

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

CRIMINAL APPEAL NO. 1302 OF 2013

1. Vishal Ashok Narayane @ Samir Shaikh,
Aged 28 years, Off. Service, Indian
Inhabitant, Permanent Resident of Room
No.9, Adhunik Compound, Nityanand Nagar,
Ghatkopar (W), Mumbai No.400 075.
2. Shabana Samir Shaikh,
Aged 30 years, Indian Inhabitant,
Housewife by profession, Permanent
resident of Building No.10/C, Room No.607,
Indian Oil Nagar, Govandi, Mumbai

(Presently appellant/Orig.AccNo.1 lodged at
Arthur Road Central Prison and Appellant/
Orig.ACC.No.2 being woman prisoner lodged
at Byculla District Prison as convict prisoner
in the aforesaid matter).

... Appellants.

V/s.

The State of Maharashtra.
(At the instance of Pant-Nagar Police
Station vide their C.R.No.183 of 2008).

... Respondent.

Ms.Payoshi Roy i/b. Dr.Yug Mohit Chaudhary for the appellant.

Mr.J.P.Yagnik, APP for the respondent- State.

CORAM : A.S.OKA AND A.S.GADKARI, JJ.

DATE : 13th February 2019.

ORAL JUDGMENT : (Per A.S.Gadkari, J.)

The appellants have questioned the correctness of the impugned Judgment and Order dated 29th November 2013 passed by the learned Ad-hoc Additional Sessions Judge, Greater Mumbai in Sessions Case No.758/2008 @ 272/2009 convicting the appellants under sections 302, 34 and 120(b) of Indian Penal Code (for short “IPC”) and sentencing them to suffer imprisonment for life.

By the same judgment and order, the appellant No.1 is further convicted under sections 420, 465, 471 and 328 of IPC and is sentenced to suffer maximum rigorous imprisonment of 7 years. The appellant No.2- Shabana Shaikh is also convicted for the offence punishable under section 201 of IPC and sentenced to suffer rigorous imprisonment of 5 years.

The trial Court has directed that all the substantive sentences shall run concurrently.

2. Heard the learned counsel for the appellants and the learned APP. Perused the entire record.

3. The prosecution case, in brief, is as under:

(i) Mr.Ajay Janardan Sindkar (PW1), API, in the year 2008 was attached to Pant Nagar Police Station, Mumbai. On 22nd August 2008, he joined his routine duty as Detection Officer. On 23rd August 2008 at about 12.10 a.m. in the midnight, Mr.Unawane, the officer attached to the said police station received information that one injured was lying in front of building No.69, Pant Nagar, Mumbai and, therefore, Mr.Ajay Sindkar (PW No.1) along with Mr.Unawane went to the said spot and found one injured person lying on the footpath near Netaji Garden, opposite Building No.69, Pant Nagar. They noticed profused bleeding from the person of the injured and he was unconscious. Mr.Sindkar (PW No.1) with the help of other police personnel, thereafter, shifted the said injured person to Rajawadi Hospital, Ghatkopar, Mumbai. The said officers also noticed one Auto Rickshaw bearing No.MH-03-6369 standing near the said place where the injured was lying and also noticed blood stains on its rear seat. Mr.Sindkar thereafter called Police Sub-Inspector Mr.Vijay Jadhav to guard the said Auto Rickshaw. After the admission of the said injured person to the hospital, during search of his person, the police found one

identity card in the pocket of his clothes and the name of the said injured person as Soheli Shaneali Sayyed was revealed. The injured person succumbed to the injuries on 23rd August 2008. Initially, an Accidental Death Report was registered by the police and the criminal law was set in motion.

(ii) During the course of investigation, it was revealed that Ms. Rubi Shaneali Sayyed (PW19), the sister of Soheli Sayyed (deceased) was intending to take admission for Engineering course in Bharati Vidyapeeth. The appellant No.1 had assured her for getting the said admission and for that purpose, he had accepted Rs.75,000/- in cash and a demand draft of Rs.29,000/- from Soheli Sayyed (deceased). It is further revealed that a bogus receipt denoting that the work of admission to the said college was completed by the appellant No.1 was given to Ms. Rubi Shaneali Sayyed (PW19) and Mr. Soheli (deceased).

(iii) The deceased and her sister Rubi Shaneali were consistently pursuing the appellants for giving admission and, if it is in fact given, to complete further formalities. It is further alleged that as the appellants were apprehensive of the fact that their act of cheating would come in light, they decided to commit murder Mr. Soheli Sayyed and in furtherance of their conspiracy, on 22nd August 2008 at about 9.30 p.m., they called

Sohel Sayyed at their residence. It is further alleged that the appellants administered stupefying substance (sleeping pills) from the cold drink to Soheli and after he got unconscious, he was transported on a motorcycle bearing No.MH-03-6434 belonging to Mr.Sadik Ashfak Khan (PW9) and thereafter he was made to sit in Auto Rickshaw No.MH-03-6369. It is alleged that in the said Auto Rickshaw the appellant No.1 assaulted the deceased on his neck and committed his murder. It is the further allegation of the prosecution that the appellants thereafter tried to screen the evidence available against them.

(iii) After completion of investigation, the police submitted chargesheet in the Court of Metropolitan Magistrate, 49th Court at Vikhroli, Mumbai. As the offence punishable under section 302 of IPC is exclusively triable by the Court of Sessions, the learned Metropolitan Magistrate, 49th Court, Vikhroli, Mumbai committed the said case to the Court of Sessions. The trial Court framed charge below Exhibit-4. The said charge was read over and explained to the appellants to which they denied and claimed to be tried. The defence of the appellants was of total denial. The prosecution in support of its case examined in all 31 witnesses. The appellants examined 5 witnesses in support of their defence. The learned trial Court after recording the evidence of witnesses

and hearing the parties to the said case was pleased to convict the appellants and sentenced them by the impugned judgment and order as noted hereinabove.

4. At the outset, the learned counsel appearing for the appellants, on instructions from the appellant No.1, submitted that appellant No.1 is not seriously contesting the conviction and sentence under section 420, 465 and 471 of IPC. Inter alia, the appellant No.1 has accepted his conviction and sentence recorded by the Trial Court by the impugned judgment and order under sections 420, 456 and 471 of IPC.

The learned counsel for the appellants further submitted that there is no cogent evidence available on record to indicate that as a matter of fact, the deceased was seen lastly in the company of the appellants. She further submitted that the police had seized one knife from beneath the Auto Rickshaw which was parked near the place of offence. She further submitted that other knife and blood stained clothes were seized by the police from the house of the appellant No.1 by the alleged Panchanama (Exhibit-88) which do not stand to the test of legal sanctity and, therefore, it requires to be kept aside from the consideration. She submitted that if these two circumstances are held to be not sufficiently proved by the prosecution, then the appellants are entitled for acquittal

under section 302 read with section 34 of IPC. She, therefore, prayed that the present appeal may be partly allowed by acquitting the appellants from the charges under sections 302, 328 and 201 read with section 120(b) of IPC.

Per contra, Mr.Yagnik, the learned APP vehemently opposed the appeal by pointing out the evidence available on record. He contended that the prosecution has proved beyond reasonable doubt that charge under sections 328, 302, 201 read with section 120(b) of IPC and, therefore, the conviction and sentence imposed upon the appellants by the Trial Court need not be interfered with by this Court in its appellate jurisdiction. He, therefore, prayed that the present appeal may be dismissed.

5. The evidence available on record indicates that the prosecution case as far as charge under sections 328, 302, 201 read with section 120(b) is concerned, is based on circumstantial evidence. The prosecution in support of its case has propounded two major circumstances rather only two circumstances.

(i) Last seen together; and (ii) seizure of blood stained clothes and a knife at the instance of the appellant No.1 from his house.

6. 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.

7. As far as evidence pertaining to the circumstance of 'last seen together' i.e. the deceased was last seen together in company of the appellants is concerned, the prosecution has examined witness, namely, Mr.Majhar Ali Haider Ali Sayyed (PW12). The said witness in his testimony has stated that he had seen Soheli Sayyed alive at about 10.30 p.m. on 22nd August 2008 as he was passing near from his room. That Soheli (deceased) was proceeding towards "Domnic School", Pant Nagar Police Station, Ghatkopar. He had seen Soheli walking with ear phones in his ears. He thereafter saw the appellants proceeding behind Soheli. In his cross-examination, the said witness has admitted that, it did not happen that five minutes after Soheli had gone, the appellants had also gone to the direction of Domnic High School. Apart from the said admission given by the said witness (PW12), it is to be noted here that the statement of PW12 has been recorded by the investigating agency after a

gap of 45 days from the date of alleged incident which creates doubt in the mind of this Court about the veracity of its maker. Apart from the said fact, as narrated hereinabove, the evidence of PW12 nowhere even remotely suggests that PW12 is the witness, who had in fact, seen Sohail Sayyed (deceased) lastly in the company of the appellants.

8. This leads us to deal with the other circumstance propounded by the prosecution against the appellants i.e. recovery of the knife from the appellant No.1 and blood stained clothes from his house. It is to be noted here that the alleged recovery Panchanama (Exhibit-88) at the instance of the appellant do not stand to the legal test of section 27 of the Indian Evidence Act. A bare perusal of the said Panchanama would indicate that the facet of 'fact discovered' as enumerated in section 27 of the Indian Evidence Act is lacking in the said Panchanama. It appears to us that the said Panchanama was effected during the course of investigation and though it is termed as 'House Search Panchanama' of appellant No.1, it was carried out on the basis of information gathered by the police during the course of investigation without there being any statement of the accused expressing his desire to make 'discovery of fact'. A safe reliance to that effect can be placed on a celebrated decision of the

Privy Council in the case of *Pulukuri Kottaya v. King Emperor*¹. Minute perusal of the said Panchanama would however indicate that, the house in which search was taken was in the possession of the mother-in-law of the appellant No.1 and she was having exclusive domain over it at the relevant time. In view thereof, the said Panchanama needs to be kept aside from consideration. It further appears that, there is no other evidence available on record to connect the appellants with the present offence of murder of Soheli Sayyed.

The record further indicates that, evidence pertaining to administration of stupefying substance (sleeping pills) from the cold drink to Soheli Sayyed (deceased) is also lacking to attract section 328 of IPC to the present crime.

9. In view of the facts of the present case, it is clear that, the prosecution has failed to prove that, the appellants were, in fact, seen lastly in company of Soheli Sayyed. The vital piece of evidence to link in the chain of circumstances is missing and the chain of circumstances is not complete. In view thereof, the appellants deserve to be given benefit of doubt and, as a result thereof, are entitled for acquittal from the offenses

1 AIR 1947 (34) PC 67

punishable under sections 328, 302 and 201 read with section 120(B) of IPC.

Hence, the following order:

ORDER

- (i) The conviction and sentence of both the appellants for the offences punishable under sections 328, 302 and 201 read with section 120(B) of IPC is quashed and set aside;
- (ii) The conviction and sentence of the appellant No.1- Vishal Ashok Narayane @ Samir Shaikh for the offences punishable under sections 420, 465 and 471 of IPC imposed by the trial Court by the impugned judgment and order is upheld. The fine amount imposed on the appellant No.1 for the said offence is also upheld;
- (iii) The appellant No.1 is entitled to benefit of set off under section 428 of Cr.P.C.;
- (iv) The appeal is partly allowed in the aforesaid terms;

(A.S.GADKARI, J.)

(A.S.OKA, J.)