

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL APPEAL NO. 723 OF 2012**

Sujit Gopal Pawan,
Aged about 25 years,
R/o. Dabhel, Puniafalia,
Nani Daman,
(At present in sub-jail Daman)

.....Appellant

Vs.

1 The Administration,
U.T. of Daman & Diu,
Through Shri Ballu Sankarbhai Patel,
Residing at House No.16-A,
Puniya Faliya, Dabhel,
Nani Daman.

2 Union of India.

3 The State of Maharashtra

.....Respondents.

Shri. Ralston Fernandes for the Appellant.
Shri. H.S.Venegaonkar for Respondent No.1
Ms. P.P.Shinde, APP for Respondent No.2.

**CORAM : A. S. OKA, AND
A. S. GADKARI, JJ.
DATE : 4th MARCH, 2019.**

JUDGMENT (PER A.S. GADKARI, J.):

The Appellant has questioned the correctness of the Judgment and Order dated 23rd February, 2012 passed by the learned Sessions Judge, Daman at Daman in Sessions Case No. 7 of 2009,

convicting him under Section 302 of the Indian Penal Code and sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/-, in default of payment of fine to suffer rigorous imprisonment for one year.

2 Heard Shri. Fernandes, the learned counsel for the Appellant, Shri. Venegaonkarn for Respondent Nos.1 and 2 and Mrs. P.P. Shinde, APP for the Respondent No.3-State. Perused the record.

3 The prosecution case in brief is that, the deceased Sujata was wife of the Appellant. That, on 18th July, 2009, at 2.30 p.m. when Shri. Subhash Patel (P.W. No. 2) was on his way back from Shirdi, at Peth, received a call on his mobile phone from the Appellant. The Appellant informed him that, the dead body of his wife Sujata was lying beneath the cot in his room. It is the prosecution case that, the Appellant had taken the said room on rental basis from the mother of Shri. Subhash Patel (P.W. No. 2) and Shri. Ballubhai Patel (P.W. No. 1). Shri. Subhash Patel (P.W. No. 2) immediately informed the said fact to Shri. Ballubhai Patel (P.W. No. 1), his younger brother on telephone. He (P.W.No.1), therefore, immediately went to the room of the Appellant and found it in locked position. He immediately went to Dabhel Police Out Post and informed the said fact to the police.

The police without wasting any time, came to the room of the Appellant and broke open the lock and entered into the room. The dead body of a female was found under the bed in the room. It was identified to be of Sujata, the wife of the Appellant. The persons present there noticed injury marks on the head and eyes of the dead body and blackish marks on the throat.

4 The police seized six articles from the scene of offence including one big spoon. After receipt of specific information, the Appellant came to be arrested at Surat Railway Station on 25th July, 2009. The Appellant on 27th July, 2009, when was in custody expressed his desire to show the articles by which he committed murder of Sujata and accordingly discovery of articles namely a steel spoon, a pillow alongwith a cover with blood stains, a T-shirt with blood stains and a half pant was discovered by effecting a panchanama (Exhibit-24) under Section 27 of the Evidence Act, in presence of Dharmesh Patel (P.W. No. 4).

5 After completing investigation, the police submitted charge-sheet in the Court of Chief Judicial Magistrate, Daman on 22nd October, 2009. The learned Chief Judicial Magistrate, Daman committed the said case to the Court of Sessions at Daman by its

Order dated 28th October, 2009 as the offence punishable under Section 302 of the Indian Penal Code is exclusively triable by the Court of Sessions.

The learned Trial Court framed charge against the Appellant below Exhibit-2. The contents of the said charge were read over and explained to the Appellant to which, he pleaded not guilty and claimed to be tried.

6 The defence of the Appellant was of total denial. It is the further defence of the Appellant that, Sujata was not his wife and he was not residing with her in the rented premises owned by Smt. Diwaliben Patel, the mother of P.W. Nos. 1 and 2. It was his further defence that, Sujata was not related to him however, they were working together in the same Company. He further adopted a defence that, on 16th July, 2009 he was out of station and had gone to Delhi to see his brother and when he was returning back to Daman, the brother of Sujata called him and informed him that Sujata was killed. That, when he was returning back to Daman, the police arrested him from Surat Railway station. It is his specific case that, he has been falsely implicated in the present case.

The prosecution, in support of its case, has examined in all

7 witnesses. The learned Trial Court after recording evidence and hearing the parties to the said case, was pleased to convict and sentence the Appellant by the impugned Judgment and Order.

7 The perusal of entire evidence on record indicates that, the Prosecution in support of its case has put-forth three circumstances namely; (i) phone call given by the Appellant to Shri. Subhash Patel (P.W. No.2) on 18th July, 2009 at about 2.30 p.m.; (ii) the Appellant was absconding from 17th July, 2009 till his arrest on 25th July, 2009; and (iii) discovery of articles such as a spoon, a pillow with cover having blood stains on it at the instance of the Appellant on 27th July, 2009, from his house.

8 The present case is entirely based on circumstantial evidence. It is the settled position of law that, in a case of circumstantial evidence the circumstances on which the prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. In a case resting on circumstantial evidence, it is incumbent for the prosecution to prove each and every circumstance on which it proposes to rely. The circumstances so proved should be of conclusive nature i.e they should have a definite tendency of implicating the accused. The circumstances so established should form a complete

chain which should exclude every hypothesis of the innocence of the accused and unquestionably point towards the guilt of the accused. In other words the circumstances should be conclusive i.e accused and the accused alone has committed the crime

The standard of proof required to convict a person on circumstantial evidence is now well established by a series of decisions of the Apex Court. According to that standard the circumstances relied upon in support of the conviction must be fully established and the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The circumstances from which the conclusion of the guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused and should not be capable of being explained by any other hypothesis, except the guilt of the accused and when all the circumstances cumulatively taken together should lead to the only irresistible conclusion that the accused alone is the perpetrator of the crime.

9 Shri. Ballubhai Patel (P.W. No. 1) is the younger brother

of Shri. Subhash Patel (P.W. No.2). Shri. Ballubhai Patel (P.W. No. 1) in his testimony has stated that, on 18th July, 2009 at about 2.30 p.m., he received a phone call from his elder brother Shri. Subhash Patel (P.W. No.2) who informed him from Shirdi that the dead body of Sujata, wife of the Appellant was lying under the bed in their room. Shri. Subhash Patel (P.W. No.2) also informed him that, the said information was given to him by the Appellant himself. He, thereafter, immediately informed the said fact to the police, who came at the scene of offence and broke open the lock of the door and entered the room. He noticed a dead body of a female beneath the bed in the said room. It was identified to be of Sujata. He has further deposed that, he noticed injuries on the person of Sujata. That, the police seized certain articles including one big spoon and clothes of deceased Sujata therefrom.

Shri. Subhash Patel (P.W. No.2) has deposed that, on 18th July, 2009, in the early morning he had been to Shirdi for Darshan and on his way back to Daman at about 2.30 p.m. when he was at Peth, he received a call on his Mobile phone from the mobile phone of the Appellant. The Appellant informed him that the dead body of Sujata was lying beneath the cot in his room. The said room was

rented to the Appellant by the mother of Shri. Ballubhai Patel (P.W. No. 1) and Shri. Subhash Patel (P.W. No.2). Shri. Subhash Patel (P.W. No.2) therefore, immediately informed the said fact on phone to his younger brother Shri. Ballubhai Patel (P.W. No. 1).

10 As far as the first circumstance of phone call made by the Appellant to Shri. Subhash Patel (P.W. No.2) on 18th July, 2009 at about 2.30 p.m. is concerned, the prosecution has examined Shri. Gaurav Pandit (P.W. No. 5) an Officer employed with Bharati Airtel Limited, the service provider company, who has provided mobile phone facility along with sim card to the Appellant for his mobile phone No. 9601174904 and Shri. Bhavik Joshi (P.W. No. 6), an Officer employed with Idea Cellular Limited, who is the service provider to the cell phone of Shri. Subhash Patel (P.W. No.2) who was having his cell number as 9824141151. By examining the said two witnesses, the prosecution has only proved that on 18th July, 2009 at about 2.10 p.m. the Appellant had given a phone call to Shri. Subhash Patel (P.W. No.2) and nothing more than it.

The prosecution has thus only proved the fact that, on 18th July, 2009, the Appellant had given a phone call to Shri. Subhash Patel (P.W. No.2) at about 2.10 p.m. on his mobile phone and

provided him with the information that, the dead body of Smt. Sujata was lying beneath the bed/cot in his room rented to him by the mother of P.W. Nos. 1 and 2.

11 The prosecution has relied on the second circumstance of abscondance of the Appellant from 17th July, 2009 till his arrest on 25th July, 2009.

It is the settled principal of law that absconding may lend weight to the other evidence establishing the guilt of an accused, but, by itself, is hardly any evidence of guilt. The conduct of an accused making himself scarce for some period is relevant under Section 8 of the Evidence Act and may be indicative to some extent of a guilty mind, but it would not be conclusive evidence of his guilt. Even innocent persons may, when suspected of grave crimes, attempt to evade arrest. Such is the instinct of self-preservation in an average human being. Absconding is a weak link in the chain of circumstances and is not conclusive either of guilt or a guilty conscience. Even assuming that, the fact of absconding has been established by the prosecution, it cannot be held that the appellant was the author of the crime in the absence of evidence pointing to his guilt. Reliance is placed on the decision of the Division Bench of Orissa High Court in

the case of *Adikanda Das Vs. State of Orissa reported in 1988 Cri. L.J. 1884 (Orissa High Court)*. We affirm the view expressed by the Division Bench of the Orissa High Court and reiterate that, the circumstance of abscondance of an accused person is a weak piece of evidence in the chain of circumstances and is not a conclusive criteria either of guilt or a guilty conscience of the accused.

We, are therefore, not inclined to take into consideration the said circumstance as a vital piece of evidence in the chain of circumstances putforth by the prosecution in the present case.

12 The third circumstance relied upon by the prosecution is the recovery of articles at the instance of the Appellant on 27th July, 2009 from his house. It is to be noted here that on 18th July, 2009 itself, after receipt of information from Shri. Ballubhai Patel (P.W. No. 1), the police had broke open the lock of the door of the Appellant and had entered into the said premises. The police had also seized certain articles from the said scene of offence. The evidence indicates that the said articles were lying scattered in the room and were not found concealed by the Appellant. The evidence of Shri. Ballubhai Patel (P.W. No. 1) clearly indicates that, the police had put their own lock on the door of the Appellant. The evidence on record is silent

about the fact that, before breaking open the lock on the door of the Appellant, the police had in fact effected any panchanama. After the arrest of the Appellant, on 25th July, 2009, when he was in custody, it is the case of the prosecution that, the Appellant expressed his desire to give recovery of the articles, which were used in commission of the crime and in furtherance thereof on 27th September, 2009 after effecting a memorandum statement (Exhibit-23) of the Appellant, the police again visited the said premises and after opening the lock by the police, the Appellant gave recovery of a steel spoon and a pillow along with cover having blood stains on it.

13 As noted earlier, the premises in question i.e. the scene of offence, was earlier visited by the police on 18th July, 2009 and a search of it was taken. A prudent Investigating Officer would have certainly noticed the said articles during the search of which is done in the present case. In view thereof, we are of the opinion that there is every possibility of tampering with the evidence and/or articles cannot be ruled out in the present case and therefore, the said circumstance of alleged recovery of articles at the instance of the Appellant needs to be kept aside from consideration.

14 The cumulative effect of the aforestated deliberation

would indicate that there is only one circumstance i.e. the alleged phone call given by the Appellant to Shri. Subhash Patel (P.W. No. 2) remains on record for consideration. It is to be noted here that, by the said phone call, the Appellant had only given information to Shri. Subhash Patel (P.W. No. 2) about the dead body being there at a particular place and nothing more than it.

15 The evidence on record is silent about the fact that any witness had seen the Appellant either on 16th July, 2009 or 17th July, 2009 entering or leaving the said premises. The evidence on record is also silent about the fact that any witness saw the Appellant near the place/scene of offence within the proximity of time before the dead body was found by the police.

16 In view of the above, we are of the opinion that the prosecution has failed to establish the entire chain of circumstances beyond reasonable doubt. The Appellant is therefore, entitled for benefit of doubt and as a consequence, acquittal thereof.

Hence, we pass the following Order.

- I) The impugned Judgment and Order dated 23rd February, 2012 passed by the learned Sessions Judge, Daman in Sessions Case No.7 of 2009 is

hereby quashed and set aside and the appellant-Sujit Gopal Pawan is acquitted of the offences alleged against him;

- II) The appellant shall be forthwith set at liberty unless he is required in connection with any other offence;
- III) The fine amount if paid shall be returned to the appellant;
- IV) Appeal is allowed on above terms;
- V) All concerned to act upon an authenticated copy of the operative order of this Judgment and order.

(A.S. GADKARI, J.)

(A.S. OKA, J.)