

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.50 OF 2013

State

(Through Mapusa Police Station)

... Appellant

Versus

1. Pravin Patel,
S/o Walji Patel,
male, 32 years,
r/o Muddal Titha,
Murgod, Tal. Kagal,
Dist. Kolhapur,
2. Vithal Gondhali,
s/o Tukaram Gondhali,
male, 28 years,
r/o Ranapratap Chowk,
Murgud, Talk,
Kagal, Dist. Kolhapur,
3. Madhukar Ainapure,
s/o Digamber Ainapure,
22 years, male,
Dist. Kolhapur,
Murgud.

4. Mahesh Vandkar,
s/o Ramakant Vandkar,
male 35 years,
r/o Murgud,
Bazar, Peth,
Kagal, Kolhapur.

... Respondents

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

Mr. J. A. Lobo, Advocate under Legal Aid Scheme for the Respondents.

***Coram : M. S. Sonak &
Prithviraj K. Chavan, JJ.***

Date : 11th January, 2019

Oral Judgment (Per M. S. Sonak, J)

Heard Mr. S. R. Rivankar, learned Public Prosecutor for the Appellant/State and Mr. J. A. Lobo, learned counsel appointed under Legal Aid Scheme to represent the Respondents (Accused).

2. This is an appeal against the acquittal recorded by the learned Sessions Judge, Panaji, in Sessions Case No.36/2004, in which, the Respondents were charged for offences punishable under Sections 302, 392 and 201 read with Section 34 of the Indian Penal Code

(IPC). The acquittal came to be recorded in judgment and order dated 13th July, 2009 made by the learned Sessions Judge, North Goa, at Panaji.

3. Mr. Rivankar, learned Public Prosecutor submits that the view taken by the learned Sessions Judge cannot be said to even be a “possible view”. He submits that there are compelling circumstances which warrant to interference with the view taken by the learned Sessions Judge. He therefore submits that this is a fit case to exercise jurisdiction under Section 378 of the Criminal Procedure Code and to interfere with the acquittal recorded by the learned Sessions Judge.

4. Mr. Rivankar submits that there is no doubt in the present case that the death of Mr. Antonio Rodrigues was homicidal in nature. He points out that even the learned Sessions Judge has answered this issue in the affirmative and there is no challenge to these findings on behalf of the Respondents. Mr. Rivankar submits that there is overwhelming evidence on record to establish beyond any reasonable doubt, the chain of circumstance which warranted conviction of the Respondents.

5. Mr. Rivankar submits that there is overwhelming evidence on record to establish that the Respondents stayed in Swapna Hotel at KTC bus stand on 25th April 2004 between 7.00 a.m. to 4.00 p.m. This position is made clear from the evidence of Sanjay Kalyani, a room boy in hotel (PW41); Rajendra Naik, a pancha witness to the attachment of hotel register (PW13); Shivanand Navelkar, another pancha witness to specimen signature and hand writing panchanama (PW19) and Sammy Tavaris, I.O. who came to be examined as PW50. He submits that the deposition of these witnesses has stood the test of cross examination. He submits that on the basis of some minor discrepancies in the context of entries in the hotel register, the learned Sessions Judge, was not at all justified in raising a doubt whether the Respondents indeed stayed at hotel Swapna on 25th April, 2004 or not. He submits that on the basis of overwhelming evidence on record, the circumstance that the Respondents stayed in hotel Swapna at KTC bus stand on 25th April, 2004 stands established beyond the reasonable doubt.

6. Mr. Rivankar submits that the next most important circumstance in the present case is that the deceased Antonio was last seen with the Respondents at about 4.30 p.m. at KTC bus stand and

7.00 p.m. at Keri Ferry ramp on 25th April, 2004, soon after which, he was found dead. He submits that this circumstance has been overwhelmingly established beyond the pale of any reasonable doubt by the deposition of Minguel Joao Fernandes, a taxi driver at KTC bus stand, Panaji (PW3); Minguel D'Souza, another taxi driver at KTC bus stand, Panaji (PW23); Suresh Bicholkar, yet another taxi driver at KTC bus stand (PW24) and Vilas Bhetkar, (PW33) a taxi driver at KTC bus stand, who in fact saw the deceased Antonio in company with Respondents at Keri Ferry ramp at about 7.00 p.m.

7. Mr. Rivankar submits that the aforesaid witnesses not only deposed to seeing the Respondents negotiating and hiring Antonio's taxi at KTC bus stand at Panaji but thereafter, Vilas Bhetkar, further deposed to seeing Antonio and the Respondents at Keri Ferry ramp. Some of these witnesses have even identified the Respondents in the TI parade held on 31st May, 2004, which is not too long after the homicidal death of Antonio. He submits that this most relevant circumstance of last seen together has been established beyond the pale of reasonable doubt by the prosecution. He submits that there is cogent evidence as to the timing of Antonio's death, it is hardly a few hours after Antonio was seen in the company of the Respondents. He

therefore submits that it was incumbent upon the Respondents to have offered some explanation as regards such incriminating circumstance. However, the Respondents, neither led any defence evidence nor offered any explanation in the course of record of their 313 Cr.P.C. statement. He therefore submits that the circumstance that Antonio was last seen with the Respondents stands conclusively established.

8. Mr. Rivankar submits that in the present case, the prosecution has established the recovery of mobile phone at the instance of and in pursuance of the statement made by Accused No.1. The evidence of Everril Correia, recovery pancha witness (PW12) is extremely relevant in this regard. Similarly, the gold chain with cross belonging to the deceased Antonio came to be recovered at the instance of Accused No.2. This is well established by the deposition of Joao Dias, recovery pancha witness (PW4). The wrist watch belonging to the deceased Antonio was attached from Accused No.3 and this evidenced from the deposition of Yeshwar Shetkar (PW17). The car stereo, speaker, remote etc., came to be recovered at the instance of Accused No.4. This is evident from the deposition of Jerom Pereira, recovery pancha witness (PW18). Even the wallet of

the deceased Antonio was attached from Accused No.4 and this is evident from the deposition of Pramod Mayekar (PW15). Finally, the maruti van owned by the Antonio, taxi driver was ultimately recovered from Vapi Gujrath. The evidence of Jimmy Fernandes and Celestina Rodrigues establish these aspects. Mr. Rivankar submits that such recoveries in accordance with the provisions of Section 27 of the Evidence Act, afford yet another important circumstance in the chain of circumstances pointing out to the guilt of the Respondents. He submits that again on the basis of minor discrepancies here and there the learned Sessions Judge was not at all right in suspecting the recoveries.

9. Mr. Rivankar points out that two TI parades were held in the present case. In the first TI parade held by Meghana Shetgaonkar, Executive Magistrate at Mapusa, identifying witnesses Minguel D'Souza, Suresh Bhicholkar and Sanjay Kalyani have identified the Respondents. In the second TI parade held by Sudin Natu, Joint Mamlatdar, Mapusa (PW8), again, the identifying witnesses Minguel D'Souza, Minguel Fernandes, Suresh Bicholkar and Sanjay Kalyani identified the Respondents. Mr. Rivankar points out that TI parade was held in accordance with the procedure prescribed in the Criminal

Manual. He submits that this is yet another important circumstance in the chain of circumstances pointing to the guilt of the Respondents.

10. Mr. Rivankar submits that one of the Respondents Madhukar Ainapure made an extra-judicial confession in front of Dr. Madhu Ghodkirekar, when the said Respondent was taken for treatment to the said doctor. Mr. Rivankar submits that since this was the case a conspiracy amongst all the Respondents, the confessional statement of the said Respondent ought to have been used for convicting the remaining Respondents as well. He submits that for no cogent reason the extra-judicial confession came to be rejected by the learned Sessions Judge.

11. Mr. Rivankar submits that there are several incriminating circumstances like destruction of evidence by the Respondents, motive of the Respondents to rob Antonio's valuables and thereafter to eliminate him, surrender by Accused No.3 before the police, attachment of wrist watch of Antonio from Accused No.3 and attachment of wallet at the instance of Accused No.4. He submits that the recovery of maruti van from Vapi Guj Rath is also relevant circumstance. He submits that all such relevant circumstances have

virtually been ignored by the learned Sessions Judge thereby rendering the findings perverse.

12. Mr. Rivankar submits that the learned Sessions Judge in the present case has failed to apply the correct principles in such matters. He submits that undue emphasis was laid upon minor discrepancies here and there when in fact, such minor discrepancies were neither material nor could they retract from the veracity of other overwhelming evidence on record. He submits that this was not a case where there was any reasonable doubt as to the involvement of the Respondents in the crime. He submits that this is a case where guilt of the Respondents stands established beyond any reasonable doubt. He also pointed out the evidence as to the manner in which the crime in the present case was investigated and based upon which the charges were levelled against the Respondents. He also pointed out the evidence relating to the movement of the Respondents from 25th April, 2004 to 10th June, 2004. He submits that all such material evidence has been ignored by the learned Sessions Judge.

13. Mr. Rivankar relies on *Balwinder Singh Vs State of Punjab*¹ for explaining the principles relating to appreciation of

¹ 1987 (1) SCC 1

circumstantial evidence. He relies on *State of Rajasthan V/s Kishore*². He submits that irregularities and illegalities committed by the Investigating Officer will not render the prosecution case untrustworthy. He relies on *Rohtash Kumar Vs State of Haryana*³ to submit that the minor discrepancies on trivial matters ought not to affect core of the case of the prosecution and that great weight is required to be attached to the circumstance that the deceased was last seen with the accused persons. He relied upon this ruling to point out that doctrine of “*last seen together*” shifts the burden on the Accused requiring him to explain as to how the incident had taken place.

14. Mr. Rivankar relied upon *Shamsundar Anchan @ Shyam Vs State of Goa & Another*⁴ to submit that when the Accused was last seen in the company of the deceased, the Accused, had to offer some explanation about his presence on the spot at the relevant time, failing which the prosecution can be said to have established the presence as well as the complicity of the Accused in the commission of crime.

15. Mr. Rivankar relies on *Malkhansingh & Others Vs State*

2 1996 CRI. L. J.2003

3 2013(14) SCC 434

4 2018 ALL MR (Cri) 5216

of *Madhya Pradesh*⁵ to submit that the substantive evidence is the evidence of identification in Court and test identification parade provides corroboration to the identification of the witness in the Court. He points out that several prosecution witnesses had actually identified the Respondents in the Court itself and in this circumstance is entitled to great weight. He relied upon *Anil Kumar Vs State of U.P.*⁶ to submit that there are circumstances which would impress on the mind of the witness, the facial expressions of the assailants and therefore, the evidence as regards the identification parade ought not to be discarded merely because there was some time lapse between the date of crime and the conduct of the identification parade.

16. Mr. Rivankar relies on *Piara Singh and others Vs State of Punjab*⁷ to submit that extra-judicial confession, particularly when corroborated, is a strong piece of evidence and has to be considered as one of the circumstances relevant for establishing the guilt of the Accused persons. He relies on *Ammini and others Vs State of Kerala*⁸ to submit that extra-judicial confession by one of the Accused persons can be used against other Accused persons as well, particularly when

5 2003(5) SCC 746

6 2003 (3) SCC 569

7 1977(4) SCC 452

8 1997 (9) Supreme 394

there is charge of conspiracy.

17. Mr. Rivankar relies on *Anand Anil Raimokar Vs The State of Maharashtra and others*⁹ to submit that there is no luck which requires the receiver stolen property to be amenably prosecuted alongwith the persons who have been Accused of murder and sale of gold ornament of the deceased person to such goldsmith.

18. For all the aforesaid reasons, Mr. Rivankar submits that this is a fit case to exercise jurisdiction under Section 378 of the Criminal Procedure Code and to interfere with the acquittal of the Respondents as recorded by the learned Sessions Judge in judgment and order dated 13th July, 2009.

19. Mr. Lobo, learned counsel appointed under Legal Aid Scheme to represent the Respondents submits that the view taken by the learned Sessions Judge is not merely a possible view but the only correct view that could have been taken in the matter. He submits that even otherwise the scope of appeals against the acquittal is quite limited and as long as the acquittal is based on a possible view, there is no question of interference. He relies on *Hakeem Khan and others Vs*

⁹ 2017 ALL MR (Cri) 4633

*State of Madhya Pradesh*¹⁰ to explain the scope of appeals against the acquittal.

20. Mr. Lobo submits that in the present case the register at hotel Swapna, where the Respondents alleged to have stayed on the date of crime was never packed and sealed. There is evidence of manipulation of entries in the said register. He submits that TI parade was not at all held in accordance with the procedure in the Criminal Manual. At least two dummies who participated in the TI parade were far from independent. He points out that one of the dummies was a stock pancha and other the brother in law of the deceased Antonio. He points out that on every occasion, the stock pancha stood near the Respondents and this cannot be a matter of mere coincidence.

21. Mr. Lobo points out that there are glaring deficiencies in the evidence relating to so called last seen theory. He submits that the son of the deceased Antonio has himself claimed that Antonio had called him up at 8.00 p.m. but the son does not say that Antonio told him that he was with the Respondents in the car at the time of call. He submits that the evidence of taxi driver at KTC bus stand or at the Keri ferry ramp is far from reliable. Based upon such discrepancies, the

¹⁰ (2017) 5 SCC 719

last seen theory can never come into play. He submits that the burden is always on the prosecution to prove the guilt of the Respondents.

22. Mr. Lobo points out that there are very serious infirmities in the so called recoveries effected under Section 27 of the Evidence Act. He points out that the mobile phone and gold chain were stated to be recovered on the same day from two different locations. However, the record produced by the prosecution shows that Arjun Gawas, PC 3486, who was supposed to guard the Respondent was present at both such alleged recoveries at two diverse locations at one and the same time. Mr. Lobo submits that from this it is very clear that the prosecution has attempted to fabricate the evidence against the Respondents.

23. Mr. Lobo submits that there are serious infirmities with regard to the recovery of gold chain and the mobile hand set. He submits that the note book allegedly attached from the goldsmith was never sealed. The entries on the note book are highly suspicious. The name of one of the accused persons is not even found on the note book though the goldsmith has deposed that such accused person had signed on the note book. The material on record makes it clear that

only the accused person who was in the custody was made to sign on the note book much after the date reflected in the note book. Mr. Lobo submits that this is yet another instance from which it can be deduced that the prosecution in the present case has virtually tried to fabricate the evidence against the Respondents. Mr. Lobo submits that there is absolutely no evidence on record to establish that the Respondents made any phone call from the mobile hand set of Antonio. This is because call details produced on record nowhere indicate that such calls were made from Antonio mobile hand set which bear an IMEI number.

24. Mr. Lobo submits that the learned Sessions Judge in the present case has examined the material on record in greatest detail and has rightly concluded that the prosecution has miserably failed to prove the complicity of the Respondents in the alleged crime. Mr. Lobo, therefore, submits that this is not at all a fit case to interfere with the order of acquittal, which is based upon the material on record and arrived at after applying the correct legal principles in such matters. He therefore submits that this appeal warrant dismissal. Mr. Lobo submits that extra-judicial confession inspires no confidence whatsoever. The Respondent Ainapure was alleged to have suffered a

very trivial injury to his thumb. Mr. Lobo submits that it is inconceivable that this Respondent would be taken for treatment of the injury after a lapse over a month and the Respondent would make any confession to the doctor of his alleged involvement in the crime. Mr. Lobo submits that such wholesale confessions are clearly inadmissible. Mr. Lobo submits that there is material on record that Ainapure was taken to the doctor in handcuffs and it is obvious that the police were standing just outside the treatment room where Ainapure alleged to have made an extra-judicial confession to the doctor. Mr. Lobo submits that in the present case, there is absolutely no corroboration and, therefore, there could have been no conviction on the basis of such alleged extra-judicial confession. Mr. Lobo points out that this is not a case where the Respondents have been charged under Section 120-B of the Indian Penal Code and therefore, the decisions relied upon by the Public Prosecutor are distinguishable.

25. For all the aforesaid reasons, Mr. Lobo submits that this appeal may be dismissed.

26. The rival contentions now fall for our determination.

27. The Respondents had been charged for offences punishable under Sections 302, 392 and 201 read with Section 34 of Indian Penal Code (IPC). The case of the prosecution was that on 25th April, 2004 between 4.30 hours to 11.00 hours, the Respondents, with common intention, hired maruti van bearing registration No. GA-01-C-5263 operated by the deceased Antonio Rodrigues from KTC bus stand at Panaji for a return trip to Terekhol, Goa. The prosecution alleges that the Respondents, on the return journey assaulted Antonio with beer bottles on his head, causing him serious head injuries. Thereafter, they put him in the same maruti van and threw him in the river at Tar, over a bridge on the NH-17 at Acoi, Mapusa. The prosecution further alleges that the Respondents stole Antonio's gold chain, mobile phone, wrist watch, car stereo and thereafter even destroyed the evidence which might have linked them with the offence.

28. The evidence led by the prosecution was entirely circumstantial and the prosecution put forth the following main circumstances in support of its case that it is the Respondents who had committed the offences alleged :-

“(a) The accused persons were in Hotel Swapna at Patto, near KTC Bus stand, Panaji on 25.4.2004 till about 4.00 p.m.

(b) The deceased being last seen together with the accused persons.

(c) Failure on the part of the Respondents to either lead any defence evidence or to give other suitable explanation in the course of their 313 CrPC statements.

(d) Recoveries of various articles under section 27 of the Evidence Act and of the wrist watch from the possession of the accused no.3 during arrest panchanama.

(e) The Test Identification Parade in which the Respondents were identified.

(f) Extra-judicial confession made by the accused no.3 before PW21, Dr. Madhu Ghodkirekar”.

29. The learned Sessions Judge, relying mainly on the evidence of Dr. E. J. Rodrigues (PW31) who conducted autopsy on Antonio has held that the death of Antonio was homicidal. There is neither any challenge to these findings nor there appear to be any grounds to defer from these findings. Accordingly, in the present case, it will have to be said that the prosecution has succeeded in establishing the death of Antonio was clearly homicidal.

30. The principles relating to the appreciation and assessment of circumstantial evidence are too well stated to require any elaboration. In cases where the evidence is purely circumstantial in nature, the facts and circumstances from which the conclusion of guilt is sought to be drawn must be fully established beyond any reasonable doubt and the facts and circumstances should not only be consistent with the guilt of the accused, but they must be such in their effect as to be entirely incompatible with the innocence of the accused and must exclude every reasonable hypothesis, consistent with the innocence of the accused. [*Balwinder Singh* (supra)].

31. The first circumstance relied upon by the prosecution is the alleged stay of all the Respondents at hotel Swapna, KTC bus stand, Panaji on 25th April, 2004 between 7.00 a.m. to 4.00 p.m. This circumstance, by itself, is not very significant. However, this circumstance, is relied upon by the prosecution, possibly because if this circumstance is considered together with the remaining circumstances, then, the same, may assume the same limited significance. In support of this circumstance, the prosecution examined Sanjay Kalyani, a room boy at hotel Swapna (PW41), Rajendra Naik, pancha witness to the attachment of the hotel register

(PW13), Shivanand Navelkar, pancha witness to the specimen signature and hand writing panchanama (PW19) and finally Sammy Tavaris, Investigating Officer (PW50), who also produced the opinion of hand writing expert at Exhibit 168 (Colly).

32. The evidence of Sanjay Kalyani, room boy (PW41) does not evoke much confidence. Therefore, the prosecution itself had sought to lay great emphasis upon the entries in the register at Swapna hotel (Exh. 6) in order to contend that the Respondents had stayed at Swapna hotel between 7.00 a.m. to 4.00 p.m. on 25th April, 2004 and even made entries/signed in the hotel register.

33. Rajendra Naik (PW13) who was examined in the context of entries in the register, at the outset admitted that this register though attached under the panchanama, was never packed and sealed. This is important because ultimately it was found that the last two pages on this register where relevant entries were supposed to have made were separate and not naturally attached one another. These last two pages were joined with the help of cello tape. The fact that this hotel register was never packed and sealed coupled with the circumstance that the entries which the prosecution seek to rely upon

were on the pages which were separate but joined with the cello tape, indeed renders such evidence doubtful. The learned Sessions Judge in such circumstances, cannot be said to have taken a view which was not even a possible view in so far as this circumstance is concerned.

34. Besides, PW19, pancha witness to the attachment of this hotel register (Exh.6) admitted that he was a pancha in at least four to five cases including the present case. The report of the Government examiner of questioned documents, Hyderabad, cannot, in the present state of evidence, be regarded as clinching. There are discrepancies in the entries on last two pages, which have been adverted to in some detail by the learned Sessions Judge. From positioning and the columns in the register, there was no reason to make any entries on the back side of the last page since, this page, would ordinarily contain only the column nos.1 to 10 and no further columns 11 to 19. However, record indicates that entries were made on the back side of the last page as well. The entries bear neither any serial number nor the signatures of guests. There is discrepancy with regard to the dates, in the sense that the entries in the register, including the particular entries on the crucial last two pages do not appear to be date wise entries or entries made serially date wise. In some cases, the guests have

signed in the column which relates to payment of luxury tax rather than column reserved for signatures of guests. All these factors render it quite unsafe to place any reliance upon such register for establishing the alleged circumstance that the Respondents did stayed at hotel Swapna at KTC bus stand between 7.00 a.m., to 4.00 p.m., on 25th April, 2004. The prosecution, therefore, cannot be said to have established this circumstance beyond reasonable doubt.

35. The next circumstance relied upon by the prosecution is based upon the “*last seen theory*”. The circumstance that the Respondents were last seen with the deceased victim, is no doubt, an important circumstance, provided same is established beyond reasonable doubt.

36. In *Rohtash Kumar* (supra), the Hon'ble Apex Court has held that in cases where the accused was last seen with the deceased victim, before the incident, it become duty of the accused to explain the circumstance under which the death of the victim occurred. In *Trimukh Kirkan Vs State of Maharashtra*¹¹ the Hon'ble Apex Court has held that whereas the accused alleged to have committed a murder of his wife and the prosecution succeed in establishing that shortly

¹¹ 2006(10) SCC 681

before commission of the crime they were seen together or that the offence took place in dwelling home where the husband is also nearly resided, and if, the accused does not offer any explanation how his wife received injuries or offer an explanation which is found to be false. Thus, it is a strong circumstance which in fact the accused is responsible for the crime. Thus, the doctrine of “*last seen together*” shifts the onus of proof on the accused requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a strong presumption against him.

37. In the present case, the prosecution examined Minguel Fernandes (PW3), a taxi driver at KTC bus stand, Panaji who according to the prosecution identified Accused Nos.1, 2 and 3 in the TI parade held on 31st May 2004. The prosecution also examined Minguel D'Souza (PW23), another taxi driver at KTC bus stand, Suresh Bicholkar, (PW24), a taxi driver at KTC bus stand. It is the case of the prosecution that even PW24 identified the accused Nos.1, 2 and 3 in TI parade held on 31st May, 2004. Finally, the prosecution also examined Vilas Bhetkar, a taxi driver who claims to have seen the Respondents with Antonio at Keri Ferry ramp at about 7.00 pm.

Thus, on the basis of parole evidence all these witnesses have also alleged the identification of the Respondents in the course of TI parade, the prosecution seeks to establish that the Respondents were last seen with deceased Antonio at about 7.00 p.m. at Keri Ferry ramp, which was a few hours before which Antonio was killed.

38. From the perusal of depositions of PW3, PW23, PW24 and PW33, we agree with the learned Sessions Judge that there are discrepancies in the depositions of the witnesses and in any case the discrepancies between the version put forth by each of the witnesses. Some of the witnesses have positively deposed that at least some of the Respondents holding beer bottles in their hands. However, the other witnesses have failed to depose to this aspect. Some of the witnesses described the Respondents as belonging to the age group of 35 to 40 years whereas the other described them as belonging to the age group of 25 to 30 years. Most of the witnesses deposed that the Respondents were non Goans. However, none of the witnesses were able to explain as to how by merely looking at the Respondents from a distance, they were able to deduce that they were non Goans. There are discrepancies in relation to the description of clothes worn by the Respondents.

39. In para 44 of the impugned judgment and order, the learned Sessions Judge has compared the testimony of PW3, PW23, PW24, PW33, PW34 and brought about various discrepancies. These are not some minor discrepancies or inconsistencies as suggested by the learned Public Prosecutor. The view taken by the learned Sessions Judge is certainly a possible view in so far as the aspect of last seen theory is concerned. Taking into consideration the restrictive parameters of jurisdiction under Section 378 of Cr.P.C., there is really no case made out to disturb the view taken by the learned Judge *inter alia* on the aspect of last seen theory.

40. The son of the deceased – Antonio has deposed that he received a phone call from Antonio at around 8.00 p.m. There is however no material on record to establish that the deceased Antonio at the time when he made this phone call to his son stated anything about the presence of Respondents with him. The statement of Antonio's son that he heard some noise in the background is hardly sufficient to link the Respondents to the crime. The ruling relied upon by Mr. Rivankar, will apply to the situation where the factual foundation to invoke last seen theory is very strong. Only in such a situation it can be said that the onus of proof shifts upon the accused

persons and their failure to explain what happened to the deceased – victim after he was last seen with them may be taken as a circumstance against the accused. In the present case, it cannot be said that the factual foundation to invoke last seen theory has been conclusively established. Therefore, the ruling relied upon by Mr. Rivankar, can be of no assistance to the prosecution.

41. On the aspect of recoveries, there are several gaping holes in the theory put forward by the prosecution. It is the case of the prosecution that Antonio's mobile phone of Nokia make was recovered at the instance of Accused No.1; Antonio's gold chain with cross was recovered at the instance of Accused No.2; Accused No.3 surrendered at the police station while wearing Antonio's wrist watch, which was subsequently attached by the police from his person. The car stereo, speaker, remote were alleged to be recovered at the instance of Accused No.4. So also Antonio's wallet was attached from the person of Accused No.4. All these is a little curious because it is apparent that the prosecution has sought to apportion some belongings/articles of Antonio's to each of the accused persons. The learned Sessions Judge has quite reasonably raised doubt in so far as such recoveries/attachment are concerned.

42. On the aspect of alleged recovery of mobile phone at the instance of Accused No.1, the same is said to have been recovered from the house at Muddal at Murgod. The recovery panchanama states that Arjun Gawas, PC 3486 was present at the stage of preparation of recovery panchanama and actual recovery of mobile phone at Murgod. Arjun Gawas PC 3486 was stated to be the guard and therefore was presumably guarding/accompanied the accused no.1 at the time when recovery was allegedly effected at Murgod. The recovery panchanama states that the recovery commenced at 14.00 hours and concluded at 21.15 hours on 27th May, 2004.

43. It is also the case of the prosecution that on the same day, i.e. on 27th May, 2004, the gold chain with cross was recovered from Accused No.2, this time, from the location near Jain Mandir at Nipani. As regards this recovery as well, the recovery panchanama indicates that Arjun Gawas, PC 3486, accompanying Accused No.2 as a guard at the time of alleged recovery from Nipani. The recovery panchanama in so far as gold chain with cross is concerned commenced at 13.45 hours and concluded at 19.15 hours. This means that Arjun Gawas, PC 3486 was allegedly present at the time of recovery of Nokia mobile phone and from the Accused No.1 at

Murgod and was also simultaneously present at the time of recovery of gold chain with cross from Accused no.2 at Nipani. Since, this is really not possible, the learned Sessions Judge, has rightly disbelieved the recovery of Nokia phone and gold chain with cross at the instance of Accused Nos.1 and 2 respectively.

44. Mr. Rivankar, learned Public Prosecutor however submitted that there must be some mistake in the record of recovery panchanama since, the presence of Arjun Gawas, PC 3486 at two different places, almost simultaneously is impossible. He submits that such mistake is required to be overlooked, particularly since the recoveries were established by examination of recovery panchas. He submits that the learned Sessions Judge laid too much emphasis upon the circumstance concerning Arjun Gawas, PC 3486.

45. We cannot agree with the above contentions. The so called mistake was never explained by the prosecution in the course of the trial. Significantly, Arjun Gawas, PC 3486 was never examined as a witness by the prosecution. If the reference to Arjun Gawas, PC 3486 was indeed mistake as was now contended by Mr. Rivankar, then, the prosecution should have examined Arjun Gawas, PC 3486 to explain

this glaring discrepancy. Even, the Investigating Officer has failed to explain this discrepancy. All this renders alleged recoveries of Nokia phone and gold chain with cross highly improbable.

46. Apart from the discrepancies arising out of presence of Arjun Gawas, PC 3486 at two locations at one and same time, there are serious discrepancies which arise in the entire recovery process in which the said gold chain with cross was alleged to be recovered from the goldsmith Krishna Potdar. The prosecution had heavily relied upon the deposition of Krishna Potdar (PW36), goldsmith at Nipani from whom the gold chain with cross was allegedly recovered at the instance of Accused Nos.2 and 4. In the present case, though the said Krishna Potdar admitted to having purchased the gold chain with cross from Accused Nos.2 and 4, no prosecution was launched against the said goldsmith (PW36). Mr. Rivankar, learned Public Prosecutor however relied upon *Anand Raimokar* (supra) in which the learned Single Judge of this Court has taken a view that an offence under Section 411 of the IPC cannot be said to be made out unless it is established that the accused goldsmith had reason to believe that the property which he received is stolen property. In the facts of the said case, the learned Single Judge of this Court observed that though the

accused goldsmith dealing with the sale and purchase of gold ornaments, may have been negligent in purchasing the gold ornaments from the accused person, it cannot be said that he had reason to believe that the articles purchased by him were stolen property.

47. In the facts of the present case, the goldsmith (PW36) has deposed to knowing Accused No.2 Vithal Tukaram Gondhali and Accused No.4 Mahesh Vandkar, through one of his relative. PW36 has deposed that he was knowing two accused persons since about two years. The accused persons were not christian and, therefore, it cannot be said that PW36 had absolutely no reason to even suspect that the gold chain with cross which the two accused persons allegedly offered for sale was not from the stolen property. Ruling in *Anand Raimokar* (supra) is therefore clearly distinguishable.

48. That apart a note book was allegedly attached from PW36-Goldsmith, but this note book was never sealed. PW36 has categorically deposed that Accused Nos.2 and 4 signed on the said note book in token of receipt of Rs.12,000/- towards the sale of gold chain with cross. Now if relevant page/entry in the note book is perused, then, the same appears to bear the signature of Accused No.4

against the entry dated 27th April, 2004. There is however, yet another entry, which, PW36 states the name and the signature of Accused No.2 Vithal Tukaram Gondhali, however, if the extract of the note book is perused, it is very clear that the second entry on the said page indicates the name of “*Vithal Tukaram Dhumal*” and not “*Vithal Tukaram Gondhali*”. Besides, this entry refers to some chain being pawned and not sold. Against this entry, there is a date 19th May, 2004. Most importantly even the handwriting expert has failed to identify the signature at “Q3” as that of Vithal Gondhali. These are very serious discrepancies which were required to be explained by the prosecution. However, there is no explanation forthcoming in so far as these discrepancies are concerned.

49. Mr. Lobo, learned counsel for the Respondents pointed out the significance of not sealing a note book in the facts of the present case. He submits that first entry, which is stated to bear the signature of Accused No.4 Mahesh Vandkar, is dated 27th April, 2004, on which the date the Accused No.4 was in police custody. Mr. Lobo however points out that in so far as second entry, it is supposed to bear the signature of Vithal Tukaram Gondhali, Accused No.2, the said accused was taken in custody only on 9th June, 2004 and therefore,

according to Mr. Lobo, Accused No.2 was not available with the police for taking his signature on the said entry in the unsealed note book. Mr. Lobo points out that the signature at Q3 is of one “Dhumal” and not “Gondhali”. He points out that coincidentally even the handwriting expert has clearly stated that the signature at Q3 cannot be identified or stated to be handwriting of Accused No.2. In such circumstances, therefore, the evidence as regards the alleged recovery of gold chain with cross at the instance of Accused Nos.2 and 4 will have to be discarded.

50. The attachment of wrist watch from Accused No.3 is extremely doubtful. It is the case of the prosecution that Accused No.3 Madhukar Ainapure surrendered at Mapusa Police Station on 28th April, 2004. It is the case of the prosecution that at the time of the surrender, the Accused No.3 was wearing a wrist watch, which has allegedly robbed from the deceased Antonio. It is difficult to believe that Accused No.3 who has surrendered at Mapusa Police Station whilst wearing a wrist watch which he has allegedly to have robbed from the deceased. That apart none of the witnesses have deposed to say that the deceased Antonio was wearing this wrist watch on 25th April, 2004. Mere statement that the deceased used to wear such a

wrist watch, at least in the facts of the present case was not sufficient to establish this circumstance beyond reasonable doubt. The learned Sessions Judge also noted the discrepancy arising out of quick succession in which panchanama was made in the context of attachment of the wrist watch as also certain further recoveries at the instance of the Accused No.3.

51. The recovery of stereo, sound box and remote at the instance of the Accused No.4 is also doubtful. This recovery was allegedly carried out on 10th June, 2004 i.e. almost one and half month after the incident. It is the case of the prosecution that the Accused No.4 was absconding from 25th April, 2004 till 10th June, 2004 when, he, on his own surrendered at the Mapusa Police Station. To expect that throughout this entire period the Accused No.4 retained the car stereo, sound box or remote by himself or by placing it with his father in law or wife, does raise a doubt as regards this alleged recovery. Besides, in the present case, neither the father in law of the Accused No.4, Mr. S. S. Kaneri nor Smt. Anita Vandkar, wife of Accused No.4 were ever examined. If, in this state of evidence, the learned Sessions Judge observed that the recovery of car stereo, speaker, remote is not free from doubt, it cannot be said that the view

taken by the learned Sessions Judge was not even a possible view in the matter.

52. The TI parade also leaves a lot to be desired. The TI parade was stated to have carried out in accordance with the procedure prescribed in Manual. The TI parade was stated to have been carried out in the presence of two respectable witnesses Dattatray Pednekar, Talathi and Ashok Kharbe, LD.C., independent witnesses (panchas). Though both these panchas were cited as witnesses, they were not examined. It is not as if non examination is fatal in every case. However, in the facts of the present case, such non examination assumes importance particularly, because one of the dummies (PW19) was a stock pancha in the panchanama held on 28th May, 2004 yet another dummy was found to be the brother in law of the deceased. The evidence on record indicates that PW19 has served as pancha in at least four to five cases. PW19 was found standing right next to Accused Nos.1 and Accused No.2 in the respective TI parade. In this state of evidence, it cannot be said that the view taken by the learned Sessions Judge was not even a possible view in the matter.

53. In so far as TI parade is concerned, the learned Sessions

Judge is right in observing that it cannot be the matter of pure coincidence that on every occasion the accused persons were found to be standing right next to PW19, who has served as a pancha not only in this case but also in about four to five other cases. Besides, one of the identifying witness at the TI parade was Sanjay Kalyani, a room boy at Swapna hotel at KTC bus stand. The memorandum of TI parade held by Sudin Natu, Executive Magistrate, indicates that this identifying witness Sanjay Kalyani was *“asked to view the parade and to see whether he could identify the person who hired the maruti van of Antonio Rodrigues at Panaji bus stand to proceed to Terekhol, Pernem and assaulted him resulting in to his death”*. Now it was never the case of the prosecution when Sanjay Kalyani had ever witnessed the accused person at the KTC bus stand hiring the maruti van of the deceased Antonio. Yet, Sanjay Kalyani was called upon to identify the persons who were seen hiring the maruti van from Antonio and Sanjay Kalyani proceeded to identify them. The circumstance that on each occasion PW19, stock pancha witness was always standing adjacent to the accused persons, is not a circumstance, which can be easily overlooked in such a situation.

54. The case of the prosecution is that the IMEI number of

Antonio's mobile phone hand set was secured from warranty document produced by the wife of the deceased. Based upon the IMEI number a letter was addressed to Bharati Cellular to furnish the information as to whether any calls were traced from such hand set. Bharati Cellular network, Bangalore reported that mobile phone having IMEI no.351344803077434 was being used by inserting a different SIM card. The SIM card was bearing No.9880263463 and was registered in the name of accused Madhukar Ainapure. It is on the basis of this information the police traced and arrested Madhukar Ainapure from Kolhapure.

55. The prosecution examined Stanley Agnelo from Bharati Airtel Limited, Bangalore, as PW46. On perusal of deposition of PW46 in its entirety, it is clear that this witness has only deposed that the calls were made from SIM card bearing No.9880263463 registered in the name of Madhukar Ainapure. This witness has also produced four pages of call details record (CDR) marked as Exhibit 145 Colly. However, significantly, PW46 has nowhere stated in his deposition that the calls made relate to mobile hand set bearing IMEI No. 351344803077434. In case the prosecution desired to link Madhukar Ainapure with the use of Antonio's mobile hand set, then, this

evidence was crucial. However, this evidence is conspicuously missing. Mr. Lobo pointed out that SIM card bearing No.9880263463 could have been used through any mobile hand set. He pointed out that Exhibit 145 Colly merely reflects the call details made through the said SIM card. However, neither the deposition of PW46 nor the documents at Exhibit 145 Colly connect the calls so made with the mobile hand set of the deceased Antonio bearing a unique IMEI number as aforesaid. Again, this is an additional ground for not disturbing the view taken by the learned Sessions Judge.

56. On the aspect of extra-judicial confession allegedly made by Accused No.3 before Dr. Madhu Ghodkirekar (PW21), again, the same is not free from doubt. According to PW21, the Accused No.3 had sustained some injuries on his left hand index finger and when asked to explain the same, Accused No.3 alleged to have been stated that this injury was caused in the course of scuffle when he tried to assault a driver with beer bottle. Taking into consideration the law laid down by the Apex Court in the case of *Ammini and others Vs State of Kerala* and *Commissioner of Police Delhi Vs Narender Singh*¹², such wholesale confessions are not admissible in evidence except when made before the Magistrate. That apart, the material on record

¹² AIR 2006 SC 1800

indicates that the injuries on index finger of his left hand were minor. In this circumstance, it is difficult to believe that Accused No.3 made the wholesale confessional statement which, the prosecution, now seeks to rely upon. In any case, the view taken by the learned Sessions Judge is clearly a possible view in so far as even in this circumstance is concerned.

57. In *Ammini* (supra) the factum of extra-judicial confession had been conclusively established. Besides in the said case, Section 120-B of the Indian Penal Code had been invoked. These are two distinguishing features on account of which principles of *Ammini* (supra) that extra -judicial confession by one of the accused person can be used against other accused persons as well cannot be invoked.

58. For all the aforesaid reasons, we are unable to agree with Mr. Rivankar that the view taken by the learned Sessions Judge in the present case is not a possible view in the matter. Taking into consideration, the restricted parameters in appeal against the acquittal, it is therefore not possible to interfere with the acquittal recorded by the learned Sessions Judge.

59. In *Hakeem Khan and others Vs State of Madhya Pradesh*¹³ the Hon'ble Apex Court made a reference to the earlier ruling in the case of *Murugesan*, reported in (2012) 10 SCC 383. The Apex Court has held that the possible view denotes an opinion which can exist or be formed irrespective of the correctness or otherwise of such an opinion. A view taken by a Court lower in the hierarchical structure may be termed as erroneous or wrong by a superior court upon a mere disagreement. But such a conclusion of the higher Court would not take the view rendered by the subordinate Court outside the arena of a possible view. The correctness or otherwise of any conclusion reached by a Court has to be tested on the basis of what the superior judicial authority perceives to be the correct conclusion. A possible view, on the other hand, denotes a conclusion which can reasonably be arrived at regardless of the fact whether it is agreed upon or not by the higher Court. The fundamental distinction between the two situations have to be kept in mind. So long as the view taken by the trial Court can be reasonably formed, regardless of whether the High Court agrees with the same or not, the view taken by the trial Court cannot be interdicted and that of the High Court supplanted over and above the view of the trial Court.

¹³ (2017) 5 SCC 719

60. In *Bhagwan Jagannath Markad and others Vs State of Maharashtra*¹⁴, the Apex Court has held that if the Appellate Court is to reverse the judgment of the trial Court, the reasoning of the trial Court has to be adverted to and reversal of acquittal is permissible only if the view of the trial Court is not only erroneous but also unreasonable and perverse. At the same time, the Appellate Court has full power to review the evidence and to reach at its own conclusion. The Appellate Court can set aside the acquittal if the acquittal is not justified. Of course, the Appellate Court has to consider the fact that the trial Court has the benefit of seeing the witnesses in the witness box and the presumption of innocence is not weakened by the acquittal. If two reasonable conclusions can be reached, the Appellate Court should not disturb the finding of the trial Court.

61. In *K. Venkateshwarlu Vs State of Andhra Pradesh*¹⁵, the Hon'ble Apex Court has held that if the view taken by the trial Court is a reasonably possible view, the High Court cannot set it aside and substitute it by its own view merely because that view is also possible on the facts of the case. The High Court has to bear in mind that presumption of innocence of an accused is strengthened by his

¹⁴ (2016) 10 SCC 537

¹⁵ (2012) 8 SCC 73

acquittal and unless there are strong and compelling circumstances which rebut that presumption and conclusively establish the guilt of the accused, the order of acquittal cannot be set aside. Therefore, unless the order of acquittal is perverse, totally against the weight of evidence and rendered in complete breach of settled principles underlying criminal jurisprudence, no interference is called for with it. Crime may be heinous, morally repulsive and extremely shocking, but moral considerations cannot be a substitute for legal evidence and the accused cannot be convicted on moral considerations.

62. In *Kanhaiya Lal and others Vs State of Rajasthan*¹⁶, the Apex Court refused to interfere with the acquittal by observing that it is very difficult to hold that there are '*substantial and compelling reasons*', '*good and sufficient grounds*', '*very strong circumstances*', '*distorted conclusions*' or 'glaring mistakes', in the order by which acquittal came to be recorded.

63. Applying the aforesaid principles to the matter at hand, we are not persuaded to hold that there are substantial or compelling reasons to reverse the acquittal. According to us, this is certainly not a case whether the view taken by the learned Sessions Judge cannot be

¹⁶ (2013) 5 SCC 655

regarded as a possible view. Besides as pointed out by us there are certain glaring discrepancies, which the prosecution has failed to explain.

64. For all aforesaid reasons, we dismiss this appeal.

65. We record our appreciation at the fair manner in which Mr. Rivankar, learned Public Prosecutor presented this matter. We also record with gratitude that able assistance rendered to us by Mr. Lobo for the Respondents appointed under Legal Aid Scheme.

Prithviraj K. Chavan, J.

M. S. Sonak, J.

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