

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.1017 OF 2011

Mohammad Atiulla @ Abdul
Mohammad Ali Moharam Ali
R/o:- Room No.13, D'Silva
Chawl No.4, Azad Nagar,
Ghatkopar (E), Mumbai 400 075

...Appellant

V/s.

The State of Maharashtra

...Respondent

Mr. Pawan Mali (Appointed) for the Appellant.
Mrs. P.P. Shinde, APP for the Respondent-State.

**CORAM : NITIN JAMDAR AND
C. V. BHADANG, JJ.**

DATE : 26 July 2021

JUDGMENT: (Per Nitin Jamdar, J)

. By the judgment and order passed by the Sessions Court on 27 August 2009, the Appellant-Accused stands convicted for offences punishable under section 302, 394 read with 397 of the Indian Penal Code and is sentenced to suffer imprisonment for life for the offence punishable under section 302 of IPC and for rigorous imprisonment of 7 years and fine for

offences punishable under section 394 read with section 397 of the IPC.

2. The Deceased Avtarsingh Gugnani used to reside sometimes with elder son Tejindersingh and sometimes with his younger son Kulwantsingh. The Complainant Tejindersingh lived at flat Nos.D/3/21 and 22 of Greenfield Society with his wife-Devendrapal and family. Kulwantsingh resided at Marol, Mumbai, with his wife Mani and family. Avtar Singh had purchased two flats bearing Nos.26 and 27 in building No.D-3 of Greenfield Society and let both apartments on rent. Avtarsingh was receiving a pension. Apart from investing the pension amount, he used to lend money on interest. Avtarsingh used to get his two-wheelers repaired from Abdul, the accused, whose garage was in front of Greenfield Society. Avtarsingh had lent Rs.50,000/- on interest to Accused, who did not return the amount, and there was a dispute between the Deceased and the Accused on nonpayment of the loan.

3. On 8 August 2008, Avtarsingh and Mani came to the house of Tejindersingh. Avtarsingh went to stay at flat No.26 of D-3 building. During the night on 9 August 2008, Mani brought tiffin for her father-in-law. At that time, Avtarsingh had told her that he would come to stay at her house at Marol from Sunday. Tejindersingh and Avtarsingh attended the annual meeting of the Society on 10 August 2008 till 11.30 a.m.

Then Tejindersingh went for some work at 1.00 p.m. Avtarsingh and members of the Society got in a dispute. At 3.00 p.m., Tejindersingh's wife returned to her house. At 3.30 p.m., Tejindersingh's son Jasmitsingh called Avtarsingh for lunch but did not go. Later, at 3.00 p.m., Manit asked Avtarsingh to come to her house. He did not go to her home, so she called Avtarsingh on the landline and cell phone between 8.00 p.m. to 9.00 p.m., but nobody picked up the phone. At around 9.00 p.m., Manit asked her sister-in-law Devendrapal to check the position. At 10.00 p.m., Tejindersingh went to flat No.D/3/26. He knocked and rang the bell, but there was no response. Tejindersingh was under the impression that Avtarsingh may be sleeping.

4. On 11 August 2008, when Manit called again, there was no response on the landline and cell phone. At around 10.00 a.m., when Devendrapal went to the flat, no one opened the door. So she informed her husband Tejindersingh, who asked her to call a key maker. At 10.30 a.m. again, Manit knocked on the door of flat No.26 and also rang the bell, but her father-in-law did not open the door. Tejindersingh came to the flat at 12.05 p.m. Duplicate key was made, and the flat was opened. After entering the flat, they found Avtarsingh dead in the bedroom. Two pillows were on the head of Avtarsingh. When they were removed, a bleeding injury was seen on the head.

5. Tejindersingh went to the police station, and his statement was recorded. The offence was registered. Spot Panchanama was carried out. There was blood on the bedsheet and the dead body. A hammer, specs, some articles were lying near the dead body. A wristwatch, a ring of white metal and a Kada of white metal was on the hands of the dead body. The injury was on the head above the right ear of the dead body. Inquest panchanama was prepared. Police collected blood samples. The articles found were given to Tejindersingh.

6. On 13 August 2008, the Accused was arrested by the police in the presence of panchas. Accused showed a willingness to lead to the ornaments and his clothes. A memorandum Panchanama was prepared. The Accused took the police and panchas to a chawl. Accused opened one locked room with a key and took out a gunny bag and a plastic bag from it. Ornaments and identity documents of the Deceased and currency notes were found. Accused took out his bloodstained clothes, which he was wearing on the date of the incident. The police seized the clothes of the Accused in the presence of panchas.

7. On 18 August 2008, at the instance of the Accused SIM card of the mobile was recovered from Abdul Auto Garage. Seized articles were sent to Chemical Analyser for analysis.

8. On 19 August 2008, Kulwantsingh, the younger son of the Deceased, brought a cheque issued by the Accused, an agreement and other documents to the police station. On 23 August 2008, an identification parade was held at Arthur Road jail. Charge-sheet was filed in the court of the Metropolitan Magistrate, who committed the case to the Sessions Court.

9. Charge was framed for the offences punishable u/s.302, 394 and 394 r/w. Section 397 of I. P. C.. The Accused pleaded not guilty and claimed to be tried taking the defence of total denial and false implication.

10. The learned Sessions Judge, Sewree, conducted the trial of Sessions Case No.722 of 2008. The learned Sessions Judge, after considering the evidence on record and after hearing the arguments, concluded that the prosecution proved that between 3.30 p.m. of 10 August 2008 till 12.05 p.m. of 11 August 2008 at D/3/26, Greenfield Society, J. V. Link Road, Andheri (E), Mumbai. Accused-Appellant committed the murder of Avtarsingh Gugani. The learned Sessions Judge also concluded that the Appellant committed robbery of property, i.e. gold ornaments and mobile phone belonging to the Deceased, and thirdly that the Appellant committed robbery using a deadly weapon, i.e. hammer and caused the death of Avtarsingh.

11. After hearing the Appellant-Accused on the aspect of the sentence, the learned Sessions Judge convicted the Appellant for the offence punishable under section 302 of Indian Penal Code, and he was sentenced to suffer imprisonment for life and a fine of Rs.4,000/- in default to suffer R.I. for one and half year. The Appellant was also convicted for the offence punishable under section 394 read with section 397 of Indian Penal Code, and he is sentenced to suffer R.I. for seven years and a fine of Rs.4,000/- in default to suffer R.I. for one and half years. Both sentences were directed to run concurrently. Challenging the judgment and order, the Appellant is before us in this Criminal Appeal.

12. We have heard Mr. Pawan Mali, the learned counsel appointed for the Appellant and Ms. P. P. Shinde, Additional Public Prosecutor for the Respondent-State. With their assistance, we have gone through the record.

13. The case of the prosecution is of circumstantial evidence. The Supreme court in the case of *Sharad Birdhichand Sarda v. State of Maharashtra*¹In para 153 (AIR 1984 SC 1622), has laid down that certain basic features must be complied with whenever the case is based on circumstantial evidence. These are: the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully

¹ (1984) 4 SCC 116

established; 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; the circumstances should be conclusive; the circumstances should exclude every possible hypothesis except the one to be proved, and there must be a chain of evidence so complete 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. Keeping these principles in mind, we now assess the evidence led by the prosecution.

14. The prosecution has sought to establish the chain of circumstances to establish the guilt of the Appellant that the Appellant was seen in the premises and with the Deceased. The Appellant had a strong motive to commit the crime, and there was a recovery of incriminating articles at his instance.

15. Regarding the presence of the Appellant with the Deceased, the prosecution has examined four watchmen of the Building complex as witnesses. PW-5-Mahant Vishnu Salgaonkar deposed that he was on duty as a watchman in the Greenfield Society on 10 August 2008 from 8.00 a.m. to 8.00 p.m. at Building No.D/8. At about 6.30 p.m., the Appellant came there and said that he wanted to see the motorcycle of the flat D-6-24.

PW-5 showed the Appellant the bike, and after that, the Appellant went towards building D-4, and he returned to building D-8. PW-6-Bhimrao Khandu Sasane deposed that he was working as a watchman in Greenfield Society, and he was on duty on 10 August 2008 at building D-7. He stated that at 6.30 p.m., the Appellant talked spoke with PW-5-Salgaonkar and went from there. PW-11-Ramsamuj Pancham Pal deposed that he was a watchman in the Greenfield Society. On 10 August 2008, he was on duty at the outgate. He deposed that at around 1.30 p.m., when he was taking tea in the tea stall, Deceased Avtarsingh came along with the Appellant. After tea, PW-11-Ramsamuj returned to his place. He deposed that thereafter Deceased Avtarsingh came to the Society, and he did not see both of them till 8.00 p.m. PW-14-Rajendra Radheshyam Dube deposed that he was a watchman in the Greenfield Society, and he was on duty on the gate of building No.B-4. He had taken entries of visitors in the Register from 8.00 a.m. to 6.00 p.m. on 10 August 2008. He stated that at 5.30 p.m., one person by the name Abdul came to visit flat No.44 and entry was taken on page Nos.71-72 of the Register. He identified the Appellant in the identification parade in the Arthur Road jail. PW-7-Tarunkumar Jagdishprasad Gautam, a resident of the Building complex, deposed that he knew the Appellant as he had a motorcycle and was getting the work of motorcycle from the Appellant for the last 5-6 years. He

stated that he did not meet the Appellant for a year as he had sold the motorcycle and had brought a new motorcycle.

16. We have gone through the evidence led by the prosecution regarding the presence of the Appellant. PW-5-Salgaonkar, the watchman, admitted that the Greenfield Society had eight buildings and an entrance gate. PW-6-Bhimrao Khandu Sasane admitted in the cross-examination that the Appellant used to come in the building compound usually and he has a garage in front of his building. None of the prosecution witnesses, viz., watchmen, i.e. PW-5-Salgaonkar, PW-6- Sasane and PW-11-Ramsamuj, have stated anything more than the presence of the Appellant in the building compound where the bike was kept. PW-5-Salgaonkar, who had the interaction with the Appellant and showed him a motorcycle, stated that the Appellant went towards building No.D-4, but the murder took place in building No.D-3. Therefore there is no convincing evidence to connect the Appellant being seen going towards the flat where the murder occurred. Even the Register entry as deposed by PW-14-Rajendra Radheshyam Dube was in respect of flat No.44 and as it can be seen from the deposition of PW-7-Tarunkumar Jagdisprasad Gautam that he resides in flat No.44. PW-7-Gautam has stated that the Appellant did not come to his house on 10 August 2008, but he admitted that he possesses a motorcycle. The Appellant had a mechanic shop in front of the

Greenfield Society and deposed by the prosecution witnesses; the Appellant was a frequent visitor to the buildings. Therefore, merely because the Appellant entered the premises of the Society compound, which has eight buildings, it cannot be straightaway proved by the prosecution that the Appellant is connected with the crime.

17. Regarding the Appellant and the Deceased being seen together, PW-11-Ramsamuj deposed that on 10 August 2008, when he was taking tea at a tea stall, he saw the Deceased and the Appellant together at 1.30 p.m. PW-12- Manit deposed that she had phoned her father-in-law at around 3.00 p.m. and her father-in-law told her that he would come to the house in the evening. Thereafter, when she called at 10.00 p.m. on the landline phone and cell phone, there was no response. PW-3-Bharat Narayan Sawant, a telephone booth operator, deposed that his booth was in front of the Greenfield Society building. Deceased Avtarsingh met PW-3-Sawant at 4.00 p.m. Therefore, till 4.00 p.m. Avtarsingh was alive as per the prosecution story. He had, in fact, come up to the telephone booth.

18. Therefore, even as per the prosecution story, the Deceased and the Appellant were last seen together at 1.30 p.m. and that too near a tea stall on the road. This is not a scenario where the Deceased and accused are seen together going towards any secluded area or area under the control of the accused, and

only the accused is seen returning, for which the accused needs to explain the disappearance of the deceased. The Appellant and the Deceased, as per the prosecution story, were seen at 1.30 p.m. together near a tea stall, then thereafter Avtarsingh was seen at 4.00 p.m. near the telephone booth. The death, according to the prosecution, was after 4.00 p.m. The circumstance of last seen together is generally considered to establish the chain of circumstances, but to invoke the Last Seen theory, the time gap between the point of time where the accused and deceased were found together and when the deceased was found dead is important. Furthermore, the place where the accused and the deceased were seen is also important. Thus with such a state of evidence, the Last Seen theory cannot be invoked in this case.

19. The next circumstance sought to be proved against the Appellant is that the Appellant had a strong motive to commit the crime. The prosecution case is that Avtarsingh had given Rs.50,000/- to the Appellant, which the Appellant did not return, and the dispute regarding this loan was the motive for the Appellant to commit the crime. The prosecution led the following evidence to establish the motive.

20. PW-1-Tejindersingh deposed that the Appellant had come to his flat to take money from Avtarsingh. Avtarsingh had told PW-1-Tejindersingh that the Appellant had taken a loan of

Rs.50,000/- He deposed that when Avtarsingh was staying in the house of his other son, in a telephonic conversation, Avtarsingh, after being annoyed regarding the non-return of the loan, had told the Appellant that he would report the matter to the police. PW-2-Santosh Lalbihari Sharma, the owner of one hotel Gurukrupa, adjacent to the garage of the Appellant, deposed that he was aware of the money transaction between the Appellant and the Deceased and that the Deceased used to come to meet the Appellant to demand the return of money and quarrels used to take place amongst them. PW-3-Sawant, a telephone booth operator, deposed that the Appellant had taken a loan from Deceased, which was not repaid, and quarrels used to occur amongst them. He stated that on 10 August 2008, when he met Avtarsingh at 4.00 p.m., Avtarsingh told him that Appellant had not given his money. PW-18- Paskal Lorence D'Souza, the Investigating Officer, deposed that on 19 August 2008, Kulwantsingh had brought a cheque, one agreement, one xerox copy of the agreement, xerox copy of photo identity card of Avadhram and xerox copy of B.M.C. receipt etc. and the police seized those documents in the presence of panchas. The cheque of Rs.50,000/- and copies of the agreement was attached under Panchanama at Exhibit 47, for which PW-16-Vinayak Krushnappa Uchil deposed as panch. PW-18- Paskal Lorence D'Souza stated that when he sent letters to the concerned bank to supply a statement of the Appellant's Bank Account, the Banks

replied that there was zero balance. This evidence, according to the prosecution, proves a strong motive for the Appellant to commit the crime.

21. The learned Counsel for the Appellant submitted that the Appellant had repaid the loan, as seen from the cheque. We do not find that there is any evidence that the Appellant repaid the amount. The cheque on record is a bearer cheque, and from the reading of the agreement, it appears that the cheque was given as security. But that does not mean that the prosecution has proved the aspect of motive. PW-1-Tejindersingh, though deposed as to the amount of Rs.50,000/- is given by way of loan, did not specify as to when the loan was given and when the incident of Avtarsingh telling the Appellant on the phone that he would inform the police took place at his brother's place. In the cross-examination, Tejindersingh admitted that though he knew that his father had given money to the Appellant, he did not know how much was given, before the incident. He also admitted that he came to know that quarrels used to take place between his father and the Appellant regarding money, after the incident from his brother's wife. Tejindersingh, on the date of the incident as deposed by PW-17-PSI Salunke, did not suspect anyone on the date of the crime. PW-2-Sharma, the hotel owner, stated that quarrels used to take place among the Appellant and Deceased Avtarsingh regarding the non-return of loan, but he

admitted in the cross-examination that only once he heard an exchange of hot words between the Appellant and Avtarsingh, which he heard from his hotel, and the incident was 1-2 months prior to the death of Avtarsingh. PW-3-Sawant, the telephone booth owner, also deposed regarding the quarrels; however, no particulars regarding the same were given. It is rather strange that PW-1-Tejindersingh was unaware of the exact amount of the loan before the incident; however, the Deceased chose to confide the telephone booth owner that the Appellant is not returning his loan. According to the prosecution, Appellant had executed an agreement. There is a cheque with the signature with the name Abdulla. PW-18- D'Souza, the Investigation Officer, did not inquire whether the loan stated to be given by Avtarsingh was credited in the account of the Appellant. Even if the prosecution case regarding the genuineness of loan and nonpayment is established, that alone cannot be a strong motive for the Appellant to murder Avtarsingh. None of the prosecution witnesses have deposed that the Appellant gave any threats to Avtarsingh from which it can be inferred that there was a motive to commit murder. No details of the quarrel have been brought on record. Loan transactions and cheques given as security are commonplace commercial transactions. So also the instances of nonpayment. Therefore the evidence led by the prosecution on motive is nothing more than suspicion.

22. The third circumstance urged against the Appellant by the prosecution is the recovery of articles at the instance of the Appellant. PW-18-D'Souza, the Investigating Officer, deposed that on the date of arrest on 13 August 2008, the Appellant showed willingness for the discovery of the ornaments. He prepared memorandum Panchanama Exhibit 24, and in the presence of panchas, ornaments were recovered. He deposed that the Appellant brought out his clothes which he was wearing on the date of the incident, which were bloodstained. They were seized and sealed in the presence of panchas. A seizure memo at Exhibit 25 was prepared. PW-18-D'Souza deposed that on 14 August 2008, he had sent viscera of the Deceased to Chemical Analyser for analysis. On 16 August 2008 and 22 August 2008, seized articles were sent to Chemical Analyzer for analysis under letters at Exhibit 52 and Exhibit 54. Chemical Analyzer's reports were received at Exhibit 55 to Exhibit 57. PW-9-Amarjit Kashiram Yadav was examined being a panch witness for the panchanamas Exhibit 24 and 25. PW-9-Yadav deposed, and the panchanama stated that the Appellant took them to one locked room in Sakinaka, took out a key from the shed of the room and brought out a gunny bag. The bag had one plastic carry bag having all articles, which was taken out by the Appellant and handed over to police. The articles were seized and kept in a gunny bag with the signature of PW-9-Yadav. The articles were one golden Kada, two-finger rings, one chain, the mobile phone

of the make Sony Ericsson and cash amount, PAN card, Driving licence, senior citizen card, certificate of registration, I-Card of a bank, pensioners ID card, phone card and pollution test certificate. The Appellant also brought out the clothes, that were seized.

23. We have examined the evidence regarding the recovery. Regarding the clothes of the Appellant is concerned, PW-18-D'Souza, the Investigating Officer, had deposed that the clothes of the accused were bloodstained. The Chemical Analyzer's report stated that there was no blood detected on these clothes. Thus the case of the prosecution that there was recovery at the instance of the Appellant of bloodstained clothes, falls.

24. PW-9-Yadav admitted that his house was 10 minutes walking distance from the MIDC Police Station and that he had acted as panch in several cases of MIDC police station. It is rightly contended by the learned Counsel for the Appellant that PW-9-Yadav is a habitual panch, and the veracity of his version is in doubt. Further, PW-9-Yadav, though deposed in the examination-in-chief that the Appellant took out a gunny bag, admitted in the cross-examination that he did not know about the gunny bag. Therefore there is serious doubt about the veracity of the panch. When the independent witness is not examined, the

evidence of the Investigating Officer will have to be looked at carefully.

25. PW-1-Tejindersingh has admitted in the cross-examination that the kada, ring and gold chain had no specific marks. PW-9-Yadav also admitted that any goldsmith could prepare chain Art-B and mobile Article-E is available in the market. He also admitted that Article-A did not have any name but only figure 22A. Therefore there is no cogent evidence that the ornaments were distinctive.

26. PW-17-Smt. Rajani Vyankat Salunke, attached to MIDC police station as Police Sub-Inspector, deposed that one hammer, specs and other articles were lying near the dead body. A wristwatch of the make Sonata was on the hand of the dead body. Also a ring and a Kada of white metal. The learned counsel for the Appellant submitted that white metal ornaments are equally valuable, and it is inconceivable that the culprit would select and choose the ornaments in such a manner. There is no explanation from the prosecution on this facet as urged.

27. Taking the prosecution case at the highest that there was a recovery of the ornaments and identity documents of the Deceased at the instance of the Appellant, it cannot be a sole circumstance to connect the Appellant. It is rather unusual for the

Appellant to keep all the identity documents of the Deceased or even take them in the first instance from the body of the Deceased. Furthermore, in a case based on circumstantial evidence, if the other circumstances in the chain are not established, it will be unsafe to base the conviction on recovery alone. In the case of *Vijay Thakur v. State of Himachal Pradesh*,² the Supreme Court ruled in cases of circumstantial evidence complete chain of events has to be established, and if the chain is incomplete; it becomes difficult to convict the accused based only on the recovery. The Supreme court, in the case of *Mustkeem alias Sirajudeen v. State of Rajasthan*,³ observed that discovery of the material object at the disclosure of the accused is relevant, but it would not automatically lead to the conclusion that the offence was also committed by the accused. Thus, in the present case, the evidence of recovery alone is not sufficient to base the conviction of the Appellant on it.

28. PW-4-Panchal, a carpenter, was examined by the prosecution. He deposed that Avtarsingh had also asked him to fit an Air Conditioner for which he was given Rs.500/-. He deposed that on 9 August 2008, after completing his work when he started to leave, Avtarsingh told him to keep one hammer and drill machine to do his repairs. So he left those tools there. On 11 August 2008, when he went to the flat, the police present there

² (2014) 14 SCC 609

³ (2011) 11 SCC 724

asked him about the drill machine and a hammer. He stated that they belong to him. Police showed him another big hammer which the PW4 stated did not belong to him. There is no evidence that anyone had seen the Appellant with the big hammer.

29. The learned Counsel for the Appellant made a grievance that the prosecution has withheld important evidence regarding fingerprints on the weapon, and thus adverse inference be drawn. PW-17-PSI Sakunke stated that the fingerprint expert took the fingerprints while the spot Panchanama was going on. PW-17-PSI Salunke seized and sealed the hammer and other articles. The hammer was added as Article Q. PW-8-Gurunath Pundalik Tandel was examined by the prosecution as panch for inquest Panchanama Exhibit 22. He deposed that on 11 August 2008, he was called to the flat where the body of Avtarsingh was lying. He stated that inquest panchanama was prepared, which he signed. He deposed that Fingerprint Bureau and photographers were present. The learned Sessions Judge has also referred to the present Fingerprint Bureau. Thus, the prosecution case is that the big hammer was used as a weapon and that Fingerprint Bureau was present at the inquest Panchanama-Exhibit 22 and had taken fingerprints. The fingerprints on the hammer would have been a formidable piece of evidence. But the Fingerprint Bureau's analysis report regarding the hammer is not disclosed by any of

the prosecution witnesses giving rise to an inference that this evidence was adverse and thus withheld.

30. To recapitulate, in this case, a mere quarrel over nonpayment of a loan with no other particulars could not have been construed as a motive. There is no cogent proof to invoke the theory of Last Seen Together. The panch to the Recovery panchanama is habitual. Even though the prosecution asserted that the accused produced bloodstained clothes pursuant to recovery panchanama, no bloodstains were found on the clothes of the accused. The ornaments were commonplace. Even assuming the aspect of recovery is proved, only based on recovery, in this case, based on circumstantial evidence, when other links are not established, it would be unsafe to record a conviction. Considering the totality of the evidence led by the prosecution, we conclude that the degree of proof required to establish the guilt of the Appellant based on circumstantial evidence is not discharged by the prosecution.

31. As a result, the Appeal is allowed. The conviction and sentence recorded against the Appellant by the learned Ad-hoc Additional Sessions Judge at Sewree on 27 August 2009 in Sessions Case No.722 of 2008 is set aside. The Appellant is acquitted of the offences as charged. Fine, if paid, be refunded. The part of the impugned judgment relating to the disposal of the muddemal properties stands confirmed. The Appellant be set at

liberty forthwith, if not required in connection with any other offence.

(C. V. BHADANG, J.)

(NITIN JAMDAR, J.)