

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.335 OF 2015

Yadubahadur @ Yadu Manbahadur Singh	]	
Age 25 years, R/o: Daud Ward 1, Devanmanu,	]	
District Todi, Hoti Hanchal, Nepal. At present	]	
lodged in Nashik Road Central Prison, Nashik	]	... Appellant
		/Original Accused
		No.2

Versus

The State of Maharashtra	]	
(At the instance of Santacruz Police Station,]		
Mumbai	]	... Respondent

Mrs.Nasreen Ayubi for the appellant.
Mr.Arfa Sait, APP for the Respondent.

**CORAM : B.P. DHARMADHIKARI &
PRAKASH D. NAIK, JJ.**

RESERVED: 05/04/2019

PRONOUNCED ON: 12/06/2019

JUDGMENT (Per B. P. Dharmadhikari, J.)

1. Accused No.2 Yadubahadur @ Yadu Manbahadur Singh convicted by Additional Sessions Judge, Greater Bombay on 20/3/2014 for offence punishable u/s.302 for committing murder of deceased Ushaben Parekh and sentenced to suffer life imprisonment and to pay fine as also for murder of deceased Harsh Parekh similarly, has filed present appeal. He is also convicted for offence punishable under section 392 of IPC and sentenced to suffer RI for 7 years and to pay fine. We have heard learned counsel Nasreen Ayubi for accused and learned APP for the State.

2. According to learned counsel for accused there is no eye
Corrected pursuant to speaking to minutes order dated 21/6/2019.

witness and conviction is based only on circumstantial evidence. None of the circumstances is brought on record by any cogent and convincing evidence. She submits that son of deceased Ushaben viz. Dilip examined as PW-7 could not identify accused No.2 and he identified accused No.1 who already was in employment of his mother. Test identification parade was conducted almost after 15 days that too in jail and reliance upon such test identification parade is unwarranted. His evidence that he saw three *nepali* persons in pump room and one of them was accused does not inspire confidence.

3. She urged that prosecution has introduced PW-6-Salim as witness to suit its purpose and he had no business to come to spot of offence otherwise. Evidence of this witness PW-6 is again not material as he claims that he saw three persons leaving the society in which deceased resided hurriedly cannot be accepted. This witness has accepted that he was shown accused No.2 in the police station and hence his participation thereafter in test identification parade cannot be accepted as valid.

4. The claim of prosecution that accused persons immediately after their arrest on 16/9/2008 made disclosure statement and accordingly recoveries have been effected on 17/9/2008 and 19/9/2008 vide Exhibit 91 and Exhibit 73 is liable to be discarded. This recovery is not supported by PW-8 and this witness happened to be an employee of PW-7-Dilip Parekh. The panchanama of recovery at Exhibit 91 and Exhibit 73 are pressed into service by learned counsel to show that properties shown as discovered therein were not disclosed by informant/PW-1-Rupal. PW-1-Rupal is daughter-in-law of deceased and she has identified only some of the ornaments vide Exhibit 102 on 21/9/2008. She could identify only 11 ornaments as mentioned in this panchanama and ornaments recovered vide Exhibit 73 are not part of Exhibit 102. Submission is even alleged currency

notes seized have not been shown to PW-1-Rupal. Panchanama Exhibit 73 is relied upon only to urge that three articles mentioned therein at Serial Nos.1, 2 and 9 could be identified by PW-1-Rupal. Learned counsel relied upon evidence of PW-4 Sudhir Nene to contend that his evidence does not show that bag discovered allegedly under section 27 was not concealed in any way.

5. Chance finger print of accused No.2/appellant proved on record by examining PW-10-Rafiq Patel and PW-11-Gangadas Jagtap is also assailed on the ground that finger prints of accused No.2 were obtained in police station on glass and the same may have been used to demonstrate his presence in the flat of deceased.

6. Learned APP on the other hand has submitted that alleged incident occurred in the flat of deceased persons on 15/9/2008 between 1.00 to 1.30 p.m. and then accused persons were arrested on 16/9/2008 There are recoveries on 17/9/2008 from accused persons. There is recovery on 19/9/2008 from accused no.2 and on 20/9/2008 again from accused Nos.2. Recovered articles were identified on 21/9/2008. Test identification Parade was held at neutral place on 1/10/2008 and witnesses have identified accused persons. Very same evidence is relied upon to submit that participation in crime by accused No.2 has been proved beyond reasonable doubt. Finding of his finger print on mirror in flat of deceased persons shows that accused No.2 who had no business to enter that flat, had gone there. Other material on record therefore completes the chain and indicates accused No.2 as the person who has committed murder and robbery. He relied upon evidence of PW-2-Rajul Parekh the wife of PW-7, to show that because of festival members of Parekh family had kept their ornaments and jewellery with PW-1-Rupal and accused No.1 was working with her as servant. He had joined just 8-10

days before the incident. He submits that accused No.1 was aware of availability of ornaments and appellant/accused No.2 therefore committed robbery.

7. Learned APP concludes by urging that accused persons had knowledge of availability of ornaments, of absence of adult members in flat house at relevant time and therefore had committed the offence. The circumstances establish that they had entered the flat and were last seen in the flat. Recoveries under section 27 of the Evidence Act of ornaments stolen from flat and their identification in test identification parade again clinches the issue. Finger print of appellant/accused No.2 was found in flat and it has not been explained by him. As such the chain of circumstances complete in itself which rules out involvement of any other person as accused and indicates appellant as one of the accused has been brought on record by the prosecution.

8. Briefly the story of prosecution can be narrated as follows:

On 15/9/2008 deceased Ushaben aged about 74 years and her grand son Harsh aged about 12 years were present in Flat No.7, 2nd floor in 'A' wing, Shobhana Building, Tilak Road, Santacruz (W), Mumbai. They were occupying that flat with Udayan Parekh who happened to be the son of Ushaben and PW-1 happens to be the wife of Udayan Parekh. Other son of Ushaben by name Dilip was residing in Flat No.3 on first floor of the very same building. PW 2 Rajul is wife of this Dilip.

9. PW-2 Rajul used to drop son of PW 1 Harsh and her daughter to Mumbadevi Vidya Mandir in morning. School timings were from 7.30 a.m. to 1.30 p.m. PW-1-Rupal used to go to fetch children in the afternoon. This was the practice in vogue.

10. On 15/9/2008 Udayan left house at about 11.30 a.m. for his office work. At that time accused No.1, PW-1-Rupal and both deceased were in the house. Accused No.1 used to arrive at about 8.30 a.m. and remained in flat up to 11.30 p.m. As Harsh was not sent to school, daughter of PW-2-Rajul by name Pankti was dropped by PW-2 Rajul in morning hours in the school. PW-1-Rupal then went to school at about 1.00 p.m. to fetch her. Thus, only three persons were left in Flat No.7.

11. At about 1.45 p.m. PW-1-Rupal returned and then left said Pankti in her flat. Rupal then came to her own flat and rang door bell 2-3 times. As there was no response she opened the door with her keys and then she found her mother in law Ushaben lying on floor with her limbs tied. She immediately called PW-2-Rajul and PW-2-Rajul also came up hurriedly. They searched for Harsh in flat and found that articles in cupboard were lying scattered. She did not find Harsh even in mother-in-law's bedroom. Harsh was ultimately found in bath tub of 2nd bedroom with his limbs tied. Harsh was then lifted from tub. One Dr. Maniyar had arrived in the flat and declared Ushaben dead. He advised Harsh to be taken to Nanawati hospital but in the hospital Harsh was declared dead.

12. In flat, wardrobes in both bedrooms were open and articles therein were lying scattered. Two screwdrivers not belonging to family were also seen. Jewellery box, watch box which contained ornaments, watches and cash amount was found empty. Servant accused No.1 was not to be seen anywhere. PW-1-Rupal accordingly lodged report.

13. The recoveries mentioned by us supra therefore need appreciation in the backdrop of evidence on record. Homicidal death of Ushaben and Harsh is not in dispute at all. PW-1-Rupal has supported story of prosecution and stated that when she arrived back to her flat at about 1.45

p.m. she found dead bodies and robbery being committed. She also proved that her servant accused No.1 was missing. She has also identified articles stolen from her house. The list which forms part of her deposition paragraph No.9 shows that she identified 27 articles. Article No.28 is also recorded as identified by her. Article 28 is green polythene bag which contained other articles. Learned counsel for the appellant has urged that Article 28 was not shown to PW-1-Rupal. However, her deposition in paragraph No.9 does not support this submission. Even at the conclusion of her examination-in-chief, she has referred to all articles shown to her. Nothing fruitful in relation to events or robbery or then to show absence of accused No.1, has been brought on record in her cross examination. There is no cross examination on identification of articles by her. We find that these witnesses have supported the story of prosecution fully.

14. PW-7-Dilip is brother-in-law of PW 1. His evidence shows that he was aware of accused No.1 being domestic servant with PW-1-Rupal. He pointed out that accused No.1 was employed 10-12 days before the incident. He also pointed out that on 15/9/2008 when he proceeded towards his car, he noticed three persons in pump room. One of them was accused No.1 while other two were unknown. He identified accused No.2 in Court hall. He also deposed that in test identification parade he identified two suspects i.e. accused before the Court. Nothing fruitful has been brought on record in his cross examination and it is therefore not possible to discredit this witness also.

15. PW-6-Salim has been examined by prosecution to show that when he entered the flat scheme of PW-7 at about 1.30 p.m., he saw accused persons hurriedly leaving that building. He has deposed that he had gone to that building viz., Shobhana building to collect medicines brought by PW-7-Dilip for him from Doctor at Ghatkopar. He has deposed

that three persons crossed him at the entrance of that building and they were going away hurriedly. He was not aware of accused No.1 or his employment with deceased. He has briefly given their description and then pointed out that in test identification parade he identified two of them. In chief only he deposed that he has seen them in police station before test identification parade and thereafter at Arthar Road jail.

16. His cross examination shows that he could not explain why the fact that bag was in the hand of one person did not appear in his police statement. He has also stated in cross that he went to police station on one or two occasions after 3-5 days to identify the offenders. He further deposes that in identification parade faces of persons were not covered. He stated that 20-22 persons were brought for TIP. This witness therefore ceases to be witness to test identification parade as accused persons were already shown to him in police station. Identification in test identification parade therefore loses its significance but then it supports his claim that he saw three persons leaving Shobhana building hurriedly at 1.30 p.m.

17. Above evidence therefore shows that crime took place after PW-1-Rupal left flat at 1.00 p.m. and it was finished before 1.30 p.m. when PW-6-Salim arrived in Shobhana building. It also shows that accused No.1 domestic aid who should have been present in flat of PW-1-Rupal, vanished thereafter and was arrested by police on 16/9/2008.

18. Recoveries under section 27 are brought on record by examining PW-8-Rajnish Dadish. Even PW-4-Sudhir Nene has supported the same. PW-8 Rajnish has deposed that on 19/9/2008 when he went to Santacruz Police Station two accused persons were present. He however told Trial court that he was not remembering what happened thereafter. Trial Court then permitted learned APP to put leading questions. He

accepted that in his presence police asked accused persons their names and accused No.2 disclosed the same as Yadusingh. However, again he refused to answer further questions because of loss of memory due to lapse of time. Learned APP was then permitted to cross examine him and then this witness admitted everything was recorded in Exhibit 73. He then accepted that accused, this witness and police arrived at Medini Niketan Apartment. Then they went to office of Society in that building which was closed. Accused knocked the door and person coming out disclosed his name to be Sudhir. He stated that he was secretary of the Society. Appellant/accused No.2 then went to one chair and produced one bag of blue colour and took out cash amount and ornaments from that bag. Police seized those articles and sealed them in presence of PW-8. His cross examination shows that he was working with PW-7-Dilip and on 15/9/2008 had been to Police Station. He again went to Police Station when police called him. He could not explain why in latter part of recovery panchanama Exhibit 73(A) the word 'seal' was not written. Exhibit 75 Envelope was opened in Court in presence of this witness and it was found to contain currency notes worth Rs.47,760/- as mentioned in Exhibit 73. This witness also accepted his signature on paper labels at Exhibit 74 and 75. He accepted that in panchanama, fact of affixing paper labels or then putting lac seal on envelope did not appear. He denied that he signed panchanama because of his employment with PW-7. Examination-in-chief and cross examination of PW-8 therefore does not show any attempt to mislead the Court. Moreover the Secretary of Society Sudhir has been examined as PW-4 who independently proves the recovery.

19. Deposition of PW-4-Sudhir shows that appellant/accused took out a bag from the corner of office of society and gave it to police. He has also narrated 11 items which were taken out of that bag. His cross examination by accused persons does not show anything worth mentioning

and his assertion on oath therefore needs to be accepted. Thus, recovery at the instance of accused No.2 on 19/9/2008 is satisfactorily established by prosecution.

20. Perusal of panchanama Exhibit 73 shows how the memorandum and discovery has been brought on record. Total 15 articles were then recovered. Perusal of identification panchanama Exhibit 102 in which PW-1-Rupal has identified ornaments shows that total 4 envelopes were then open and ornaments/articles contained therein were shown to her. Panchanama records that all articles contained in these 4 envelopes were identified by her and she claimed that those belonged to her.

21. Valuer Chandanlal Jasraj Parmar then examined those articles. He separated silver/gold ornaments and one valuable watch. He worked out worth of these articles separated by him to be Rs.2,27,875/-. He prepared the list of those 15 articles. Panchanama then mentions that the other articles were kept back again in respective envelopes and those envelopes were sealed. This panchanama therefore does not show that PW-1-Rupal identified only three articles or only 15 articles and such interpretation by appellant on this panchanama Exhibit 102 is without any substance. Other panchanama on record is Exhibit 91. Witnesses who have witnessed this recovery under section 27 have not been examined by the prosecution. This panchanama Exh.91 dated 17/9/2008 is proved by PW-12-Investigating Officer Dalvi. This witness has proved this document Exh.91 and articles then recovered. He also speaks about Exhibit 73. We find that this witness accepted that the word 'seal' is not mentioned in panchanama Exh.91, however panchanama mentions that total 7 articles and cash were placed in transparent plastic bag, it was closed by applying label of signature of police and panch witnesses and that bag was seized. This material therefore shows nothing but process of sealing. Nothing

wrong about this recovery under section 27 can be pointed out to us by the appellant/accused.

22. The fact remains that all these articles were then identified by PW-1-Rupal. We find that even in Court PW-2 Rajul has identified the ornaments. Her deposition shows that religious festival was being celebrated and 3/9/2008 was 8th day of that function. Because of that function called as Sanji function, the ornaments were stocked with PW-1-Rupal. It is not necessary for us to go into niceties of this religious function.

23. Finger print of accused No.2/appellant is proved by PW-10-Rafiq Patel, the Assistant Police Commissioner. He pointed out collection of chance finger prints from glass cupboard and showcase and panchanama thereof. One finger print was collected from glass on cupboard. Total three chance prints were collected. Nothing worth mentioning to discredit this witness is brought on record. PW-11-Jagtap is next witness who pointed out how he detected finger prints and how photographer Savekar took photographs of this impressions. One finger print was on mirror/glass of wooden cupboard while one was on sanmaika ply strip, while the third one was on glass showcase. He then pointed out receipt of those photographs by him on 24/9/2008 and exercise of study thereof. He pointed out that Exhibit 84 and 85 were found identical. He has given reasons in support of his opinion at Exhibit 87 and his findings are at Exhibit 88. The evidence of this witness has not been assailed before us and there is no challenge to it at all. His report at Exhibit 88 shows that finger print on mirror of wooden cupboard was found identical with ring-finger print of present appellant. Similarly chance finger print on mirror of another wooden cupboard is found identical with left middle finger print. These two finger prints of appellant/accused in flat of PW-1-Rupal clearly show his presence in that flat.

24. We therefore find that through clinching evidence of PW-1-Rupal, the prosecution has established time of commission of offence and the fact of accused No.1 vanishing thereafter. The finger print expert brings on record the presence of accused No.2 in that flat. Recovery of ornaments of family of PW-1 under section 27 of Evidence Act at the instance of accused No.2 vide Exhibit 73 and 91 is also established beyond reasonable doubt.

25. We in this situation, find that the chain of circumstances as claimed by learned APP is satisfactorily established. The chain is complete and indicate accused No.2 as the offender. Accused No.2 has not explained how his finger prints appeared on glass in two different rooms in said flat. His contention that his finger prints were taken by police on glass after arrest does not support defence that police have fabricated fake story. No such case is made out against prosecution by accused persons.

26. We therefore find nothing wrong in judgment of conviction delivered by trial Court.

27. Accordingly, we pass following order:

- i) Appeal is accordingly dismissed.
- ii) Muddemal property be dealt with as directed by trial Court after the appeal period is over.

(PRAKASH D. NAIK, J.)

(B.P. DHARMADHIKARI, J.)