

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 63/2018**

Shri Nazir Pathyekhanvar, ,
Presently lodged in Central Jail,
Colvale, Bardez, Goa. ... Appellant.

Versus

1. State of Goa,
Through Quepem Police Station,
Quepem, Goa. ... Respondent.

Mr . K. Paulekar, Advocate for the Appellant.

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

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

Dated : 6th September, 2019.

ORAL JUDGMENT : (Per M.S. Sonak, J.)

Heard Mr. Paulekar, learned Counsel for the appellant and Mr. S.R.Rivankar, learned Public Prosecutor for the respondent/State.

2. This appeal is directed against the judgment and order dated 20.01.2017 in Sessions Case (302) No. 35 of 2015 made by the Sessions Judge, South Goa at Margao convicting the appellant for the offences punishable under Section 302 and 201 of the Indian Penal Code (IPC) and sentencing the appellant to life imprisonment for the offence under Section 302 and for payment of fine of ₹10,000/- or in default three months simple imprisonment and simple imprisonment for three years and payment of fine of ₹5000/- or in default three months simple imprisonment for also offence under Section 201 of IPC.

3. We have heard Mr. Paulekar, learned Counsel for the appellant and Mr. S. R. Rivankar, learned Public Prosecutor for the State.

4. The charge framed against the appellant was that on or about 05.05.2015, in the afternoon at Newvada, Telegao, Sirvoi, Quepem Goa, the appellant committed murder by intentionally causing death of Shanul son of Shajaan Sharif, resident of Pedamol, Sirvoi, Quepem thereby committing offence punishable under Section 302 of IPC.

The charge further states that on the said date, place and time, the appellant caused destruction of evidence by burying the dead body in the soak pit and covering it with mud, banana leaves and branches of jungle trees in order to destroy evidence thereby committing offence under Section 201 of IPC.

5. At the trial, the prosecution examined 14 witnesses. The appellant was questioned under Section 313 of the Code of Criminal Procedure (Cr.P.C.). The appellant neither examined himself nor led any defence evidence. By the impugned judgment and order dated 20.01.2017, the learned Sessions Judge convicted the appellant and sentenced him, in the aforesaid terms. Hence the present appeal.

6. Mr. Paulekar, the learned Counsel for the appellant submits that in the present case, the identity of the dead body has not at all been established. The tawiz, on the basis of which, Pw5 claims to have identified the dead body, was never attached and the so called stitch marks on the left hand were nowhere to be found on the dead body. He submits that in the absence of any identification that the dead body was indeed that of Shanul, the charge could never be said to have been proved. He submits that there is no cogent evidence to establish that this was a case of homicidal death. In any case, there is absolutely

no evidence to link the appellant with the death of the person whose body was discovered in the soak pit.

7. Mr. Paulekar, learned Counsel submits that in the present case, the prosecution has relied upon only three circumstances i.e. the last seen theory, recoveries under Section 27 of the Evidence Act and the motive. He submits that each of these circumstances have not at all been proved by the prosecution beyond reasonable doubt. He submits that in any case, these circumstances are not sufficient for conviction of the appellant on the basis of circumstantial evidence. He submits that there are inherent improbabilities in the case of the prosecution which have not been duly appreciated by the learned Sessions Judge. For all these reasons, he submits that the impugned judgment and order warrants interference.

8. Mr. Paulekar, learned counsel submits that the principles relating to establishment of last seen theory have not been appreciated by the learned Sessions Judge. He submits that even the recoveries in this case are found in the open space and articles which have no nexus with the alleged crime. He submits that even the motive have not been established. He relied upon certain decisions and on the basis of the same, submits that the conviction against the appellant may be set

aside.

9. Mr. Rivankar, learned Public Prosecutor defended the impugned judgment and order on the basis of the reasoning referred to therein. He refers to the deposition of PW9 Dr. Banaulikar and submits that this was clearly a case of homicidal death. He submits that the last seen theory has been proved by the prosecution from the testimonies of PW2 and PW3 who had seen the appellant assaulting Shanul and thereafter, sitting with him on the bench at or about the time when the murder may have taken place. He submits that the murder has taken place near the house of the appellant, which is itself in an isolated area and the dead body was found in the soak pit behind the house of the appellant. He submits that the circumstance of last seen theory stands proved beyond reasonable doubt.

10. Mr. Rivankar, learned Public Prosecutor submits that in this case a wooden danda was recovered in pursuance of the disclosure statement made by the appellant and further human blood was recovered on the danda. Finally Mr. Rivankar submits that the motive i.e. robbery of ₹10,000/- by the deceased Shanul has also been established by the prosecution beyond reasonable doubt. For all these reasons, Mr. Rivankar, learned Public Prosecutor submits that the

conviction recorded against the appellant is required to be sustained.

11. We have with the assistance of the learned Counsel for the appellant and the learned Public Prosecutor perused the evidence both oral as well as documentary available on record. Upon critical evaluation of all such evidence, we are afraid, we are unable to sustain the conviction of the appellant, for offences punishable under Sections 201 and 302 of IPC, for the reasons indicated hereinafter, in the course of this judgment and order.

12. In the first place the prosecution, has failed to establish that the body which was found in the soak pit, behind the house of the appellant, was indeed the dead body of Shanull, son of Shajan Sharif, resident of Pedamol, Sirvoi, Quepem, Goa. This was important because the charge against the appellant was quite specific in regard that he had murdered the said Shanul.

13. The prosecution has examined one Musthaq Kadarbhai (Pw5) on the aspect of the identification of the dead body. Pw5 has deposed that he was the brother-in-law of Shanul i.e. brother of Rajma Kadarbai, who was married to Shanul.

14. Pw5 has deposed that on 08.05.2015, the police came at his house and informed him that they had found a body of a male in the soak pit of the house belonging to the appellant at Tollegal, Sirvoi and requested Pw5 to come to the spot alongwith his sister Rajma to identify the body. He has then deposed that he alongwith his sister Rajma went to the site and identified the body as that of Shanul.

15. Pw5 has categorically deposed that he identified the body on the basis of silver tawiz around the neck and old surgery marks on the left hand of the body. The precise and the only statement made by Pw5 on the aspect of identification of the body reads thus:-

“I identified the body on the basis of the silver tawiz around his neck and old surgery marks on the left hand alongwith my sister Rajma”

16. In the course of cross examination, a suggestion was put to Pw5 that his identification was incorrect and false which suggestion Pw5 has denied.

17. The prosecution, has not at all explained why Rajma, wife of Shanul was never examined in the course of the trial. Rajma, who alongwith Pw5 is alleged to have identified the dead body as being that of Shanul's was a material witness and there is no explanation

forthcoming, as to why she was not examined in the matter. Mr. Paulekar is consequently right that such non examination of material witness calls for drawal of adverse inference.

18. As if, the aforesaid was not sufficient, the prosecution in the present case has failed to even attach the silver tawiz which was allegedly found on the dead body and which was the basis for identification of the dead body as that of Shanul. There is absolutely no explanation as to why this tawiz was not attached under the pachanama. Further, there is absolutely no evidence led on the aspect of the tawiz belonging to Shanul or evidence to the effect that Shanul was known to be wearing such a tawiz on his person. The non attachment of the tawiz coupled with no evidence whatsoever, that the tawiz belonged to Shanul and that Shanul was known to be wearing such a tawiz, rendering the identification by Pw5 quite infirm. The learned Sessions Judge obviously erred in relying upon such identification, in such circumstances.

19. Pw5 made express reference to “*old surgery marks on the left hand*” of the dead body of alleged Shanul. In the course of his cross examination he even referred to Shanul undergoing surgery some 10 years back and stitch marks on his left hand. However, there is

absolutely no evidence on record to establish that the dead body found in the soak pit behind the house of the appellant had any such surgery marks or stitches on the left hand. In the absence of any such evidence, we cannot accept, that the dead body found in the soak pit was indeed, the dead body of Shanul, who the appellant is alleged to have murdered.

20. The prosecution examined Dr. S. Banaulikar, Pw9 as the Forensic Expert who conducted autopsy on the dead body. Neither the autopsy report nor the deposition of Pw9 refers to any surgery marks on the left hand of the dead body or stitches on the left hand of the dead body.

21. The prosecution also examined one Dnyaneshwar Malkanekar, Pw6 as pancha, in whose presence the dead body from the soak pit was removed. This witness has deposed that the dead body was covered with flies, was emanating a foul smell and was in a decomposed state beyond identification. He has deposed that there was long sleeves shirt, long pant folded upto the knees and underwear on the body. Even the doctor Pw9 has deposed to the deterioration of the body including in particular peeling of skin all over and degloving of skin of the palms and disstocking of the foot. Pw9 has

deposed that the colour of subcutaneous body skin had changed to brown and green all over. Thus, neither Pw9 nor Pw6 spoke of any old surgery marks or stitches on the left elbow on the body found in the soak pit. The second basis for identification of the dead body also, has not at all been established by the prosecution.

22. Accordingly, we are satisfied that in the present case, there is no evidence whatsoever to establish that the dead body recovered from the soak pit was indeed the dead body of Shanul, allegedly murdered by the appellant. Since, this vital fact has not been proved by the prosecution, much less proved beyond reasonable doubt, it is difficult to sustain the appellant's conviction.

23. On the aspect of the death being homicidal it is true as contended by Mr. Rivankar, learned Public Prosecutor, that there is evidence of PW9, the doctor and the forensic expert who has stated that the cause of death to the best of his knowledge and belief was due to head injury consequent upon blunt force impact by object vide injury No. 1 which was necessarily fatal in the ordinary course of nature.

24. In the cross examination, Pw9 has stated that such injury No. 1

could not have been caused by a person falling on a hard rocky surface since this injury was above the hat line. On the basis of this Mr. Rivankar contended that the injury was homicidal, is required to be accepted. Mr. Paulekar contended that according to Pw9 the injury No.1 was a laceration which, according to the learned Public Prosecutor is deep cut injury with knife, tool or machinery there is no evidence that any knife, tool or machinery was ever used. Mr. Paulekar, learned Counsel pointed out that it is the case of the prosecution that the appellant struck the deceased with a bamboo danda. He therefore, submits that there are inherent contradictions in the deposition of Pw9. According to us, it is not necessary to delve any deeper on this aspect because even if proceed on the basis that the death of the deceased was homicidal, that by itself does not establish that the appellant is the one who has caused the death.

25. On the aspect of last seen theory, again, we are unable to agree with the learned Sessions Judge that this circumstance has been proved by the prosecution beyond reasonable doubt. The prosecution examined Pw2 and Pw3 as witnesses in support of this circumstance.

26. Pw2 has deposed that “*somewhere in May 2015*” when he was having lunch with his wife and son, between 13.30 hrs. to 14.30 hrs

the appellant who was drunk came to his house and told him that some person has come to his residence. The appellant then picked up a bamboo stick , broke into two and started walking away followed by Pw2 and his son. The appellant then went inside his house pulled one person near the door, whom the witness recognized as Shanul, assaulted Shanul with a stick in his hand, which also broke on account of the assault and continued to assault Shanul. Thereafter the appellant went inside the house and brought one empty plastic container and stated that Shanul had taken away ₹10,000/- from the said container. This witness has then deposed that he inquired with Shanul as to what he was doing in the house of the appellant to which Shanul replied that he was residing in said house from the previous night. Pw2 has then deposed that the appellant and Shanul sat on the bench while he alongwith his son and nephew returned to the house and this witness deposed that the appellant and he were drunk when he saw them.

27. To the same effect, is the testimony of Pw3, Rasid Ali Kati, the son of Pw2 Raju Ali Katti. Pw3 has however referred to the aforesaid incident taking place “*sometime in the first week of May,2015....*”

28. Now, there is no precise evidence as regards the time of the

death, which is a vital circumstance for evaluating the last seen theory evidence. Pw9 Doctor/Forensic Expert in his substantive evidence has not at all adverted the time of death even by way of approximation. However, Pw9 has produced on record the memorandum of autopsy and Mr. Rivankar the learned Public Prosecutor urges us to accept the date and time referred to therein as legal evidence for establishing the date and time of the death.

29. The memorandum of autopsy indicates that the date of death “*as per records*” is in the afternoon of 05.05.2015 to 18.46 hours of 08.05.2015. This is some entry in the memorandum of autopsy on the basis of records. The records are not produced in evidence. The basis for this entry is not at all explained by the prosecution. This entry does not reflect the opinion of the doctor or the forensic expert. This entry, in these circumstances, cannot even be regarded as any legal evidence to establish the date and time of death even by approximation.

30. The opinion, at the highest, is to be found in the column entitled “*opinion as to the cause of death*”. The column “*the approximate time since death*”, it is stated that the same is within 5 to 7 days prior to preservation in the morgue. The date of preservation

in the morgue is 10.05.2015. This means that the opinion indicates that the approximate time of death can be at any time between 5 to 7 days from 10.05.2015. This means that the time of death can be any indeterminate period between 3rd May or 8th May, 2015. It can even be “*prior to 5 to 7 days*” which is precisely the opinion stated in the memorandum of autopsy. In the substantive evidence, surprisingly, PW9 has not even adverted to this crucial aspect of the time and the date of death.

31. On the basis of the aforesaid material, it is not at all possible to arrive at the time of the death even by way of approximation. Since the prosecution seeks to rely upon the last seen theory, it was the duty of the prosecution to produce relevant and cogent evidence on record at least as to the approximate time of the death. It is only if such evidence was placed on record by the prosecution that the contention of Mr. Rivankar, on the basis of last seen theory could have been considered. In the absence of any such evidence, we find it difficult to agree to the reasoning of the learned Sessions Judge and to sustain the consequent conviction recorded against the appellant.

32. In *Ramreddy Rajeshkhanna Reddy and ors. Vs. State of Andhra Pradesh*, 2006 (10) SCC 172 the Hon'ble Apex Court has

held that the last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime become impossible. Even in such a case, the court should look for some corroboration.

33. In this decision, the Hon'ble Apex Court has referred to its earlier decision in ***State of U.P. Vs. Satish*** 2005 Cr.L.J.1428 in which it is observed that it would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is long gap and possibility of other person coming in between exists.

34. In the case of ***Jaswant Gir Vs State of Punjab***, 2005 12 SCC 438, the Hon'ble Supreme Court has held that the difference of time between the two – i.e. the accused and the deceased being seen together and the time of the death of the deceased ought to be so small that the possibility of any person being the author of the crime can be ruled out. In the said decision, the Hon'ble Supreme Court referred to its earlier decision and held that where the prosecution has relied upon last seen theory, it must establish the time when the accused and deceased were last seen together as well as the time of

death. These are necessary ingredients to be established in such matters.

35. Applying the aforesaid principles to the evidence in the present case, we are satisfied that the prosecution has failed to establish both the necessary ingredients for invoking the last seen theory. In this case, there is no evidence as to when precisely Pw2 and Pw3 saw the appellant and deceased together. In any case, there is absolutely no evidence as to the date of the death and not to mention exact the identity of the dead body. In this circumstances, the learned Sessions Judge, erred in placing any reliance upon the last seen theory.

36. Besides, we find it little strange that the appellant, should go to the house of Pw2 and Pw3 and invite them to his own house and thereafter assault Shanul with bamboo stick in their presence and thereafter sit with Shanul on the bench whilst the two witnesses depart. We find it difficult to accept that this can be the conduct of a murderer in the peculiar circumstances of the present case. To that extent therefore the circumstance of “*last seen theory*” cannot be said to have been proved by the prosecution beyond reasonable doubt.

37. The circumstance relating to recovery of certain articles on the basis of alleged disclosure statement made by the appellant is also not been proved by the prosecution beyond reasonable doubt. In pursuance of alleged statement, some articles were recovered from the house of the appellant like crate, chopper, clothes, hammer and plastic container. The prosecution has failed to establish the nexus between these articles so recovered and the alleged crime. These are the articles which are normally found in any household. Besides, Since in the present case, the body was discovered in the soak pit behind the house of the appellant, it is reasonable to proceed on the basis that the prosecution was very much aware of not only house but the area surrounding the house and therefore, all these matters should have been referred in the scene of offence panchanama itself. There was no need of recovery of such articles under some recovery panchanama.

38. Mr. Rivankar however relied upon the recovery of two pieces of bamboo sticks and urged that since human blood is found on one of the sticks, the same is an incriminating article. He submits that the statement of the appellant to the extent that it led to the discovery of this bamboo stick is therefore, an incriminating circumstance admissible in evidence in terms of Section 27 of the Evidence Act.

39. The evidence of Pw13, the witness for recovery panchanama clearly indicates that the two pieces of bamboo stick were recovered from the front of the house. The precise statement of Pw13 in this regard reads thus:

“The accused pointed to one house on the left side of the road and informed that the said house belongs to him. We had all got down from the jeep near the said house and the accused led us to the front portion of the said house. Infront of the house, the accused pointed out to two pieces of a bamboo stick. The bamboo stick had the length of 12 cms. The said piece of the bamboo stick was inserted in one kaki paper envelope and was packed and sealed and marked as Exhibit 8.”

40. Now, the recovery of two bamboo sticks infront of the house i.e. from an open space, can hardly be regarded as recovery in terms of Section 27 of the Evidence Act. In fact all these articles if indeed existed at the spot must have been noticed by the investigating authorities at the time when they retrieved the dead body from the soak pit. Therefore, merely because some human blood is found on one of the bamboo sticks, we cannot say that some incriminating circumstance stands established as against the appellant.

41. On the aspect of motive as well the evidence inspires no confidence whatsoever. Merely on the basis of the statement of Pw2

and Pw3 that the appellant brought out from his room an empty plastic container and stated that Shanul has robbed Rs.10,000/- from the same, we cannot say that the prosecution has established the motive, which is of some importance in a case which based on circumstantial evidence.

42. Thus the prosecution, in the present case, has failed to establish beyond reasonable doubt any of the circumstances, on the basis of which they seek to prove the charge leveled against the appellant.

43. Mr. Rivonkar relying on *Rohtash Kumar Vs State of Haryana*, 2013 ALL MR. (Cri.) 2620 submitted that the appellant in the present case has furnished false explanation to question Nos.61 and 62 posed to him in the course of recording of his 313 Cr. P.C., statement. He submits that false explanation by an accused person can be counted to provide a missing link for completing the chain of circumstance. In the present case none of the links have been established by the prosecution. Besides questions 61 and 62 posed to appellant, only relate to the identity of dead body and the appellant has merely answered that he does not know anything about the same. Such an answer cannot be regarded as false answer. Therefore, the

ruling in Rohtash Kumar (supra) is totally inapplicable in the facts and circumstances of the present case.

44. The legal position relating to evaluation of circumstantial evidence is quite clear. The prosecution must establish all the pieces of incriminating circumstances reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than the one of guilt of the accused. The circumstances cannot be any other hypothesis. It is also well settled and suspicion, however grave may be, cannot be a substitute to prove and the Court must take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence.

45. Applying the aforesaid principles of evaluation of circumstantial evidence, we are satisfied that the prosecution has utterly failed to bring home the charge against the appellant. None of the circumstances have been proved by the prosecution beyond reasonable doubt. The chain of circumstances, in any case, cannot be said to be so complete as to give any reasonable ground for the conviction of the appellant. Besides in this case, the prosecution has even failed to establish beyond reasonable doubt that the dead body recovered from the soak pit was indeed the dead body of Shanul who

is alleged to have been murdered by the appellant.

46. For all the aforesaid reasons, we set aside the impugned judgment and order dated 20.01.2017 made by the Sessions Judge, South Goa at Margao in Sessions case No. (302) 35/2015 and the conviction of the appellant recorded therein. We consequently acquit the appellant of the charge leveled against him and direct that he shall be set at liberty forthwith unless he is required in any other case.

47. The Registry to do the needful and for this purpose is authorized to act on the basis of an authenticated copy of this judgment and order.

NUTAN D. SARDESSAI, J.

M.S. SONAK, J.

MF/-