

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT NAGPUR, NAGPUR.

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CRIMINAL APPEAL NO. 484/2018

* Dushyant @ Gabbar s/o Gulab Pushpatode
Aged about 28 years, occu: Labour
R/o Dongri (Buz) Tah. Tumsar, Dist.Bhandara. **..APPELLANT**

v e r s u s

State of Maharashtra
Through Police Station Officer,
Gobarwahi, Tah.tumsar
Dist. Bhandara. **.. RESPONDENT**

.....
Mr R.M.Daga, Advocate for appellant
Mr. V. A.Thakre, Advocate for Respondent-State
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CORAM: V. M. DESHPANDE &
AMIT B. BORKAR, JJ
DATED : 28th September, 2021.

ORAL JUDGMENT: (PER V.M. DESHPANDE, J.)

1. The learned Additional Sessions Judge, Bhandara framed charge against appellant in Sessions Trial No. 37/2016 that on 29.04.2016 at 11.15 pm in the house of deceased at Syndicate Camp Dongri (Bk), Tah.Tumsar, District: Bhandara, the appellant had committed murder of Fulan wd/o Gulab Pushpatode, by means of an axe, by giving the blow on neck and head of and therefore he was

tried for offence punishable under section 302 of the Indian Penal Code.

2. In order to prove the charge, the prosecution has examined in all eight witnesses and also relied upon various documents including memorandum statement of the appellant, seizure of an axe and his clothes thereto, spot panchnama, post-mortem report and CA report.

3. PW8- Manoj Wadhive conducted the investigation of Crime No. 16/2016. This crime was registered on the basis of oral report (Exh. 13) lodged by Pradip Shendre (PW 2). As per the report, the first informant runs a grocery shop at his village Bazartola Dongri (Bk) . His wife Smt., Nilima Shendre is discharging her duties as Police Patil of the said village from 2008. If any dispute or quarrel erupted in the village, as per the report, the person involved in such a dispute they visit his house. If it is noticed that the dispute is trifling, then the issue is referred to Tanta Mukti Samiti and if the dispute is having serious consequences the matter is to be reported to the Police Station. With this prelude, the first informant stated in his report Exh. 13 that on 29.4.2016 at about 9.30 pm after the dinner, he and his wife were sleeping. At about 11.15 pm, son of one Gulab Pushpatode came to his house and informed that he has committed the

murder and he wants to surrender. On this, as per the report PW2-Pradip Shendre made enquiry about his identity and as to whose murder he has committed. Upon that, he disclosed his identity as Dushyant Gulab Pushpatode and told that he has committed the murder of his step-mother by means of an axe. The report further states that the PW2-Pradip asked that when he has committed murder. Upon that the reply was that he was not knowing the time. As per the report, this information was communicated by Pradip Shendre to his wife who immediately informed the fact to Police Station by phone call, by contacting PSO PW8-Wadhive. Thereafter he asked the appellant to sit in his house and then he went to the house of deceased. PSI Wadhive had conducted the investigation and during investigation he had drawn spot panchnama in presence of PW1-Jude Pitcher. Spot panchnama is at Exh.11. Also, he collected sample as well as blood- smeared earth. The blood of the deceased from the spot itself collected by cotton under seizure Panchnama (Exh.15) which was proved by PW3-Umesh Samargade, a Panch. The Investigating Officer arrested the appellant on 29.04.2016 at about 7.25 hours as could be seen from arrest form (Exh.36). During the interrogation, as per the prosecution case, the appellant in presence of Panch witness PW4 Nithin Ushir made a statement that he would show the place

where he has concealed the axe as well as the clothes which were on his person at the time of commission of the offence. Admissible portion of his memorandum statement is at Exh.19/1. Pursuant to the recording of his memorandum statement, he led the police party. According to the prosecution case he led the police party at his house and he took out axe from the water tank which was in the courtyard. Similarly, from inside the house, he took out his clothes. The recovery panchnama is at Exh.19/2. As per the recitals of the recovery panch when the axe was taken out, it was having bloodstains. Similarly on the clothes of the appellant also, there were blood stains.

4. The Investigating Officer sent the axe to Dr.Sandip Ghodeswar (PW7) and sought his opinion as to whether the weapon which is sent to him can cause the injury which were noticed while conducting the post-mortem. The Investigating Officer also sent all the muddemal properties to CA on 03.05.2016 by giving requisition to CA Nagpur (Exh.37). After completion of the investigation the challan was presented .

5. As observed in opening paragraph of this judgment a charge was framed against the appellant who abjured his guilt and

claim for his trial.

6. The Autopsy Surgeon i.e. Dr. Pradip Ghodeswar has found two external injuries when the dead body of Fulan was referred to him. Those are as under :-

“ i) Deep penetrating injuries over right side of temporal parietal region of scalp over mastoid region just behind right pinna measuring approximately 3.5 inches x 1 inch x 1 inch, caused by hard and sharp object.

ii) Deep penetrating injury over mid region of right ear involving maxillary region of face measuring approximately 2 inches x 1 inch x 1 inch in dimension, caused by hard and sharp object.”

7. The post-mortem report is at Exh.26. From the post-mortem report, it is clear that the nature of death of Fulan was a homicidal death. Even the said aspect is not at all disputed by the learned counsel for the appellant before us.

8. The question is whether the appellant is an author in respect of the injuries found on the dead body of Fulan resulting into his death as claimed by the prosecution or whether in this case the prosecution has not proved any circumstance to show the finger of guilt towards the appellant, as argued by the defence.

9. The incident of occurrence of murder was not witnessed by anybody. As such, there is no direct evidence. The prosecution case is based on circumstantial evidence coupled with extra-judicial confession made by the appellant allegedly to PW2-Pradip Shendre. The law in respect of the appreciation of the prosecution case solely based on circumstantial evidence is laid down in catena of decisions of the Hon'ble Supreme Court and the leading light on the subject is the authoritative pronouncement of the Constitution Bench of the Hon'ble Apex Court in Sharad Birdichand Sarda vs. State of Maharashtra, reported in (1984) Vol.4 SCC Page 116. In this authoritative pronouncement, the Hon'ble Apex Court has laid down five principles which are known as "five golden principles" to evaluate the prosecution case solely based on circumstantial evidence.

10. In the present case, apart from the circumstances the prosecution wishes to rely upon the extra-judicial confession made by the appellant to PW2-Pradip Shendre.

11. In Paragraph Nos.13,14 and 16, the Hon'ble Apex Court in Sahadevan and another vs. State of Tamil Nadu, reported in (2012) Vol.6 SCC 403, the Apex Court has ruled as under :-

“13. There is no doubt that in the present case there is no eye witness. It is a case based upon circumstantial evidence. If in case of circumstantial evidence, the onus lies upon the prosecution to prove the complete chain of events which shall undoubtedly point towards the guilt of the accused. Furthermore, in case of circumstantial evidence, where the prosecution relies upon an extra-judicial confession, the Court has to examine the same with a greater degree of care and caution.

14. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra-judicial confession suffers from material discrepancies or inherent improbabilities 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. In such circumstances, the Court would be fully justified in ruling such evidence out of consideration.

16. Upon a proper analysis of the above-referred judgment of this Court it will be appropriate to state the principles which would make an extra-judicial confession and admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused:

i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the Court with greater care and caution.

- ii) It should be made voluntarily and should be truthful.
- iii) It should inspire confidence.
- iv) An extra-judicial confession attains greater credibility and evidentiary value if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.
- v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.
- vi) Such statement essentially has to be proved like any other fact and in accordance with law.”

Keeping in mind the principles laid down by the Hon’ble Apex Court we are scrutinising the available evidence on record as brought during the course of the trial.

12. The prosecution case primarily rests on the extra-judicial confession of the appellant. Admittedly, this extra-judicial confession was oral and was not recorded in writing by Pradip (PW2) to whom it was made allegedly by the appellant.

13. From the evidence of PW2- Pradip, it is brought on record that prior to the incident he was not even knowing the appellant. He

admitted during his evidence that prior to the incident, he and the appellant were not on visiting terms with each other. Not only that there was no family relations in between these two families. In addition to that, he has admitted that there was no monetary transaction in between them.

In the backdrop of the aforesaid evidence as brought on record by the prosecution, it is clear that the appellant and prosecution witness no.2-Pradip were not having any concern whatsoever between them. Evidence of PW2-Pradip shows that there was no intimate relationship in between them. The quality of the evidence shows that there was no reason/ occasion for the appellant to repose any trust in PW2-Pradip. It is difficult to accept that any person will make confession about his acts which are not approved either by society or by law to any stranger. Human nature is such it tend to disclose his misdeeds to only such person in whom he is having semblance of confidence or trust.

14. The learned counsel for the appellant Shri Daga placed reliance upon the decision of the Hon'ble Apex Court in the case of Sunny Kapoor vs. State (UT of Chandigarh) reported in (2006)

Vol.10 SCC 182 to buttress his point that it is really unbelievable that the appellant will make any extra-judicial confession to Pradip (PW2).

15. In the judgment of Sunny Kapoor, *supra*, the appellants were the rickshaw-pullers. They were charged for committing murder of Satish Kumar Mehra, a businessman. According to the facts of the said case they approached to one Chander Prakash (PW 11), a social worker and to whom confession was made. In this backdrop, the Hon'ble Apex Court in para No.17 observed as under:-

“17. It is wholly unlikely that the accused would make extra-judicial confession to a person whom they never knew. It also appears to be wholly improbable that unknown persons would come to seek his help unless he was known to be close to the Police officers. His statement, thus, do not even otherwise inspire confidence.”

16. From the first information report as well as the evidence of PW2-Pradip, it is clear that when the appellant came to his house and made extra-judicial confession, the said fact was transmitted by Pradip to his wife-Police Patil. In village, Police Patil is having his/her own position and role. Police Patil is one of the respectable person in the village. Even from the first information report, it is clear that if

any dispute occurred in the village disputant used to visit his house and used to narrate the dispute to Police Patil and then Police Patil used to take a call either to send it to the Tanta Mukti Samiti or to the Police Station.

17. In the present case, leave apart wife of PW2-Pradip who was a Police Patil, is not examined as a prosecution witness during trial. Even her statement was also not recorded. Not recording statement of Police Patil appears to be unnatural in given set of facts.

18. As per the oral extra-judicial confession, it is clear that it was not wholly voluntary as we scanned the evidence of PW2-Pradip. The voluntariness while making extra-judicial confession has its own importance.

19. In our view, in the aforesaid facts as established on record, the law laid down by the Hon'ble Apex Court in AIR 2011 SS Page 2545 in the case of Sunil Rai vs. Union of India, is squarely applicable. In paragraph 27 of the said judgment, the Hon'ble Apex Court has observes thus :

“27. Admittedly, the alleged confessional statement was oral and it was not recorded in writing.

Admittedly. Sunil Rai had no personal acquaintance, much less any intimacy with PW 10. An extra-judicial confessional statement made orally before a person with whom the maker of the confession has no intimate relationship is not a very strong piece of evidence and in any event it can only be used for corroboration (see S.Arul Raja V. State of Tamil Nadu (2010) 8 SCC 233, Paragraph 48-56): (2010 AIR SCW 593) . In this case with PW10 appearing particularly anxious to implicate Jaspreetsingh in place of Ramlal, it further loses any credibility. Further, in the confessional statement allegedly made before PW10 there is an inherent improbability. The “disclosure” made by Sunil Rai before PW10 did not indicate the place where the assault on Dile Ram took place but it gave the time of the assault as 9.00pm. In the evidence of PW 17, it has come that Nilam Police Chowky is at a distance of 50 yards from the Nilam Sub-way. The police post is naturally manned 24 hours even though, according to PW 17, after 8-9 pm only one or two persons remain on the post. The occurrence took place on March 29. At the end of March, 9 pm is not a very late hour when an occurrence of this kind taking place near the local bus stand and the parking place for rickshaws, behind a cinema theater and at a distance of no more than 50 yards should normally go completely unnoticed by any one, including the policemen at the police post.”

20. Another aspect for this Court to examine as to whether there is any corroborative piece of evidence connecting the appellant with the crime.

21. According to the prosecution, the appellant has made his disclosure statement u/s 19/1 and pursuant to that his clothes and weapons were seized under seizure panchnama Exh.19/2. PW 4 Nitin

Ushir is the Panch who has proved these two vital documents. According to the evidence of Nitin, there was a cement tank in the courtyard of the house of the accused and there was no water in it and it was dry. Exactly, the opposite is the evidence of Investigating Officer PW8-Wadhive. In his evidence, he states as under :

“I had gone with the accused to his house and accused discovered an axe from water tank in his house. There was little water in the water tank. It is true that axe was wet due to water in the tank.”

As per the evidence of Panch witness, the water tank was completely dry and at the same time the Investigating officer is deposing on oath that there was some water and the axe was wet. It had its own importance because in contemporaneous document Exh. 19/2, while seizure of the weapon and in the recovery panchnama recital that there was bloodstains on the weapon. Clothes of appellant were also having bloodstains at the time of its seizure.

Further, neither the Investigating officer nor the panch witness Nitin or contemporaneous document Exh.19/2 recites about putting seal at the time of recovery

22. In the prosecution case which is solely based on circumstances proper sealing has its own importance because noticing blood either on the clothes of the accused or weapon is an

incriminating circumstance if it is not properly explained by the accused. That will be a connecting piece of evidence against the accused.

23. After the muddemal property was sent to CA, the CA examined the same and gave its report which is available on record at Exh.39. It shows that no blood was found on the axe. Similarly there was no blood on full shirt of the appellant but blood was found on the full pant and the footwear of the appellant. We have already noticed that these articles were not sealed at the time of taking in custody of those articles by the Investigating officer. In our view, in a case solely based on circumstantial evidence not fixing the seal at the time of its seizure is a serious lacuna if it is not explained during the trial by the prosecuting agency as to why the seal was not affixed. In the present case, there is no explanation coming on record from the side of the prosecution in respect of the said serious lacunae. In that view of the matter, the said circumstance cannot be used as a circumstance to hold that it shows finger of guilt towards the appellant conclusively.

24. In addition to that when the appellant was examined by the learned Judge under section 313 of the Cr.P.C. the incriminating circumstance that blood was noticed on his full pant and footwear

were not brought to his notice. The question No.13 reads thus :

“13. It has also come in his evidence that your blood sample is collected and forwarded to chemical analysis. All other articles seized during investigation are forwarded to CA. What you want to say about it ?”

25. This issue is no more *res integra* in view of the law laid down by the Hon’ble Apex Court in the case of Sujit Biswas vs. State of Assam reported in (2013) 12 SCC 406. Paragraph 20 of the said report, Hon’ble Apex Court observes as under :-

“20. It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person under section 313 Cr.P.C. is to meet the requirement of the principles of natural justice i.e. audi alteram partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313 Cr.P.C. cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement.”

26. Further, from the spot panchnama, it is clear that the dead

body was lying outside the house of the deceased. It is to be mentioned here that it is an admitted position on record that the appellant and the deceased were not residing jointly but they were residing separately.

27. Coupled with the aforesaid, there is also another lacunae in the prosecution case namely the prosecution was not able to point out what was the motive for the appellant to commit the murder. PW5 is the Nagma Kadir Sheikh. As per her evidence, deceased Fulan was her mother and she performed the second marriage with Gulab, the father of the appellant. Except a bare statement in her evidence that her mother used to tell her that the accused frequently quarrel with her, nothing is brought on record. On the contrary, in her cross-examination she has admitted that there was a liquor business in the house of Fulan and Gulab.

28. Perusal of the impugned judgment does not reflect the consideration of the aspects in its correct perspective, which we have discussed in the body of this judgment.

29. On re-appreciation of the entire prosecution case, we are of the view that the prosecution has failed to bring home the guilt to the accused beyond reasonable doubt. Therefore, the benefit of doubt has to be extended in favour of the appellant. Consequently, we pass

the following order:

ORDER

- a) Criminal Appeal No. 484/2018 is allowed.
- b) The impugned judgment and order of conviction dated 16.07.2018 passed by learned Additional Sessions Judge, Bhandara in Sessions Trial No. 37/2016 convicting the appellant for the offence punishable u/s 302 IPC is hereby quashed and set aside.
- c) The appellant- Dushyant @ Gabbar s/o Gulab Pushpatode stands acquitted of the offence punishable u/s. 302 IPC.
- d) The appellant- Dushyant @ Gabbar s/o Gulab Pushpatode who is in jail, shall be released forthwith if not required in any other case.

JUDGE

JUDGE

sahare