

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO. 10 OF 2016

State,
Through Anjuna Police Station,
Anjuna, Goa.

..... Appellant

V e r s u s

Sagar @ Taijul Mondal (Major)
s/o Haif Mondal,
male, Indian National,
native of Indra Village,
Kamalpur, P. O. Thakurpurahat,
Dist. Dakshin Dinajpur,
West Bengal, Police Station,
Balurghat.

..... Respondent

Mr. S. R. Rivankar, Public Prosecutor for the State-Appellant.

Mr. A. D. Bhole, Advocate as Amicus Curiae.

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

Date : 2nd September, 2020

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

1. The present appeal is filed by the State challenging the judgment and order of acquittal dated 29.06.2015, passed by the learned Sessions Judge, North Goa, Panaji, in Sessions Case no. 10 of 2013.

2. The story of prosecution in short is that on 22.09.2012, during evening hours, accused entered the house of the deceased Patrick D' Souza and committed theft of cash and thereafter assaulted said Patrick D' Souza with a metal coita on his head and face, causing multiple cut injuries and thereby committed murder of said Patrick.

3. It is a matter of record that vide order dated 28.05.2013, the accused was charged with following charges :

CHARGES

(Sections 221, 222, 223 Cr.P.C.)

I, Smt. Anuja Prabhudessai, Sessions Judge, Panaji, hereby frame charge against you Sagar @ Taijul Mondal, r/o. Indra-Village, Kamalpur, P.O. Thakurpurahat, Dist. Dakshin Dinajpur, West Bengal, Police Station, Balurghat, presently as follows :

That you on or about 21st day of September 2012 at about 5.00 p.m. you entered the House no.62/1, Mainathbhati, Arpora, belonging to Patrick D'Souza and committed theft of cash from the cupboard and you have thereby committed an

offence punishable under Sec. 380 of I.P.C. And within my cognizance.

That on the same date, time and place you assaulted and committed murder of Patrick D' Souza by inflicting injuries on his head and face with a metal coita. You have thereby committed an offence punishable under Section 302 I.P.C., and within my cognizance.”

4. The accused pleaded not guilty and, therefore, trial proceeded further.
5. The prosecution examined in all 12 witnesses in support of their case. Statement of accused came to be recorded under Section 313 of Cr.P.C. After hearing, the learned Sessions Judge acquitted the accused by giving benefit of doubt.
6. The learned Public Prosecutor, Mr. Rivankar, submitted that the learned Sessions Court failed to appreciate that the prosecution established last seen theory through Pw.3, 4, 5 and 10. It is the case of circumstantial evidence and prosecution has established beyond reasonable doubt that accused is the only author of the crime. Considering the deposition of

witnesses and recovery of blood stained clothes and the weapon of assault at the instance of the accused, it is claimed that death of Patrick is admittedly homicidal death and the accused is the only author of crime. The prosecution clearly completed the chain of events which point out the guilt only against the accused. The motive of committing theft, last-seen, recovery of weapon, CFSL report, injuries found on the accused, all these aspects are not appreciated by the learned Sessions Judge, in its proper perspective.

7. The learned Counsel Mr. Bhobe, for the respondent-accused, has vehemently submitted that the prosecution miserably failed to established charges against the accused. At the most, the case of the prosecution could be considered only having grave suspicion but not the proof of guilt and, therefore, only on the basis of grave suspicion conviction cannot be imposed. It is pointed out that there was no identification parade nor there is any finger print in the house or on the weapon obtained by I.O. to seek expert's opinion. The prosecution has not established that there was any cash in the house nor any cash recovered from the accused. He also submits that scope

in appeal against acquittal is very limited. There is no perversity, illegality or error of law in the Judgment and Order passed by the learned Sessions Court.

8. These rival contentions fall for our consideration.

9. As claimed by the learned Public Prosecutor, prosecution through witnesses Pw.3, Pw.4, Pw.5 and Pw.10, established last-seen theory. Pw.3, Vimal Pawar, is a maid working in the adjacent house of the deceased in Arpora and she was called by the deceased to collect the keys on 22.09.2012 as he was supposed to leave for Mumbai to join his family and, thereafter, to go abroad. On 22.09.2012, she noticed that the deceased was lying motionless with injuries on his face in the back side portion of the house and, therefore, she informed the neighbour as well as wife of the deceased, who was at Mumbai on that day. She disclosed that she knows the accused who used to work in the garden of the deceased and was present on the previous day. There is no doubt that from the medical evidence on record, it is the case of homicidal death. Considering the post mortem report and deposition of Dr. Sapeco, injuries could have been caused by means of a

coita. According to him, appropriate time since death was within 24 hours of preservation of the dead body at the morgue. As per his opinion, death was due to haemorrhagic shock as a cumulative effect of the chop injuries no. 1 to 14, which were necessarily fatal. As such, there is no dispute over fact of homicidal death.

10. Pw.3, disclosed that she saw the deceased lying inside his back portion of his house with injuries on his face and, therefore, she called the neighbour by name Anthony, who came and thereafter the Police Officer was called.

11. Pw.5, Anthony, deposed that Vimal came and informed him that said Patrick is lying inside back side portion of his house in a pool of blood. Therefore, he immediately went to the house of Patrick and observed from the iron gate and found that Patrick was lying in a pool of blood with cut injuries on the face and presumed to be dead. He lodged the complaint to Anjuna Police Station against unknown person. The first circumstance that presence of Sagar on the preceding day was clear from the deposition of Pw.3.

12. Pw.4, wife of Patrick, also deposed that her husband informed her on the preceding day i.e. on 21.09.2012 during the afternoon time, that

accused had come on his own to their house to work and therefore her husband allowed the accused to finish the work for that day. She suspected accused that he has committed theft of Rs. 25,000/- so also murder of her husband. It is deposed by Pw.4, that accused was having knowledge they were leaving abroad for about one month and on 21.09.2012, she was not present as she had already left for Mumbai and Patrick was alone in the house. Thus, the contention of the prosecution that motive as well as knowledge of the accused has been clearly established. So far as last seen theory is concerned, in our considered opinion, Pw.3, Vimal Pawar and Pw.4, wife of Patrick are the only relevant witnesses. Pw.4, Maria, has deposed that she was informed by her husband that accused had been to their house for work but she has not personally seen the accused along with the deceased on that day but she was having knowledge as informed by her husband. So far as Pw.3, Vimal is concerned, though she deposed that she has seen Sagar working in the garden of the deceased on the previous day, however, in cross, she has deposed that there were three to four persons including Sagar working in the garden of Patrick uncle. She has deposed that she was not entering into the compound of Patrick due to the fear of

dogs. She used to wish him only from outside the compound as she was working as a maid for the adjacent house and she used to wish the deceased and his wife if they were seen outside. In her deposition, no where she has stated that she has seen accused and the deceased together on 21.09.2012. On the contrary, she claimed that there were three to four persons including the accused working in the garden of the deceased on that day. Pw.4 also was not present in Goa on 21.09.2012 as she was in Mumbai and there was no occasion for her to see the deceased and the accused together on previous day.

13. Malappa, Pw.10, who is also claimed to be a witness to establish last seen theory, deposed that he had seen the accused, who used to work in the garden of the deceased on the earlier day of the incident during evening hours while going from the said road. He was having one bag in his hand. As per Malappa, his wife received a phone call from Pw.4, Maria, requesting her to go to the house and to find out what had happened. However, the said wife of Malappa has not been examined nor Pw.4 deposed that she gave a call to Suvarna, wife of Malappa. This Malappa did not refer to presence

of Vimal or Anthony. These witnesses also deposed that they saw the accused person working outside the house of the deceased in the garden. Thus, last seen theory is not at all established even through these witnesses. On the contrary, it appears that there were another two to three persons working in the garden as per the deposition of Pw.3.

14. So far as disclosure and recovery is concerned, it is the claim of the prosecution that immediately after arrest, accused gave voluntarily disclosure statement and showed readiness to show place where he kept his clothes and the weapon.

15. The prosecution examined Pw.6, PSI Mahesh Kerkar of Anjuna Police Station. The accused was arrested from his native place Balurghat, West Bengal, and was produced on 03.10.2012.

16. P.I. Vishwesh Karpe, Pw.12, deposed that on 04.10.2012, the accused voluntarily made disclosure in presence of two panch witnesses and as per disclosure, weapon of assault as well as clothes were recovered. The clothes and polythene bag are marked as R and R-2 respectively, having stains of

blood. However, no human blood is detected on exhibit R-1 which is a rusted coita. Similarly, examination regarding the blood group was inconclusive with regard to exhibit R and R-2. As such, though report of CFSL shows presence of blood at exhibit R, R-1 and R-2, however, human blood was not found on R-1, which is the coita. Blood group also cannot be ascertained on all the three exhibits. Moreover, I.O. Has not brought on record any finger print available on the said weapon or even at the residence of deceased Patrick. It is surprising that the prosecution failed to established the blood group of deceased. In such circumstances, it is difficult to hold that the blood stains on T-shirt or polythene bag was of the deceased. In absence of detection of blood group of deceased, all the efforts are in vain.

17. It is alleged by Pw.4 Maria, wife of deceased, that she used to contact the accused on phone and by the same number, the accused used to contact them. When Narayan, Pw.7, was examined, as per his deposition, he sold one sim card to Sagar. However, the form was filled in by one Aizul. As informed by the accused, he was residing in room. The accused brought Aizul's Voter I.D. Card along with the form. However, the I.O. neither

collected call details in respect of the said phone number nor seized the form from the said Narayan so as to verify the details. No mobile phone was seized or was found in possession of the accused at the time of arrest. It is alleged that Sagar is the same person by name Taijul. If that would be the case, looking to the photograph, Narayan, Pw.7, would have come to know that Sagar and Taizul is one and the same person. However he deposed otherwise.

18. Another aspect about the residence of accused, the prosecution examined Pw.2, Santan D' Souza, who claimed that accused was residing on rent in the room adjacent to his house. Though he claimed that he furnished the form to Calangute Police Station, however, the form produced does not bear any date on which it was submitted to Calangute Police Station nor there is signature of the accused. There was no agreement executed between the accused and Pw.2. The investigation officer, who was attached to Anjuna Police Station, also did not bother to contact Calangute Police Station and to verify the contention raised by Pw.2 about submission of form. The said form also does not show any details. It is a matter of

record that no identification parade was conducted. The I.O. By name Mahesh Kerkar, has deposed that he visited Balurghat, West Bengal, then to the Village of Indra Kamalpur, wherein the accused by name Taijul Mondol was found at his residence. It appears that there was an application moved for Transit Remand before the CJM Balurghat, West Bengal, of the accused namely Taijul, s/o Anil Mondol. In the entire application, nowhere it is mentioned that the accused is also known as Sagar nor this witness Mahesh Kerkar, has deposed that the accused Taijul Mondol is known as Sagar. As such, identification of a person by name Sagar, viz-a-viz, the accused was necessary by the respective witnesses. Identification of accused during the trial by the witnesses having no evidentiary value specifically when there is a doubt of the identification of the accused.

19. It is well settled principle of law that to apply last-seen theory, the time gap between the point of time when the accused and deceased were last seen alive together and when the deceased is found dead, is so small that possibility of any person other than the accused being the author of the crime becomes impossible. In the present matter, no witnesses says that

accused and deceased were last-seen together nor it is positively established that possibility of other persons coming in between, does not exist at all.

20. Mr. Bhobe, the learned Counsel for the respondent, relied on the citation reported in *(2014) 14 SCC 609, Vijay Thakur vs. State of Himachal Pradesh*, in support of his contention that when a case based on circumstantial evidence, link in the chain of circumstances, will have to be complete. He also relied on the same citation in support of his contention that suspicion however strong, cannot take the character of proof. The learned Counsel relied on the citation reported in *(2008) 15 SCC 551* in the case of *State of Uttar Pradesh vs. Ram Balak & anr.*, wherein the Hon'ble Apex Court restated, ingredients for basing conviction on circumstantial evidence including last-seen aspect and legal position relating to dog tracking. It is held that as there was no evidence to show that accused were last-seen in the company of the deceased, merely because, they were seen near the place of incident, cannot be a ground to show their involvement.

21. Mr. Bhobe, the learned Counsel, has relied upon the citation reported in *(2011) 14 SCC 117* in the case of *Manthuri Laxmi Narsaiah vs. State of Andhra Pradesh*, in support of his contention that in a case relating to circumstantial evidence, no unbroken chain of circumstances has to be spelt out by the prosecution. Even if one link is broken, accused must get benefit thereon.

22. The learned Counsel relied on the citation report in *(2007) 3 SCC 755* in the case of *State of Goa vs. Sanjay Thakran*, wherein the Hon'ble Apex Court held that in appeal against acquittal, scope is limited. The Appellate Court can review the evidence and interfere with the order of acquittal only if the approach of lower Court is vitiated by some manifest illegality or the decision is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. Mere possibility of two views would not be a ground for Appellate Court to take the view which would upset the decision of the Court below.

23. Mr. Bhobe, the learned Counsel, also relied on unreported judgment of this Court in Criminal Appeal no.86 of 2018, wherein the above referred judgment of Hon'ble Apex Court *State of Goa vs. Sanjay Thakran*, (supra) is relied on.

24. In view of the discussions in foregoing paras, we do not see any reason to interfere with the judgment and order of acquittal passed by the learned Sessions Judge, North Goa, Panaji, and the appeal is liable to be dismissed.

25. Accordingly, the appeal is dismissed.

26. Before we part, we must express our gratitude to the efforts put in by Mr. A. D. Bhobe, who appeared as an Amicus Curiae in this matter. At a short notice, he prepared himself and rendered effective assistance in deciding this matter.

M. S. JAWALKAR

M. S. SONAK, J.

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