

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 377 OF 2015**

Shrinivas @ Shenu Shirsappa Ayyappa Swami,
Age : 32 years,
R/o Chawl No.4, Room No.102,
Panther Nagar, Kannamvar Nagar,
Vikhroli (E), Mumbai – 400 083.
(Presently in Arthur Road Jail)

... Appellant

V/s.

State of Maharashtra
Parksite Police Station, Vikhroli (W),
Mumbai.

... Respondent

**ALONG WITH
CRIMINAL APPEAL NO.1050 OF 2015**

Mr. Vyankatesh @ Vyankati Narsimallu Sagar,
Age : 38 years, Occ.: Service,
R/at : Chawl No.9, Room No.296,
Panther Nagar, Kannamvar Nagar,
Vikhroli, Mumbai – 83.
(Accused is at present in Nashik Road Central
Jail)

... Appellant
(Orig. Acc.No.2)

V/s.

The State of Maharashtra
(At the instance of Parksite Police Station,
Vikhroli (W), Mumbai)

... Respondent

Mr. Anil Joshi i/b. Ms. Vaishali Joshi for the Appellant in Apeal/377/2015.

Mr. Anil Joshi a/w Ms. Sandhya A. Mailagir for the Appellant in
Apeal/1050/2015.

Ms. Prajakta P. Shinde, APP for the Respondent - State.

**CORAM : SMT. SADHANA S. JADHAV &
N.J. JAMADAR, JJ.**

JUDGMENT RESERVED ON : 16.10.2020.

JUDGMENT PRONOUNCED ON: 03.11.2020.

JUDGMENT : PER SADHANA S. JADHAV, J.

1. The appellants being aggrieved by the judgment and order passed by the Additional Sessions Judge, Greater Bombay dated 20th February 2015 in Sessions Case No.336 of 2012 thereby sentencing them to imprisonment for life and fine of Rs.5,000/- in default to suffer imprisonment for a period of six months under section 302 r/w 34 of Indian Penal Code have filed the present appeal.

2 Such of the facts necessary for the decision of this appeal are as follows :-

(i) On 9th January 2012, Prabhakar Joshi, PSO – P.W.1 of Parksite Police Station was informed by the Police Constable Laxman Wagh – P.W.5 that the dead body of a male was found in Swaminarayan Nagar, Hiranandani Street, Chandan Sharma Tekdi Compound and that the dead body was being taken to Rajawadi Hospital, Ghatkopar. P.W. 1 reached the Hospital. Police Constable Mr. Laxman Wagh – P.W.5 had informed him about the location where dead body was found. P.W.1 registered A.D.R. No.5 of 2012. Inquest panchanama was drawn which is at **Exh.29**.

(ii) On 10th January 2012, Kasim Ismail Shaikh - P.W.2 had visited Parksite Police Station pursuant to the directions of Vikhroli Police Station and informed the Police that they had filed a missing complaint at Vikhroli Police Station. P.W.1 had shown photographs of the dead body which was found on the earlier date. Kasim – P.W.2 identified the photographs to be that of Iqbal his nephew. P.W.2 had called upon Javed – P.W.3, the brother of the deceased. They visited the mortuary at Rajawadi Hospital and identified the dead body to be that of Iqbal.

(iii) The missing complaint filed at Vikhroli Police Station is missing from the records. The Investigating Agency has neither placed the case diary on record to show that the missing complaint was ever filed at Vikhroli Police Station. No officer of Vikhroli Police Station has been examined to show that a missing complaint was ever filed.

(iv) P.W.1 had recorded the statement of Hasina Shaikh – P.W.4, the mother of the deceased and handed over the dead body to her.

(v) On 10th January 2012, the identity of the deceased was established. P.W.1 had lodged FIR (**Exh.36**) at Parksite Police Station against unknown persons for the offences punishable under section 302, 201 r/w 34 of Indian Penal Code on the basis of which Crime

No.18 of 2012 was registered at Parksite Police Station. Post-mortem notes indicated that Iqbal had died a homicidal death due to strangulation.

(vi) At the trial, the prosecution examined as many as 21 witnesses to bring home the guilt of the accused.

3. P.W.-1 Prabhakar Joshi has deposed before the Court that on 9th January 2012, on the basis of the telephonic information given by Police Constable Wagh, he reached Rajawadi Hospital. He had drawn inquest panchanama. The statement of the PI Wagh was recorded. He had then registered A.D.R. No.5 of 2012 under section 174 of Cr.P.C. and sent the viscera for chemical analysis on 10th January 2012. P.W.1 in his deposition before the Court claims to have recorded the scene of offence panchanama on 10th January 2012 on the basis of the information given by Police Constable Mr. Wagh. It is surprising that within two days i.e. by 11th January 2012 the scene of offence panchanama was missing from the records. P.W.1 Joshi has also received the provisional death certificate and post-mortem notes on 9th January 2012 itself and on perusal of the same, it was more than clear that it was a case of homicidal death. Yet P.W.1 had registered A.D.R.

No.5 of 2012.

4. PW.1 could not place on record the scene of offence panchanama and accordingly, he has deposed as follows :-

“Though I took search at police station I did not find panchanama of place of incident and to that effect I have filed Report to this Court on 5/10/2013”.

5. The said report dated 5th October 2013 is at **Exh.31**. It is reported that the scene of offence panchanama is misplaced.

6. According to P.W.1, the statement of Hasina Shaikh - P.W.4 was recorded on 9th January 2012 only for the purpose of handing over the dead body to her.

7. It is specifically conceded by P.W.1 that in the first statement P.W.4 had not given the names of accused. According to him, the said statement was recorded only for the purpose of handing over dead body of deceased Iqbal and although he had directed her to give details she had not suspected any particular person. P.W.1 has further stated that after recording first statement of P.W.4 it had transpired that Iqbal was notorious person in the vicinity and many offences were

registered against him at different Police Stations in Mumbai.

8. Kasim Shaikh - P.W.2 has deposed before the Court that “he was aware that three criminal cases were registered against Iqbal at Santacruz and Vikhroli Police Station.” According to him, on 9th January 2012 at about 8.00 am, he was informed by his sister Hasina that her son Iqbal is missing since night of 8th January 2012. They had searched for him and thereafter, at night on 9th January 2012 his brother Mustak had filed missing complaint at Vikhroli Police Station. At the time of filing missing complaint Hasina had accompanied them to the Police Station. He has further deposed that on 10th January 2012 Mustak had called him at Parksite Police Station and therefore, he along with Javed Shaikh – P.W.3 had been to Parksite Police Station. They had identified the photograph to be that of Iqbal about whom the missing complaint was filed. Thereafter, their statements were recorded. According to him, the Police had informed them that the dead body was found at Chandan Sharma Tekdi Compound. It is admitted in the cross-examination that it was stated in the missing complaint that Iqbal was missing from 11.00 pm of 8th January 2012.

9. Javed J. Shaikh - P.W.3 happens to be the brother of the deceased Iqbal. He has deposed before the Court that Vyankatesh was a friend of Iqbal since 10 years. He used to visit the house of the deceased quite often. On 8th January 2012 at about 11.00 pm he had seen Iqbal and Vyankatesh together at Panther Nagar area. That night Iqbal had not returned home. On the next day, they searched for him and finally his mother and maternal uncle filed a missing complaint at Vikhroli Police Station at about 4.00 - 5.00 pm. At the first instance, he had not informed the Police that on the earlier day, he had seen Iqbal in the company of Vyankatesh. From Rajawadi Hospital they were taken to Parksite Police Station where their statements were recorded. P.W.3 has made the following admissions:

(i) P.W.3 has conceded in the cross-examination that there were crimes registered against Iqbal. He was always accompanied by his friends. The ground at Panther Nagar was mostly visited by people to consume alcohol at night. On the night of 8th January 2012 there were many people on the ground;

(ii) P.W.3 had not suspected the involvement of the present appellants in causing the homicidal death of Iqbal despite having knowledge about the quarrels between Iqbal, Shrinivas and Shiva at

the time of Ganesh Festival and therefore, the same was not mentioned in his statements;

(iii) There is an admission of Javed - P.W.3 that he had learnt about the death of Iqbal for the first time on 10th January 2012. The Police had called upon P.W.3 to Parksite Police Station and had shown the accused – appellants to him and further informed that they were arrested;

(iv) There is a clear admission by Javed – P.W.3, brother of deceased that Panther Nagar ground where the deceased was last seen in the company of Vyankatesh is at a distance of about 10-12 kilometers from the place where the dead body of Iqbal was found on 9th January 2012.

(v) There is also an admission that several criminal cases were registered against the deceased. In fact, it was the Police who had informed P.W.3 that accused Vyankatesh happens to be the perpetrator of the crime.

10. The witness was confronted with his previous statement and he has stated that he had never informed the Police on 12th January 2012 that he along with his mother and maternal uncle had

been to Vikhroli Police Station and filed missing complaint. Hence, the said portion is marked as portion marked - “A”. He has also denied to have informed the Police that Vyankatesh is close friend of Shrinivas Swami and hence, the said contradiction is marked as portion mark – “B”.

11. Hasina Shaikh - P.W.4 happens to be the mother of deceased Iqbal. According to her, on 8th January 2012, from 11.00 pm onwards Iqbal was missing. On the next day, despite the search, he could not be traced and therefore, on 9th January 2012 she filed a missing complaint at Vikhroli Police Station. They were informed by Vikhroli Police Station to approach Parksite Police Station. At Parksite Police Station, Police informed her brother Mustak that they have found a dead body in abandoned condition at Chandan Tekdi at Swaminarayan Nagar. Mustak conveyed the message to P.W.4 pursuant to which, she rushed to Rajawadi Hospital. After recording her statement, the dead body was handed over to her. P.W.4 deposed that on 8th January 2012 at about 10.45 pm when she contacted her son Iqbal she was informed that he was on the ground at Panther Nagar. Her communication with Javed - P.W.3 at the relevant time is not mentioned in her previous statement. She has further elaborated that 3

to 4 months earlier there was a quarrel between Iqbal on one side and Shrinivas and Shiva on the other and in the said altercation, Iqbal had assaulted Shiva with a razor and since then, there was enmity between Iqbal, Shrinivas Swami and Shiva. After the said incident, Iqbal was being threatened by Shrinivas. On one occasion, there was also a quarrel between Iqbal and Sushila Tevar wherein Sushila had stabbed Iqbal @ Gullu in the stomach and therefore, they were being prosecuted. PW.4 claims to have seen Sushila Tevar and others near Vikhroli Station on 7th January 2012 and therefore, she suspected Shrinivas, Shiva, Sushila Tevar, Vyankatesh and Suresh @ Kallu as the assailants of Iqbal. Secondly, her supplementary statement was also recorded on the same day. PW. 4 has identified the accused.

12. It is elicited in the cross-examination that on 11th January 2012 her statement was recorded by PW.1. She has affirmed before the Court the contents of her statement which is marked at **Exh.37**. She has voluntarily stated that on the same day i.e. on 11th January 2012, Mr. Joshi had recorded only one statement. She further claims to have informed PW.1 that her son Javed and his friend had told her that on 8th January 2012 at 11.00 pm they had seen Iqbal in the company of

Vyankatesh at Panther Nagar. She has conceded in the cross-examination that she had not filed any complaint/ report to the effect that Shrinivas had extended threats to Iqbal. It is also conceded that action under section 151 of Cr.PC was intermittently taken against deceased Iqbal. She has also conceded that after arrest the accused Shrinivas Swami, Vyankatesh and Suresh @ Kallu were shown to her in the Police Station and she was informed by the Police that they had caused homicidal death of Iqbal. P.W.4 had volunteered that on every occasion before visiting the Court she had visited the Parksite Police and she was told to depose before the Court. According to her, on 8th January when she called upon Iqbal he had informed her that he is in company of Vyankatesh.

13. Laxman Wagh – P.W.5 was discharging patrolling duty of Parksite Mobile Van No.I from 9.00 am on 8th January 2012 to 9.00 am of 9th January 2012. At about 7.30 am he had received a wireless message from control room that the dead body of an unidentified male was abandoned near Swaminarayan Temple, Road No.17, Veer Sawarkar Marg. P.W.5 reached the site, informed PSO of Parksite Police Station and carried the dead body to Rajawadi Hospital.

14. Ashupati Shivsharan - P.W.6 is the panch. According to him, the accused Suresh Gupta @ Kallu had volunteered to show the place where Iqbal was killed on 13th January 2012. The memorandum of accused Suresh is at **Exh.52**. The accused Suresh had also led Police to his house situated in a chawl at Swaminarayan Nagar and a cell phone was recovered which according to the Police belonged to deceased Iqbal. It is also admitted that when they reached the scene of offence many people had gathered there and they had learnt from the public that the dead body was found at that place. No panchnama was drawn there. The panchanama was prepared at the Police Station which is at **Exh.53**. Overwriting in respect of time on the panchanama is admitted by the witness. The cross-examination clearly establishes that the witness was tutored before deposing in the Court and the same is admitted by P.W.6.

15. According to Eknath Khade – P.W.7, resident of Panther Nagar, when he was at the public toilet he had seen Iqbal @ Gullu and Vyankatesh proceeding towards Kannamvar Nagar. P.W.7 has stated that at about 9.30 pm on 8th January 2012, Gullu and Vyankatesh were seen together and they both were in inebriated condition. On the very

next day, in the morning, he had learnt that Iqbal had not returned home and accordingly, he had informed the mother of the deceased that on the previous night he had seen her son Gullu in the company of Vyankatesh and that they were being followed by Shrinivas. On 10th January 2012, he learnt about the death of Gullu. He has also affirmed about the quarrel between the deceased and Shrinivas at the time of Ganesh Festival. He had not met anyone near the public toilet which is situated at a distance of 30 meters from his house. The fact that FIR was registered against unknown persons on 11th January 2012 would falsify the statement of P.W.7 and P.W.10 that they had disclosed to the Police on 10th January 2012 that the deceased was last seen in the company of Vyankatesh. Their evidence would further show that Iqbal had friends on the way from Kannamvar Nagar to Swami Narayan Nagar. He has conceded that he is one of the witnesses to the incident of scuffle between Iqbal and the Tevar family, in which Sushila had stabbed Iqbal. He happens to be a childhood friend of deceased Iqbal @ Gullu. There is a specific admission by P.W.7 that the distance between Panther Nagar and the place where the dead body of Gullu was found is about 10 to 12 kilometers. His statement was recorded on 10th and yet the FIR was registered against unknown persons.

16. It is also admitted that Iqbal @ Gullu had friends on the way from Kannamvar Nagar to Swami Narayan Nagar. He was in a habit of joining any friend whom he met on the way. In answer to the Court question, it is stated that Gullu was seen in the company of Vyankatesh only.

17. Shyam Shinde - P.W.8 was a good friend of deceased and one Kunal Gaikwad (P.W.10). On 8th January 2012 at about 11.30 pm he had seen the deceased Gullu in the company of Kunal and Vyankatesh at Firoz Shah Nagar compound ground. They were all consuming alcohol at that time. He spoke to P.W.10 and thereafter, he had even smoked a cigarette with the deceased.

18. On 9th January 2012, P.W.8 had been to Godrej ground for answering nature's call and at that time, watchmen of the said ground had given cell phone of the deceased and informed him that the deceased had asked him to return it to the deceased. P.W.8 returned that cell phone to Mr. Lallu, the maternal uncle of the deceased. On 9th January 2012 in the morning, upon enquiry by the mother of the deceased P.W.8 had informed her that he had seen him in the company of P.W.10 and accused Vyankatesh previous night while they were

consuming illicit liquor. The statement of P.W.8 was recorded on 10th January 2012. In the very next breath, P.W.8 has denied that his statement was recorded on 10th January 2012.

19. Bharati Ruptakke - P.W.9 is a resident of Panther Nagar. She also claims to have seen the deceased in the company of Vyankatesh at about 11.15 pm on 8th January 2012 when she had visited the public toilet along with her minor daughter. It appears that all the witnesses were aware of the altercation between Shrinivas and deceased at the time of Ganesh festival. On the next day, she had learnt about the death of Iqbal @ Gullu. It is conceded that the public toilet is situated at a distance of four minutes walk from her home.

20. On 9th January 2012, she had not disclosed to the mother of the deceased that she had seen her son in the company of Vyankatesh but on 10th January 2012 she learnt that Gullu had told his mother about the same.

21. The evidence of P.W.10 – Kunal Gaikwad would show that on 8th January 2012 at about 11.30 pm, Vyankatesh was on the ground, consuming alcohol before P.W.10 arrived on the ground

alongwith the deceased. Shyam Shinde – P.W.8 joined them for a short while just for smoking a cigarette and thereafter, parted their company. While leaving the ground, Gullu had handed over his cell phone to the security guard Mr. Rane – P.W.11. Vyankatesh had parted from their company. He was followed by Gullu whereas P.W.10 retired for the night in the cabin of watchman. On the next day, mother of Gullu woke him up at 6 am and inquired about her son. She was also informed that Gullu and Vyankatesh had consumed liquor along with Atik and P.W.10 had searched for Gullu. P.W.10 has conceded in the cross-examination that he along with Gullu had reached the spot between 12.15 am to 12.30 am and had no knowledge as to since when Vyankatesh was sitting there and consuming liquor since they met Vyankatesh at 12.30 am. They did not share snacks and alcohol with Vyankatesh but they had offered it to him. Till 1.30 am they were together and except Shyam they had not met anybody at that place. Vyankatesh had continued to sit at the same place for about 30-45 minutes and thereafter, had gone away towards a lane whereas the deceased and P.W.10 were at the bonfire near the watchman cabin. They continued to sit there for about half an hour. Thereafter, it was on 9th January 2012 that he learnt about death of Gullu. The Police had

accidentally met P.W.10 in the garden on 10th January 2012. At that time, Lallu brother of Gullu had accompanied the Police. On 12th January 2012, the statement of P.W.10 was recorded in the Police Station.

22. Admission of P.W.10 that he does not recollect for how many days the Police had kept him in Police Station coupled with the admission that the Police provided meals on time when he was in their custody and the charges for his meals were being paid by Shyam Shinde who was also detained by the Police at that time would lead to an inference that Shyam and P.W.10 were detained by the Police in their custody without any warrant. P.W.10 was not allowed to meet his family members when he was in Police custody, neither he was produced before the Court. Besides P.W.10, Awara @ Sonu, Nadar and Shyam Shinde were also kept in police custody. P.W.10 has candidly and positively admitted that Police were torturing them while in custody. They were kept in the lock-up and the Police had never assigned any reason for detaining them in custody. They were assaulted by flour mill belt and they were tortured separately twice a day. The detainee were not given any medical treatment nor taken for

medical examination.

23. Dinkar Rane - PW.11 was serving as watchman in Bakshi Securities Limited. He was on duty on intervening night of 8th January 2012 and 9th January 2012 in Phirojshah Nagar, Godrej Compound, Vikhroli. He was discharged from deposing on the ground of his illness and thereafter, by a letter dated 12th August 2014, the prosecution had chosen to drop him as a witness for the reasons best known to the prosecution. In fact, he would be the material witness for the prosecution.

24. Jagannath - PW.13 has also suffered the same trauma as that of PW.10 – Kunal Gaikwad and PW.8 - Shyam Shinde. He is a resident of Panther Nagar. On 16th January 2012 at about midnight the Police had taken him to Parksite Police Station, detained him in the Police Station till 6.00 am and he was subjected to the same treatment like that of PW.10 only because the brother of accused Shrinivas viz. Rajesh was his friend. Accused Shrinivas @ Shenu was like an elder brother to PW.13. The Police had taken his cell phone along with sim card and his signatures were obtained on a plain paper. On 17th January 2012, he was freed from Police custody at about 4.00 pm and

according to him, he had seen some more persons from the same locality in Police custody who were detained without being arrested. He was declared hostile. Even if the witness is declared hostile by prosecution, it does not efface his evidence from the record altogether. That much of the evidence of hostile witness can be relied upon by the prosecution, if that part of the statement is in conformity with other evidence. The accused can also rely upon that part of evidence which supports him.

25. Vikram S. Pawar - P.W.14 is a panch for the recovery of rope at the instance of accused Shrinivas. According to him, the accused had led the Police to a hardware shop from where he had purchased the rope. The accused was identified by the shopkeeper. The memorandum is at **Exh.71**. The said recovery panchanama is at **Exh.72**. In fact, two ropes of same colour and size were produced in the present case. The witness had identified one of them to be the rope which was taken from the hardware shop.

26. P.W.16 – Satish Pawar is a panch to the recovery of a cell phone. The said cell phone was recovered from the house of accused Shrinivas Swami on 20th January 2012. It is conceded in the cross-

examination that the camera of the cell phone was broken and the Police had not opened the mobile phone for verifying sim card, memory card and battery. The digits of IMEI number is missing from the memorandum as well as recovery panchanama. Witness has admitted that the house of accused Shrinivas and deceased Gullu are facing each other.

27. PW.17- Mohd. Siddiqui is a Carpenter. At the instance of accused no.1 – Shrinivas the Police had drawn the scene of offence panchanama. The memorandum is at Exh.87. The accused had led them to Chandan Wadi Compound more particularly to the hill and had produced a piece of rope lying at that place. There was a compound wall of about 8 to 10 feet. There was no watchman at the scene of offence. There was garbage including the waste material of stones, wood, paper and other scrap material and the distance between both the places shown by the accused is about 10 feet. The scene of offence was in fact known to the Police as Mobile Van had picked up the dead body from that site and according to PW.1, he had also drawn scene of offence panchanama on 9th January 2012 which is missing from the records. In fact, the scene of offence was known prior to 16th

January 2012, the day on which the accused Shrinivas was arrested.

28. PW.18- Dr. Narendra Shinde had performed autopsy on the dead body of Iqbal @ Gullu. He had noticed 18 artificial wounds. After post-mortem the Dr. had arrived at a conclusion that the cause of death was "Asphyxia due to strangulation and multiple injuries with right lung Haematoma". The post-mortem notes are at **Exh.92**. Injury No.17 in Column No.17 was found to be fatal injuries. There were no traces of alcohol in the column showing contents of the stomach. It is pertinent to note that initially autopsy was performed on the dead body of unknown person. The name of the deceased was then written in the memorandum of post-mortem examination after identity was established and in this backdrop PW.18 has conceded that making material alteration in carbon copy of a document is serious and illegal. On 11th January 2012, the Police had informed PW.18 about the name of the deceased. However, according to PW.18 he had not committed any illegality. On 9th January 2012 he had not given any opinion even about the probable cause of death.

29. PW.19 – Vitthal Kadam is the panch for the disclosure statement of the site where Vyankatesh had consumed liquor along

with the deceased. The said spot was behind quarter Nos.27 and 28 of the Godrej Compound. He had also shown the place where Gullu was murdered. The memorandum and the panchanama are marked as **Exhs.96, 97, 98 and 99**. There is also recovery of a cell phone at the instance of accused Vyankatesh from his house. According to the prosecution, he had concealed the same in his house on a wooden plank embeded in the wall of that house. The said cell phone was seized.

30. Kaniram Pawar – P.W.21 was attached to Parksite Police Station in the year 2012. He had investigated Crime No.18 of 2012 partly. P.W.21 had arrested accused Vyankatesh and Suresh Gupta under the panchanama at Exh.106. According to P.W.21, in the course of investigation Vyankatesh had admitted to have committed the murder of Gullu and had co-operated with the investigation by showing places where the murder was committed, where liquor was consumed and had also produced the cell phone which was used by him for contacting the other accused before commission of murder of Gullu. He has then narrated the steps taken by him in the course of investigation. On 16th January 2012 he had arrested accused Shrinivas and the arrest panchanama is marked at **Exh.111**. There was recovery

of articles at the instance of Shrinivas under section 27 of the Indian Evidence Act. Charge sheet was filed by P.W.21. It is admitted that P.W.21 had taken up investigation only on 11th January 2012 and before that the preliminary investigation was carried out by PSI – Mr. Joshi – P.W.1 but the same was supervised by P.W.21. Initially ADR was registered. Witness had volunteered that there is no illegality in inquiry in ADR case by the Police Officer who is an informant. It is admitted that the post-mortem notes and certificate of cause of death were obtained by P.W.21 in the inquiry of A.D.R. The post-mortem notes did not indicate any opinion of medical officer indicating the cause of death of Gullu. The said cause of death certificate is at **Exh.129**. That on 10th January 2012 the identity of the deceased was established and during the A.D. inquiry, it could not be ascertained as to whether death was homicidal, suicidal, etc. It is conceded that although the family members of the deceased were present at the time of registration of FIR he did not feel it necessary to make any of the family members as first informant. In any case, FIR was registered against unknown persons. It is the contention of P.W.21 that he had met Hasina mother of the deceased on 12th/ 13th as the statement was recorded by PSI Joshi. The witness has denied to have obtained the signatures of Suraj

Deshmukh P.W.15 on blank papers. The admissions of P.W.21 are as follows :-

- (i) Many criminal cases were pending against deceased Gullu;
- (ii) P.W.1 PSI, Joshi had prepared the scene of offence panchanama but the same was not handed over to P.W.21 after taking over the investigation and therefore, he had expressed his inability to state the date on which the panchanama was prepared or was misplaced;
- (iii) He had not made any inquiry in respect of the scene of offence panchanama which was misplaced in the Police Station. The case diary also does not indicate that the panchanama was missing and that he had not intimated the same either to the Magistrate, the Sessions Court or Public Prosecutor. Since he had not recorded the statement of PSI Joshi, the names of panch witness to the scene of offence panchanama could not be ascertained;
- (iv) He had received the statement of Police Constable Mr. Wagh on 11th January 2012;
- (v) Shrinivas was arrested on 16th January 2012 and interrogated by P.W.21, wherein he had admitted

commission of offence;

(vi) He did not find it necessary to record the statement of nodal officers in respect of CDR's under section 65B of the Evidence Act. He has denied to have detained any of the witnesses without arrest;

(vii) That the IMEI number of the cell phone produced by accused Vyankatesh is 356255011952421 whereas IMEI number of mobile phone mentioned in the memorandum and seizure panchanama is 355212030346987 and it is agreed that both the numbers are at variance.

31. The evaluation of evidence would show that on 11th January 2012, the statement of P.W.4 – Hasina Shaikh was recorded between 10.30 am to 11.30 am and the FIR was lodged by P.W.1 – Joshi at 8.35 pm, wherein he has taken upon himself the onus of being the first informant when more than 3 family members were available. In fact, P.W.1 had inquired into A.D. No.5 of 2012. It is not known as to when P.W.4 had raised suspicion against the present appellants. Moreover, she had suspected Shiva, Phulchand and Tevar besides Shrinivas as probable assailants of her son. She had not even suspected Vyankatesh at that stage.

32. PW.8 – Shyam Shinde also claims to have seen Iqbal in the company of Kunal and Vyankatesh at Firoz Shah Nagar Compound at 11.30 pm. The watchman of Godrej ground had given the cell phone of deceased to PW.8. The watchman i.e. Mr. Rane was dropped by the prosecution. In fact, Mr. Rane would have been able to clarify as to who accompanied Iqbal after he had handed over the cell phone to him. The cell phone was handed over to the maternal uncle of the deceased on the very next day and it is surprising that the family members who were searching for Iqbal had not inquired with Mr. Rane. Handing over of the cell phone by the deceased to Mr. Rane is clothed with suspicion.

33. This is a case of circumstantial evidence. The learned Sessions Judge has convicted the accused mainly on the basis of the evidence of last seen together and has relied upon the substantive evidence of PW.10 – Kunal Gaikwad. The learned Sessions Judge has fallen in error to hold that the accused have not brought on record nor explained when they departed from the company of deceased Iqbal and thereafter, who was in the company of deceased Iqbal @ Gullu. It is a settled position of law that it is incumbent upon the

prosecution to prove its own cause beyond reasonable doubt.

34. In the case of *Nizam & Anr. vs. State of Rajasthan (2016)*

1 SCC 550, the Apex Court has held as under :-

“14. Courts below convicted the appellants on the evidence of PWs 1 and 2 that deceased was last seen alive with the appellants on 23.01.2001. Undoubtedly, “last seen theory” is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The “last seen theory” holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well-settled by this Court that it is not prudent to base the conviction solely on “last seen theory”. “Last seen theory” should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.”

35. Ordinarily, if the prosecution would succeed in establishing the theory that the accused and the deceased were last seen in the company of each other the failure of the accused to satisfactorily account for the disappearance of the deceased would be an incriminating circumstance but it cannot be a conclusive proof unless there is evidence on record to show that during the intervening time i.e. the time between last seen and the time when dead body is found the deceased had no occasion to meet anyone else. In fact, according to P.W.7, the deceased knew certain people

on the way from Kannamvar Nagar to Swaminarayan Nagar. According to PW.10, deceased had continued to be in his company whereas, Vyankatesh had parted their company at Panther Nagar ground itself.

36. There is also evidence that the deceased was on inimical terms with several people. The distance between the place where the accused and deceased were last seen is about 10-12 kilometers from the place where the dead body was found. It is a settled position of law that it is incumbent upon the prosecution to prove its case beyond reasonable doubt. Only if the prosecution had discharged this onus of proving that the accused were last seen in the company of the deceased, the onus would shift upon them.

37. In the case of *Mohibir Rahman And Anr vs. State of Assam reported in AIR 2002 SC 3064*, the Apex court has held as under :-

“The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the

accused and the crime. There may be cases where on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the culpable homicide. In the present case there is no such proximity of time and place. As already noted the dead body has been recovered about 14 days after the date on which the deceased was last seen in the company of accused. The distance between the two places is about 30-40 Kms. The event of two accused persons having departed with the deceased and thus last seen together (by Lilima Rajbongshi, PW6) does not bear such close proximity with the death of victim by reference to time or place.”

38. None of the witnesses had named the present appellants as suspects from 10.00 pm of 9th January 2012 to 8.30 pm of 11th January 2012 despite their claim to have seen the deceased in the company of accused on 8th January 2012 as late as 11.30 pm. The brother of the deceased P.W.3 also has not suspected the accused and therefore, FIR was lodged against unknown persons by P.W.1.

39. In the case of *Bodhraj @ Bodha & Ors. Vs. State of Jammu & Kashmir (2002) 8 SCC 45*, the Apex Court has held as under :-

“The last-seen theory comes into play where the time-gap

between the point of time when the accused and the deceased were seen last alive 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. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.”

40. The learned counsel for the appellants has vehemently argued that there is no iota of evidence to connect the appellants with the homicidal death of deceased Iqbal. It is argued that a quarrel had taken place between the accused Shrinivas and deceased sometime in September/ October and the incident is of January. The date of death is not proximate to the date of previous quarrel and moreover, no untoward incident had occurred in three months prior to the incident. It is also argued that there is no evidence against Vyankatesh except that the witnesses have stated that the deceased had met Vyankatesh on the ground at Panther Nagar and had departed at Panther Nagar itself. It is also urged that all witnesses are interested witnesses.

41. Per contra, the learned APP supports the case of the prosecution and submits that the accused has failed to furnish any explanation in his statement under section 313 of the Cr.P.C. to discredit the witnesses who have lastly seen the accused in the company of the deceased. The said submission cannot be comprehended in view of the fact that the prosecution itself has not established the theory of last seen together.

42. In the case of *State of Karnataka Vs. Chand Basha (2016) 1 SCC 501*, the Apex Court has held as under :-

“The prosecution story relies upon the ‘last seen together’ theory, which resulted into the death of Ganesh. This Court has time and again laid down the ingredients to be made out by the prosecution to prove the ‘last seen together’ theory. The Court for the purpose of arriving at a finding as to whether the said offence has been committed or not, may take into consideration the circumstantial evidence. However, while doing so, it must be borne in mind that close proximity between the last seen evidence and death should be clearly established. Yet, the prosecution has failed to prove the evidence which establishes the ‘last seen together’ theory beyond reasonable doubt to prove the guilt of the accused. The prosecution merely proved the motive which could have compelled the accused, and that the accused went to the bar with one other person, but the identity of that other person is not clearly established at all. The post-mortem report fails to specify any approximate time of death and in light of the recovery of the dead body on 20.01.2001, after 4 days, which is not a small gap since the deceased disappeared on 16.01.2001, it is not appropriate to convict the accused when his role is not firmly established.”

43. The recovery of rope at the instance of accused Shrinivas is vague and ambiguous since two ropes are placed on record. The rope was recovered from the place where the dead body was found - in an open place accessible to all. The recovery of cell phone does not lead to any logical conclusion as IMEI number in the panchanama differs from that of the IMEI number of cell phone. Moreover, the cell phone of the deceased was handed over by the deceased to Mr. Rane – P.W.11 and the same was returned to the maternal uncle of the deceased. There is no cogent evidence to show that the deceased had any other cell phone which was taken by the accused Shrinivas.

44. The nature of evidence adduced by the prosecution leads to an unerring conclusion that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt. In view of the above discussion, the conviction of the appellants for the offences punishable under section 302 r/w 34 of Indian Penal Code would be unsustainable in the eyes of law and hence, the accused deserve to be acquitted of all the charges levelled against them. Hence, we pass the following order :-

ORDER

- (i) Appeals are allowed;

(ii) Conviction and sentence passed by the Additional Sessions Judge, Greater Bombay dated 20th February 2015 in Sessions Case No.336 of 2012 is hereby quashed and set aside;

(iii) Appellants be released forthwith if not required in any other case;

(iv) Fine amount, if paid, be refunded;

(iv) The appeals are disposed of on above terms.

45. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on a digitally signed copy of this order.

(N.J. JAMADAR, J.)

(SMT. SADHANA S. JADHAV, J)

Digitally
signed by
Pallavi M.
Wargaonkar
Date:
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