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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.115 OF 2016

Vijay @ Viju Ramesh Ippar	...Appellant
vs.	
State of Maharashtra	...Respondent

ALONG WITH
CRIMINAL APPEAL NO.1101 OF 2015

Dyaneshwar @ Pintu Vasant Jadhav	...Appellant
vs.	
State of Maharashtra	...Respondent

Mr.Harshad E. Palwe I/b Mr.Chetan S. Damre for the
Appellant in Appeal No.115 of 2018 and for applicant
in 114/2018
Mr.Indrajeet Joshi for the appellant in Appeal
No.1101/2015
Ms P.P.Shinde, APP for the respondent-State

CORAM : A.S.OKA, &
 A.S.GADKARI, JJ.
DATE : FEBRUARY 26, 2019

ORAL JUDGMENT: (PER A.S.OKA,J.)

1 Appeal No.115 of 2016 is by the accused No.1-
Vijay and the Appeal No.1101 of 2015 is by accused
No.2-Dyaneshwar @ Pintu Vasant Jadhav. The third
accused being a juvenile in conflict with law was
not tried along with accused Nos.1 and 2. The
appellants have been convicted for the offence
punishable under section 302 read with section 34 of
the Indian Penal Code (for short "IPC") and section
201 read with section 34 of the IPC. They have been
directed to pay fine of Rs.37,500/- each and

Rs.5,000/- each respectively. An order of compensation under section 357 of the Code of Criminal Procedure,1973 has also been made.

2 With a view to appreciate the submissions, factual details will have to be set out. The case unfolds with the version of P.W.No.1-Digambar Patil, Police Constable. According to him, he along with P.W.No.6-Chaudhari PSI were on patrolling duty in the night of 10th April 2011. At about 3.35 a.m in the early morning of 11th April 2011, when they reached near overbridge at Ankaibari on Manmad-Yeola road, they noticed a Maruti Omni Car. They enquired with the inmates of the vehicle. It is pointed out that the inmates of the vehicle told the police that the vehicle got broke down. It was revealed that the right side door of the vehicle was broken and there were blood stains on the left side rear door. The persons who were sitting inside the vehicle informed that their Maruti Omni met with an accident, due to dash given by a by truck in which a passenger was injured and the said injured was taken by them to the hospital. When enquired by the police, the three accused persons disclosed their names including the accused Nos.1 and 2. The third one is a Juvenile in conflict with law. It is alleged that the accused No.2 and the juvenile accused tried unsuccessfully to flee from the spot taking advantage of the darkness. According to the prosecution case, the accused No.1-Vijay confessed of having committed a murder of the deceased and he

disclosed the place where the dead body of the deceased was thrown by the accused. Accordingly, the police personnel along with accused went near railway track where the body of the deceased Pappu was found. Thereafter, P.W.No.1's complaint was recorded which was treated as the First Information Report. The Accused were arrested on 11th April 2011. Investigation was carried out and charge sheet was filed. The case was committed to the Court of Sessions. The prosecution examined total 14 witnesses. P.W.No.1 is a Police Constable who is the first informant. P.W.No.6 is PSI Chaudhari who apprehended the accused. The P.W.No.5 Dipak and P.W.NO.7 Dattu are the witnesses in support of the theory of last seen together. There are Panch Witnesses and other witnesses including P.W.No.14 who is the Investigating Officer.

3 The prosecution case is based on circumstantial evidence. Following are the circumstances relied upon by the prosecution - (I) Accused were last seen together along with the deceased; (II) discovery of dead body at the instance of the accused No.1; (III) The Accused were found to be in possession of the vehicle having blood stains at 3.35 hours in the suspicious circumstances; (IV) discovery of alleged weapons of offences at the instances of the juvenile accused and (V) Motive.

4 Motive as pleaded is that the deceased used to harass the sister of the accused No.1 and therefore,

the accused No.1 did the offending act for teaching a lesson to the deceased.

5 The learned counsel for the applicant has taken us through the notes of evidence. His submission is that the identification by the P.W.NO.5 and P.W.No.7 of the deceased is extremely doubtful and that the theory of last seen together has to be disbelieved. He pointed out that the discovery of weapon is at the instance of the Juvenile accused. The learned counsel pointed out that the FIR is registered at 6.05 hours and therefore, the alleged discovery of the place where the dead body was thrown was made by the accused No.1 before he was taken into custody. He submitted that there is a serious doubt about the registration of FIR at 6.05 hours as the record of the police indicates that the police party consisting of P.W.No.1 and P.W.No.2 returned to the police station at 9.15 hours as can be seen from the log book. He would submit that the finding of the trial Court is that motive has not been proved. His submission is that the prosecution has failed to prove each and every circumstance forming part of the chain and therefore, the finding that all the circumstances forming the part of the chain have been proved is completely erroneous.

6 The learned APP supported the impugned Judgment and Order by pointing out the evidence of the P.W.No.7. She submitted that the said evidence indicates that the prosecution has proved the theory

of last seen together. Her submission is that the presence of the accused persons in suspicious circumstances in the early morning at 3.35 hours in Maruti Omni vehicle having blood stains and the discovery of the place at which the dead body was thrown at the instance of the accused No.1 is also duly proved. The submission of the learned APP is that the existence of the motive will have to be inferred as held by the Trial Court. Her submission is that the chain of circumstances has been duly established as rightly held by the Trial Court.

7 We have considered the submissions. The law is well settled. Each and every circumstance forming a part of the chain of circumstances has to be established by the prosecution when the case is based only on circumstantial evidence.

8 The first main circumstance relied upon forming part of chain of circumstances is the theory of last seen together. There are two witnesses examined in support of the theory. The P.W.NO.5 stated that he was working as a Waiter in a Dhaba (road side restaurant). He deposed that four persons came to his Dhabha on 10th April 2011 in the night. In the examination in chief, he did not depose that he identified one of them as the deceased. He merely stated that on the next day, he noticed one person out of four died due to murder. In the examination in chief, photographs of the deceased or of his dead body were not not shown to P.W.No.5-Dipak.

P.W.No.5 was admittedly not knowing the deceased before he came to the Dhaba. As he was not shown the photographs of the deceased, a doubt is created whether the person who accompanied the accused was the deceased.

9 Now coming to the evidence of P.W.No.7, in examination-in-chief he deposed that he was working in the same Dhaba in which P.W.No.5 was working and he was the manager. He deposed that in the midnight of 10th April 2011, one black and yellow car came near Dhaba and four persons got down. In the examination-in-chief, he was shown the photograph of the deceased. He identified the accused Nos.1 and 2. He stated that the person seen in the photograph is the person who accompanied the accused. His evidence was recorded on 29th January 2014. In the cross examination, he admitted that when his statement was recorded on 12th April 2012, the photograph of the deceased was not shown to him and the same was shown to him for the first time in the Court. Moreover, P.W.No.7 accepted that the police enquired with him on 11th April 2011 and recorded his statement. He accepted that what he told the police on 12th April 2011 was not told by him to the police on 11th April 2011.

10 As the photograph of the deceased was shown to the P.W.No.7 for the first time during recording of his evidence before the Court after lapse of more than two and half years from the date of the

incident and as P.W.No.7 was not knowing the deceased earlier, the evidence of P.W.No.7 that he has seen the accused along with the deceased at midnight of 10th April 2011 becomes extremely doubtful especially when he was not knowing the deceased earlier and therefore, cannot be believed. Thus, the theory of last seen together will have to be kept out of consideration.

11 As far as the possession of Maruti Omni vehicle by the accused is concerned, we may note here that admittedly no investigation was carried about the ownership of the vehicle. Other circumstance relied upon is the presence of blood stains on glass and seat cover of Maruti Omni. The blood sample of the deceased was sent for examination to the FCL. However, the report at Exhibit-153 shows that the result was in-conclusive. As far as the evidence of recovery of weapon is concerned, the same is at the instance of the juvenile accused.

12 The other circumstance is the alleged discovery at the instance of the accused No.1 of the place where the dead body was thrown. Even if the said case of the police is accepted as correct, it will prove only one circumstance forming a part of chain of various circumstances pleaded by the prosecution. The crux of the arguments was that when the alleged discovery was made, the accused No.1 was not in the custody of the police in as much as section 27 of the Evidence Act is applicable when

the discovery is made at the instance of the accused in custody. The P.W.No.6 Chandrakant brings on record the fact that two out of three accused attempted to run away. He further deposed that the police took them into the police van, and thereafter, the accused No.1 took them to the place where the dead body was thrown and thereafter they were taken to the police station and shown arrested. Thus, when the alleged discovery was made, the accused No.1 was in constructive custody of the police. Hence, the said submission cannot be accepted.

13 As regards the motive, the Trial Court has recorded a finding that firstly the motive is not proved. It will be interesting to refer to the finding recorded by the Trial Court on this aspect. The Trial Court held that not establishing the motive of the accused is hardly relevant in the context of this matter. The Trial Court placed reliance on the decision of the Apex Court in the case of Rohtash Kumar Vs State of Haryana¹. Perusal of the said decision show that in the facts of the case, the Apex Court came to the conclusion that the evidence on record adequately suggests the existence of necessary motive. As far as reliance on motive in a case which is based only on circumstantial evidence is concerned, the law is very well settled. Only for the sake of reference, we are referring to the decision of the Apex Court

1 2013 All MR (Cri) 2620 (SC)

in the case of Sheo Shankar Singh vs. State of Jharkhand and another². The Apex Court held that in a case based only on circumstantial evidence, the proof of motive is given the importance it deserves for proof of a motive itself constitutes a link in the chain of circumstances upon which the prosecution may rely. Only in a case where the prosecution case is rested on the evidence of eye witnesses the proof of motive recedes to the background.

14 In the present case, even going by the finding of the Trial Court, the prosecution did not establish the motive. Therefore, it cannot be said that the prosecution has established beyond reasonable doubt all the circumstances forming a part of the chain and especially the circumstance of last seen together. Hence, this is a case where a benefit of doubt will have to be given to both the accused Nos.1 and 2 and therefore, both the appeals deserves to be allowed.

15 Accordingly, we pass the following order.

(I) The impugned Judgment and Order dated 19th October 2015 passed by the learned Additional Sessions Judge, Malegaon, District Nashik in Sessions Case No.59 of 2011 is hereby quashed and set aside to the extent to which accused No.1-Vijay @ Viju Ramesh Ippar and accused

2 (2011) 3 SCC 654

No.2-Dyaneshwar @ Pintu Vasant Jadhav were convicted for the offences punishable under section 302 read with section 34 and section 201 read with section 34 of the Indian Penal Code;

(II) Consequential direction regarding payment of compensation is also set aside;

(III) The directions issued under the impugned order regarding the Muddemal Articles stand confirmed;

(IV) Appeals are allowed accordingly. Pending Criminal Application No.114 of 2018 does not survive and the same is disposed of;

(V) The appellant-accused No.1-Vijay @ Viju Ramesh Ippar and accused No.2-Dyaneshwar @ Pintu Vasant Jadhav shall be immediately set at liberty unless they are required in connection with any other offence;

(VI) All concerned to act upon an authenticated copy of this Judgment and order.

(A.S.GADKARI,J.)

(A.S.OKA,J.)