

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 11 OF 2019

Anthony Fernandes,
s/o. Joe Fernandes, aged 52 years,
Occ. Driver and Tiatrhist,
r/o. Bungalow, Thivim,
Bardez, Goa through next friend
Joaquim Santana Marques, aged
54 years, occ. Stage Artist and
self employed, r/o. House No.
57/B, Ranwaddo, Salcete, Goa. Appellant.

Versus

1. Police Inspector,
Margao Town Police, Margao,
2. State,
through PP, Hon'ble High Court of
Bombay at Panaji, Goa. Respondents.

Mr. Arun de Sa, Advocate for the Appellant.

Mr. S. Rivankar, Public Prosecutor for the State-Respondents.

**Coram:- M. S. SONAK &
SMT. M.S. JAWALKAR, JJ.**

Date : 31st January, 2020

ORAL JUDGMENT: (Per M. S. Sonak,J)

This appeal is directed against Judgment and Order dated 20th
December, 2018 made by the learned Sessions Judge, South Goa, at

Margao in Sessions Case (302) No.5/2016, convicting the appellant for offence under Sections 302 and 201 of the Indian Penal Code, 1860 (IPC) and sentencing him to undergo imprisonment for life and to pay fine of Rs.20,000/- for the offence under Section 302 IPC and to undergo simple imprisonment for 3 years and pay fine of Rs.10,000/- for offence under Section 201 IPC.

2. The case of the Prosecution is that the appellant on 24.3.2016 at about 15,00 hours at Moti Dongor Margao, murdered his wife Fiona and in early hours of 25.3.2016, chopped off her legs, packed her dead body along with the chopped legs in a traveller bag, took the same on a Honda Dio Scooter, dumped the same in TB Hospital property at Monte Hill Margao and set it on fire to destroy evidence.

3. Since, the case turns on circumstantial evidence, the learned Sessions Judge, has basically relied upon the following circumstances :

- (A) Last seen theory;
- (B) Recovery of knife, bag and mobile phones under Section 27 of the Evidence Act;
- (C) Injuries on the person of the accused; and
- (D) Motive.

4. Before, we discuss and determine whether the prosecution has succeeded in proving beyond reasonable doubt the aforesaid

circumstances, and whether the aforesaid circumstances, if proved, are sufficient to sustain the conviction, it is necessary to advert to the important aspect of identification of the dead body, which, prosecution claims, is of the appellant's wife Fiona.

5. On the issue of identification of the dead body, the prosecution relies almost entirely on the evidence of Thomas Fernandes, the brother of Fiona who has been examined as PW.8. This witness, in his deposition recorded on 16.3.2017, spoke absolutely nothing about his presence at the time of the inquest panchanama held on 28/3/2016 and consequently about the identification of the dead body as being that of Fiona. The prosecution examined Shri Devanand Pereira PW.11 as the Pancha witness to the inquest panchanama. This witness has categorically deposed that only Damaciano Fernandes, another brother of Fiona was present at the time of the panchanama and it is this Damciano who identified the dead body. This deposition of PW.11 was recorded on 4.7.2017. This deposition of PW.11 is entirely consistent with the inquest panchanama which records the presence of only Damacian and Felton Pereira, the son in law of Fiona. There is no mention of the presence of Thomas Fernandes, PW.8, much less any identification by PW.8.

6. The prosecution has then examined PSI Ajit Umare as PW.19 in the context of the inquest panchanama and identification.

PW.19 has also categorically deposed that only Damacian and Felton were the two relatives present at the inquest panchanama who identified the dead body as being that of Fiona. This deposition was recorded on 10.8.2017 and 26.10.2017.

7. The prosecution, has failed to examine Damaciano and Felton, the only two witnesses who were alleged to have identified the dead body as that of Fiona. There is no explanation for the non-examination of these most material witnesses. Mr. Rivankar, learned P.P. did attempt to urge that the said witnesses live abroad. However, there is nothing on record to substantiate this position or to even suggest that any efforts were made by the prosecution to secure the presence of these most material witnesses. This was absolutely crucial, since PSI Ajit Umare PW.19, in his cross examination had clearly admitted that the face and the body of the deceased was charred. The medical evidence also suggests that the face and the body was charred. In such a situation, identification assumes great importance and the prosecution, could not have afforded not to examine, perhaps the only two witnesses who are alleged to have made the identification at the time of inquest.

8. The prosecution, perhaps realising its predicament, applied after almost 18 months under Section 311 of Cr.P.C. for leave to reexamine Thomas Fernandes PW.8, who, in his examination on 16.3.2017 had not even uttered a word about his presence at the inquest

panchanama and the consequent identification of the dead body as being that of Fiona. PW.8 was reexamined on 26.7.2018 and on this occasion claimed to have been present at the morgue at the time of the inquest panchanama. It is obvious that the prosecution has attempted to plug a serious loophole and that too in a manner which is far from satisfactory. The alleged presence of PW.8 at the time of the inquest is unsupported by the inquest panchanama, the pancha to the inquest (PW.11) and the PSI in who presence the inquest took place (PW.19). None of these witnesses spoke of even the presence of PW.8 at the time of inquest. Accordingly, it is not possible to accept the sole testimony of PW.8 on the aspect of identification in the aforesaid circumstances.

9. Curiously, in this case, the prosecution has failed to undertake any blood tests or DNA Profiling in order to identify the dead body. This was easily possible and there is no explanation as to why this was not done. The two witnesses who are alleged to have identified the dead body were also not examined by the prosecution without there being any reasonable ground or excuse even placed on record. In this state of evidence, we are constrained to hold that there is no legal evidence on record to establish that the dead body was indeed that of Fiona. This is more so because there is ample evidence on record that Fiona was working at Cyprus since 4 years prior to her alleged demise and the prosecution has not even bothered to investigate into the status of her passport or visa details, which, would have perhaps given a clue as

to her presence in Goa. The learned Sessions Judge has also observed that this is a lacunae in the case of the prosecution, but, ultimately, has chosen to go by certain other material on record. In these circumstances, identification was vital and since the prosecution has failed, it will be unsafe to sustain the conviction recorded by the learned Sessions Judge in this matter.

10. Before, we consider the circumstances relied upon by the prosecution, it is necessary to advert to the decision in *Sharad Birdhichand Sarda vs. State of Maharashtra*¹ in which the Hon'ble Apex Court has laid down the following principles in relation to circumstantial evidence:

- “(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned “must” or “should” and not “may be” established;*
- (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
- (3) the circumstances should be of a conclusive nature and tendency;*
- (4) they should exclude every possible hypothesis except the one to be proved; and*
- (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (See Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116, SCC p. 185, para 153; M.G. Agarwal v. State of*

¹ (1984) 4 SCC 116

Maharashtra AIR 1963 SC 200. AIR SC para 18.)”

11. Applying the aforesaid principles to the material on record in the present case, we are satisfied that the prosecution has failed to prove, beyond reasonable doubt, the complicity of the appellant into the crime alleged.

12. The circumstance arising out of the last seen theory can hardly be said to have been proved by the prosecution beyond reasonable doubt. The prosecution has itself relied upon the recordings of the telephonic conversation between Fiona and her alleged paramour in Cyprus in which, even as on 23rd March, 2016 she says that her husband the appellant is not aware that she is in Goa. In the conversation, she says that she has not seen him still. Yet, her sister Fatima Cardozo (PW.6) says that Fiona and the appellant used to regularly visit Fatima's and their mother's house regularly from 16.3.2016 to 20.3.2016. Significantly, the mother has not been examined as the prosecution witness. To the same effect is the evidence of PW.8, the brother of Fiona who says that Fiona and the appellant visited them till 20.3.2016. The depositions of PW.6 and PW.7 hardly inspire confidence, particularly if the recorded conversation relied upon by the prosecution itself is to be taken into account. In any case, these witnesses speak about Fiona and the appellant visiting them upto 20.3.2016. According to the prosecution, the crime was committed only on 24.3.2016 in the home of Fiona and the appellant. The time

gap, in such circumstances, cannot be said to be so small that the responsibility of any person other than the appellant being the author of the crime becomes impossible. Besides, in a recent decision in *Smt. Gargi vs. State of Haryana*² the Hon'ble Supreme Court has explained the effect of last seen theory involving husband and wife. Applying these principles to the facts of the present case, we do not think that the prosecution has established the circumstances sufficient for invoking the last seen theory beyond reasonable doubt.

13. The second circumstance relates to alleged recovery of the knife, bag and the mobile phones. Again, the prosecution, has failed to make out any case consistent with the requirements of Section 27 of the Evidence Act regards these recoveries.

14. PSI Shreedhar Kamat PW.23 has deposed that on 25.3.2016, consequent upon complaint by Flyza and Shelton, the daughter and son-in-law of Fiona and the appellant, he visited the flat where the appellant resided and the appellant locked the flat and accompanied him to the police station where he was arrested. There is an arrest panchanama which records that all the belongings on the person of the appellant were attached and a panchanama drawn out. There is no reference to any key by which the flat was locked. However, Mr. De Sa is right in his submission that only the key could not have remained with the appellant post his arrest. The recovery of the knife

and the mobile phone is on the next date i.e. 26.3.2016, on which occasion, it is alleged by the prosecution that the appellant took out the key from his pocket and opened the flat door. That apart, what is recovered is really a kitchen knife without any blood stains to connect the knife to the crime. It is the case of the prosecution that the knife was washed by the appellant. Yet, the prosecution claims to have found a finger print of the appellant on the knife. There are pictures produced on record by the prosecution which show the appellant handing over this very knife to the P.I. yet, no finger prints of the P.I. find place on the knife. There is no explanation as to how the blood stains were washed away but the finger prints remained on the knife. In the absence of any credible material to connect the knife to the crime, the recovery can hardly be some incriminating circumstance. The same is the position of the bag said to have been recovered from PW.1 and PW.2. There is absolutely no evidence about the contents of this bag which is alleged to have contained some blood soaked clothes. Besides, PW.1 and PW.2 distinctly speak about the bag being locked, but PW. 21 (IO) says that the bag was not locked. In these circumstances, we cannot say that even the second so called incriminating circumstance is proved by the prosecution beyond reasonable doubt.

15. The third circumstances is of the injury on the left palm of the appellant. PW.14, the Doctor has deposed that the appellant came to him along with another person stating that he had suffered these

injuries on account of fall from the bike and cut by a metal sheet. PW.14 has said that such cut injury could be caused by any sharp object including metal edge part of a scooter. This circumstance is really not sufficient to connect the appellant to the crime.

16. The fourth and the last circumstance is of the motive. For this the prosecution relies upon the recordings of conversation between Fiona and her paramour at Cyprus. There is, however, no evidence about the appellant having discovered such conversations. In any case, even assuming that there may have been some motive, since, the mobile phones were registered in the name of the appellant, the same is really not sufficient to sustain the conviction in the present matter.

17. As noted earlier, it is also the case of the prosecution that the appellant had stated that he had committed the crime to Flyza and Shelton, his daughter and son-in-law. There is no evidence to this effect because even PW.23 merely stated that Flyza and Shelton had come to lodge a missing complaint. That apart, if this was really so, then, Flyza and Shelton were the most material witnesses, who were never examined in this case by the prosecution. There was no proper examination of blood or DNA profiling. Damaciano, the brother of Fiona who is alleged to have identified the dead body was also not examined by the prosecution. In this state of the evidence, conviction cannot be sustained merely on the basis of creating some sort of

suspicion about the involvement of the appellant in the crime. It is quite well settled that suspicion, however, grave, can never be a substitute for legal proof in such matters.

18. In *Mohd. Faizan Ahmad Vs State of Bihar*³ the Hon'ble Supreme Court held that the High Court erred above being carried away by the heinous nature of the crime and losing sight of the basic principle underlying criminal jurisprudence that suspicion, however grave cannot take the place of proof and that Courts recognize only legally admissible evidence and not some conjectures and surmises.

19. In *Narendra Singh Vs State of M. P.*⁴, the Hon'ble Apex Court held that it is trite that suspicion, however grave may be, cannot take place of a proof. It is equally well settled that there is a long distance between '*may be*' and '*must be*'. In this case, the Hon'ble Supreme Court has held that presumption of innocence is a human right. Such presumption gets stronger when a judgment of acquittal is passed.

20. In *Babu Singh Vs State of Punjab*,⁵ the Hon'ble Apex Court held that probabilities however strong and suspicion however grave can never take the place of proof.

3 2013(2) SCC 131

4 2004(10) SCC 699

5 1963 (3) SCR 749

21. For all the aforesaid reasons, we set aside the impugned Judgment and order dated 20.12.2018 and the conviction of the appellant recorded therein. The appellant shall be set at liberty, in case he is not required in relation to any other crime. The Registry to do the needful.

22. All concerned to act on basis of authenticated copy of this order.

SMT. M.S. JAWALKAR, J

M. S. SONAK, J