

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.589 OF 2014

TEJAS GAJENDRA KSHIRSAGAR)
Age : about 24 years, Occupation : Service)
R/at. Vivekshree Apartments, F - Building,)
House No.512, Navi Peth, Pune.)
At present Yerwada Central Jail, Pune)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Vikas Shivarkar, Advocate, for the Appellant.

Mr.A.R.Patil, APP for the Respondent – State.

**CORAM : PRASANNA B. VARALE &
V. G. BISHT, JJ.**

DATE : 22nd SEPTEMBER 2020

JUDGMENT : (PER : V. G. BISHT, J.)

1 This is an appeal by the convict from the judgment and order of conviction and sentence dated 24th February 2014 delivered in Sessions Case No.221 of 2012. By the said judgment, the appellant has been convicted under Section 302 of the Indian

Penal Code (IPC) and sentenced to suffer rigorous imprisonment for life with fine of Rs.2,000/- (Rupees Two Thousand Only) with default stipulation. However, the present appellant-accused and other accused were acquitted of the offence punishable under Section 201 of the IPC and so also another accused of the offence punishable under Section 302 of the IPC.

2 Short fact of the case is that informant and her husband viz. Gopal Namdeo Bhalerao (the deceased) were present in their house in the evening of 6th January 2012. As the informant's husband's friend viz. Tejas (accused) had called up the deceased on mobile 2/3 times, she asked the deceased as to why the accused is repeatedly calling him. The deceased replied that as the accused got salary, he intended to give a new year's party and therefore, was calling him. The informant, however, did not permit the deceased.

3 The prosecution next contends that as the informant and her husband came to know that her brother-in-law would be

visiting them, both of them stepped out of the house at about 6.30 p.m. to buy mutton. During that period also, the accused was repeatedly calling the deceased. According to the prosecution, when they reached the corner of Noble Hospital, the informant noticed a person standing there and on seeing her husband, that person approached him. The deceased then introduced that person to informant as his friend Tejas i.e. the accused. The deceased then told the accused that he would buy mutton and then would join him.

4 After buying mutton when they again reached the corner of Noble Hospital, they found the accused standing there. The deceased, therefore, asked the informant to go ahead and prepare dinner. It was around 7 p.m. As the deceased did not return by 9 p.m. the informant tried to call him but could not get him and therefore, ultimately, she went to bed.

5 The prosecution further contends that at about 7.00 a.m. on 7th January 2012, the landlady visited the informant's

house and enquired whether the deceased had reached house or not. When the informant replied in negative, the landlady asked the mobile number of informant's sister-in-law and mother-in-law. When the informant enquired as to why she is asking the number, the landlady went away without saying a word. After sometime, people started gathering around her house. The informant got suspicious. Her sister-in-law then came and informed that the deceased was lying unconscious and in an injured condition in the parking place on the backside of the Noble Hospital. The deceased was taken to hospital but the doctor declared him dead.

6 According to the prosecution, in the hospital, the informant came to know from Akshaykumar Waghmare and Vilas Rathod (PW2) that in the previous evening the deceased had called them on their mobile and had invited for a drink by saying that he was enjoying drink with the accused and friend of accused.

7 In the above factual backdrop, the informant lodged the First Information Report (FIR) with Hadapsar Police Station, Pune, on the basis of which Crime No.09 of 2012 under Section 302 read with 34 of the IPC came to be registered. The investigation was, firstly, taken up by PW9 Vishwambhar Bhimrao Ghule who visited the place of occurrence, prepared Spot Panchnama, seized various articles therefrom, recorded statement of three witnesses and forwarded the seized articles to the Forensic Science Laboratory. It appears that further investigation was carried out by PW11 Smt.Dwarka Vishwanath Doke. She recorded the supplementary statement of the informant and statement of three witnesses. Pursuant to the Disclosure Statement given under Section 27 of the Evidence Act, she recovered a gold chain. It further appears that PW8 Dr.Abhishek Kumar conducted autopsy on the dead body of the deceased and noted number of external and internal injuries and opined that the deceased had died due to coma as a result of injury to skull and brain as a result of blunt force trauma. On completion of investigation, PW9 filed the charge-sheet against the appellant-

accused, who has been acquitted under Section 201 read with 34 of the IPC and committed the case to the Court of Sessions, Pune.

8 To substantiate the Charge against the appellant-accused, the prosecution has examined as many as eleven witnesses and exhibited number of documents. The appellant-accused was questioned under Section 313 of the Code of Criminal Procedure about the incriminating evidence and circumstances and the appellant-accused denied all of them as false. Upon appreciation of oral evidence and circumstances, the learned trial Court convicted the appellant-accused for the offence punishable under Section 302 of the IPC and sentenced him in the manner stated hereinabove. Hence, this appeal.

9 Mr.Shivarkar, learned counsel for the appellant-accused, vehemently submitted that the learned trial Court has misinterpreted the evidence on record and wrongly came to the conclusion that the appellant-accused committed murder of the deceased. On the contrary, the evidence led by the prosecution

does not clinchingly prove the involvement of the appellant-accused in the offence allegedly committed by the appellant-accused. According to the learned counsel, except the testimony of the informant/wife, there is no other corroborative evidence to prove the complicity of the appellant-accused in the alleged offence. Merely because the deceased was lastly seen in the company of the appellant-accused and the fact that no other corroborative evidence is forthcoming, the last seen theory in itself will not clinch the case of the prosecution and it is precisely where the learned trial Court fell in error and wrongly convicted the appellant-accused. The judgment and order of the learned trial Court being illegal and bad in law, the same deserves to be set aside, argued learned counsel.

10 Per contra, the learned APP vehemently and fervently opposed the submissions made by the appellant's counsel and submitted that all the circumstances having been duly established in the light of evidence led by the prosecution witnesses, the trial Court was justified in returning the finding of guilt against the

appellant-accused. There being no merit in the appeal, the same is liable to be dismissed, urged learned APP.

11 Before looking into the evidence of material witnesses PW1 Asha Bhalerao, PW2 Vilas Rathod, PW5 Sachin Sathe and PW11 Smt.Dwarka Doke, we propose to refer to the postmortem report conducted by PW8 Dr.Abhishek Kumar (Exh.36).

12 PW8 testified in his evidence that on 7th January 2012, at about 1.30 p.m., dead body of Gopal Namdeo Bhalerao (the deceased) was brought. He performed postmortem examination. On external examination, he found following injuries on the dead body :

- “1. Abrasions, reddish scab in an area of 10 cms x 3 cms extending from left cheek to left side of neck having size from 0.5 x 0.5 cm to 1 cm x 1 cm.
2. Multiple small abrasion having size of 0.5 x 0.5 cm to 1 cm in an area of 19 cm x 5 cm present on left shoulder joint and extending up to upper 1/3rd of humerus.

3. Multiple small abrasion with reddish scab in an area of 5 cm x 4 cm present on the right elbow joint.
4. Multiple small abrasions with reddish scab having size of 1 cm x 1 cm to 2 cm x 1 cm, present on right wrist joint.
5. Multiple small abrasions with reddish scab in an area of 5 cm x 3 cm, present on back of neck.”

13 He then testified that on internal examination of head and neck, he found that scalp was contused in the occipital area, defused subdural and sub-arachnoid hemorrhage present all over the brain. Linear fracture of middle cranial fossa was also there. According to him, the cause of death of the deceased was “coma as a result of injury to skull and brain as a result of blunt force trauma.” The injuries noted by him were sufficient to cause his death in ordinary course of nature and were possible by hard and blunt object like stone, wooden log etc. He then proved the postmortem report at Exh.37.

14 Pertinently, the evidence of this material witness is not seriously assailed in the cross-examination. Not only the nature of injuries but the means by which those injuries were possibly caused were also not challenged in the cross-examination. In the circumstances, we have no hesitation in our mind that the deceased met a homicidal death.

15 Before we proceed with the matter, it has to be borne in mind that this case depends upon circumstantial evidence. Apposite it would be, therefore, to take note of a few fundamental principles governing the circumstantial evidence and its application. In Sharad Birdhichand Sarda vs. State of Maharashtra¹ the five golden principles which have been stated to constitute the panchsheel of the proof of the case based on circumstantial evidence are (i) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established, (ii) the facts so established should be consistent only with the hypothesis of the guilt of the

1 (1984) 4 SCC 116 : AIR 1984 SC 1622

accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (iii) the circumstances should be of a conclusive nature and tendency, (iv) they should exclude every possible hypothesis except the one to be proved, and (v) 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.

16 Similarly, in the case of **Digambar Vaishnav and Another vs. State of Chattisgarh**² in paragraph 16 of the judgment, the Hon'ble Apex Court has laid down the principle where conviction on the basis of circumstantial evidence could be sustained, viz., i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that

² AIR 2019 SC 1367

within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

17 Having taken note of the basic principles, when we examine the record, several pitfalls and shortcomings in the investigation and in prosecution evidence manifest themselves at once.

18 PW1 Asha Bhalerao – informant states in her evidence (Exh.11) that on 6th January 2012, her husband i.e. the deceased, was in the house as he had holiday. In the afternoon, he received calls from Tejas Kshirsagar (accused). Her husband told her that accused was calling him for new year's party. On that day, her brother Mahadeo Bhalerao was to visit her house and they wanted to prepare mutton. Hence, she and the deceased went to Hadapsar to buy mutton. On the way to Hadapsar, her husband was getting calls from the appellant-accused. In front of Noble

Hospital, the appellant-accused met her husband. Her husband introduced him to her and then told the appellant-accused that he would purchase mutton from market and then he would come along with him. After purchasing the mutton, she went home and her husband went along with the appellant-accused.

19 Her evidence then shows that she waited for her husband till 9 p.m. and then asked her landlady to call her husband. Accordingly, the landlady gave a call on the mobile phone of the deceased but the latter did not receive it. She then waited till 11 p.m. and then went to P.C.O. and again gave a call to her husband but the call could not be connected. She, therefore, returned and went to bed.

20 Testifying further, on the next morning at about 8.00 a.m., her landlady Smt.Awle came to her house and made an enquiry of her husband. She also demanded telephone number of her mother-in-law and sister-in-law. Her sister-in-law came to her house and took her to Noble Hospital where she came to know

that her husband was declared dead. She saw the dead body of her husband and noted injuries on his face, ear etc. She, lastly, stated that after visiting hospital, she went to Police Station and lodged complaint. She then proved her complaint at Exh.12.

21 At the very outset, we put it on record that the informant-wife is the only witness who had seen the deceased parting her company around 7 p.m. of 6th January 2012. The FIR and her substantive evidence also point out the fact that the deceased had gone along with the accused. This is the only evidence on the point of last seen theory, relied on by the prosecution.

22 In the case of Kanhaiya Lal vs. State of Rajasthan³ it has been held by the Hon'ble Apex Court that the circumstance of last seen together does not by itself necessarily lead to inference that it was accused who committed crime. There must be something more establishing connection between accused and crime, that points to guilt of accused and none else. Mere non-

3 2014 Cri.L.J. 1950 (SC)

explanation of being last seen together with deceased person on part of accused, by itself cannot lead to proof of guilt against him.

23 In order to further the last seen theory, the prosecution has also examined PW2 Vilas Rathod. PW2 states in his evidence (Exh.19) that at the relevant time he was working in Noble Hospital in Housekeeping Department. Tejas Kshirsagar (accused) and Gopal Bhalerao (deceased) were serving along with him. On 6th January 2012, at about 7.00 to 7.30 p.m., he received a call from deceased who asked him to visit Noble Hospital as he was sitting with the appellant-accused. However, he showed his inability. Thereafter, accused called him and again asked him to visit Noble Hospital but he refused.

24 In the cross-examination, this witness states that he had not met any family members of deceased on 7th January 2012. Now, if the FIR is read carefully, then it would be seen that this witness as also one Akshaykumar Waghmare, Supervisor, had met the informant in the hospital and had told her about the fact of

the deceased calling them separately and requesting them to join the drink session. This is one aspect of the matter.

25 Equally significant aspect of the testimony of this witness is that, he was called by the appellant-accused and the deceased simultaneously with a request to join them at Noble Hospital. Neither PW9 Investigating Officer nor PW10 Investigating Officer anywhere in their respective testimonies have disclosed this material fact. Even assuming for the sake of argument that this witness did receive calls from the appellant-accused and the deceased but then no Call Details Record (CDR) pertaining to the conversation at the relevant time between the accused and the deceased on one hand and this witness on the other are filed on record to boost and further the testimony of this witness. Therefore, the testimony of this witness is not strong enough to provide any kind of succour to the prosecution.

26 According to the learned trial Judge, since the deceased was seen lastly in the company of the appellant-accused,

the appellant-accused had failed to explain his (deceased) whereabouts as also the circumstances leading to his death.

27 The trial Judge has proceeded on the assumption that Section 106 of the Indian Evidence Act directly operates against the appellant-accused. In our view, such an approach has also not been free from an error, where it was omitted to be considered that Section 106 of the Indian Evidence Act does not absolve the prosecution of its primary burden.

28 The Hon'ble Apex Court has explained the principle in **Sawaldas vs. State of Bihar**⁴ in following :

“10 Neither the application of Section 103 nor of Section 106 of the Indian Evidence Act, could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a prima facie case that the question arises of considering facts of

4 AIR 1974 SC 778

which the burden of proof may lie upon the accused.....”

Thus, in the given set of circumstances, the last seen theory cannot be operated against the appellant-accused only because the deceased was seen in the company of the accused.

29 The next circumstance which the prosecution relied upon is that of recovery of gold chain allegedly at the instance of the present appellant-accused. In this regard, we have closely scrutinized the statements of PW5 and PW11 Investigating Officer.

30 PW5 Sachin Sathe states in his evidence (Exh.25) that on 12th January 2012, he was requested by the police from Hadapsar Police Station to act as a panch witness. Present appellant-accused was present in the police station and stated before the police that he has kept gold chain in his house and showed his willingness to produce the same. Accordingly, the statement was reduced into writing. He then proved the statement at Exh.28. It is his further evidence that the appellant-accused

then took him and the police to Dattawadi. He led them to one house wherein one woman was present. The appellant-accused produced the gold chain from the house. The said gold chain was then wrapped in one paper and he signed it. Panchnama was prepared accordingly. He then proved the panchnama at Exh.29.

31 PW11 Investigating Officer, on her part, states in her evidence Exh.47 that during interrogation present appellant-accused made voluntary statement that he had kept gold chain of the deceased in the house of Dattawadi and showed his willingness to point out the said place. Pursuant to that, she and panch witness went to Dattawadi. The appellant-accused entered into the house and took out one bag. He opened it and took out one small box. It was containing one gold chain. If the testimonies of PW5 panch witness and PW11 Investigating Officer are juxta posed, then we get sheer disappointment and dissatisfaction for the reasons to follow.

32 PW5 in the cross-examination admitted that he was told by the police that they wanted to seize the chain and mobile phone from the appellant-accused and thereafter, obtained his consent to act as a panch witness. This admission in itself goes to show that the police was knowing before hand about the gold chain and mobile phone which was to be recovered with the help of this witness. Thus, the police was very much in the know of the fact about the seizure of gold chain and mobile phone. This being so, the so called Discovery Statement recorded under Section 27 of the Evidence Act, pales into insignificance and loses all its evidentiary value. This is not enough.

33 The cross-examination of panch witness further shows that the chain was kept on the table of the house. As against this, the evidence of PW11 Investigating Officer shows that after entering into the house, the appellant-accused took out one bag, opened it and then took out a small box which was containing a gold chain. Thus, both these material witnesses are miles apart as

to the place where the gold chain was allegedly kept. On this count also, the so called Discovery Statement needs to be discarded immediately, apart from being the fact that in the words of PW5, the police party had knowledge of a gold chain and mobile phone in advance. Thus, this circumstance also, like the earlier one, fails to promote, substantiate and further the case of the prosecution.

34 In the light of the above discussion, we are of the firm opinion that the learned trial Court committed fundamental error while appreciating the evidence available on record holding the circumstances to be proved. Needless to say, we are of the considered view that the prosecution has not been able to prove that it was the appellant-accused alone who authored the death of the deceased.

35 For what has been discussed hereinabove, we are clearly of the view that the circumstances relied on by the prosecution do not form a complete chain that rules out any other

hypothesis except guilt of appellant-accused. Hence, the conviction of the appellant-accused cannot be sustained.

36 In view of above, we pass the following order :

ORDER

- i) Criminal Appeal is allowed.
- ii) The judgment and order dated 24th February 2014 passed by the Extra Joint Ad-hoc Additional Sessions Judge-1, Pune, in Sessions Case No.221 of 2012 is hereby quashed and set aside and the appellant-accused is acquitted of the offence charged against him.
- iii) The appellant-accused be set at liberty forthwith, if not required in any other case.

(V. G. BISHT, J.)

(PRASANNA B. VARALE, J.)