Section 392 IPC and within the cognizance of this Court.

And I hereby direct that you be tried by this Court on the said charge.

14. Upon the appellant's pleading “not guilty”, the Trial commenced, in which the prosecution examined, in all, 54

witnesses. The statement of the appellant under Section 313 of the Criminal Procedure Code (Cr.P.C.), was recorded in which he claimed that he is falsely implicated in the matter and that he was alongwith Xavier Koshy (PW19) at the time the prosecution alleges, the crime took place. There was no defence evidence on behalf of the appellant. The learned Sessions Judge, as noted earlier, vide impugned judgment and order, has convicted the appellant for offence punishable under Sections 302 and 392 of IPC. Hence, the present appeal.

15. There is no dispute that there were no eye witnesses to the crime. The prosecution rests its case entirely upon the circumstantial evidence. The learned Sessions Judge, in the impugned judgment and order, has made reference to the following circumstances relied upon by the prosecution :

- “(A) Recovery of car of the deceased;*
- (B) Recovery of key of the car at the instance of the appellant;*
- (C) Recovery of laptop, hard disc, cell phone and sim card at the instance of the accused;*
- (D) Existence of injuries on the accused; and*
- (E) Finding of blood of appellant at the scene of offence.”*

16. From out of all the aforesaid circumstances, maximum emphasis was laid by Mr. Rivankar, on the circumstance (E) i.e.

finding of blood of appellant at the scene of offence. Accordingly, we deem it appropriate to advert to this circumstance, at the very outset.

17. In order to establish the aforesaid circumstance, the burden is upon the prosecution to establish the following :-

- “(a) that the appellant was indeed present at the scene of offence where the murder took place;*
- (b) that the appellant suffered injuries at the scene of offence and consequently some of his blood spilled at the scene of offence;*
- (c) that the sample of this blood was collected by the prosecution from the scene of offence, in the presence of independent pancha and was properly sealed;*
- (d) that the blood on the sample, matches with that of the appellant, either on the basis of blood group or DNA profiling.”*

18. Mr. Rivankar has relied upon ***Dharam Deo Yadav Vs State of Uttar Pradesh*** to emphasize upon conclusive nature of DNA test. On the other hand, Mr. De Sa, had relied upon a decision of this Division Bench of this Court in ***Jitendra Gabhane Vs. State of Maharashtra*** disposing of Criminal Appeal No.200 of 2016 on 4th October, 2017. Mr. De Sa, pointed out that before any reliance can be placed on DNA test, it is necessary for the prosecution to establish the purity of the process of leading to the collection of the sample and testing of the sample. He submits that the prosecution has to rule out the possibility of tampering in such

matters.

19. In *Dharam Deo Yadav* (supra), the Hon'ble Apex Court, has held that in criminal cases, especially based on the circumstantial evidence, forensic science plays a pivotal role, which may assist in establishing the element of crime, identifying the suspect, ascertaining the guilt or innocence of the accused. Therefore the Investigating Officer has to deal with the scene of crime in a scientific manner and guard against potential contamination of physical evidence which can be found during the process of collection, packing and forwarding of sample. Subject to fulfillment these contentions, the Hon'ble Apex Court has held that the evidence of DNA profile is entitled to great weightage. In *Jitendra Gabhane* (supra), the Division Bench of this Court has held that in order to convict a person on the basis of DNA profiling, it is absolutely necessary that the collection of samples and quality control regards testing is to be of the highest standard. Any material on record creating a doubt about the purity of sampling or testing standards or creating a doubt on the tampering of a sample, would render the DNA profile quite doubtful and therefore, it would be unsafe to base any conviction upon such basis. According to us, the principles set out in both these decisions will have to be applied to the facts and circumstances of the present case in order to evaluate the evidence relating to DNA profiling.

20. Admittedly, in the present case, the blood group of the deceased and the blood group of the appellant is one and the same. Therefore, quite correctly and fairly even Mr. Rivonkar, agreed that the results of the blood grouping will not assist the prosecution case. Mr. Rivankar, however focused about MO-20 which is the sample of which the DNA profiling was undertaken at the forensic laboratory, to which it was referred.

21. Mr. Rivankar, submits that MO-20 is the bandage upon which the blood was scratched and collected in the washroom of the crime scene. He submits that the CFSL report conclusively establishes on the basis of DNA test that the blood found on this sample is the blood of the appellant. Mr. Rivankar, points out that the appellant has offered no explanation for this vital circumstance in his 313 Cr.P.C. statement. Mr. Rivankar, submits that this is a circumstance which clinches the guilt of the appellant and the conviction recorded by the learned Sessions Judge is required to be sustained on the basis of this circumstance alone. He submits that there are other circumstances as well, which corroborate this vital circumstance.

22. In support of the circumstance of DNA profiling, the prosecution has examined the following witnesses:

- (i) Stanley Fernandes (PW5), a panch at the scene of crime;

- (ii) PI Braz Menezes (PW54), the Investigating Officer;
- (iii) Shri S. Sathyan (PW45), Scientist "B" Biology division, CFSL, Hyderabad.
- (iv) Dr. Avinash Pujari (PW27), the Doctor who examined the appellant in the context of certain injuries on the person of the appellant.

23. As noted earlier, it is for the prosecution to establish that the appellant was indeed present at the scene of the offence at or around the time of the crime. None of the aforesaid witnesses have deposed to this aspect as admittedly, this is not a case of direct evidence. However, even if this aspect is for a moment presumed in favour of the prosecution, the prosecution has to then establish the appellant suffered injuries at the scene of the offence and consequently, some of the blood spilled at the scene of the offence. Again, as we shall discuss hereafter, there is no cogent evidence on the basis of which it can be said that the prosecution has discharged the burden on this aspect. However, even if this aspect is presumed in favour of the prosecution, the prosecution has to further establish that the sample of the spilled blood was indeed collected by the prosecution from the scene of the offence in the presence of any independent panch and was appropriately sealed. It is only thereafter, if the DNA profile of this sample matches with the admitted DNA profile of the appellant, can it be said that the prosecution has successfully discharged the burden so as to shift the onus upon the appellant, to explain this vital circumstance.

24. Insofar as the issue of collection of sample from the scene of the offence is concerned, it is necessary to look to the testimony of Stanley Fernandes (PW5), who is the only independent panch examined by the prosecution, upon this aspect. PW5 has deposed that there were grey shorts and white T-shirt with blood stains found in the washroom of the apartment where the murder took place and these items were duly attached and sealed in his presence. He has deposed that some hair was found in the trap of the floor of the washroom which was also attached and sealed. He has deposed that blood stains were scratched from the floor of the dining room which were again attached and sealed. He has deposed that clothes, wallets, plastic and steel cups, cigarette butts, weighing scale, bed sheet having blood, a blade of knife without handle, Toshiba box with blood stains, Goldflake empty cigarette packets were also attached and sealed in his presence. After having deposed in great details about the objects/material which were attached from the scene of offence in his presence, PW5 then made the following vague statement in his deposition:-

“ There were some other items also attached under the panchanama which I do not remember now”.

25. The prosecution, as noted earlier, has relied upon the M.O. 20 (Exhibit 20) which was supposed to be a bandage on which dry blood from the washroom of the apartment where the murder took place was collected, sealed and sent for DNA profiling.

Consequently, PW5, who is the only independent panch examined by the prosecution in the context of the scene of the offence punchanama, has made no reference to the collection of any dry blood from the washroom upon a bandage and its consequent attachment and sealing in form of Exhibit 20 or MO 20. Since PW5 deposed in substantial detail to the collection, attachment and sealing of several objects/ material from the scene of crime, it is reasonable to proceed on the basis that PW5 would have definitely made a reference to the collection, attachment and sealing of the dry blood on the washroom on the bandage. However, PW5, quite conspicuously makes no reference to the scrapping of dry blood upon a bandage and its consequent attachment and sealing. Since, so much emphasis is laid upon the circumstance arising out of DNA profiling, the prosecution, was duty bound to establish that the sample in question was indeed collected, attached and sealed from the scene of crime. The second independent panch witness was never examined by the prosecution. Only, at the later stage of the evidence, PW5 was shown MO 20 for identification of signature. This means that there is no clear and independent evidence on the aspect of collection of the sample from the scene of offence.

26. PI Braz Menezes (PW54) who is an official witness did depose that the dry blood was found on the floor of the toilet cum

bathroom, was scrapped and collected on the bandage and thereafter attached and sealed. However, as noted earlier, this aspect was not deposed to by the only independent panch examined on behalf of the prosecution. Secondly, there is variance between the testimony of the PW54 and the testimony of Shri S. Sathyan (PW45), the forensic expert examined by the prosecution to establish DNA profile, on certain crucial aspect of this sample.

27. PW54 has very categorically deposed to the dry blood being collected on a bandage. PW45, who is a forensic expert, has categorically deposed that the sample in M.O.20 was not a bandage but was a gauze piece. PW54 had deposed to collection of dry blood on a bandage. However, PW45, the forensic expert has categorically deposed that M.O. 20 is "*stain on the cotton gauze*". PW54 had deposed that he had scrapped the dried blood from the toilet floor and collected the scrapping on a bandage. PW45, a forensic expert has however categorically deposed that M.O. 20 was a swab and not a scrapping.

28. The aforesaid means that PW54 had deposed that M.O.20 was a bandage on which dry blood, which was scrapped from the toilet floor, was collected, attached and sent for testing. In contrast PW45, the forensic expert has deposed that the sample on which he performed the test was not a bandage but a cotton gauze,

on which there was no dried blood but there were blood stains and further, the sample was not a scrapping. Mr. Rivankar, chose to style these discrepancies as minor and of no consequence. However, now that the prosecution seeks to lay such great emphasis on the DNA profiling circumstance, we cannot say that this discrepancies are minor or inconsequential. In any case, as between the evidence of PW54, an official witness and PW45, the scientific expert, greater credence will have to be given to the testimony of PW45. This, coupled with the testimony of the only independent panch examined by the prosecution (PW5) renders it extremely unsafe to hold that the prosecution has established beyond reasonable doubt the circumstance relating to the collection of the blood sample from the scene of offence.

29. Even if we were to extend further latitude to the prosecution, there is a gaping hole in the case of the prosecution when it comes to establishing the injuries on the person of the appellant or the circumstance that the blood found at the scene of offence was spilled on account of the injuries sustained by the appellant at the scene of the offence. This gaping hole arises from the failure of the prosecution to state the precise date on which the appellant was arrested and to produce on record the copy of the medical examination report obtained at the time of the appellant's arrest, may be, in some different case.

30. Admittedly, the date and timing of the murder according to the prosecution is either the night intervening 1st and 2nd August, 2010 or at the highest the morning of 2nd August 2010. The charge framed against the appellant is a little vague, inasmuch as it refers to the crime being committed on 2nd August, 2010 “*prior to 12.55 hours*”.

31. The Investigating Officer (PW54) has clearly deposed that on 2nd September, 2010 i.e. almost one month after the date of the crime, a letter was addressed by him to the JMFC, Vasco seeking directions to the Judicial Sub-Jail at Sada to handover the custody of the appellant, since, the appellant was arrested in some other case. This deposition is to be found at page 620 of the paper book in this appeal.

32. The prosecution in this case, has not brought any material on record to indicate the precise date on which the appellant was arrested in some other case and lodged at the Sub-Jail at Sada. One of the documents did make a vague reference to the appellant being in the Sub-Jail at Sada from 23rd August, 2010. Mr. Rivankar, also attempted to make a reference to the case diary which is really not a part of record in this case to suggest that the appellant was in fact arrested on 16 August, 2010.

33. According to us, the prosecution was required to come clean on the precise date of the appellant's arrest. This date can be any date between 2nd August and 23rd August, 2010 or 2nd August and 16th August, 2010. Besides, it was a duty of the prosecution to have placed on record the medical examination report of the appellant, when the appellant was referred for medical examination at the time of his arrest on some date between 2nd August, 2010 and 23rd August, 2010. This medical examination report would have clearly thrown light upon the injuries on the person of the appellant and the possibility of connecting such injuries with the blood allegedly found in the toilet of the scene of offence in the present case. However, the prosecution, has not bothered to place the evidence on the aspect of precise date of arrest of the appellant and the evidence in the form of medical examination report of the appellant and at the time of such arrest. According to us Mr. De Sa, is right in submitting that an adverse inference is liable to be drawn against prosecution in this regard.

34. Mr. De Sa, submits that if the medical examination report were to indicate that there were no injuries on the person of the appellant or there were no injuries having nexus with the spilled blood, obviously, there was no question of linking the spilled blood with the appellant. In the peculiar facts and circumstances of the present case we are constrained to accept this contention of Mr. De

Sa on the aspect of adverse inference. This is because even the evidence of Dr. Avinash Pujari (PW27) on the aspect of injuries upon the person of the appellant is not at all conclusive or inspires much confidence.

35. Dr. Avinash Pujari (PW27), examined the Appellant on 3rd September, 2010 i.e. after a period of a month from the date of incident. He deposed that he noticed eight linear well healed scars on the forearm and elbow joint and two linear well healed scars on the left forearm on the tip of elbow. He opined that both these injuries were caused by sharp edged weapon and were of *“more than two weeks duration”*.

36. Now the expression *“more than two weeks duration”* suggests that the injuries, which were, at the time of the examination, well healed related to some date closer to 15th or 16th August, 2010. This is the time at which the appellant was probably arrested by the prosecution in relation to some other case. The prosecution, in such circumstances, cannot rely upon the vague statement of PW27. The prosecution had the evidence of the precise date on which the appellant was arrested. The prosecution, had the medical examination report at the time of such arrest. In fact Mr. Rivonkar agreed that in terms of the legal provisions as also the judgments of the Hon'ble Supreme Court, such medical

examination is a must and therefore, must have been undertaken.

37. Therefore, it was incumbent upon the prosecution to come clean on this issue and the prosecution cannot take any undue advantage of the vague statements made by its witnesses. Accordingly, based upon the material on record it is not possible to hold that the blood allegedly found at the scene of the crime has any nexus to the injuries on the person of the appellant. This is yet another reason for discarding the circumstance relating to DNA profile.

38. The learned Sessions Judge, has taken no cognizance whatsoever of the circumstance that the appellant was already in custody of the police at some point of time between 2nd August and 23rd August, 2010. The learned Sessions Judge has not taken cognizance of the fact that the prosecution failed to produce on record the medical examination of the appellant obtained at the time of his arrest at some point of the time between 2nd August and 23rd August, 2010. The learned Sessions Judge, has simply gone by the vague statement of PW27 that the well healed injuries on the body of the appellant were of more than two weeks duration. This is a case where best evidence was available to the prosecution but the prosecution, chose not to produce the same. All this calls for drawal of adverse inference against the prosecution. In any case, all

this renders reliance on the DNA profiling circumstance, extremely unsafe.

39. It is necessary to note that both PW5, the independent pancha for the scene of offence panchanama as well as the I.O. PW54 has deposed to the attachment of grey shorts and T-shirt with blood stains found in the washroom of the scene of offence. The DNA test undertaken by the prosecution indicate that the blood on these grey shorts and T-shirt was that of the deceased. There is no explanation as to how these blood soaked clothes of the deceased were found in the washroom. The prosecution has not even bothered to explain this circumstance.

40. Thus, it is clear that there is no clear and cogent evidence that M.O.20 indeed bears the dried blood collected, attached and sealed on 2nd August, 2010 in the toilet cum washroom from the scene of the offence. There is no clear and cogent evidence that this dried blood has any nexus with the injuries on the person of the appellant. There are serious discrepancies in the testimony of the Investigating Officer (PW54) and the forensic expert (PW45) on the aspect of MO20 being a bandage or a gauze, the material thereof being a stain or a scrapping of dry blood and so on. The only independent witness PW5 makes detailed reference to attachment of several objects but not to the

collection and attachment of dried blood on M.O.20. Applying the principles laid down in *Dharam Deo Yadav* (supra) and *Jitendra Gabhane* (supra), to the facts of the present case, we have no option but to hold that the purity, in the matter of collection of sample and establishing the nexus between the injuries and the sample, stands compromised. All these factors, according to us, render it quite unsafe to rely upon the DNA profile in order to sustain the conviction recorded against the appellant. If this circumstance is excluded, then, there is a serious dent to the hypothesis propounded by the prosecution.

41. Before we proceed to the other circumstances relied upon by the prosecution, we propose to advert to the issue of virtual non-consideration of the testimony of Xavier Koshy (PW19) and the defence of the appellant raised in the course of the record of his 313 Cr.P.C. statement that he was alongwith Xavier Koshy (PW19) at the time of the alleged crime. According to us, the total non-consideration of this aspect also renders the conviction recorded against the appellant, quite unsustainable.

42. Xavier Koshy (PW19), has deposed that on the night intervening 1st and 2nd August, 2010, he alongwith the appellant went to Baga, stayed there in the nightclub and came back in the morning. In fact PW19 has deposed that he dropped the appellant

to Panaji and he returned to Vasco. PW19 was declared as hostile by the prosecution. However, despite availing the opportunity of cross examination, the prosecution has failed to make any dent to the testimony of PW19. So much so that not even a suggestion was put to PW19 that he was not alongwith the appellant on the night intervening 1st and 2nd August, 2010 or that he never dropped the appellant to Panaji on the morning of 2nd August, 2010. As noted earlier, the appellant, in his 313 Cr.P.C. statement has also, in response to question number 239 stated:

“I did not commit this crime. I was with my friend Xavier on that night”.

43. The prosecution has hypothesized that the crime took place on the intervening night of 1st and 2nd August, 2010 or on the morning of 2nd August, 2010. There is evidence of Sherman Nunes (PW3), a friend of the deceased, in which he states that on the night intervening 1st and 2nd August, 2010, he was exchanging SMSs with the deceased. He has deposed that the last message he received from the deceased was at 3.45 a.m. on 2nd August, 2010. This means that the deceased was certainly alive upto 3.45 a.m. on 2nd August, 2010. Then, there is other evidence on record to suggest that some witnesses came to know of the murder of the deceased at about 11.30 a.m. on 2nd August, 2010. This means that the crime was committed at some point of time between 3:45 a.m. and 11:30 a.m. on 2nd August, 2010. The medical evidence is also

not quite conclusive on this aspect but suggests that the crime was committed within 12 hours from the time of post mortem which was at about 9.00 p.m. on 2nd August, 2010.

44. The prosecution, after declaring Xavier Koshy (PW19) as hostile did not make any efforts to even question (PW19) as to the time at which he dropped the appellant at Panaji on the morning of 2nd August, 2010 after they spent the night at a nightclub in Baga. There is no explanation as to why the appellant, who is also otherwise a resident of Vasco, was dropped at Panaji by PW19, who thereafter returned on the same morning to his home in Vasco. In any case, the appellant, had raised a defence that he was with PW19 at the time of the crime. His defence was backed by the evidence of PW19, who was originally, a witness for the prosecution. His defence together with the deposition of PW19 was at least was required to be considered by the learned Sessions Judge. However, we find that there has been total non consideration of such defence. This according to us, makes a serious dent to the conviction recorded in the impugned judgment and order.

45. In ***Reena Hazarika Vs State of Assam***³, Hon'ble Apex Court has held that Section 313, Cr.P.C. cannot be seen simply as a part of *audi alteram partem*. *It confers a valuable right upon an accused to establish his innocence and can well be considered*

³ 2018 (4) Crimes (SC) 295

beyond a statutory right as a constitutional right to a fair trial under Article 21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2), Cr.P.C. The importance of this right has been considered time and again by this court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) Cr.P.C. the Court is duty bound under Section 313(4) Cr.P.C. to consider the same. The mere use of the word 'may' cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 Cr.P.C., in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr.P.C. and to either accept or reject the same for reasons specified in writing.

46. In **Reena Hazarika** (supra), the Hon'ble Apex Court noted that neither the Trial Court nor the High Court even

considered it necessary to take notice of much less discuss or observe with regard to the defence statement made by the appellant under Section 313 Cr.P.C. and either to accept or reject the same. The Hon'ble Apex Court held that the complete non consideration of the defence has clearly prejudiced the appellant since, the appellant was not required to establish his defence beyond all reasonable doubt but had to only raise doubts on a preponderance of probability. The Apex Court had hold that non consideration of such defence by the Trial Court and High Court was sufficient, in the facts of the said case to overturn the conviction concurrently recorded by the two Courts in the said matter.

47. If the ratio in ***Reena Hazarika*** (supra) is applied to the facts and circumstances in the present case, then it will have to be said that total non consideration of the defence raised by the appellant in the course of his 313 statement, vitiates the conviction recorded against him. This is more so because in the present case, it is not as if the learned Sessions Judge was required merely to consider the defence raised by the appellant in the course of his 313 statement but this was a case where one of the prosecution witnesses PW19, who no doubt was declared as hostile, had clearly deposed that he was along with the appellant at Baga on the night intervening of 1st and 2nd August, 2010. This evidence coupled with defence raised by the appellant in the course of his 313 statement to

the effect that he was not involved in this crime because he was with his friend Xavier Koshy (PW19) on the night of the crime was at least required to be considered. Applying the ratio in ***Reena Hazarika*** (supra) to the facts of the present case, according to us, the total non consideration of this defence raised by the appellant, renders the conviction recorded against the appellant, infirm.

48. Mr. Rivankar, submitted that it is plausible that the crime was committed by the appellant after he was dropped at Panaji on the morning of 2nd August, 2010. He submits that it was for the appellant to establish where he was on the morning of 2nd August, 2010 after he was allegedly dropped by Xavier Koshy (PW19) at Panaji on the morning of 2nd August, 2010. According to us, the burden of establishing the guilt is always on the prosecution. After the testimony of Xavier Koshy (PW19), this burden, was even greater on the prosecution. On the basis that it was possible or plausible that the appellant committed the murder after he was dropped at Panaji in the morning of 2nd August, 2010, it is difficult to sustain a conviction in a matter of this nature. In such matters, we have to remind ourselves that there is a large distance between “*may be possible*” and “*must be probable*” which distance has to be traversed by the prosecution and not by the accused. If the prosecution fails to traverse this distance, conviction cannot be sustained.

49. The circumstance of alleged recovery of car at the alleged instance of the appellant can hardly be styled as recovery in terms of Section 27 of the Evidence Act. In fact, the learned Sessions Judge, in para 61 of the impugned judgment and order has quite correctly held that there was no recovery of the car in terms of Section 67 of the Evidence Act. The material on record amply establishes that the investigating agencies were already aware of the place where the car was parked. The car, had in fact been attached by the investigating agencies from the said parking place. Therefore, the alleged circumstance that the appellant once again led the police and the panchas to the spot where the car was parked, and that too after a period of almost a month after the date of the crime, is not at all some incriminating circumstance sufficient to link the appellant with the crime.

50. The learned Sessions Judge has relied upon the circumstance of recovery of laptop, hard disc, cell phone and SIM card at the instance of the appellant. According to us, for the reasons discussed hereafter, these recoveries have neither been established by the prosecution beyond reasonable doubt and in any case, these recoveries, by themselves, could not, in the facts and circumstances of the present case, be regarded as sufficient to link the appellant with the crime of murder.

51. In the first place, it is necessary to note that the prosecution has purported to effect no less than seven successive recoveries on 04.09.2010, 05.9.2010, 06.09.2010, 07.09.2010, 12.09.2010, 14.09.2010, 15.09.2010. This means that it is the case of the prosecution that the appellant made disclosures only on piecemeal basis on each of the said dates.

52. It is the case of the prosecution that the appellant, after committing the murder on 2nd August, 2010 robbed the mobile phone of the deceased and sold the same to Shravan Singh (PW15) for ₹2400/-. Shravan Singh (PW15) has deposed that he is not in the business of sale or purchase of used mobile phones. He has stated that he did not issue any receipt or maintain any record of the sale with him. He has only deposed that he asked the appellant for the bill of the mobile phone and since the appellant stated that the bill will be produced later, he asked the appellant for his contact number. He has deposed that the appellant stated that he will give his contact number and the bill on the next day. Yet, PW15 states that he told the police the contact number of the appellant. PW15 stated that he recorded the contact number of the appellant on his book. Thereafter, PW15 has deposed that he simply gave this mobile phone to one Sher Singh who was working with him at the shop.

53. Sher Singh, (PW18) has deposed that he started using the mobile phone which was given to him by PW15 after inserting a SIM card having last number 111. He explained that this SIM card was in the name of his friend Sawlaram (PW40). Now the number stated by Sher Singh and the number of the SIM card attached by the police does not tally. There is no clarity on the I.M.E.I. number. Besides, all this evidence of the sale of the mobile phone to Shravan Singh (PW15), Shravan Singh simply handing over the mobile phone to Sher Singh (PW18) and Sher Singh using the mobile phone by inserting a SIM card in the name of Sawlaram (PW40) simply does not inspire much confidence and is surely not sufficient to link the appellant to the crime of robbery and murder.

54. It is the case of the prosecution that the appellant threw out the SIM card from the mobile phone of the deceased at a particular spot and the same was recovered pursuant to the information furnished by the appellant. The prosecution examined Ashok Naik (PW52) as a pancha in support of this recovery. The alleged recovery was effected at an open place. What was recovered were pieces of the SIM card which were yellow in colour and having a circuit on it. This witness has deposed that the two pieces were matched but there was no mark or any number on the said pieces to identify as SIM card. This witness admitted that the recovery was at a spot where there were many houses and was accessible to all.

55. The prosecution examined P.N. Ramkrishnan (PW47), a senior scientific officer (Physics) CFSL Hyderabad, who analysed the broken SIM card circuit pieces alleged to be attached in presence of PW52. He stated that he cannot tell the number of the SIM card and further he could not connect the circuit of both the pieces to find out the number. He admitted that he was only required to opine whether both the pieces of the circuit belong to the same card or not. All this evidence, according to us, neither links the pieces of the SIM card recovered from the mobile phone of the deceased or is sufficient to conclude that these were the pieces of the SIM card of the deceased placed in the mobile phone which the appellant robbed after committing the murder.

56. On the aspect of recovery of the laptop and the laptop bag, again, we find that there are discrepancies which the prosecution has failed to explain. The case of the prosecution is that the appellant after committing the murder and robbery handed over the laptop to Asif Shaikh, (PW22) for repairs. At the same time, the prosecution has led evidence to show that this very laptop was handed over by the appellant to Sherwyn Vaz (PW38) who used the laptop and returned the same to the appellant in perfect working condition. The prosecution examined both Asif Shaikh (PW22) as well as Sherwyn Vaz (PW38). The prosecution has also examined Stephanie Vaz (PW32), the sister of PW38. However, the

prosecution has failed to explain the overlap.

57. The material on record is not at all clear as to whether the laptop was first given to PW38 and thereafter given to Asif Shaikh, PW22 for repairs. An impression is created that the prosecution wished to rely upon two theories, one of the appellant handing over the laptop to Asif Shaikh (PW22) for repairs and the other of the appellant handing over the laptop to his friend Sherwyn Vaz (PW38). The prosecution has failed to bring convincing evidence in support of either of these theories.

58. Stephanie Vaz (PW32) had deposed that on checking her brother's mobile phone, she noticed that there were 9 to 10 missed calls from the appellant. The prosecution, despite such statement, failed to even attach the mobile phone and to seek call detail records. Sherwyn Vaz, PW38 has also deposed to the missed calls from the appellant. Again, the prosecution did not bother to attach this mobile phone and to seek call detail records. Some of the witnesses have deposed that the appellant had spoken about having this laptop with him, even prior to the date of the crime. The prosecution, had in fact called for the call detail records in relation to mobile phones of several witnesses as well as the appellant. However, no all such call detail records were produced in evidence by the prosecution. The call detail records produced in the evidence

did not, in any manner, incriminate the appellant. All this, renders the prosecution case, rather suspect. The benefit of such legitimate doubt, has to go to the appellant.

59. As far as the recovery of the key of the Chevrolet car from the flush tank of the polytechnic college is concerned, the witnesses have admitted that the original locks of the car were already removed. They have admitted that the duplicate of the keys can always be made. They have deposed that they are unable to state whether the key recovered was the original or the duplicate. Based upon such evidence and coupled with the other circumstances on record, we are really not satisfied that this recovery is sufficient to link the appellant with a crime.

60. In *Raj Kumar Vs State*⁴, the Apex Court, after reference to its earlier decision in *Sanwat Khan Vs State of Rajasthan*⁵ has held that recovery of ornaments of the deceased from the accused or production of the same by the accused in the course of investigation, however suspicious, cannot be conclusive of the question of the accused having committed the offence of murder.

61. The circumstance of injuries on the person of the

⁴(2017) 11 SCC 160

⁵ AIR 1956 SC 54

appellant has not been established by the prosecution. As noted earlier, the prosecution failed to explain the precise date on which the appellant was arrested, no doubt, in connection with some other offence on some date between 2nd August, 2010 and 23rd August, 2010. The prosecution failed to produce on record the medical examination report in relation to such arrest. In the absence of this relevant and vital evidence, which was very much in the possession of the prosecution, we do not deem it fit to act on the evidence of PW27, the Doctor who examined the appellant almost a month after the date.

62. The principles for evaluation of circumstantial evidence are well established and require no restatement. The prosecution has to establish the circumstances from which the inference of guilt is sought to be drawn. Such circumstances must be cogent and firm and not merely tentative. Such circumstances should have definite tendency to unerringly point towards the guilt of the accused. Such 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 finally the circumstantial evidence, in order to sustain conviction, must be complete and incapable of explanation by any other hypothesis than the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but

should be inconsistent with his innocence.

63. Mr. Rivonkar had relied upon *Rohtash Kumar Vs State of Haryana*⁶ to submit that minor discrepancies on trivial matters should not prompt the Court to reject the evidence of the prosecution in its entirety. He relied upon this authority to submit that the evidence of the prosecution witnesses cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross examine him.

64. According to us, in the state of evidence in the present case, the ruling in *Rohtash Kumar* (supra) is of no assistance to the prosecution. This is not a case of rejection of the prosecution case on the basis of some minor discrepancies or a case where the testimony of the hostile witness is being discarded in toto. In this case, the evidence of the hostile witness, was in fact required to be considered but was not considered by the learned Sessions Judge whilst convicting the appellant.

65. Applying the aforesaid well settled principles in evaluation of the material on record in this case, we are constrained to hold that the prosecution has not established the involvement of the appellant in the crime beyond reasonable doubt. Accordingly,

⁶ 2013 AllMR (Cri.) 2620 (SC)

we find ourselves unable to agree with the conviction recorded by the learned Sessions Judge in the impugned judgment and order.

66. For all the aforesaid reasons we allow this appeal, set aside the impugned judgment and order and acquit the appellant of the charges framed against him. The appellant will have to be set at liberty forthwith, if not required in any other case.

Nutan D. Sardesai, J

M.S. Sonak, J

mv/at*