

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 141 OF 2010**

Ajay Dattaram Surve.
Aged 28 years, residing at
Tulsani, Tal. Sangmeshwar,
District Ratnagiri.
(now confined at Nasik Road
Central Prison, Nasik Road.)

... Appellant.
(Accused No. 1)

V/s.

State of Maharashtra.

... Respondent.

**ALONGWITH
CRIMINAL APPEAL NO. 833 OF 2009**

Anant @ Anna Rama Tambe,
Age : 30 years,
R/o at & post- Nivali, Shindewaid,
Tal. & District Ratnagiri.

... Appellant.
(Accused No. 3)

V/s.

State of Maharashtra.

... Respondent.

Mr. Manas Gawankar i/b. Ms. Sharon Patole, advocate for appellant in
Cri. Appeal No. 141 of 2010.

Mr. Rakesh Bhatkar a/w. Mr. Mohan Devkule a/w. Mr. Mohit Dalvi
a/w. Mr. Adesh Chavande, advocate for appellant in Cr. Appeal No.
833 of 2009.

Ms. P.P. Shinde, APP for State.

**CORAM : SMT. SADHANA S. JADHAV &
N.R. BORKAR, JJ.**

**RESERVED ON : MARCH 9, 2021.
PRONOUNCED ON : JUNE 8, 2021.**

JUDGMENT (PER SMT. SADHANA S. JADHAV, J):

1 The appellants impugn the Judgment and Order passed by Learned Additional Sessions Judge, Ratnagiri in Sessions Case No. 10/2008 dated 20/6/2009 thereby convicting the accused No. 1 Ajay Dattaram Surve for the offence under section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life. The accused No. 1 is also convicted for offence punishable under section 392 of the Indian Penal Code and sentenced to suffer R.I. for 10 years and to pay fine in the sum of Rs. 1000/- I.d. to suffer R.I. for 8 months. The accused No. 1 is further convicted for the offence punishable under section 201 of the Indian Penal Code and sentenced to suffer R.I. for 2 years. The accused No. 1 is further convicted for the offence punishable under section 182 of the Indian Penal Code and sentenced to suffer R.I. for 6 months and to pay fine of Rs. 100/- I.d. to suffer R.I. for 15 days. The accused No. 3 Anant @ Anna Rama Tambe is convicted for the offence punishable under section 414 of the Indian Penal Code and sentenced to suffer R.I. for 2 years and to pay fine of Rs. 500/- I.d. to suffer R.I. for 6 months.

2 Case involves the death of one Nanikram Sukeja resident of Ulhasnagar. He was a partner of Konark Company, which is engaged in taking contracts of excavation of sands. He was also engaged in collection of octroi taxes. On 6th May, 2007 Nanikram had left Ulhasnagar to go to Chiplun. On the way, he had collected Rs. 3,25,000/- from the office of the company. His relatives Shankarlal Makhija and Girish Wagh wanted to go to Malkapur, which falls on the way to Chiplun and therefore, they had accompanied Nanikram. He was also carrying with him royalty books. On the same day, he reached Malakapur at about 7 p.m., dropped his companions, checked into a hotel and then after freshening left for Chiplun. He had also informed his companions that he would return to Malkapur within 2 to 4 days. They had travelled in a Tata Sumo Jeep, which was driven by the accused No. 1 Ajay.

3 In the night of 7th May, 2007 the accused No. 1 informed the police at Sakharpa out post, Devrukh that on the way from Malkapur to Chiplun at Amba Ghat, a Scorpio Jeep had accosted their vehicle (Tata Sumo). 5 to 6 persons alighted from the said jeep, had a conversation with Nanikram in Sindhi language and thereafter, they

kidnapped him. He further informed that 2 persons from the said jeep had closed his mouth with handkerchief, after which he fell unconscious. He had regained consciousness in the morning of 7th May, 2007. At that time, he was on the road near Oras. On 7th May, 2007, P.W. 22 Girish Koyande of Deorukh Police Station received a telephonic information from an unknown person that on 6th May, 2007 a crime has taken place in Amba Ghat. On 7th May, 2007 P.W. 22 reached Sakharpa out post. The accused No. 1 Ajay Surve was brought to Sakharpa out post. Statement of accused No. 1 was recorded in the intervening night of 7th and 8th May, 2007 in which he disclosed above information. Hence, on 8th May, 2007 Crime No. 42 of 2007 was registered at Devrukh Police Station against unknown persons for offence punishable under section 302, 395, 397, 365, 328, 201 of the Indian Penal Code.

4 On the same day i.e. on 8th May, 2007 P.W. 17 Rajesh, son of the missing person appeared before the police. His statement was recorded. P.W. 17 had cooperated with the police to search for his father. At the time of recording the statement of accused No. 1, P.W. 22 had noticed that the said complainant i.e. accused No. 1 had

sustained an incise wound on his left humerus. PW. 22 had suspected the accused no. 1, who was the complainant in Crime No. 42 of 2007 and doubted the genuineness of the information given by him.

5 On 10th May, 2007 wireless message was received at the police station that they have found an unidentified body of a male person. Ganpat Gawade(PW.1) was informed by Santosh Mitore that a dead body of an unidentified male person is lying at Phanas Wadi. They had visited the spot and found the dead body by the side of the road passing from Bavnadi to Charveli. A foul smell was emanating and therefore, they did not go near the dead body. On the instructions of P.W. 1, Mahesh Mhap informed the police about the same. At about 8.30 p.m., statement of P.W. 1 was recorded. On the basis of which, A.D. No. 32 of 2007 was registered and the investigation was set in motion.

6 In fact, on 9th May, 2007 a Tata Sumo Jeep bearing No. MH-04-AS-2329 was found and the same was seized on 10th May, 2007. At the time of detailed panchanama, they found empty beer bottles in the jeep.

7 Inquest panchanama on the dead body was performed. P.W. 20 Sanjay Durgule was the panch. The inquest panchanama indicated that the dead person was about 45 to 50 years of age and he was wearing shirt and bermuda pant. The panchanama is at Exh. 67. That, the dead body was in decomposed state and could not be identified. At the time of inquest, it was noticed that the penis of the dead body was circumcised, which is usually found in Muslim male. That, fluid was oozing from the dead body. That, they had not found any wrist watch on the wrist of the deceased. The recitals of Exh. 67 would establish that the death was due to head injury. The same was confirmed by performing post mortem. The post mortem notes are at Exh. 18. The cause of death is shown as "Neurohaemorrhagic shock due to head injury". The post mortem was performed on 10/5/2007. Column No. 7 of the post mortem notes shows wrist watch in working condition and one yellow colour ring in right hand index finger. There were maggots all over the dead body. The post mortem was also conducted on the spot by the Medical Officer, Primary Health Center, Hathkhamba and was then handed over to Gram Panchayat and with the help of Gram Panchayat staff, said dead body was buried.

8 On 11th May, 2007 P.W. 21 had learned about the registration of Crime No. 42 of 2007 at Deorukh Police Station. That, a dead body was found in the jurisdiction of Ratnagiri Rural Police Station and therefore, A.D. was registered. Inquest was performed. Post Mortem was conducted on the spot and the body was buried. Upon learning about this, P.W. 21 had transferred all the papers of A.D. No. 32 of 2007 to Deorukh Police Station.

9 On 11th May, 2007, P.W. 17 was informed by one of the partner of the company namely, Jethanand that an unidentified dead body was found within the jurisdiction of Ratnagiri Rural Police Station and that the dead body was buried. P.W. 17 reached Deorukh Police Station and thereafter, the body was exhumed. P.W. 17 had identified the dead body to be that of his father, mainly by seeing the wrist watch and the finger ring. The cell phone which was used by the deceased was in fact, allotted to an employee by the company, namely, Dagadu Malban. The Cell Phone number is 9422637629. P.W. 17 had informed the police that while travelling to Oras, his father was carrying royalty books and debit card of UTI bank. The accused No. 1 was again interrogated and finally he was arrested on 15/7/2007 as he was

protected by an order of pre-arrest bail till 5/7/2007.

10 In the course of trial, P.W. 1 Ganpat Gawade had substantiated that the information was given to the police station by him through Mahesh Mhap about noticing an abandoned dead body in a large pipe. The seizure of Tata Sumo Jeep bearing No. MH-04-AS-2329 on 9th May, 2007 is proved by P.W. 2. The scene of offence panchanama was recorded on the basis of the statement of the accused No. 1 on 9th May, 2007 which is at Exh. 36.

11 In the course of investigation, it had transpired that accused No. 1 had sold a mobile hand set to P.W. 13 Narayan Nanda who runs Ashapura Mobile Shoppe at Ratnagiri. P.W. 13 had purchased the said hand set for Rs. 2300/-. On the same day, P.W. 14 Hanif had purchased said mobile hand set from Ashapura Mobile Shoppe. Hanif was working as Mechanic in garage. On 21/6/2007 cell phone hand set of Nokia Company was produced by Hanif to the police. It was seized at garage in the presence of P.W. 9 Najam Hodekar, owner of the garage and the panchanama is at Exh. 38. The prosecution had attempted to prove that accused No. 1 was the person who sold the

said cell phone to P.W. 13 Narayan Nanda by claiming that photograph of the accused was shown to him. This could not have established by itself that the prosecution has proved beyond reasonable doubt that accused No. 1 had sold the said cell phone.

12 P.W.16 Suresh Lokhande, Sub-Divisional Engineer in BSNL at Ratnagiri furnished call record details of mobile number 9422637629 from 6th May, 2007. Thereafter the handset was used for a different SIM card bearing No. 9422391046, registered in the name of Hanif Jagirdar, employee of P.W. 9, Investigating Officer had not verified the IMEI number to be the same. The call records also did not show as to who was the last person to have called upon Nanikram. The photograph of the accused No. 1 was shown to the shopkeeper and he has mechanically identified the same. That, if the investigating agency had kept a track of the cell phone from the date when the report was lodged by accused No. 1, it would have been easier to trace the accused who had sold the same after passage of time.

13 In the course of investigation, P.W. 17 Rajesh Sukheja had specifically stated that his father had collected an amount of Rs.

3,25,000/- from the office of the company and the money was given to him by P.W. 26 Udhavdas Rupchandani. The same has been proved through P.W.26. According to P.W. 26, on 6th May, 2007 he had given an amount of Rs. 3,25,000/- to Nanikram Sukheja for paying daily wages and salary. P.W. 26 has deposed before the Court that on 6th May, 2007, he had given Rs. 3,25,000/- to Nanikram for paying daily wages and salary. That, he had handed over the amount in the bundle of Rs. 100/- currency notes. But, he was not sure as to whether the bundle of the currency notes shown to him before the Court were the part of the amount (Muddemal Article No. 10). Upon seeing the photograph, he has identified that the accused No. 1 was the driver on Tata Sumo Jeep. He has further admitted that he has seen the accused in the Court on the previous date of hearing. According to him, there is no documentary evidence to show that the said amount was paid to Nanikram on that day, except the income tax return. In fact, two bundles of Rs. 100/- denominations were affixed with the seal of UCO Bank and Business Cooperative Bank and yet, P.W. 26 has failed to identify the money which was recovered at the behest of accused No. 1. The prosecution claims that an amount of Rs. 1,69,150/- was recovered at the instance of accused No. 1 from the house of accused

No. 3.

14 The memorandum of accused No. 1 shows involvement of one Sadik Mukadam(accused No. 2) who was arrested initially on the ground that he used to be in contact with accused No. 1. Sadik Mukadam is acquitted by the learned Sessions Court and there is no appeal against acquittal.

15 The accused No. 3 was arrested since it was contended that the accused No. 1 was residing with him till he was arrested. However, accused no. 3 is convicted for an offence punishable under section 414 of the Indian Penal Code. The arrest panchanama of accused No. 1 dated 15/7/2007 at Exh. 19 shows that he was arrested in the police station by local crime branch. The accused No. 3 was also arrested on the same day.

16 At the time of recovery, 11 bundles of 100 notes of Rs. 100/- denomination (1,10,000), one bundle of 100 notes of Rs. 500/- denomination (Rs. 50,000/-), one bundle of 100 notes of Rs. 50/- denomination (Rs. 5,000), 35 notes of Rs. 100/- denomination(Rs. 3,500/-) and 13 notes of Rs. 50/- denomination (Rs.650/-), total Rs.

1,69,150/- were recovered. However, it is not the contention of P.W. 26 that he had also given notes of Rs. 500/- denomination. The remainder amount has not been recovered. Neither it is shown that it was shared by all the accused. The prosecution has not examined any panch witness to prove that an amount of Rs. 1,69,150/- was recovered at the instance of accused No. 1 from the house of accused No. 3. The prosecution has placed implicit reliance upon the recovery of the amount of Rs. 1,69,150/- at the behest of accused No. 1. It is the contention that the accused No. 1 had not offered any explanation in respect of his knowledge about the amount of Rs. 1,69,150/- in the house of accused No. 3.

17 It is pertinent to note that it is a specific case of the prosecution that Nanikram had left for Oras alongwith Shankarlal Makhija and Girish Wagh. However, statement of both the witnesses was not recorded till 11th May, 2007. It is admitted by P.W. 26 that the amount shown to him may not be the same which was given to Nanikram. It is also admitted that there were several rival groups in the business of sand excavation and the suggestion that the possibility of Nanikram being murdered at the hands of one of the rival groups

cannot be ruled out, has been answered evasively by P.W. 26. People in the vicinity knew that Nanikram used to travel on that road to make payment to daily wagers and salary on the excavation site and therefore, the possibility that the act was committed by sand mafia cannot be ruled out. It is also stated that there are several civil and criminal cases pending against Konark Company in the Court of Chiplun and surrounding area.

18 All this could have been proved by the prosecution in the eventuality of there being some investigation in Crime No. 42 of 2007 on the basis of the complaint of the accused No. 1. The toll plaza was the easiest mode, by which the investigating agency could have found out, as to whether any Scorpio Jeep had travelled at the relevant time on the same road as that of Tata Sumo Jeep. It appears that ever since inception, P.W. 22 was suspecting the accused No. 1 and his report was taken with a pinch of salt and hence, it was not a fair investigation. It is true that lacunas in the investigation would not entitle an accused to seek acquittal. However, the prosecution has to stand on its own legs and there is a long distance to be travelled between “may be” and “must be” which has to be covered by the prosecution on its own

strength. Although P.W. 22 claims that he was suspecting accused No. 1 to be the miscreant, had not kept any vigilance on the movement of the accused No. 1 to verify whether he had taken the said amount and spent it at various places.

19 In the present case, P.W. 17 had specifically claimed that his father was 63 years old. That, it was incumbent upon the investigating agency to have done DNA profiling in order to establish that the dead body, which was found in the pipe on the roadside of Bavnadi to Charveli was that of Nanikram. There is variance in the age of the deceased as mentioned in the inquest panchanama and post mortem notes, whereas, actual age of the deceased was more than 60 years. In fact, P.W. 17 Rajesh Sukheja was 31 years old when the incident had occurred and in his previous statement, he has given the age of his father as 60 years whereas, he had informed the investigating officer that the age of his father was 63 years. The dead body on which inquest was made was of a male person who was 45 years old. DNA profiling could have been the only mode by which it could be proved that the dead body was that of Nanikram. Moreover, the identity of the dead body as 'Muslim' dismantles the theory of the

prosecution that the dead body was that Nanikram who was a Hindu.

20 This cannot be said a case of corpus delicti, as the prosecution has placed implicit reliance upon the identification of the dead body by the son of the deceased to be that of Nanikram. The Court cannot be oblivious of the fact that the body was in completely decomposed state and even, according to P.W. 17, he had identified the body on the basis of a ring and the wrist watch. No wrist watch was found on the person of the deceased which is clear from the inquest panchanama which is at Exh. 67. In the absence of any fair investigation, it cannot be said that the dead body was that of Nanikram. This would be the most important link. Moreover, accused No. 3 has also been convicted only for an offence punishable under section 414 of Indian Penal Code and it cannot be imagined that the accused No. 1 had alone done the entire act of killing the deceased by giving a blow on his head and then concealing the dead body in a pipe on the road. Moreover, it is not the case of the prosecution that the deceased was wearing the same clothes which were found on the dead body while leaving the house. It is neither the case of the prosecution that circumcision on the penis was a result of fresh injury, nor the

same is proved either through P.W. 17 or his mother.

21 Learned Counsel for the appellant has submitted that the prosecution has not proved the guilt of the accused beyond reasonable doubt, firstly, recovery of an amount of Rs. 1,69,150/- does not ipso facto prove that it was the accused, who had stolen the amount from the deceased and in that course, had killed him. It is also submitted that since the recovered amount is not proved by P.W. 26 to be the same amount which was given to Nanikram, as he did not have record about denominations and the recovery of amount by itself would not prove that it was none other than the accused No. 1 who had killed Nanikram and therefore, he could not have been convicted for an offence punishable under section 302 of the Indian Penal Code. Hence, he deserves to be acquitted for an offence punishable under section 302 of the Indian Penal Code.

22 Per contra, learned APP has submitted that the accused No. 1 has failed to give an explanation under section 106 of the Indian Evidence Act, as at the relevant time the deceased was in the exclusive company of accused No. 1. It is submitted that there can be an error in

determination of age. The learned APP has supported the Judgment of conviction.

23 It is incumbent upon the prosecution to prove all the circumstances to eliminate every possibility of the accused being innocent and that none other than the accused No. 1, who had committed the said offence.

24 The Hon'ble Supreme Court in landmark Judgment of **Sarwan Singh vs. The State of Punjab**,¹ has laid down a guiding principle in cases which rest upon circumstantial evidence. It is held as follows :

“that considered as a whole the prosecution story may be true; but between ‘may be true’ and ‘must be true’ there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence.”

25 Learned Sessions Judge has also convicted the accused No. 1 for an offence punishable under section 182 of the Indian Penal Code. Section 182 of the Indian Penal Code reads as under :

¹**1947 AIR 637**

"182. False information, with intent to cause public servant to use his lawful power to the injury of another person.—Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause, such public servant—

(a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or

(b) to use the lawful power of such public servant to the injury or annoyance of any person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.”

In view of the above, the accused No. 1 is entitled to be acquitted of the charge under section 182 of the Indian Penal Code.

26 The fact that the accused No. 1 is being acquitted of section 302 of the Indian Penal Code, it can be safely inferred that he had not created any disappearance of evidence, which would lead to the principal offence and in view of that the accused No. 1 deserves to be acquitted for the offence punishable under section 201 of the Indian Penal Code. Similarly, since the amount that was recovered purportedly at the behest of the accused No. 1 from the house of the

accused No. 3 has not been proved to be same amount beyond reasonable doubt, which was handed over to the deceased by PW. 26 is sufficient to acquit the accused No. 1 of the offence punishable under section 392 of the Indian Penal Code by giving benefit of doubt.

27 In view of the above discussion, accused No. 3 also deserves to be acquitted of the charge under section 414 of the Indian Penal Code.

28 Hence, following order is passed :

ORDER

(i) Both the Criminal Appeals are allowed.

(ii) The conviction and sentence imposed vide Judgment and Order dated 20/6/2009 passed by Learned Additional Sessions Judge, Ratnagiri in Sessions Case No. 10/2008 against accused No. 1 and accused No. is hereby quashed and set aside. The accused No. 1 and accused No. 3 are acquitted of the charges levelled against them.

(iii) The accused No. 1 be released forthwith, if not required in

any other case.

(iv) The bail bond of accused No. 3 stands cancelled.

(v) The fine amount, if paid by accused Nos. 1 and 3, be refunded.

(vi) Both the appeals are disposed of accordingly.

(N.R. BORKAR, J)

(SMT. SADHANA S. JADHAV, J)