

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 86 OF 2018

State of Goa, Through PI, Verna Police
Station, Verna, Goa.

.... Appellant

Versus

1. Somashekarappa Yammetti, s/o
Chidanandappa Yammetti, age 23
years, occupation: Driver, r/o
Zuarinagar Birla Goa, n/o Post
Pochopur Taluka, Karadi Hungund
Bagalkot, Karnataka.
2. Renuka Chavan, w/o late Ramu
Chavan, age 35 years, occupation:
Fish Vendor, H. No. 18, Lamani
Colony, Zuarinagar, Birla, Goa.
3. Meenadevi Yadav, w/o Mulchandra
Yadav age 35 years, occupation:
business (Panpatti Gada), r/o Near
Petrol Pump, Zuarinagar, Birla, Goa.
4. Mulchandra Yadav, s/o Rajpat Yadav,
age 52 years, occupation: business
(Panpatti Gada), r/o Near Petrol
Pump, Zuarinagar, Birla, Goa.

.... Respondents

Mr. S.R. Rivankar, Public Prosecutor with Mr. Gaurish
Nagvenker, Additional Public Prosecutor for the Appellant.

Mr. Arun Bras De Sa with Mr. Sidhesh Shet and Mr. S.
Sardessai, Advocates for Respondent No. 1.

Mr. Pavithran A.V., Advocate for Respondent No. 2 and
Amicus Curiae for Respondent Nos. 3 and 4.

Coram:- M.S. SONAK &

SMT. M.S. JAWALKAR, JJ.

Dated:- 6th August, 2020

ORAL JUDGMENT: (Per Smt. M.S. Jawalkar, J.)

This Appeal, preferred by the prosecution, challenges the judgment and final order dated 11.12.2017 in Sessions Case (302) No. 50 of 2015 passed by Sessions Court, South Goa at Margao, acquitting accused of offence punishable under Sections 302 and 201 read with Section 34 of I.P.C.

2. Heard the learned Public Prosecutor, Mr. S.R. Rivankar for the State, learned Advocate Mr. Arun Bras De Sa for respondent no. 1 and learned Advocate Mr. Pavithran for respondent no. 2. At our request Advocate Pavithran consented to act as Amicus Curiae and represented accused nos. 3 and 4, who chose to remain absent inspite of service.

3. The case of the prosecution is that between 11.00 hours on 10.08.2015 to 08:40 hours of 11.08.2015 at Velsao Beach, accused persons/respondent nos. 2 to 4 with their common intention committed the murder of Shri Vijay

Shrivastava, in the bushes at Velsao Beach by assaulting him with “pido” (stem of coconut leaves) on his body and thereby caused his death. Further, the accused persons/respondent nos. 2 to 4 along with respondent no.1, rickshaw driver of rickshaw bearing registration No. GA-06-T-2764 with their common intention to destroy the evidence, transported the dead body of the deceased in the above rickshaw driven by accused no. 1 from Velsao Beach and dumped the same near Consua Cross Chapel, Consua. Hence, the accused committed offences under Section 302, 201 read with Section 34 of I.P.C.

4. It is submitted by the learned Public Prosecutor that the learned Sessions Judge failed to consider that the prosecution brought evidence on record, which was sufficient to draw conclusion of guilt of accused. It is submitted that circumstances are of conclusive nature, which exclude every possibility, except that of involvement of the accused in the offence.

5. It is the contention of the learned Public Prosecutor that the learned Sessions Court failed to appreciate evidence. PW-4 was on duty at Velsao Beach. He

saw accused nos. 2, 3 and 4 dragging one person on sea shore and left lying the said male person on the beach and on questioning them, they took the said person towards another property. Thereafter, at around 19.00 hours, he again saw accused nos. 2, 3 and 4 shifting the said person in a rickshaw and he identified all the three accused in the Court and photograph of rickshaw.

6. It is further contention of learned Public Prosecutor that the learned Sessions Court failed to appreciate that the deceased was working as a labourer in Birla fish market with accused no. 2, who is fisher woman, vending fish in the same market. From the evidence of PW-1 to 3, it reveals that the deceased was working with accused no. 2 as labourer and that he had expressed his desire to marry accused no. 2, which was not liked by accused no. 2. In view of this, the Trial Court's finding that prosecution failed to bring any material on record to prove motive on the part of the accused persons to commit such serious offence of murder is erroneous. The learned Sessions Judge failed to appreciate that prosecution has duly established that accused nos. 2 to 4 was last seen with the deceased. Lastly, it is

submitted that the learned Sessions Court acquitted the accused merely upon the minor variations in the depositions of the witnesses, who were otherwise consistent on the material aspects.

7. It is submitted that accused nos. 2 to 4 were seen lastly together at Velsao beach and that too, deceased was not in a condition to walk due to beating given to him. The lifeguard had seen accused nos. 2 to 4 putting the deceased in a rickshaw near Velsao beach and at that time, he noted the registration number of the rickshaw. Thus, from the statement of lifeguard, it was revealed that the deceased was lastly seen together with the accused persons. The postmortem report clearly shows that there were several injuries on the dead body, which are ante-mortem. As the accused were lastly seen together with the deceased, the onus shifts on the accused to explain what had happened thereafter. All these factors are not considered by the learned Sessions Court. The learned Public Prosecutor also invited our attention to depositions of various witnesses and other material evidence such as CFSL report and medical evidence.

8. As against this, the learned Advocate Pavithran strongly contended that the judgment and order passed by the Sessions Court is perfectly legal and justified. There is no error whatsoever in the findings recorded by learned Sessions Court. When the case is based on circumstantial evidence, motive behind murder is required to be established. However, prosecution miserably failed to establish the same. It is submitted that the prosecution failed to establish complete chain of events. The chain of event is found broken at many places. The prosecution failed to examine material witnesses. Connection of rickshaw and its driver (accused no. 1) is not at all established by the prosecution. Learned Advocate for the respondents then invited our attention to various lacunae and omissions in the prosecution evidence and contended that the judgment and order passed by the learned Sessions Judge needs to be upheld as it is.

9. Learned Advocate Pavitran relied on **(2007) 3 SCC 755, State of Goa Vs. Sanjay Thakran and Another** in support of his contention that scope in an Appeal against acquittal is very limited. The same judgment is also relied on in support of his contention that evidence of last seen

together could not be taken into account due to long time gap between the accused persons seen in the company of the deceased and detection of the crime. Learned Advocate Mr. Pavithran also relied on an unreported judgment of Hon'ble Apex Court in Criminal Appeal No. 42 of 2018 in support of his contention that in a case based on circumstantial evidence, every circumstance must be fully proved and all the circumstances must form a chain of evidence so complete as to exclude every hypothesis other than the guilt of the accused.

10. The rival contentions of the parties fall for our consideration and determination.

11. It is clear from the evidence on record that there is no direct evidence brought on record by the prosecution to show that accused nos. 2, 3 and 4 were found assaulting the deceased either at Velsao Beach or at any other place. There is also no material brought by the prosecution to show that there is any motive to commit such an offence. It has also come on record that Vijay was chronic alcoholic and he was not staying with his family, but, he used to stay in the fish

market during night time. It is a matter of record that initially, there was U.D. registered in the present case wherein, it was mentioned that deceased Vijay was working as a labourer at Velsao Beach for loading and unloading of fish crates. Though some of the witnesses claim that he was working with accused no. 2, nobody has deposed that they saw them fighting or any sort of altercation between them.

12. PW-1 is a Security Supervisor of Zuari Industries, who used to visit regularly Birla fish market and used to purchase fish from accused no. 2. This witness deposed that Vijay wanted to marry with accused no. 2, though he was married and had children. He deposed that Renuka (accused no. 2) told him that Vijay wanted to marry and she told him that he should not harass her and discuss such matters with others. Even if it is presumed that such statement is made by accused no. 2 to PW-1, there is nothing on record to show that there was any quarrel or dispute on that count.

13. PW-2 is a labourer working at Birla market. He deposed that he knows accused nos. 2 to 4 and on 10.08.2015, he received phone call from accused no. 4 at

around 17:30 hours, when he was returning by the evening bus from Vasco to Birla. He told him to arrange and send one rickshaw to Cansaulim. Accused no. 4 handed over mobile to accused no. 2, who told him that he wanted to transport the fish from Cansaulim. Till reaching Birla, there were frequent calls from the accused. After reaching Birla, he went to Ashapura shop, rickshaw stand. On seeing rickshaw at the side of the road near Birla market, he approached the driver and made him to speak to Renuka (accused no. 2). The said rickshaw driver spoke to Renuka from his mobile phone and left the spot. He deposed that Vijay was working with Renuka. This witness has also not deposed anything, on which, the prosecution can rely to form the motive behind the said offence.

14. PW-3 is a labourer and deposed that he is knowing late Vijay Shrivastava from the year 2009. He deposed that he was alcoholic and was married and was having four children. He deposed that he was working with Renuka and used to sleep in the market after the days work. He has not identified accused no. 4. He further deposed that at the end of July, 2015, he met late Vijay at Birla market and that he

was drunk and on inquiry he told that he is under tension as he is in love with Renuka and that he wanted to marry her. However, in cross, he has admitted that he had not stated to the P.I. while recording his statement that when he met Vijay in the market, he told him that he was under tension. Thus, it appears that he has improved his statement in the Court. Even in the evidence of this witness, nothing has come on record to form such conclusion of motive for committing such offence of murder.

15. These are the only witnesses from whom prosecution would have established motive. Apart from these three witnesses, there are no other witnesses examined by the prosecution to establish motive on the part of the accused persons and in our considered opinion, prosecution miserably failed to establish the same. Though, the absence of motive, *per se* may not be fatal in every case, in the facts of the present case, in the absence of prosecution establishing any motive, we can hardly say that the view taken by the learned Sessions Court is not even a plausible view.

16. It is a matter of record that initially, U.D. came to be registered vide No. 41/2015. On the basis of information gathered, body was identified as that of Vijay. It is also revealed that deceased was working as a helper to assist fishermen to load fishing crates mostly at Velsao beach.

17. It has also come on record that deceased was habitual drinker and an ex-convict. Therefore, possibility cannot be ruled out that he might have fallen down at some stone surface and later he might have expired. It is the prosecution's case that after receiving post mortem report, I.O. visited to Velsao beach and recorded statement of lifeguard by name Naguesh Chavan. Upon recording the statement of Naguesh, he found that it is a case of homicidal death and therefore, he lodged complaint on behalf of State against four unknown persons for assaulting deceased Vijay and trying to destroy evidence by dumping dead body in an isolated place. It is surprising that though on the basis of statement of said Naguesh, crime came to be registered, he was not examined by the prosecution and the reason given is that his whereabouts were not known. Said Naguesh was working for Drishti Lifesaving Pvt. Ltd. However, it appears

that no efforts were taken by the prosecution to secure his presence.

18. The statement of Naguesh Chavan was very much material as on the basis of such statement, crime was registered and investigation started. It also appears that after registration, the crime statements of other lifeguards were recorded. In such circumstances, it was necessary to examine Naguesh Chavan to explain as to how they revealed that it was a murder. The prosecution has neither placed anything on record nor any register maintained at the tower location at Velsao beach for the purpose of proving presence of particular lifeguard at the beach on 10.08.2015, though, prosecution examined Director of Drishti Lifesaving Private Limited.

19. Insofar as accused no. 1 is concerned, the prosecution examined PW-5 Hanumanta, who claimed that he is the owner of Tata Ace goods rickshaw bearing no. GA-06-T-2764 and the said rickshaw was driven by accused no. 1 on the relevant day. From his deposition, it appears that he was having two rickshaws and he had employed two drivers and

he was not aware as to which driver took which rickshaw. He deposed that when he collected the money at the night time from these drivers, he was not knowing in respect of which rickshaws, each of his driver had handed over the money to him.

20. PW-2, Kamlesh, though claimed to searched the rickshaw for accused no. 2, in cross examination, he deposed that accused no. 1 was near the said rickshaw, but, he does not remember the colour of the rickshaw or the registration number of the said rickshaw and he was not knowing accused no. 1 prior to the said day. No call details of the mobile phone of PW-2, Kamlesh or that of accused no. 4 have been collected by the I.O. to corroborate that they had spoke to each other on phone and there was telephonic conversation between them at the relevant time. This important link is missing, which creates doubt about trustworthiness of the statement of PW-2. Though, he claimed that he identified accused no. 1, he stated that he is not aware of the registration number of the rickshaw or its colour.

21. The prosecution also examined PW-18, Ishwar Kamlapur, who was having goods vehicle, which was operated by him from the rickshaw stand at Ashapuri. There is discrepancy in the statement made by PW-2 and this witness. Moreover, he neither identified PW-2 nor he was aware where accused no. 1 went during that evening. As such, the evidence of this witness PW-18 is of no help to link accused no. 1 with the offence.

22. The prosecution heavily relied upon the deposition of PW-4, Gurudas Vazrekar, who claims that he was working as lifeguard at Velsao beach on 10.08.2018 from 10:00 a.m. Admittedly, his statement was recorded on 13.08.2015 after registering the crime and after arrest of all the accused along with seizure of rickshaw. Said Gurudas deposed that there were two other lifeguards namely, Naguesh and one Avinash on duty at Velsao beach on that day. At around 15:00 hours, he was present on the lifeguard stand, whereas, Naguesh and Avinash had gone for patrolling at Cansaulim beach. Thus, PW-4 was alone on Velsao beach. He saw two ladies and one male person come out from the bushes and they were bringing one male person by lifting and dragging him at the

shore. This was at a distance of about 200 metres from the lifeguard stand where he was sitting. The said ladies and one man were lifting the fourth person and trying to make him stand and this went on for about 10 to 15 minutes. The said fourth person was unable to stand and was lying on the shore. He deposed that the said two ladies and one male person then started walking away leaving the male person lying on the beach and started walking towards the lifeguard tower. Thereafter, he called their captain lifeguard Naguesh Chavan. At that time, Naguesh was patrolling. PW-4 told him about the person, who had been kept on the beach. Said Naguesh instructed him not to allow the ladies and the male person to go away by keeping the fourth person lying on the beach. On reaching near the tower, he asked the two ladies and the man as to why they were going after keeping the fourth person lying on the sea shore, upon which, they again went near the male person. At that time, our supervisor Umesh, Captain Naguesh and other lifeguard Avinash reached the spot and asked accused nos. 2, 3 and 4 to take the person, who was lying on the beach. Then the accused persons took the person lying on the beach towards the property near the beach. He further deposed that on the same day, in the

evening, at around 19:00 hours, he was proceeding to his rest room, which is at some distance from the beach and it is near the road side. He saw one white brown colour rickshaw bearing no. GA-06-T-2764 parked at the side of the road. He saw accused nos. 2, 3 and 4 had lifted the male lying person and were going towards the said rickshaw. He noted the number of the said rickshaw in apprehension that the said persons may come back to the shore for keeping the fourth person. From his evidence it is clear that he was at a distance of 200 metres and when he saw a person lying from his watch tower, he is totally silent on identifying the deceased person as the person lying on the beach. He is also silent on whether he saw the said three accused persons shifting the fourth person, who was the deceased in the said rickshaw to another place from the beach. This witness during his cross examination stated that whenever fishermen want to transport the fish from the beach, they get the rickshaws and the said rickshaws are kept by the side of the road. When he saw rickshaw by the side of the road, Naguesh and Avinash were not along with him nor the said rickshaw was shown by the police when the statement was recorded. The rickshaw was attached on 12.08.2015 and his

statement was recorded on 13.08.2015. Thus, identification of the said rickshaw by PW-4 was must. This witness has not brought any material on record to show that where he has noted the number of the rickshaw nor there is any evidence lead by the prosecution to that effect. Most important is non description of person lying on the beach and his identification. This witness also does not say that he saw there fourth person injured or assaulted by the accused.

23. It is evident from the deposition of PW-4 that he has nowhere described anything about the fourth person or about the clothes he was wearing. On the contrary, he was seeing from the watch tower and he questioned the said ladies when they came near the tower, which is 200 metres away from the place where the fourth person was lying. Insofar as the incident of the evening is concerned, he deposed that he was alone, but, he nowhere states that he saw the said ladies and the male person keeping that fourth person in the rickshaw. Though, he deposed that he has noted the number in the register, maintained by them, the same is not produced on record, which creates serious doubt about investigation.

24. The prosecution also examined one Umesh as PW-10, who is also a lifeguard. He deposed that Naguesh informed him to see that the said persons leave the beach. PW-4, Gurudas, is silent on the presence of Umesh at Velsao beach and on his visit to the said couple. Though, Umesh deposed that there was fight going on between the two couples, no such disclosure is made by Gurudas. He deposed that two females and one male person were trying to bring another male person by lifting and dragging him towards the sea shore. Gurudas nowhere disclosed that he went near the person lying on the beach nor he identified him by his clothes. The most important thing is that this witness, PW-10, Umesh, in cross, he admitted that the photograph of the deceased was not shown to him by the Police and he did not disclose this fact while recorded his statement that he will be able to identify the person lying on the beach, if shown to him. He has also not disclosed any features of that person or the clothes which were worn by the person lying on the beach.

25. Thus, there are contradictory statements in testimony of PW-4 and PW-10, which clearly goes against the prosecution case of last seen theory. Thus, the statement of

PW-4 that he saw in the evening, accused nos. 2, 3 and 4 carrying one male person towards the rickshaw is not sufficient to conclude that accused no. 1 was the driver of the said rickshaw or that the deceased was carried in the said rickshaw. The photograph of the deceased was shown to PW-10, Umesh, for the first time in the Court, which cannot be considered as proper identification. The mystery of knowing the number of the rickshaw is unfolded as statement of Gurudas is recorded subsequent to the seizure of rickshaw and arrest of the accused.

26. Earlier U.D was registered as matter of record, wherein as per the statement recorded by the I.O., the deceased Vijay was a labourer and was working at Velsao beach and used to carry crates of fish. The crime came to be registered on the basis of statement made by one Naguesh Chavan. However, the prosecution has not examined said Naguesh for the reason best known to it. It is the contention of the I.O that his whereabouts were not known. When the said person was working as a lifeguard captain for Drishti Lifesaving Private Limited, it was not difficult to secure his presence. So also, no efforts were made to verify the

whereabouts of Naguesh. Even the owner of Drishti Lifesaving Private Limited was called as a witness and he also deposed that no enquiry was made about Naguesh by the Police to him. Insofar as recovery panchanama is concerned, the accused was arrested on 12.08.2015 and the recovery panchanama is carried on 14.08.2015. It is nothing, but, recovery of discovered material. It is not the case that the discovery of such places is for the first time brought to the knowledge of the I.O. As such, there is no evidentiary value to this recovery panchanama. The places where the said person was lying is shown by PW-4. At the relevant time, panchanama was carried out and sand was also collected. Said Gurudas also showed the place where the rickshaw was parked. As such, there is no question of discrepancy of said places, again, at the instance of accused no. 2. As deceased was habitual drunkard and ex-convict, therefore, other possibilities of his death cannot be ruled out.

27. It is a matter of record that nobody had seen accused nos. 2, 3 and 4 assaulting the deceased person. The case is based on circumstantial evidence. As already discussed, there was no motive established by the

prosecution. Thus, there is no link connecting the accused persons or holding those persons responsible for causing the death of Vijay. The last seen theory cannot also be accepted in view of contradictions and silence on the part of witnesses about the identity of the deceased and the material issues.

28. In an unreported judgment of the Hon'ble Apex Court in Criminal Appeal No. 42/2018 dated 01.08.2019, reference to the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra** is made, wherein it is held thus:

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793, where the following observations were made:

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court

can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(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."

29. The principle of circumstantial evidence has been reiterated by Hon'ble Apex Court in a plethora of cases. In **Bodhraj Vs. State of J&K (2002) 8 SCC 45**, wherein the Hon'ble Apex Court has held as under:

10. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt

can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan (1977) 2 SCC 99, Eradu v. State of Hyderabad AIR 1956 SC 316, Earabhadrapa v. State of Karnataka (1983) 2 SCC 330, State of U.P. v. Sukhbasi (1985) Supp SCC 79, Balwinder Singh v. State of Punjab (1987) 1 SCC 1 and Ashok Kumar Chatterjee v. State of M.P. (1989) Supp (1) SCC 560). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab AIR (1954) SC 621, it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

11. We may also make a reference to a decision of this Court in C. Chenga Reddy v. State of A.P. (1996) 10 SCC 193, wherein it

has been observed thus:

“21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.”

30. In **Trimukh Maroti Kirkan Vs. State of Maharashtra (2006) 10 SCC 681**, the Hon'ble Apex Court held as under:

“12. In the case in hand there is no eyewitness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime

was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with their innocence.”

31. Insofar as the case of **Manoj Suryavanshi Vs. State of Chhattisgarh 2020 SCC Online SC 313** is concerned, the facts involved cannot be related to the facts in the present matter as we have concluded that last seen theory is not established by the prosecution.

32. In the case of **State of Goa Vs. Sanjay Thakran & Another (2007) 3 SCC 755**, it has been held thus:

“While exercising the powers in appeal against the order of acquittal the court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the court of appeal would not take the view which would upset the judgment delivered by the court below. However, the appellate court has a power to

review the evidence if it is of the view that the view arrived at by the court below is perverse and the court has committed a manifest error of law and ignored the material evidence on record.”

33. As such, we do not see any reason to interfere with the judgment and order passed by the learned Sessions Court, South Goa, Margao, in acquitting the accused persons as the prosecution has failed to prove that in all given probabilities, the crime was committed by the accused persons and they are unable to explain any hypothesis, other than that of the guilt of the accused, inconsistent with their innocence. Accordingly, the Appeal is liable to be dismissed, and is hereby dismissed.

34. There shall be no order as to costs.

SMT. M. S. JAWALKAR, J.

M. S. SONAK, J.