

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.610 OF 2016

**SAYEED DABESTANI @ SAYEED IRANI @)
AKBAR IRANI)...APPELLANT**

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

WITH

CRIMINAL APPEAL NO.662 OF 2016

NITESH @ CHAUDA KRUSHNKUKMAR ZHA)...APPELLANT

V/s.

**1) THE STATE OF MAHARASHTRA)
2) MOHD. RIZA KAMBAR ALI BABAI)...RESPONDENTS**

Mr.Fakhruddin Khan, Advocate for the Appellants.

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

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

**RESERVED ON : 29th SEPTEMBER 2020
PRONOUNCED ON :**

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

1 These two appeals arise out of a common judgment and order passed by learned Additional Sessions Judge, City Civil and Sessions Court, Greater Bombay, dated 18th August 2016 in Sessions Case No.676 of 2012 along with Sessions Case No.627 of 2013. Criminal Appeal No.610 of 2016 is preferred by Sayeed Dabestani @ Sayeed Irani @ Akbar Irani and Criminal Appeal No.662 of 2016 is preferred by Nitesh @ Chauda Krushnkumar Zha.

2 They have been convicted under Section 302 read with 34 of the Indian Penal Code (IPC) and sentenced to life imprisonment and to pay a fine of Rs.50,000/- (Rupees Fifty Thousand Only) and Rs.10,000/- (Rupees Ten Thousand Only) respectively, in default, to suffer rigorous imprisonment for 6 months and 2 months respectively. They were also given benefit of set-off under Section 428 of the Code of Criminal Procedure. As both these appeals arise out of the same judgment, we propose to decide these appeals by one judgment.

3 Briefly put, the facts may be summarized as follows :

- (a) Informant along with his family members including parents, wife and a son earlier used to reside in Room No.5, 1st Floor, R.J.Irani Building, beside New India Guest House, Charnal, Jail Road, Dongri, Mumbai – 400 009. As the said building was to be repaired, they all shifted to Moghul Manzil area.
- (b) Informant was an employee at New Taj Bakery Store, Borivali. On 23rd May 2012, at about 7.15 p.m., he received a call on his mobile from his mother viz. Masooma informing that wife of Sayeed Irani (A1) had informed her about a quarrel going on between his father Kambar Ali and A-1 and asked her to immediately reach Dongri. At about 9.30 p.m., informant, his mother and wife visited Police Station and informed about the incident but the police asked them to go to the house, break open the lock and then inform the factual position. Accordingly, informant and one Bhaimiya (PW15) broke open the lock and found Kambar Ali i.e. father of

informant in a pool of blood on a wooden cot. Abdul Rahim Bashir Khan (PW14) then informed the police.

- (c) According to prosecution, since five months before the incident, A-1 was residing in the house belonging to informant as he was from informant's community and was well acquainted with the father of the informant i.e. the deceased.
- (d) The prosecution alleges that A-1 was a goonda and since 5th of May 2012 was threatening the informant's wife. A-1 was also threatening to kill her family members.
- (e) The prosecution further contends that on 23rd May 2012, at about 3.30 p.m., A-1 rang up informant's father and asked him to come at Dongri i.e. old house of the informant. According to the prosecution, A-1 along with others for some unknown reason committed the murder of the deceased.

- (f) Informant, accordingly, lodged the report with Police Station Dongri on the basis of which Crime No.75 of 2012 for the offence punishable under Section 302 read with 34 of the IPC came to be registered against the appellants-accused along with a juvenile in conflict with law.

- (g) In the course of investigation that followed, usual steps for holding of Inquest Panchnama, seizure of blood stained clothes of accused and seizure of weapon of offence were taken and the autopsy was got done through PW9 Medical Officer. Investigating Officer also got appellants-accused medically examined. All the incriminating articles were sent to the Forensic Science Laboratory. After completion of investigation police submitted charge-sheet and in usual course the case was committed to the Court of Sessions.

- (h) Appellants-accused pleaded not guilty to the Charge leveled against them and contended that they have been falsely implicated. According to A-1, deceased was his very good

friend. From the community persons he came to know about the incident and on 24th May 2012, he himself went to the police station, surrendered himself and asked the police as to why they were blaming him. During that period, police used third degree methods and he was beaten by sharp rod on his hand. The police were not ready to listen to anything told by him. The police were hitting him by belt and insisting that he should confess and they also caused injuries to his person. Before arrest he was not at all knowing the other accused persons and that he knows about his false implication by informant and witnesses.

4 Mr.Fakhruddin, learned counsel for appellants-accused, submitted that the present case is based on circumstantial evidence and the learned trial Court miserably failed to appreciate the evidence led by prosecution and wrongly held that the circumstances relied on by the prosecution are duly proved. The conclusions so reached by the learned trial Court are based on surmises and conjectures sans legality. The learned

counsel then took us through the evidence of material witnesses and pointed out various inconsistencies and discrepancies. Although the prosecution has alleged that A-1 was in possession of the premises belonging to the deceased but no documentary evidence is produced in evidence to substantiate about his residence in the premises where the alleged incident took place. According to the learned counsel, there is absolutely no evidence on record to show that the deceased even was seen in the company of the accused persons apart from the non-establishment of the motive. Thus, for all these reasons, the present appeal deserves to be allowed, argued learned counsel.

5 Per contra, Mr.Patil, learned APP, vehemently submitted that all prosecution witnesses in unison have supported the prosecution theory. The premises in question was very much in possession of A-1 and in such circumstances, when the deceased was found dead in the premises, it was expected of A-1 to explain under what circumstances the deceased died there. Since no explanation is forthcoming, therefore, an adverse

inference must be drawn against A-1 and other accused. Arguing further, the learned APP contended that the circumstances relied on by the prosecution are proved beyond doubt and in such a situation, the trial Court was totally justified in convicting the appellants-accused.

6 It has been consistently laid down by the Hon'ble Apex Court that where a case rests squarely on circumstantial evidence, inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of accused and guilt of any other person. The circumstances from which an inference as to the guilt of accused is drawn has to be proved beyond reasonable doubt and has to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

7 In Bhagatram vs. State of Punjab¹ it was laid down that where a case depends on the conclusions drawn from circumstances, it is well settled that the cumulative effect of the

1 AIR 1959 SC 621

circumstances must be such as to negative the innocence of the accused and bring the accused home beyond any reasonable doubt.

8 We may also make a reference to the decision of the Hon'ble Apex Court in C. Chenga Reddy v. State of A.P² wherein it has been observed thus (SCC pp.206-207, para 21) :

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

2 (1996) 10 SCC 193

9 In Padala Veera Reddy vs. State of A.P. and Others³ the Hon'ble Apex Court has laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests :

“(1)the circumstances from which an inference of guilt of guilt is sought to be drawn, must be cogently and firmly established;

(2)those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3)the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of

3 AIR 1990 SC 79

the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

10 In State of U.P. vs. Ashok Kumar Srivastava⁴ it was pointed out by the Hon'ble Apex Court that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

11 In Sharad Birdhichand Sarda vs. State of Maharashtra⁵ the Hon'ble Apex Court while dealing with circumstantial evidence, has held that onus was on the prosecution to prove that the chain is complete and the infirmity

4 1992 Cri.L.J. 1104

5 (1984) 4 SCC 116 : AIR 1984 SC 1622

of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

“(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so compete 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.”

12 Bearing the above principles in mind, we propose to examine the evidence led by the prosecution.

13 In case of murder, fact of homicidal death assumes significance and needs to be established beyond reasonable doubt by the prosecution. In order to prove that death of Kambar Ali was homicidal, the prosecution has relied on evidence of PW9 Dr. Chaitanya Shriram Kulkarni (Exh.60). It may be noted here that PW9 conducted postmortem on the dead body of Kambar Ali.

14 PW9 Dr.Chaitanya Kulkarni states in his evidence (Exh. 60) that at the relevant time he was working as a Resident Medical Officer in J.J.Hospital, Mumbai. Dead body of Kambar Ali (deceased) was brought in the hospital on 24th May 2015 at 4.30

a.m. He examined the body and performed postmortem. He noted several wounds on a separate sheet attached to Column No.17. It is his evidence that he found total 29 stab injuries which were caused by sharp and edged pointed weapon. Those internal injuries also were in correspondence with external stab injuries. According to him, cause of death was hemorrhage and shock due to multiple stab injuries. He then proved the panchnama at Exh. 61.

15 We have carefully perused the injuries in Column No.17 which is recorded on a separate sheet by this witness. We found various linear abrasions, superficial incised wounds and many stab injuries on the person of the deceased. Stab injuries are also corresponding to the internal injuries. The cause of death, as noted by this witness, was hemorrhage and shock due to multiple stab injuries (unnatural). We also note that those injuries were possible by sharp and edged pointed weapon like muddemal in question.

16 It is also to be noted from the evidence of this witness that injuries were sufficient to cause death including corresponding internal injuries. There is nothing significant in the cross-examination of this witness. Even otherwise, the homicidal death of the deceased is not seriously disputed. In the light of medical evidence, we have no difficulty in holding that the victim died of homicidal death.

17 This brings us to the testimonies of material witnesses. PW1 Mohd. Raza Kambar Ali Babai, informant, states in his evidence (Exh. 33) that on 23rd May 2012, he received a phone call from his mother at about 7.15 p.m. His mother informed him that she received a phone call from wife of Sayeed Irani (A-1) to the effect that there was a quarrel between Kambar Ali and A-1. It is his further evidence that, therefore, he came from Borivali to Dongri. He then along with his wife and mother went to Dongri Police Station and narrated about the quarrel and requested the police to accompany them. However, police told them that they

won't come and they should go to their house at Dongri and if there is any untoward incident, they should call them.

18 His evidence then shows that he along with mother and wife and his friend Bhaimiya (PW15) visited their house at Dongri. It was locked. Bhaimiya broke open the lock. They all went inside and saw the dead body of his father lying in a pool of blood on a wooden bed. According to him, A-1 was residing in their house at Dongri since five to six months next before the death of his father. His father was friend of father of A-1. A-1 was criminal since inception and used to send vulgar messages to his wife, threaten her on phone that he would kill everybody and used to harass her. He then proved his First Information Report (FIR) at Exh. 34.

19 It is his further evidence that since five to six months next before the incident, A-1 was residing at their Dongri house along with Almin and Akbar Shaikh (juvenile in conflict with law). On 5th May 2012, his wife had gone to her parental house along

with her son. From that time, A-1 started sending her filthy messages and used to ask when she would return from Hyderabad. This fact was told to him by his wife. On 15th May 2012, his wife returned from Hyderabad along with her brother Shahrukh. On 16th May 2012, they went at their Dongri house and confronted A-1 as to why he was sending messages to his wife. A-1 told that his wife was like his daughter and he should not mind. However, even after 16th May 2012, A-1 did not stop sending messages and he was sending messages like that he was liking his wife and if she did not listen to his saying, he would start by killing her father-in-law i.e. Kambar Ali and would stop when he would kill her son Hyder Ali.

20 It is his further evidence that all these facts were told to the deceased and when he told his father that he would make a complaint to the police, his father advised him not to make complaint and he would manage things in his own way.

21 Lastly, he states that on 23rd May 2012, A-1 called his father at about 3.00 p.m. and asked him to visit the house at Dongri. After 3.00 p.m. his father went to the house at Dongri. This fact was told to him by his mother Masooma. As his father had asked A-1 to quit their premises as he had exceeded his limits, A-1 was nurturing grudge against his father and because of that he brutally murdered his father.

22 From the evidence of the informant, several aspects are notable. Firstly, A-1 was residing in the premises belonging to informant's father. As informant's father i.e. the deceased was well acquainted with the father of the A-1 he allowed the deceased to occupy his premises. However, in the cross-examination informant states that neither he nor his father had made any agreement with A-1 about giving of room on rent and that he has no document to show that A-1 was residing in their house at Dongri. Even PW19 Investigating Officer states in his cross-examination that during the course of investigation, he did

not find any document showing that A-1 was residing in the house i.e. place of incident.

23 Secondly, A-1 used to send filthy messages to informant's wife, threaten her on phone that he would kill everybody and also used to harass her. The FIR is totally silent on this aspect.

24 Thirdly, as deceased had asked A-1 to vacate the premises, as the latter had exceeded his limits, A-1 was nurturing grudge against the deceased and because of this, A-1 brutally murdered the deceased. Suffice to say, motive is clearly imputed for the first time in the evidence by the informant. We say so because in the FIR it is alleged that for some unknown reasons A-1 committed murder of the deceased.

25 Fourthly, informant was given to understand by his mother Masooma (PW4) that A-1 had summoned the deceased in the premises and pursuant to it, the deceased left after 3.00 p.m.

Later on, he was also given to understand by his mother that a quarrel was going on between the deceased and A-1 and this fact was told to his mother by none other than the wife of A-1. In view of this understanding, when he along with his family members reached in the premises at Dongri and after breaking open the lock by PW15, they found the deceased lying dead with multiple injuries on his person. This last aspect is in the nature of hearsay evidence and how far and this being a crucial aspect, gets support from other evidence on record will have to be seen carefully and cautiously. Before that, we would like to go through the evidence of PW4, PW8, PW14 and PW15.

26 PW14 Abdul Rahim Bashir Khan states in his evidence (Exh. 82) that at the relevant time Sayeed Irani (A-1) was residing in Irani Building belonging to deceased. He knows A-1 as A-1 used to come with the deceased. On 23rd May 2012, he and Mehfujbhai (PW15) were standing in front of Ashrafi hotel. At about 7.00 p.m. in the evening, Masooma Bhabhi (wife of Kambar Ali) had come there and told that there was a quarrel between A-1

and Kambar Ali and asked them to go to Irani Building and see what happened. It is his further evidence that Mehfujbhai had gone there but new lock was put to the door. He told Mehfujbhai that they should go to Dongri Police Station. He, Mehfujbhai, Masooma Bhabhi and Sabba (PW8) went to Dongri Police Station. Police advised them to break open the lock as house belonged to Kambar Ali and if anything was there, they should inform them. It is his further evidence that at about 9.00 p.m., he, Mehfujbhai, Rahim, Riza (informant), Masooma Bhabhi (PW4) and Sabba again went to Dongri house. He and Mehfujbhai had broken open the lock. They entered into the house and saw that body of Kambar Ali was lying there in a blood. They also saw a knife lying on the cot. They, accordingly, informed the police station. Police came and took the body in their custody.

27 Similar is the evidence of PW15 Mehfuj Ahmed Maqbul Khan @ Bhai Miya (Exh. 85). Both these witnesses support the version of the informant that the deceased was found lying dead in a pool of blood. It is pertinent to note that these two

witnesses had noted, before approaching to the police that the premises was locked with a new lock. We will dwell on this aspect later on.

28 From their cross-examination, it is clear that both these witnesses are having very close relations with the informant's family. It may be noted from the cross-examination of PW15 that even on the date of recording of evidence of PW1 informant, he had accompanied the informant. Although they were suggested in their respective cross-examinations that being in close relations, they have deposed falsely but the said suggestion is denied by them. We have also pointed out from the cross-examination of PW19 Investigating Officer that no documentary evidence was collected during the course of investigation to show that A-1 was residing in the premises in question.

29 PW4 Masooma Kambar Ali Babai is the wife of the deceased and mother of PW1 informant. It is her evidence (Exh.

42) that she knows A-1 as he was on visiting terms. Their house at Charnal, Dongri was given to A-1 for the purpose of residence since eight months next back the date of the incident. A-1 was hot tempered and used to pick up quarrels with them. A-1 was also in habit of demanding monies from her husband and daughter-in-law. A-1 also used to sit with her husband in Dongri and they used to eat together. Later on, she learnt that A-1 used to send messages to her daughter-in-law Sabba (PW8) and dispute had started. A-1 also used to sent threatening messages. It is her further evidence that on 23rd May 2012, at about 8 O'Clock in the morning, her husband had left for work and returned back at 2 O'Clock on the same day. He took his lunch and went to sleep at 3 O'Clock. He had a call from A-1 asking him to join his birthday party. However, her husband said that he was tired and was going to sleep. After ten minutes, her husband said that he could not sleep and that he would attend birthday party. At 3.30 p.m. he left the house.

30 Deposing further, she states that at 4 O'Clock, A-1 came to her residence (new room) and asked Hyder Ali as to where is his mummy. Hyder replied that she had gone to tuition classes. According to her, she then asked A-1 as to where was her husband, to which he expressed ignorance and that he had not replied to his call and his mobile was switched off and he went away.

31 Testifying further, she states that at about 6.30 p.m., A-1's wife Nazi called her and asked her to go and see her husband and that something had happened between their husbands. She then went to her husband's friend Bhaimiya (PW15). Thereafter, they both went to residence at Dongri and saw that a new lock was put on the door. They went to Dongri Police Station. Police told them that they should break open the lock. Thereafter, she, her son, her daughter-in-law, Bhaimiya and Rahim Khan (PW14) went to the house at Dongri and broke open the lock. They went inside and saw her husband was lying on bed with bleeding injuries with full of cuts.

32 Firstly, like PW1 informant, this witness also admits in her cross-examination that she does not have any document to show that A-1 was staying in their Dongri house from the time eight months before the incident.

33 Even otherwise, major part of her evidence has come on record by way of omission. Her evidence shows that A-1 was of angry nature and hot tempered but since the said fact was missing from her statement recorded during the course of investigation and when confronted with by the defence, she insisted of having said so before the police but the said omission is duly proved by PW19 Investigating Officer in his cross-examination by stating that this witness had never told so during the course of recording her statement. Similarly, her evidence showing that A-1 was in habit of sending threatening messages to her daughter-in-law has again come on record by way of omission and this omission is proved by PW19 Investigating Officer in his cross-examination by stating that this witness had never told so during the course of recording her statement. Further, her

evidence showing that her husband could not sleep and that he went to attend birthday party has again come on record by way of omission and this omission is again duly proved by PW19 Investigating Officer in his cross-examination by stating that this witness had never told so during the course of recording her statement. Furthermore, her evidence showing that when A-1 visited her house, she enquired with him as to whereabouts of her husband and that A-1 replied that he does not know and that the deceased was not replying to his call and that his mobile was switched off has again come on record by way of omission and was duly proved by PW19 Investigating Officer in his cross-examination by stating that this witness had never told so during the course of recording her statement. Furthermore, her evidence showing that she was called by Nazi i.e. wife of A-1 at about 6.30 p.m. informing her that something had happened between their husbands has again come on record by way of omission and this omission is duly proved by PW19 Investigating Officer in his cross-examination by stating that this witness had never told so during the course of recording her statement.

34 Although her evidence shows that A-1 was in habit of picking up quarrels and was annoyed with her family members but since this fact was missing from her statement and when confronted she admitted that she had not told this fact to the police at the time of recording of her statement. If A-1 indeed was of quarrelsome nature, then having regard to the factual background of the case, this was the material fact from the point of view of the aggrieved family members and she ought to have stated before the police during the recording of her statement.

35 The most important admission given by this witness in the cross-examination is that her husband i.e. the deceased was having very good relations with A-1. This being so, there was no reason, as deposed, for A-1 to quarrel with the deceased. Thus, except to the extent that A-1 at the relevant time was residing at the premises, there is nothing in her evidence which can, in any manner, strengthen the case of prosecution.

36 The last witness from the family of deceased is his daughter-in-law viz. PW8 Sabba Mohd. Riza Babai i.e. wife of PW1 informant. PW8 states in her evidence that A-1 was residing in their house at Dongri at the relevant time. Her father-in-law was having good relations with him and both of them used to drink and eat together. A-1 also used to talk and send messages to her and initially used to be very friendly. He used to send jokes and recipes. She also used to share recipes.

37 It is her further evidence that on 5th May 2012 she went to Hyderabad during vacation along with her son. A-1 started sending text messages. Initially he was very friendly and later on he started sending vulgar messages. Therefore, she switched off her cell. On her reaching Mumbai, he again started sending text messages and asked as to why she had switched off her cell phone and thereafter he started harassing her and said that he would kill her.

38 Coming to the main incident, she states that she along with her family members visited the house at Dongri. Rahim uncle (PW14) broke open the lock. They went inside and saw that her father-in-law was lying on the bed and there was blood sheds everywhere. After seeing this, she went panic and due to fear of A-1 started running away from Dongri house. It is her further evidence that she sat in a cab and got down at Girgaon. She even sent messages to her family members. At that time her family members sent messages to her but she was not in a position to reply and subsequently she noticed text messages from A-1 as the latter was calling her. She picked up his call. At that time she asked him as to what he had done to her father-in-law to which he said "Yes, I killed your father-in-law and I would kill all of you if you (referring to me) did not listen to him"and he told her to go to Pune because he wanted to meet her at that time. She then asked him about his whereabouts but he did not reply and disconnected the call.

39 It is her further evidence that she engaged a cab and went to Dadar around 11 p.m. From there also she tried to make a call to him but A-1 did not reply and was threatening her by sending messages that she should not call police. From Dadar she took a cab at about 11 p.m. and on her way to Pune, wife of A-1 made a call and asked her to come to Andheri and should not go to the place where A-1 had asked her to go. She replied that A-1 had threatened her that he would kill her and her family. At about 6.30 a.m. on 24th May 2012 she reached near Pune and noticed text sent by A-1. In that text A-1 had asked her as to where she was and he abused her and said that she was never his and he would not come to station. It is her further evidence that at about 10.30 a.m. she got text from friend of her husband viz. Ali Sabuni and Mehendi Sabuni about the arrest of A-1.

40 The whole story narrated by this witness appears to us to be highly improbable and very unnatural for more than one reasons and mainly on the ground that whatever she has narrated

does not get corroboration from her own husband or her mother-in-law. More importantly, what was the necessity for her to go all the way to Pune to meet A-1 when admittedly, since beginning, A-1 was sending her filthy messages and rather in a sense was having an ill-eye over her. Palpably, the whole narration is bereft of logic and does not satisfy the judicial conscience of her highly and improbable conduct apart from lack of corroboration from the mouth of her family members. Therefore, we are not keen to take her story at its face value, even prima facie.

41 What we gather from the above discussion is that A-1 was allegedly residing in the premises belonging to the deceased. We have already pointed out that motive has not been satisfactorily established and particularly having regard to the unnatural conduct of PW8 to whom A-1 allegedly and purportedly used to send vulgar messages, we have out rightly rejected her testimony. Assuming for the sake of argument that A-1 was residing in the premises belonging to the deceased, then we would

like to enlighten ourselves whether there is evidence on record worth the name to show that the deceased was lastly seen in the company of appellants-accused, soon before the incident.

42 The last seen theory comes into play where the time gap between the point of time when the accused and deceased were last seen 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.

43 From the record we notice the only star witness heavily relied on by the prosecution is PW7 Shamshid Mohd. Shaffi.

44 PW7 states in his evidence that he works as a Waiter in Baghdad Restaurant situated in Irani building at Dongri. On the first floor deceased Kambar Ali used to reside. At the time of the incident, he was not residing there. Sayeed Irani (A-1) was

residing in that building along with Almin (juvenile in conflict with law). As per their order, they were serving them food in their room.

45 It is his further evidence that on 23rd May 2012 deceased phoned him. He did not attend his call. After fifteen minutes deceased came to hotel and asked him why he did not attend his phone. He then gave him order of five Thums Up. According to him, he took the same to his room. He saw there Sayeed Irani (A-1) and Almin (juvenile in conflict with law) were sitting along with four persons. He handed over the bottles of Thums Up in their hands and went to the hotel. He then identified two accused out of said four persons before the court. Lastly, he states that at about 11 p.m. he learnt that in Room No.5 there was murder of Kambar Ali.

46 Perusal of the statement of the witness would show that earlier deceased used to reside on the first floor in Irani building, Dongri. Later on, A-1 and Almin (juvenile in conflict

with law) started residing there. On order they used to serve food to A-1 and Almin in their room only. It means, it is also to be noted here quickly, that the said Baghdad Restaurant was situated in the same Irani Building and the fact that this witness used to serve food to A-1 and Almin in their room, he was naturally knowing both of them.

47 The second part of evidence of this witness shows that on the day of incident, the deceased ordered five Thums Up and when this witness went in that room, he served all the five bottles and also noticed the four other persons sitting there besides deceased, A-1 and Almin. It means in all there were seven persons. We may point it out here that none of the Investigating Officers in their respective testimonies have deposed the presence of seven persons in the premises at Dongri at the relevant time. This is one aspect of the matter.

48 The evidence of this witness then shows that in the course of recording of his evidence, he could identify two accused.

We have already pointed out that this witness was only knowing A-1 and Almin and the latter being juvenile in conflict with law, his trial came to be separated and went before the Juvenile Justice Board. Out of remaining two accused of which one viz. Harikesh Pal @ Dinesh is already acquitted by the trial Court while the remaining accused viz. Nitesh Zha @ Chauda (A-4) is the appellant before us. In this regard his cross-examination is very much material. It appears that this witness was summoned in jail for Test Identification Parade where he could not identify any of the accused persons. The incident took place on 23rd May 2012 and it appears from the testimony of this witness that his evidence came to be recorded on 10th July 2014. If this witness could not identify any of the accused, though present in the Test Identification Parade, then how could he identify after more than two years A-4 before the court is a mystery.

49 Lastly, it is his specific case that on 23rd May 2012, on being ordered by deceased, he served five bottles of Thums Up in the room where the alleged incident took place. Interestingly and

surprisingly, PW10 examined by the prosecution and who has proved the Spot Panchnama at Exh.64 nowhere says and shows the seizure of five Thums Up bottles from the spot. Even if we go through the Spot Panchnama Exh.64 itself, we do not even see remotely the traces of five Thums Up bottles on the spot. PW17 Investigating Officer at paragraph 43 of his cross-examination states that he did not find bottles of Thums Up on the spot when he visited the spot. It is also not the case of PW7 Waiter that after sometime he collected the empty Thums Up bottles from the room. This is something very important which seriously put question mark on the reliability of this witness and it becomes further compounded when we gradually go through his cross-examination.

50 PW7 states in his cross-examination that on 23rd May 2012 during the whole day he did not see anybody coming out of the room of the deceased or going to the room. Not to be missed fact here is that the premises was found locked by the relatives of the deceased. If throughout the day this witness did not see

anybody visiting the room or going out of it, then the question remains to be answered is how and under what circumstances the premises was found locked, particularly, when according to this witness he had served the Thums Up bottles.

51 For all the aforesaid reasons, we are not satisfied with the testimony of this witness when he states that he had seen the deceased in the company of six persons including appellants-accused.

52 Merely because A-1 at the relevant time was in possession of premises where deceased was found dead, by itself, does not mean that a presumption of guilt of the appellants-accused is to be drawn. The learned trial Court wrongly proceeded on the premise that since the possession of the premises was with A-1 and as he failed to explain as to how death of deceased occurred, same was fatal, ignoring the absence of evidence showing that deceased was in company of appellants-accused. Disturbingly enough, the learned trial Court utterly

failed to appreciate the evidence of PW7 Waiter in proper perspective. Even, it appears, the learned trial Court was oblivious of the statement made by PW19 Investigating Officer in his cross-examination to the effect that during investigation he did not find any witness who had seen all the accused going into the house i.e. place of the incident.

53 If any evidence mattered most to the prosecution, it was evidence of PW7 Waiter. But in the light of his cross-examination and as also Spot Panchnama, his reliability suffered a dent and diminished his credibility. We need not be elaborative here as we have already crystallized our findings as to the nature of evidence adduced by this witness.

54 Two more niggling aspects await. First. The premises in question was having new lock when the relatives of the deceased visited the place of the incident. Under what circumstances and necessity a new lock was put on the door is not unraveled by the Investigating Officers. Contrarily enough, the

cross-examination of PW19 Investigating Officer shows that during the course of investigation he did not find any witness who had seen A-1 before going out of the house i.e. place of the incident or putting lock to the house. This is really a pesky question which remained unanswered.

55 Even Section 106 of the Indian Evidence Act does not come to prosecution's rescue in the light of obtaining circumstances. Section 106 of the Indian Evidence Act does not absolve the prosecution of its primary burden. In **Sawal Das vs. State of Bihar**⁶ the Hon'ble Apex Court has explained the principles in the following :

“10 Neither an application of Section 103 nor of 106 of the 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

6 AIR 1974 SC 778

out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused.....”

56 Second. It is quite jittery to know that there were as many as 29 lethal injuries on the person of the deceased. There are abutting rooms to the premises where the incident in question took place. As a result of murderous assault, the deceased must have raised heart-rending cries. How it was that not a single neighbour(s) heard the cries and screams of hapless deceased. It reflects poorly on the part of PW19 Investigating Officer when he states in his cross-examination at paragraph 45 that during investigation he did not record statement of any person/witness in the neighbourhood of place of incident. It is not his case that as there was no witness from the neighbourhood, he remained satisfied from the statement of PW7 Waiter. Needless to note with pains that the relevant aspects pertaining to the crime in question were not properly investigated and even the relevant witnesses were not examined.

57 This brings us to the remaining evidence on record. The prosecution has also placed reliance on various recoveries at the instance of appellants-accused and as also reports issued by Chemical Analyzers. However, in view of several loopholes as noted hereinabove and the failure of main circumstances finding its way to connect appellants-accused cogently and conveniently with the crime, the recoveries and Chemical Analyzers Reports lose their worth and force.

58 For what has been discussed hereinabove, we are more than satisfied that the learned trial Court did not consider the evidence led by the prosecution in proper perspective and as a consequence thereof, arrived at perverse finding of guilt. In the given set of facts and circumstances, even if the prosecution has been able to create some suspicion against the appellants-accused, it would be unsafe to accept that the implicating circumstances have been established to the hilt by cogent evidence and such circumstances form a complete chain that rules out any other

hypothesis except guilt of appellants-accused. Hence, conviction of the appellants-accused cannot be sustained. They are entitled to the benefit of doubt.

59 Consequently, we pass the following order :

ORDER

- i) Criminal Appeal No.610 of 2016 and Criminal Appeal No.662 of 2016 are allowed.

- ii) The judgment and order dated 18th August 2016 passed by learned Additional Sessions Judge, City Civil and Sessions Court, Greater Bombay, in Sessions Case No.676 of 2012 along with Sessions Case No.627 of 2013 is hereby quashed and set aside and the appellants-accused are acquitted of the offence charged against them.

- iii) Fine amount paid by them, if any, may be refunded to them.

- iv) Article B Nokia mobile Model No.1202 and amount of cash of

Rs.1,220/- seized from A-1 be returned back to him.

- v) Appellants-accused be set at liberty forthwith, if not required in any other case.

(V. G. BISHT, J.)

(PRASANNA B. VARALE, J.)

Arti V.
Khatate

Digitally signed
by Arti V. Khatate
Date: 2020.12.04
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