

HIGH COURT OF BOMBAY AT GOA**CRIMINAL APPEAL NO.29 OF 2020**

Mr. Vijay Kerkatta,
50 years of age, Village Bhuru Toli,
District-Simdega, Ps-Simdega, State –
Jharkhand,
presently lodged at Modern Central Jail,
Colvale, Bardez, Goa. Appellant

VS

1. State of Goa
(As represented by the Officer in charge,
Verna Police Station) Verna, Goa

2. The Public Prosecutor
High Court Building
Althinho, Panaji, Goa. Respondents

Mr. A.V. Pavithran, Advocate for the appellant.

Mr. P. Faldessai, Additional Public Prosecutor for the respondent- State.

**CORAM: M.S. SONAK &
BHARATI DANGRE, JJ**
DATE: 8th MARCH, 2021.

ORAL JUDGMENT : (per M.S. SONAK, J.)

1. Heard Mr. A.V. Pavithran, learned Advocate for the appellant,
and Mr. P. Faldessai, learned Additional Public Prosecutor for the
respondent – State.

2. This appeal is directed against the judgment and order dated 13/03/2020 made by the learned Sessions Judge, South Goa, at Margao in Sessions Case (302) No.3 / 2019 convicting the appellant for the offense punishable under Section 302 of IPC and sentencing him to suffer imprisonment for life and pay a fine of ₹10,000/- and in default to suffer Simple Imprisonment for six months.

3. The case of the prosecution as reflected in the charge-sheet is that on 07/10/2018 at around 20.30 hours at Voglebhat Verna Salcete, Goa, the appellant (accused) assaulted one Umesh Dungdung and thereafter assaulting with a laterite stone on his head causing him fatal injuries. The accused then fled away from the spot and this incident was captured in a CCTV camera attached to the DVR fixed in the house of the complainant (Pw1).

4. The prosecution examined 18 witnesses and thereafter the accused was questioned under Section 313 of Cr. P.C. The accused neither examined himself nor led any defense evidence. By the impugned judgment and order the learned Sessions Judge has convicted and sentenced the accused as aforesaid. Hence, the present appeal.

5. We have heard Mr. Pavithran, learned Counsel for the appellant, and Mr. P. Faldessai learned Additional Public Prosecutor for the State. With their assistance, we have perused not only the impugned judgment and order but also the material on record. We have also, in the Court,

viewed the CD (Exh.39) on the laptop i.e. the CCTV footage recorded in-camera No.3, which forms a part of the prosecution evidence.

6. Admittedly, there is no direct evidence, and the learned Sessions Judge has convicted the accused based on circumstantial evidence. The only two circumstances taken into account by the learned Sessions Judge are as follows:

- a) the alleged extra-judicial confession made by the accused to Pw1, Pw4, and Pw17 on 08/10/2018;
- b) the evidence in the form of CCTV footage (Exh.39).

7. Now in so far as the CCTV footage is concerned, the learned Sessions Judge has also held that from such footage it is impossible to identify the accused. As noted earlier, we have also viewed the footage and we also agree with the learned Sessions Judge that it is quite impossible to identify the accused as one of the two persons i.e. the assailant.

8. Since it is not possible to identify the accused in the CCTV footage, this evidence can hardly be regarded as any incriminating circumstance qua the accused. Exh.39 can, therefore, not be regarded as proof of any incriminating circumstance in the matter of this nature.

9. Mr. Pavithran did contend that there was no certification in terms of Section 65 B of the Evidence Act. According to us, it is not

necessary to go into this issue because Exh.39, even if accepted, does not incriminate the accused in the absence of his identification.

10. Therefore, the only circumstance it remains is the so-called extra-judicial confession made by the accused to Pw1, Pw4, and Pw17 on the next date of the alleged incident i.e. 08/10/2018.

11. At the outset, it is necessary to remind ourselves that extra-judicial confession is a weak piece of evidence. Therefore, the Court has to ensure that it inspires confidence and it is corroborated by other prosecution evidence. If extra-judicial confession suffers from material discrepancies or inherent probabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the Court to base a conviction on such a confession.

12. Pw1 i.e. Simon Dias claims to be the employer of the accused, whom, he had engaged to drive the truck and operate the JBC machine. Pw1 has deposed on 07/10/2018 during evening hours when he was returning to his house from Margao on his bullet motorcycle, near his house he noticed one male person lying on the tar road on the side portion at around 8.30/9.00 p.m., approximately. Since the blood was oozing out from the body of the person, he made a phone call to the ambulance. He also called his brother Judas who was sent to bring the ambulance along with the driver Manoj Kumar.

13. Pw1 then deposed that when he reached the spot he found his brother and some other persons at the spot. The person was then shifted to the hospital and the person was not in a position to talk. Pw1 also deposed that he also noticed a laterite stone by the side of the injured person which was found having blood on it.

14. Pw1 has deposed that the CCTV cameras were installed in the front of the four rooms where the employees were residing. Three cameras were installed at different angles. Pw1 then deposed that on the next date i.e. on 08/10/2018 he enquired with the laborers and was told that the accused was not present. Pw1 then deposed that they all searched for the accused and found him hiding in the bushes near the mango tree. Upon questioning the accused why he was hiding, he disclosed that on the previous night when he was returning to his room after consuming alcohol he had a fight with one Umesh and he stated that he killed the said Umesh by assaulting him with a laterite stone.

15. Now in the cross-examination, at least three omissions have been marked. Besides, we also find that there are contradictions between what was stated by this witness in his complaint and what was deposed by him before the Court. The versions do not match on material aspects.

16. Pw1, in his complaint, had stated that on 08/10/2018 he was informed by the roommate of the accused that the accused had not

returned to the room since last night. Now the only roommate examined by the prosecution is one Mangra Hemrom (Pw4).

17. Pw4, in his deposition, has stated that the accused had returned to the room on 07/10/2018 at around 9.00 pm and had told him that he fought with someone. Pw4 has not deposed to informing Pw1 on 08/10/2018 that the accused was missing since the last night. Similarly, Pw1 has also not deposed about any conversation between Pw4 and the accused or the circumstance that Pw4 had seen any blood on the hand of the accused on the previous night. There are contradictions on the issue of consumption of alcohol, whether by the accused or by the deceased.

18. Pw17 is also a laborer who lives in the hut behind the hut in which the accused and the Mangra used to live. He has also deposed that the accused came to his hut on the night of 07/10/2018 and told him about the fight with someone at the road junction. Even Pw17 has deposed to noticing blood on the right hand of the accused.

19. According to us, the aforesaid evidence hardly inspires confidence for it to be elevated to the status of an extra-judicial confession. There is no consistency between the versions of these witnesses. No effort was made to record the precise words allegedly used by the accused. Besides, we also find that the prosecution version on the aspect of extra-judicial confession is vitiated by inherent improbabilities.

20. It is difficult to accept that the accused would return at night and tell his co-employees about the fight and visit from room to room with his blood-stained hand. It is also difficult to accept that the accused was hiding at the same site around the spot of the incident until the next day morning and Pw1 found him hiding in the bushes near the mango tree. The deposition on the aspect of extra-judicial confession, to say least, inspires no confidence. No conviction, therefore, could have been based on such extra-judicial confession.

21. The learned Sessions Judge, in this case, has also erred in placing reliance on certain questions posed by the accused himself while cross-examining Dr. Narayan Wadhmare, Pw16. Pw16 was a Director, Goa State Forensic Science Laboratory. He was examined in the context of Exh.39 i.e. CCTV footage.

22. The record indicates that on 21/10/2019 when Pw16 was examined, the lawyer for the accused, appointed under L.A.S. was absent. The learned Sessions Judge should have, adjourned the matter to provide the accused an opportunity to have the assistance of an Advocate for cross-examination of this important witness. However, the accused himself examined Pw16.

23. The accused in a criminal matter has a right to remain silent. Merely because some questions were posed by the accused or some suggestions were posed by the accused, the same cannot be used against the

accused. Even when it comes to recording on confession before the Magistrate there is a detailed procedure that requires the accused to be explained the import and consequences of confession. Therefore, the learned Sessions Judge was not quite right in using the suggestions put up by the accused and based on such suggestions convicting the accused.

24. The principles relating to the evaluation of extra-judicial confession have been succinctly set out in *Sahadevan and Another v/s. State of Tamil Nadu*¹. Similarly, the principles for evaluation of circumstantial evidence have been set out in several decisions including *Kishor Chand v/s. State of Himachal Pradesh*² and the recent decision of the Hon'ble Apex Court in *Shivaji Chintappa Patil v/s. State of Maharashtra*³ decided on 02/03/2021. Applying all such principles to the facts to the present case it will be difficult to sustain the conviction of the accused.

25. There is no corroboration on material particulars so much so that even the forensic evidence does not support the prosecution version about the laterite stone used in the crime. No traces of human blood or any blood were found on the laterite stone with which the murder was alleged to have been committed. The prosecution has not established any motive. The prosecution has not even established that the accused and

1 (2012) 6 SCC 403

2 (1991) 1 SCC 286

3 Cri. Appeal No.1348 of 2013

deceased knew each other at any point in time. There is no evidence suggesting any last seen theory. There were no recoveries at the instance of the accused.

26. In the above state of evidence, it is difficult to say that the prosecution has established the complicity of the accused in the crime beyond any reasonable doubt. Based upon the above two circumstances, which in any case, have not been proved by the prosecution beyond a reasonable doubt, the conviction of the accused cannot be sustained.

27. Accordingly, we set aside the impugned judgment and order and acquit the appellant for the offense under Section 302 of IPC.

28. The accused to be set at liberty, if not required in any other case.

29. The Registry to take necessary steps in the aforesaid regard.

30. All concerned to act based on an authenticated copy of this order.

BHARATI DANGRE,J.

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M.S. SONAK,J.