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**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO.21 OF 2021**

1. Mr. Suresh @ Surya Naik,
S/o. Ganagaram Naik, 45 years,
R/o. Shigao, Collem, C/o. Shinde
Farm and native of Munnavali,
Tal & Dist. Belgaum, Karnataka State.
Presently in judicial custody in
Modern Jail, Colvale.

2. Shri Suresh Mane,
S/o. Appasaheb Mane, 65 years,
R/o. Village Gumajgalli, Ta. Muddebal,
P.S. Gandhichowk and Bijapur,
Karnataka State and at present at
Collem Bazaar. Presently in judicial
custody in Modern Jail, Colvale.

...Appellants

Versus

State
Through Public Prosecutor,
High Court of Bombay at Goa,
Panaji-Goa.

...Respondent

Mr. Anoop Gaonkar, Advocate for the Appellants.

**Mr. Praveen Faldessai, Additional Public Prosecutor for the
Respondent.**

CORAM:

**M. S. SONAK &
M. S. JAWALKAR, JJ**

**Reserved on:- 15th July 2021
Pronounced on :- 22nd July 2021**

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

Heard Mr. Anoop Gaonkar, learned Counsel under the Legal aid scheme for the appellants and Mr. Pravin Faldessai learned Additional Public Prosecutor for the respondent.

2. The present appeal challenges the judgment and sentence dated 13.03.2015, passed by the learned Additional Sessions Judge-1, Margao-Goa, in Sessions Case No.07/2014, by which both the appellants/accused were convicted under Section 302 read with Section 34 of Indian Penal Code and sentenced to undergo imprisonment for life and to pay fine of ₹10,000/- each, in default, to undergo simple imprisonment of one year.

3. Facts that are material for deciding this appeal are as under :

On 26.10.2013 at about 07.25 Shri Sachin Lokre, Police Sub-Inspector attached to Collem Police Station received a phone call from Station Master of Collem Railway Station informing that one dead body of a male person is lying near Old Railway Shade Water Tank. Accordingly, a case of unnatural death under Section 174 of Cr.P.C. was registered.

4. PSI Lokre headed towards the spot and found one dead

body of a male person lying in a supine position on an uneven cement floor in front of the locked door in the verandah of one old dilapidated house of South West Railway Department, situated at Souzamol, Collem. The dead body was identified by one Vasu Shelgar, who runs a bar and restaurant at Collem, as that of Sitaram alias Mama, who was working as painter/labor in the Collem area. A detailed scene panchanama was conducted in the presence of two panch witnesses, relevant items/articles found present at the spot were attached under the panchanama and the dead body was shifted to GMC Morgue at Bambolim. On 27.10.2013, said PSI Lokre, in the presence of two panchas, conducted a detailed inquest panchanama over the dead body of the deceased. It was noticed that the deceased was having cut injury on the backside of his head, the left side of the face was seen swollen and the backside of the head was in a pool of blood. Some fly eggs/white-like substance was formed in the scalp hair and at the nostrils. The post mortem examination over the dead body was conducted on 28.10.2013 and the cause of death was given as damage for the neck and chest as a result of injuries by blunt force impact. Accordingly, PSI Lokre conducted further inquiries and registered an offense of murder on behalf of the State. A search was made to trace the suspected accused.

5. On the information received, the suspected persons were detained from Kolhapur on 19.11.2013 and handed over to PI of Collem Police Station on 20.11.2013. An arrest panchanama was drawn in the presence of the panchas. During the investigation, on 21.11.2013, on the voluntary statement of accused no.2, in the presence of panchas, a recovery panchanama was drawn under Section 27 of the Indian Evidence Act and blood-stained clothes, which he was wearing at the time of the incident were recovered from the house, which was occupied by him. Thereafter, on 22.11.2013, on disclosure statement made by accused no.1, in the presence of panchas, blood-stained clothes of accused no.1 were recovered, which were hidden by him, outside the shed in the bushes.

6. During the investigation, statements of witnesses were recorded. The exhibits/materials preserved by police were forwarded to CFSL, Hyderabad. The reports showed that the exhibits contained the blood of the deceased and, hence, the accused with common intention committed an offense punishable under Section 302 read with Section 34 of IPC.

7. Upon commitment of the case to the Court of Sessions the learned Additional Sessions Judge, Margao, to whom the case was

assigned charged the appellants of offenses punishable under Section 302 read with Section 34 of IPC. The appellants pleaded not guilty and, therefore, were put on trial at which the prosecution examined twenty-one witnesses in its attempt to bring home the guilt of the appellants. After considering the prosecution evidence in the light of the defense of denial raised by the accused the learned Judge sentenced and punished the appellants as aforementioned. Aggrieved thereby, the appellants have filed the present appeal before this Court.

8. We have heard the learned Counsel appearing for the appellants and the learned Public Prosecutor for the State and with the help of both, we have gone through the evidence on record.

9. Learned Sessions Judge in paragraph 18 observed as under :

“18. There is no dispute that there are no eye witnesses to the incident and the case of the prosecution is entirely based on the circumstantial evidence and in order to prove the guilt of the accused, the prosecution has to prove the following circumstantial evidence namely :

- (i) Homicidal death of Sitaram alias Mama.*
- (ii) Last seen together theory.*

- (iii) Scene of offence panchanama.*
- (iv) Presence of dead body of Sitaram @ Mama at railway quarters at Souzamol, Collem.*
- (v) Apprehension of accused after commission of the offence at a dabba at Kolhapur.*
- (vi) Recovery of blood stained clothes of the A1 Suresh Naik ad A2 Sursh Mane under Section 27 of the Evidence Act.*
- (vii) CFSL reports from Hyderabad.*
- (viii) Motive to commit the offence.*
- (ix) Arrest of the accused.”*

10. In our considered opinion, most of the circumstances from (i) to (ix) cannot be said to be incriminating circumstances sufficient to sustain a conviction in a case based entirely on circumstantial evidence. So far as homicidal death is concerned, it is duly established by the prosecution and that is a pre-requisite. But that by itself is insufficient to link the appellants with the crime.

11. So far as last seen together theory is concerned, the material witnesses are PW1/Lourencio Fernandes, PW7/Michael Fernandes, PW11/Sanjay Chavan, and PW15/Vasu Shelgar.

12. PW1/Laurencio Fernandes, who runs a bar and restaurant at Collem market, deposed that on 25.10.2013 at about 9.00 p.m. deceased Sitaram had come to his bar for drinks

and after drinking he left towards another bar called Gokul bar situated at a distance of about 10 meters from his bar. He also stated that he knows the accused persons as they used to come to his bar and had seen them with deceased sitting together in the market. In his cross-examination, PW1/Laurencio Fernandes admitted that he had seen the accused persons along with the deceased on 25.10.2013 till 10.00 pm in Collem market in front of Gokul bar. He further deposed that Sitaram was not his daily customer.

13. PW7/Michael Fernandes, who runs a bar in the market at Collem, deposed that on 25.10.2013 accused no.1 had come to his bar and was drinking liquor, standing. He stated that he then saw deceased Sitaram coming out of Gokul bar and walking towards the direction of Collem railway station. He further stated that he heard accused no.1 murmuring that he would show Sitaram and after some time accused no.1 went after the deceased in the same direction. He then saw both accused no.1 and deceased quarreling with each other. He further stated that he told them not to fight and to go to their houses. They accordingly proceeded to go. He further stated that on 26.10.2013, 27.10.2013, and 28.10.2013 accused no.1 came to his bar for drinking liquor but he did not return from

28.10.2013. He further stated that he had not seen accused no.2.

14. PW7/Michael Fernandes in his cross-examination reiterated that he had seen both accused no.1 and deceased Sitaram having verbal altercation near the church on 25.10.2013 and on his interfering they both proceeded to their houses.

15. PW11/Sanjay Chavan deposed that he is having the pan shop at Collem market at a distance of 30 to 40 meters. from the church. He used to open at 7.00 hrs. and close at 22.00 hrs. He deposed that on 25.10.2013, at around 9.30 to 10.00 pm, he saw three persons abusing each other with bad words near the church at Collem. At that time, he was in the process of closing the shop. He deposed that deceased and accused left the place separately. He deposed that Sitaram @ Mama went by church side and the accused went towards the market side.

16. PW15/Vasu Shelgar, who is running a bar and restaurant at Collem market by the name Gokul bar deposed that there is a bar in front of his bar belonging to one PW7/Michael Fernandes. He deposed that on 25.10.2013, deceased Sitaram came to his bar and after consuming a peg of whiskey he left the bar. Accused no.2/Suresh Mane, who was sitting in his bar had already consumed alcohol. Accused no.2/Suresh Mane also left

the bar within two minutes of leaving Sitaram. Five minutes thereafter he heard some abusive words coming from the church side which is at a distance of 50 meters. from his bar. He deposed that he saw both the accused and Sitaram abusing each other. Michael was also there. Both the accused were asking for money from Sitaram for the work which they had done. The accused along with the deceased had painted the house of one Agnelo Diniz and the deceased had not paid the accused. He deposed that Michael and himself separated them and told them not to fight. Thereafter, Sitaram proceeded to go to his house, which is an abandoned railway quarter after crossing the railway track. Both accused also followed Sitaram.

17. In the cross, this witness admitted that there were some people around the place beside him and Michael. However, he could not even approximately say how many people were there. He has also shown his inability to specify the abusive words being exchanged by the accused and the deceased. He deposed that he has not stated in his statement that he had not seen the accused since 28.10.2013. However, the Investigating Officer confirms this. Though Investigating Officer deposed that the dead body was identified by this witness PW15/Vasu Shelgar, he deposed that he never went to see the dead body.

18. The learned Judge after discussing evidence of these witnesses concluded that the last seen together circumstance stands proved. In our considered opinion, the learned Sessions Judge has erred in coming to this conclusion. The learned Judge has not taken into account the contradictory statements made by these witnesses.

19. PW1/Lourencio Fernades, who is running a bar and restaurant by the name Lucky bar deposed that on 25.10.2013 at about 9.00 pm Sitaram (deceased) had come to his bar for drinks. After drinking one peg he left towards Gokul bar. However, this witness has nowhere deposed that he saw Sitaram along with the accused persons. He deposed that he is not his regular customer. He further deposed that around 9.45 pm, Suresh Naik came to his bar and he saw Sitaram coming out of Gokul bar and went walking towards the direction of Collem railway station. After some time, accused no.1 Suresh Naik went after him in the same direction as that of Sitaram. At 11.00 pm, he saw the accused and Sitaram quarreling with each other. From his evidence, it appears that after his intervention they proceeded to go to their houses. It also reveals from his evidence that Suresh Naik had been to his bar on 26.10.2013, 27.10.2013, and 28.10.2013 in the morning.

PW11/Sanjay Chavan, who is having a pan shop, deposed that around 9.30 to 10.00 pm, he saw three persons abusing each other. He deposed that deceased and the accused left the place separately. Deceased Sitaram went by church side and the accused went towards the market side. Both deposed time of quarrel certainly as that was the time to close their shops. However, both gave different timings.

20. PW15/Vasu Shelgar, narrated the incident which took place at 9.30 pm, and deposed that Sitaram thereafter proceeded to go to the house towards the railway track, and both the accused also followed Sitaram. Though all the four witnesses received information about the death of Sitaram, none of them went to the police station, on their own, to give information about the quarrel. Though there were persons gathered, as deposed by witnesses, no statement of any of the local persons is recorded. There is a contradiction in the timing of the incident as well as their going together or following the deceased by the accused. Three witnesses say that they went to their houses, whereas one witness i.e. PW15/Vasu Shelgar deposed that both the accused followed Sitaram. As such, there are material contradictions and the testimony of the witnesses does not inspire much confidence. There is no consistent and cogent evidence to

establish the last seen theory beyond doubt. As such, in our considered opinion the prosecution failed to establish the last seen theory.

21. The learned Sessions Judge held that prosecution has proved the motive to commit the crime. The prosecution story is that the accused no.1 Suresh Naik and deceased Sitaram are painters and from the evidence, it is revealed that both of them had worked for PW8/Agnelo Diniz. After the painting work was done, charges were paid to the deceased by said Agnelo. It is the case of the prosecution that the accused were continuously demanding the said wages from Sitaram and there was also a quarrel concerning the payment of wages before the incident. However, there is no supporting evidence about repeated demand for money or any quarrel on account of wages.

22. If evidence of PW8/Agnelo Diniz is perused, he deposed that he had engaged services of Sitaram on 8.10.2013 and 9.10.2013 to paint one of the rooms of his house and the compound wall, as he had some religious ceremony. Sitaram had brought accused no.1/Suresh Naik along with him as an assistant for him. He paid ₹1,600/- as the painting charges to Sitaram as he had engaged services of Sitaram. He has deposed that accused no.1/Suresh Naik had attended their religious function on

13.10.2013. If there was any grievance of accused no.1 on account of payment of wages he would have disclosed it to PW8/Agnelo Diniz when he had attended a religious function at Agnelo's house. Moreover, only because accused no.2/Suresh Mane is a friend of accused no.1/Suresh Naik, is also roped in the matter, there was no reason for Suresh Mane to quarrel with Sitaram. In fact, accused no.2 has no connection at all with the crime. Even if it is presumed that wages of accused no.1 were not paid, how it can be said that it was the motive of accused no.2 to commit murder. In the first place, the alleged motive is not at all established by the prosecution. The witnesses on last seen theory, who have allegedly seen accused and deceased quarreling, none of them deposed that the quarrel is on the count of payment of wages. Only PW15/Vasu Shelgar deposed that there was a quarrel on account of wages. His evidence, however, does not inspire confidence. His presence itself is in doubt at the time of the quarrel. The learned Sessions Judge erred in holding that the prosecution has proved the motive to commit the crime. There is nothing on record to suggest that Sitaram had not paid the wages to Suresh Naik, despite his demand or that this was the motive for the capital crime.

23. If evidence of PW7/Michael is considered he has not

stated anywhere about the presence of PW15/Vasu Shelgar nor he deposed anything that there was a quarrel on the count of payment of wages. Thus, there is no clinching evidence to prove that there was any motive to commit such a serious offense. At any rate, there is no element of motive so far as accused no.2 is concerned. Just because he is a friend of accused no.1, the learned Sessions Judge held that he has committed the said crime. In our considered opinion, the prosecution miserably failed to establish any motive of the accused persons to commit such grave and serious offense as murder.

24. Learned trial Judge also placed reliance on the deposition of the wife of accused no.1, PW18/Renuka Naik. However, her evidence would neither inspire any confidence nor would take the prosecution case any further. She deposed that she is residing at Shigao and accused no.1/Suresh Naik had deserted her since last many years. The distance between Shigao and Collem was about ₹10/- bus fare if one travels by bus. She is residing at Shigao for the last 17 years and accused no.1 visited on 25.10.2013 and 27.10.2013 and before that he never visited her to Shigao. Police took her to the police station from Collem market after four-five days and though inquiry was made no statement was recorded. Thus, her evidence is of no use to the

prosecution and the learned Sessions Judge erroneously considered her evidence for concluding that subsequent conduct of accused no.1 is relevant.

25. The accused were indeed apprehended at Kolhapur Dhaba. However, in the deposition of PW17/Salim Inamdar, owner of Dhaba at Kolhapur, accused no.2 was working with him since September 2013. As per this witness accused no.2/Suresh Mane told him that he has some court matter in Goa and to attend the same he wanted to go to Goa. Accordingly, on 18.10.2013, he went to Goa and returned on 29.10.2013 along with his friend and requested to keep him also on work. On 19.11.2013, both the accused were arrested by Goa police.

26. As per the statement of PW15/Vasu Shelgar, he had not seen the accused after 28.10.2013. However, in the Court, he deposed that after 25.10.2013, he had not seen the accused no.1. Whereas PW7/Michael deposed that accused no.1 had been to his bar on 26.10.2013, on 27.10.2013, and 28.10.2013 and had a peg of whiskey. Thus, the accused were very much present at their places since 26.10.2013, that is, the day when a dead body was recovered, till 28.10.2013. If they had committed any offense, they could have easily fled on the very next day. Thus

apprehension of accused persons being at Kolhapur, in our considered opinion, cannot be a circumstance to connect the accused persons with the crime.

27. So far as CFSL reports are concerned, it appears that as per the deposition of Investigating Officer on 21.11.2013, a recovery panchanama under Section 27 was drawn. Some clothes were recovered at the instance of accused no.2 and recovery panchanama was conducted in respect of accused no.1 on 22.11.2013, whereas articles seized were sent to CFSL on 03.01.2014. There is no explanation for the delay in sending these articles to CFSL, if seized, at the instance of the accused.

28. The incident is on 26.10.2013 and the alleged disclosure panchanama was drawn only on 21.11.2013 and 22.11.2013 and further, articles were not sent till 03/01/2014 to CFSL. As such, the possibility of tampering cannot be ruled out. Given such circumstances, we are of the considered opinion that the learned Sessions Judge erred in convicting the accused persons based on such meager and inconclusive evidence. When the offense is of such serious nature, the evidence has to be clinching and there should not be any possibility of any other hypothesis other than the guilt. There has to be a complete chain of

circumstances. Circumstances should be conclusive and they should exclude every possible hypothesis except the one to be proved.

29. Apart from this, if a charge framed against the accused persons is seen, there is no date mentioned on which date the accused persons had committed the said offense. Even in the order passed on the point of framing of charge date is given as 26.10.2013, whereas as per prosecution the offense is committed on 25.10.2013. Normally, this by itself may not be a good ground to interfere with the conviction. But coupled with other factors, the possibility of prejudice to the defense can not be ruled out. This is the additional ground for setting aside the order of conviction apart from other grounds mentioned above.

30. For all the above reasons, the order passed by the learned Additional Sessions Judge is liable to be quashed and set aside.

31. Accordingly, we proceed to pass the following order:

O R D E R

(i) The appeal is allowed.

(ii) The judgment and order of conviction in Sessions Case No.7/2014 dated 13.03.2015

passed by the Additional Sessions Judge, South Goa, Margao, convicting accused persons, is hereby quashed and set aside.

(ii) Accused no.1/Suresh Naik and accused no.2/Suresh Mane are hereby acquitted of the offense punishable under Section 302 read with Section 34 of IPC and they be released forthwith if not required in any other case.

(iii) The Registry to take necessary steps in accordance with the law.

M. S. JAWALKAR, J.

M. S. SONAK, J.

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