

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO. 87 OF 2018**

State of Goa, ... Appellant

Through PI, Calangute Police
Station Calangute Goa.

V e r s u s

Deepak Luthria, S/o late Shri ... Respondent
Shyam Luthria, R/o Riviera Foothill,
Arpora, Bardez, Goa.

Mr. Pravin Faldessai, Additional Public Prosecutor for the
State- appellant.

Mr. M. Teles, Advocate for the respondent.

CORAM : DAMA SESHADRI NAIDU, &
SMT. M. S. JAWALKAR, JJ.

Reserved for Judgment on: 8th October, 2020
Judgment Pronounced on : 15th October, 2020

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

1. The present appeal is filed by the State being aggrieved by the Judgment and Order dated 21/04/2018 acquitting the accused in Sessions Case (302) No.06 of

2014 under Section 302 of Indian Penal Code ("IPC", for short).

2. The case of the prosecution before the learned Sessions Court was that on 04/11/2013 between 23.00 hours to 23.30 hours, at Sun City Resort, Baga Calangute, Bardez, Goa, the accused made his father Shyam Luthria sit in his golden colour Toyota Etios car bearing no.GA-03-P-2643 and drove the same to the maintenance shed side, where the accused had some discussion with his father, and during the discussion, the accused stabbed his father Shri Shyam Luthria several times on his body, with a knife causing his instant death, and thereafter dragged his dead body and kept the same next to the maintenance shed and fled away from the scene with his Toyota Etios Car bearing no. GA-03-P-2643 and hence, committed an offence punishable under Section 302 of the IPC.

3. Before we proceed further it needs to be noted that the present appeal being appeal against acquittal. While deciding the same the principles laid down in ***Chandrappa & Ors Vs State of K (2007) 4 SCC 415*** needs to be borne in mind. The Hon'ble Apex Court held that when there is appeal against acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person should be presumed to be innocent unless he is proved to be guilty by a competent Court of law. Secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the Trial Court. In the very said judgment, general principles regarding powers of an appellate Court while dealing with the appeal against an order of acquittal laid down as under :

(1) An appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', good and sufficient grounds, 'very strong circumstances', distorted conclusions', 'glaring mistakes'. etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

Keeping in view of the above principles, we proceed to decide the matter.

4. Charge came to be framed against the accused vide Exhibit-9 on 15/09/2014 as the accused pleaded not guilty, trial proceeded further.

5. The prosecution in order to establish his case examined in all 15 witnesses. After recording evidence, statement of the accused came to be recorded under Section 313 of CrP.C.

6. The learned Additional Public Prosecutor, Mr. Pravin Faldessai, submitted that the learned Sessions Court failed to appreciate evidence on record. There was an eyewitness to the incident. However, his evidence is not properly appreciated by the learned Sessions Judge. The learned Sessions Judge committed gross error by disbelieving Pw2 who is the eyewitness of the incident of crime merely on the ground that he was sleeping in the maintenance shed at the relevant night whereas in the deposition of the Pw4 Santosh Singh that a staff of the Hotel was not allowed to sleep in the maintenance shed.

7. The learned Sessions Judge also failed to appreciate that as per opinion of Doctor conducting Autopsy that the injuries caused to the deceased could be possible due to the knife recovered from the accused. The learned Trial Court has acquitted the accused merely upon the minor variations in the deposition of the witnesses who were otherwise consistent on the material aspects over the presence of the accused at the place of incident and thereafter left the place with his car.

8. The learned Sessions Court has drawn an unwarranted conclusion that delay in recording the statement of Pw2 could give ample scope to the Investigating Officer recording his statement to suit the case of the prosecution. Moreover, the defence has not sought any explanation from the Investigating Officer in respect of the delay in recording the statement and as such the same cannot be treated as a ground for seeking acquittal of the accused.

9. The learned Trial Court ought to have considered deposition of Pw3 Kavita wife of the deceased in detail what she has deposed in the Court with regard to the statement/complaint recorded by the Investigating Officer. The learned Additional Public Prosecutor took us to the depositions of the witnesses and submitted that perverse finding is recorded by the learned Sessions Court. It is also pointed out that the testimony of Pw5 Suraj – contractor of the restaurant in the hotel is not properly appreciated in the light of evidence of other witnesses. The learned Sessions Court also failed to appreciate the evidence of Pw7 who is the witness who has seen the accused lastly in the company of the deceased. He also pointed out the evidence of the rest of the witnesses. It is submitted by the learned Additional Public Prosecutor that it is a clear case of conviction and if in such serious offences the accused gets the benefit of doubt only on such minor variations and discrepancies, it will cause injustice to the victim and his family.

10. As against this the learned Counsel, Mr. M. Teles, for the accused, submitted that while deciding the appeal against acquittal this court has limited powers. Even if there is another plausible view and has been taken by the Sessions Court, interference by this Court may not be warranted. The Appellate Court may not interfere with the order of acquittal as laid down in Chandrappa(supra) by Hon'ble Apex Court. It is pointed out that the witness who has projected as eyewitness is totally unreliable and his conduct is not natural. There are material discrepancies in his testimony. Not only this but in the cross of this witness he has admitted that his age and name is not correctly mentioned in the statement though he deposed that the statement was read over to him. Though he deposed that his statement was recorded on the next day of incidence, however, in cross he has admitted that it was recorded after 4 to 5 days of incidence. He kept mum for these days and not disclosed to anybody that he has witnessed the incident which

itself is improbable. It is also pointed out that the panch witness did not stand by the prosecution. Even the motive is not established by the prosecution. In the offence like murder, there has to be a strong motive and the prosecution has to establish that motive. Even the witnesses examined on the last seen theory are also not trustworthy and there are material omissions and contradictions. As such, the prosecution miserably failed to establish the charge against the accused and the learned Sessions Court has rightly acquitted the accused.

11. Rival contentions now fall for our determination.

12. The prosecution examined Dr. A.B. Fernandes(Pw10)

he proved a memorandum of autopsy in his opinion death caused due to hemorrhage and shock as a result of penetrating injury to the heart. On showing knife (Exhibit 16) he deposed that injuries on the deceased could have been caused by the said knife. As such, the death of the deceased was homicidal.

13. The prosecution examined Pw2 Rupesh Korkhamkar as an eyewitness. He deposed that he was working as a roomboy at the Sun City Resort, Baga. On the night of 04/11/2013 he was sleeping in the maintenance shed. As contrary to his statement Pw4 Santosh Singh who is the security guard in that hotel deposed that nobody was allowed nor did anyone sleep near the maintenance shed.

He also admitted that the accommodation for the staff is provided near the canteen. Pw2 has also admitted that the staff have provided separate accommodation to sleep which is within the complex of the resort and near the restaurant. Pw4 also deposed that Pw2 is married and was staying at Pernem. He used to go to Pernem on his motorbike after his work is over. This fact is also confirmed in the testimony of Pw2. As such there was no reason for the said roomboy Pw2 to sleep in the maintenance shed specifically when independent staff accommodation is there.

14. This Pw2 deposed in chief that his statement was recorded on 05/11/2013 i.e. on the same day of the incident. He deposed that on 04/11/2013, he was sleeping in maintenance shed at that time he heard voice "Bachao Bachao" and he got up to see who is the person was. He got down and came near the tank where there was a bamboo cordon and from there he saw that the accused was assaulting his father with a knife. Due to assault Shyam Luthria, the deceased, fell down. Nobody came forward to help him. He got frightened and again came back to the same place to sleep. He heard the sound of car moving away and the accused went away in the car. Thereafter, Suraj, Pandu and Satish came to the spot. He also came again to the spot, however, he did not tell them anything, 10 minutes thereafter the accused came again at the said spot, dragged the dead body of his father towards the tennis sports area and threw it there and went away in the car. He noticed

golden colour Ertiga and also registration number thereof. In cross his evidence is totally destroyed.

15. In cross he admitted that his age is 31 years whereas while recording his statement the age is written as 20 years. He also admitted that before deposition in the Court he stated his age as 20 years. He admitted that he falsely stated his age as 20 years before the Court. Though he claimed that his statement was read over to him, he did not ask the Police Officer to correct his age. The name is also written as "Rupesh" whereas his actual name is "Subhash". He also admitted that there is another person by the name Rupesh in Sun City Resort and working as "Bailboy" . He deposed in chief that his statement was recorded by the police on 05/11/2013 on confrontation with his statement which is dated 10/11/2013, he deposed that by mistake he stated that his statement was recorded on 05/11/2013. He admitted that his working hours in the resort were 09.00 a.m. to 06.00 p.m. He was available in the resort from

the day of incident till his statement was recorded by the police. Since, the incident till the statement was recorded by the police he did not state or narrate the incident to any person. It appears that this witness neither informed anybody about the incident nor of dragging of the dead body of the deceased by the accused. This witness is not mentioned any time when he saw the accused assaulting his father or when he heard any sound. The conduct of this witness is very unnatural and unusual. Any person seeing the incident of the stabbing of his employer would have asked for help or at least informed others but he kept mum and went away to sleep again. There is no any explanation why he was sleeping in the maintenance shed specifically when there is assigned accommodation for staff to sleep at night. Thirdly, though he deposed that his statement was recorded on the same day by the police i.e. on 05/11/2013. However, in the cross he has admitted in confrontation that his statement was recorded on

10/05/2013. There is mention of age which is also not correct and there is a difference of 10 years in actual age and recorded age. There is a difference in name. In spite of his statement read over to him, admittedly, he has not asked police to correct it. Even while deposing also in chief he deposed falsely as such the testimony of this witness is not at all reliable. He is a person having a family, having a bike and having his house at some distance from the resort. For him there was no reason to sleep in the maintenance shed as claimed by him. There is no explanation for doing so. This conviction on the basis of such testimony is highly impossible.

16. Pw3 wife of the deceased and complainant, she deposed that her husband was taken by the accused from the room. She also deposed that she received information at 3.30am about the crime from her younger son Naresh Luthria who resides then in the U.S. Whereas in the complaint it is stated that she received information at 1.00 am. She has not mentioned either in the

complaint or supplementary statement that the deceased was taken by the accused from the room. She deposed that the relation between the accused and his father were strained. She deposed that there were some property issues between the accused and the deceased. However, as the learned Sessions Court observed that there was a Will (Exhibit 111) executed by the deceased wherein the deceased had left the accused an amount of ₹ 20 lakhs and similar amount was left for other heirs and therefore, it implies that there was no negative bias or hatred between the deceased and the accused. Pw3 also admitted that after the death of her husband some property has been sold and the accused gave Power of Attorney to his brother to sell the property which is worth ₹10 crores. The learned Sessions Court observed that the deceased left so much of property in Will for the accused, there was no reason to commit such crime. Pw3 deposed that she went to the Police Station to enquire from her son as to why he did it to his father. At

that time, police called her and then she lodged the complaint. She further deposed that he had not gone to the Police Station with an intention of lodging the complaint against the accused. The accused also in his statement under Section 313 CrPC stated that the police forced Pw3 to lodge false complaint on the ground of suspicion. Though she deposed that the accused confessed to the crime when she was in the Police Station. However, she has admitted that it is not mentioned either in the complaint nor in her supplementary statement. This fact of confession is not stated by her while recording her statement under Section 164 of CrP.C. Also. As such, a confession in police station not mentioned by Pw.3 while recording her statement by police or J.M.F.C., is having no probative value.

17. Pw3 further deposed that the dinner was taken at 21.30 hours whereas Pw5 Suraj Khadkade who was running a bar and restaurant at Sun City Resort, Baga

deposed that Shyam Luthria and his wife came to the said restaurant for dinner at night and after dinner went to sleep in the room, which was adjacent to reception. Though wife of Shyam Luthria went to sleep, Shyam Luthria was taking rounds at the reception, this was around 11.00p.m. In view of this evidence, the testimony of Pw3 with regard to last seen is not at all believable. As per the complaint dinner time is 23.00 hours while deposing Pw3 deposed that they had dinner at 21.30 hours. Pw5 in contrast has deposed that they had dinner at 23.00 hours and he heard the shouts at 23.15 hours. In the opinion of Doctor Pw10, the deceased died within 3 to 4 hours of the last solid meal. This timing does not corroborate with the prosecution's case. Pw2 has not given the timing of the occurrence of the incident. As per the prosecution it occurred between 23.00 to 23.30 hours.

18. Pw8 Prashant Gawandi who was on night duty, deposed that about 10.30 p.m. Shyam Luthria arrived at

the restaurant and gave his luggage to put the same in his Ertiga car. In view of this statement, it is highly improbable of him taking dinner at 09.30 p.m. when he claimed to have arrived at 10.30p.m.

19. Pw4 who is the security guard at the gate did not support the prosecution's story. Thereafter, he was cross-examined by the learned Additional Public Prosecutor. He denied that his statement is recorded as per his say. In his cross by the Counsel for the accused he admitted that the compound wall towards the maintenance shed side was damaged and anybody could enter the Sun City Resort from that side and go out. There is complete darkness to that side. As per his deposition there is difference of age, name between Rupesh and Subhash. They are different persons. This witness deposed that relations between the deceased and his wife were very bad. The brother of the accused who is abroad never used to come to the resort prior to the incident but after the incident he visits the resort. In

spite of this, it is surprising that the I.O. has not recorded his statement nor he came to depose in the Court. He had admitted that two security guards namely Ram Singh and Narayan Singh left the resort 4 to 5 days after the incident even without taking their salary.

20. However, other witnesses i.e. Pw4, Pw6 and Pw7 not corroborated the version given by Pw5, Suraj Khadkade, (Restarurant owner). Pw5's statement that he heard shout "Mara Mara" and thereafter two securties guards went towards the maintenance shed and saw the accused holding a knife in his hand and one person fallen on the ground and the accused told them to go back. This version is not corroborated by Pw4 or any other security guard. On the contrary, Pw4 deposed that he had not seen the accused in the resort during the night time. On going through the evidence of Pw2 , Pw5, Pw6, Pw7 and Pw8, there is no consistency in the sequence of alleged incident nor on the hearing of shouts or sound of car moving away.

21. Pw6 is working with Sun City Resort as assistant of the receptionist. He also did not stand by the prosecution. In his cross-examination also nothing supporting the prosecution is revealed.

22. Pw7 Satish Redkar working as an electrician also has not supported the prosecution's story. He deposed that he is not aware how was the relationship between the accused and his father. Surprisingly, none of these witnesses have mentioned the presence of witness no.2, so called eye witness. This fact strongly supports the contention of the accused that Pw2 is a got up witness to suit the case of the Investigating Officer. Pw7 deposed that he along with Pandurang, Suraj and the security guard went towards the maintenance shed with the help of the torch and saw the dead body of Shyam Luthria. His testimony also contradicts the version of Pw2. Pw8 Prashant Gawandi, bailboy, also deposed that Shyam Luthria came to the resort at 10.30p.m. and gave his luggage to put the same in his Ertiga car. Thus, what

was deposed by Pw3 that they had dinner at 09.30p.m. is again contrary to the statement of Pw8. The statement of this witness also appears to be recorded after 4 days of the incident. In deposition of these witnesses who are working in the said resort there is no mention of Pw2 who is allegedly an eyewitness of the incident. In view thereof, his presence itself is doubtful. Moreover, as discussed earlier he has made on oath many false statements which he admits also. In view thereof, his testimony is not at all reliable to convict the accused of the offence of having committed murder.

23. Pw1 Manish Shahari who has acted as panch witness of Panchanama conducted on 05/11/2013. It appears that all the articles collected during the scene of offence panchanama were sent for expert examination on 10/02/2014 about 3 months after the occurrence of the incident. This panch witness is also an employee of Sun City Resort. The Investigating Officer could have secured the presence of an independent panch witness and there

was no reason to request a Marketing Manager of the same Sun City Resort to act as a panch witness. This fact was also adverted by the Investigating Officer that articles were sent to CFSL only after 3 months. Though this witness was present in the night when the incident occurred his statement was not recorded but he was chosen as panch witness. The other panch witness to the scene of offence was not examined by the prosecution then the genuinity of the investigation is itself in doubt.

Pw1 also admitted that the compound wall has been under construction for the last 4-5 months thereby making possible for anyone to enter in the resort which corroborates to the version of Pw4.

24. So far as recovery of the articles at the instance of the accused under Section 27 of the Indian Evidence Act is concerned Pw11 did not stand by the prosecution's story who was examined by the prosecution as a recovery panch. As per the Panchanama date of recovery and disclosure shown as 06/11/2013 whereas

Pw11 deposed that it took place on 09/11/2013. Pw11 also deposed that he was called by police directly to the Marina Daura Arpora and that he went to the spot and not to the Police Station. He also deposed that he signed Panchanama and sketch next day in the Police Station. Thus, disclosure and recovery is not proved by the prosecution. Pw13 who is another panch witness to the recovery Panchanama deposed that he was not even told by the police that he is panch witness in the case. As he was asked to sign the Panchanama, he signed. He signed the same at the Police Station. He deposed that no Panchanama was carried out in his presence. Thus, there is no disclosure or recovery at the instance of the accused. Considering the overall evidence on record and the fact that many witnesses did not stand by the prosecution's case, there is no evidence to connect accused with the offence.

25. Though some of the witnesses deposed that the relations between the deceased and the accused were

strained, at the same time, admitted that the accused used to run his own hotel by name "Bademiya" and accused helped his father in the construction of the said Sun City Resort. The Will of the deceased (Exhibit 111) shows that the deceased bequeathed an amount of ₹20 lakhs to the accused, similar share to other heirs. The accused also executed Power of Attorney in favour of his brother to sell the property after the said incident also. Nobody has deposed that on the day of incident, there was any quarrel/fighting/altercation between the accused and his father. Some usual differences cannot be held to be motive for a son to commit murder of his father. Thus, the prosecution failed to establish the motive to commit the offence like murder. The prosecution also failed to establish recovery and disclosure under Section 27 of the Indian Evidence Act. There are material contradiction in the deposition of the witnesses. Most important is that the evidence of eyewitness is totally untrustworthy. His conduct also was very unusual.

There are so many false statements he made on oath and therefore his evidence cannot be relied on to hold the accused guilty. It has also come on record in the evidence of other witnesses that there was dark near the maintenance shed. In such circumstances also, Pw2's evidence is not beyond suspicion. The CFSL report also does not connect the accused person with the alleged incident. The blood group of the accused has not been detected on any of the Exhibits nor blood of the deceased was detected on the weapon. As such the possibility of planting of weapon cannot be ruled out specifically considering evidence of Panch witnesses.

26. Pw.15, Investigating Officer, has not produced any attendance register of employees to show who were present on the day of incident. He appears to be unaware of construction of compound wall or any other entrance to the hotel. He did not obtained CCTV footage. Pw.12 and Pw.3, both in their deposition, mentioned the presence of one Mr. Patel. However, his statement

appears to be not recorded by the I.O. The I.O. admitted that he has not investigated the crime from any other angle specifically deceased was transacting in crores of rupees and that many persons owed him money. There are discrepancies about the timings and the persons from whom the I.O. received information. He admitted that he arrested the accused solely on the basis of complaint of Pw.3, wife of deceased, and, at that time, nobody's statement was recorded. Without investigating further he arrested the accused solely on the basis of the complaint of Pw3. 4 to 5 days subsequent to arrest of the accused statements of other witnesses including so called eyewitness were recorded. The I.O. has not carried out any investigation about relation of deceased with his staff nor inquired into his background. Thus, investigation is not beyond suspicion and there was no fair investigation.

27. Considering overall evidence discussed in foregoing paras, the order of acquittal in favour of the accused is

perfectly justified and no interference is warranted in this appeal.

28. Accordingly, we proceed to pass the following:

ORDER

The appeal is dismissed.

SMT. M.S. JAWALKAR, J.

DAMA SESHADRI NAIDU, J.

arp/*/mv