

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

CRIMINAL APPEAL NO.834 OF 1998

Asif Nasir Khan	... Appellant
Versus	
The State of Maharashtra	... Respondent

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Ms. Keral Mehta, Advocate a/w. Niranjana Mundargi, for the Appellant.
Ms. Veera Shinde, APP, for the Respondent-State.

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**CORAM : SMT. SADHANA S. JADHAV &
SARANG V. KOTWAL, JJ.**

RESERVED ON : 2nd MARCH, 2022

PRONOUNCED ON : 9th MARCH, 2022

JUDGMENT : [*PER SARANG V. KOTWAL, J.*]

1 The Appellant was the Accused No.1 in Sessions Case No.430/1995 before the Additional Sessions Judge, Pune. Vide judgment and order dated 30.10.1998, the learned trial Judge convicted the Appellant for commission of offence punishable under Section 302 of the Indian Penal Code and sentenced him to suffer life imprisonment and to pay a fine of Rs.5,000/-; and in default to suffer R.I. for one year. The Appellant as well as his co-

accused were acquitted from the charge of commission of offence punishable under Section 201 read with 34 of IPC. The Appellant was given set off under Section 428 of Cr.PC.

2 Heard Ms. Keral Mehta, learned counsel for the Appellant and Ms. Veera Shinde, learned APP for the State.

3 As per the charge framed, according to the prosecution case, on 5.6.1995 between 9.30 a.m. to 10.00 a.m., the Appellant committed murder of Pappu @ Prakash Pardeshi in the flat of Josphin Shinde on Senapati Bapat Road, Pune by using a sharp weapon and *nunchaku*. The dead body was covered by cloth and was carried in an autorickshaw towards Lonikand and it was thrown in a quarry with the help of accused No.2 Zakir Shaikh.

4 PW-15 Balasaheb Kand was a police patil of Lonikand. One Trimbak Kharate on 7.6.1995 told him that one dead body was found lying in a stone quarry near Alandi Road. It was kept in a gunny bag. PW-15 Balasaheb went to Lonikand Police Outpost and took the police to the spot. Thereafter the dead body was taken out by the police.

5 PW-16 Head Constable Natha Thopate was attached to Lonikand Police Outpost. On receiving information from PW-15, he along with others went to the spot, took out the body and sent it to Sasoon Hospital. He conducted the inquest panchnama. He had received the information from PW-15 at about 6.00 p.m. on 7.6.1995. He lodged A.D. No.72/1995 about this dead body.

6 PW-17 PSI Bajirao Jagtap was attached to Loni Kalbhor police station. He received the papers of A.D. No.72/1995 from PW-16 Thopate. This witness made enquiries with the brother and wife of the deceased. During that enquiry the Appellant's name was disclosed. He was arrested on 14.6.1995. The Appellant pointed out the place of incident where the offence was committed. The memorandum and the panchnama to that effect was prepared. They were produced at Exhibits-36 and 37. On the basis of enquiry, this witness registered the offence under Section 302 of IPC and sent the FIR to Chaturshringi police station. The offence was registered on 14.6.1995 at 11.15 p.m..

7 The evidence of PW-3 Dinesh Pardeshi and PW-4 Saira Pardeshi is important. PW-3 Dinesh was the nephew of the

deceased Prakash Pardeshi. This witness's brother Umesh needed money for his surgery. PW-3 Dinesh and his brother Umesh had been to the house of the deceased. At that time, the Appellant came there. The deceased asked him to return the amount which he had taken from the deceased. The Appellant had promised that he would return the amount on the next day. This witness was told by PW-4 Saira that on 5.6.1995, the Appellant had taken the deceased with him but he had not returned and, therefore, PW-4 Saira sent PW-3 Dinesh in search of the deceased to the house of the Appellant at about 11.00 p.m. Initially the Appellant's sister told him that the Appellant was in the house, but, then the Appellant's mother told him that the Appellant was not in the house. He came back and told Saira that the deceased was not at the house of the Appellant. On 8.6.1995, the police called him to identify a dead body at Sasoon Hospital. He could not identify the dead body, but, when he was shown the clothes, he identified the clothes as being those of the deceased.

In the cross-examination, he has admitted that he was not knowing the Appellant prior to 4.6.1995. There was

opposition from the family of the deceased for the deceased's marriage with Saira and, therefore, they were residing separately. The deceased was addicted to gambling and was also running a lottery center at Kondhwa.

8 PW-4 Saira Pardeshi is the widow of the deceased. She has deposed that the Appellant owed Rs.15,000/- to the deceased. The Appellant had given three cheques of Rs.5,000/- each to the deceased. She produced those cheques before the court. They bore some signatures. According to her, the signatures were of the Appellant. On 4.6.1995, the Appellant had come to their house. At that time PW-3 Dinesh and Umesh were also present. On that day, the Appellant told this witness that he could not arrange the money and would be trying to arrange it till the next day. On the next day i.e. on 5.6.1995, the Appellant came to their house. The deceased opened the door. The Appellant called him outside. The deceased told this witness that since the Appellant was calling him, he was going with him and would return within a short time. The deceased then went with the Appellant and then he did not return. She sent Dinesh to the Appellant's house but he was not found

there. She made enquiries with the relatives of the deceased. On 7.6.1995, she went to the house of the Appellant and made enquiries about the deceased. The Appellant did not give information and discouraged her from lodging any report. But she went ahead and lodged the report at Kondhawa police station about missing of the deceased. On 9.6.1995, she received a message about a dead body. She went to Sasoon hospital and identified the clothes of the deceased. She even identified the dead body.

In the cross-examination, she was confronted with the fact that the report about missing of the deceased did not mention that the deceased had left the house with the Appellant. She could not explain this omission. There were other omissions from her police statement regarding the Appellant's visit to their house in the previous evening. Another important omission from her police statement was about telling Dinesh that the deceased had left with the Appellant. There is another important omission about her visit to the Appellant's house on 7.6.1995 for making enquiries and his discouragement in lodging any report.

9 Apart from these important witnesses, there are other witnesses examined by the prosecution. PW-1 Siddique Samin was an autorickshaw owner, in whose autorickshaw the dead body was allegedly carried, but he had turned hostile. PW-2 Bhanudas Londhe was a pancha for seizure of clothes of the deceased, but he had also turned hostile. PW-5 Santosh Salunke was a pancha for an attempt made to recover the knife which was thrown in a river but the knife was not found. PW-6 Santosh Unecha was a pancha, in whose presence the Appellant had made a statement pursuant to which the *nunchaku* was recovered at the instance of the Appellant which he had concealed below a heap of stones. PW-8 Kiran Kamble was a pancha, in whose presence the clothes of the Appellant were recovered at his instance from his house. PW-9 Madhukar Bachkar and PW-10 Kisan Kolape were the panchas in whose presence, the Appellant had shown willingness to point out the flat where the murder was committed. PW-10 had turned hostile, and PW-9 had not given details of those panchnama. PW-11 Bharati Shrotri and PW-12 Madankala Karmarkar were examined in respect of the flat, where the murder was committed. PW-13 Balu Sutar was a pancha, in whose presence the Appellant

had purportedly shown the spot where the dead body was thrown but this witness had turned hostile. Similarly, PW-14 Nitin Ranpise was a hostile pancha on the same issue. PW-18 PSI Dilip Godbole had investigated the offence. He had carried out various panchnamas and had recorded statements of witnesses and had seized the articles.

10 PW-19 Dr. Shrikant Chandekar had performed the postmortem examination. He has stated that the dead body was highly decomposed. There was an injury of 14 cm in length on the right temporal region. The opinion was reserved regarding the cause of death. According to this witness, the death had occurred about 48 to 72 hours before carrying the postmortem examination.

11 Besides this evidence, the prosecution produced C.A. report on record at Exhibit-60. No blood was detected in the autorickshaw, on the *nunchaku* as well as on the Appellant's clothes. The C.A. report at Exhibit-61 showed that the pillow found with the dead body matched with the pillow seized from the flat.

12 Learned counsel for the Appellant submitted that there is

no evidence against the Appellant. The 'last seen together' theory is not supported by any reliable evidence on the record. PW-4 Saira had not mentioned at the earliest that the deceased had left with the Appellant from their house in the morning of 5.6.1995. The motive is not properly proved. The cheques in question were not seized during investigation and the signatures on the cheques are not those of the Appellant. The Appellant has denied the signatures on the cheques in his statement recorded under Section 313 of Cr.P.C.. The recovery of *nunchaku* is innocuous as it is not connected with the dead body.

13 Learned counsel relied on the judgment of the Hon'ble Supreme Court in the case of **Kanhaiya Lal Vs. State of Rajasthan**¹, wherein it was held that the circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime.

14 Learned APP Ms. Veera Shinde, on the other hand, submitted that though it is a case based on circumstantial evidence, the prosecution has proved all the circumstances and they form a

¹ 2014 AIR SCW 1828

complete chain proving guilt of the Appellant. The motive is established. The appellant owed money to the deceased. In his statement under Section 313 of Cr.P.C. also the Appellant had admitted that those were his cheques, though he has denied his signatures. In the missing report, there is a reference to a friend though name of the Appellant is not mentioned. The pillow found with the dead body, matched with the pillow recovered at the flat shown by the Appellant. All these are incriminating circumstances.

15 We have considered these submissions. From the evidence and the submissions, it is clear that there are following circumstances alleged by the prosecution against the Appellant :

- i. 'Last seen together' theory;
- ii. Motive;
- iii. Recovery;
- iv. Pointing out the places by the Appellant; &
- v. C.A. Report.

16 The prosecution case mainly is based on the circumstance of 'last seen together' theory. PW-4 Saira is the crucial witness in that behalf. According to her, the deceased had left with the

Appellant from their house on 5.6.1995 at about 7.00 a.m.. After that, he had not returned. She had lodged her complaint on 7.6.1995 at 7.30 p.m. about the deceased missing from their house, which is brought on record vide Exhibit-19. In that complaint, she has not named the Appellant. She has not stated that the deceased had left with the Appellant. A cryptic description in that complaint is that the deceased had left the house after telling this witness (PW-4) that he was going out with a friend. She has not even stated that she had seen the deceased leaving the house with the Appellant. The prosecution case is that the dead body was found on 7.6.1995 and the police patil was informed about it at 6.00 p.m. on that day. On 9.6.1995, according to her, she identified the dead body. The FIR itself is lodged on 14.6.1995. There was no reason for lodging this FIR belatedly, though the dead body was already identified on 9.6.1995. If the deceased had really left with the Appellant, he should have been the natural suspect right from the day of missing but even after giving concession till the date on which the body was identified; even thereafter for about five days the FIR was not lodged. This indicates that PW-4 had never expressed any suspicion against the Appellant. There was no

investigation in respect of the missing complaint wherein PW-4 Saira had not disclosed name of the Appellant. In her evidence, there are important omissions about PW-4 confronting the Appellant about the whereabouts of the deceased and also about the Appellant discouraging her from lodging the FIR. Therefore, it is extremely doubtful as to whether the deceased had left with the Appellant. The prosecution has not proved beyond reasonable doubt that the Appellant had left with the deceased and that the Appellant was last seen together with the deceased.

17 Even otherwise if according to the prosecution case the deceased had left with the Appellant on 5.6.1995 at about 7.00 a.m., the dead body was discovered only on 7.6.1995. The significant fact is that the body was discovered not in the vicinity from where the deceased had left allegedly with the Appellant. Thus, there is no proximity of place. The time of death is also not established clinchingly. The evidence in that behalf is that of a doctor conducting the postmortem examination on 8.6.1995 at about 5.00 a.m. He has stated that the death could have occurred 48 hours to 72 hours prior to conducting the postmortem

examination. Therefore, there is a reasonable possibility that the death could have occurred much later from 7.00 a.m. of 5.6.1995. Thus, even there is no conclusive evidence about the proximity of time of death and the 'last seen together' theory.

18 PW-3 Dinesh's evidence does not really help the prosecution case. He was not knowing the Appellant and when he had gone to the house of the Appellant, he was not found there. Beyond that he has not stated anything. According to him, the Appellant had visited the deceased's house on the previous evening. But, even that circumstance is not incriminating. It only shows their friendship and possible financial transaction.

19 Therefore, in this case, the 'last seen together' theory is a weak piece of evidence. In that context, the judgment relied by Ms. Mehta in the case of **Kanhaiya Lal** (supra) would be applicable.

20 The next circumstance is of 'motive'. In this case, the widow i.e. PW-4 Saira, had produced three cheques purportedly signed by the Appellant only during the trial. She had not produced those cheques during investigation. They were not sent for handwriting expert's opinion to establish the fact that they were

signed by the Appellant himself. In any case; that, at the most, may show that there was some financial transaction, but, it still does not establish strong enough motive to commit murder of the deceased.

21 The circumstance of recovery of *nunchaku* and rickshaw is of little consequence because no blood was detected either in the rickshaw or on the nunchaku, as is mentioned in the C.A. report. The clothes of the accused did show presence of human blood, but, the blood group was not determined as being that of the Appellant or of the deceased. Therefore, this circumstance is also not useful to the prosecution case.

22 There is one more circumstance of matching the pillow found near the dead body with the pillow recovered from the flat. In this context, it is important to note that Exhibits-35 and 37 show that the Appellant had led the police party to the same flat on 14.6.1995. At that time, nothing was seized from the flat; neither the pillow nor the tiles. However, surprisingly on the next day i.e. on 15.6.1995, another panchnama was carried out and at that time tiles and pillow cover were seized from that flat. The tiles, of

course, did not show any blood stains therefore, that is innocuous. But the prosecution case is that the pillow recovered from the flat on 15.6.1995 matched with the remaining portion of that pillow found with the dead body and the C.A. report says so. However, the prosecution has not explained the circumstance as to why on the earlier day itself though the police had gone to the same flat, nothing was recovered; even pillow was not recovered. It is not even mentioned in the panchnama. Therefore, the recovery effected on the very next day from the very same place is extremely doubtful.

23 The alleged murder weapon of knife was not recovered though an attempt was made to search it in Mutha river at the instance of the Appellant. Therefore, even that evidence is lacking.

24 Thus, taking into consideration all the above factors, we are of the opinion that the prosecution has not proved the case against the Appellant beyond reasonable doubt. The Appellant, therefore, deserves to be acquitted from all the charges. Hence, the following order :

:: O R D E R ::

- i. The Appeal is allowed. The judgment and order dated 30.10.1998 passed in Sessions Case No.430/1995 by the learned Additional Sessions Judge, Pune is set aside. The Appellant is acquitted of all the charges. Consequently, the conviction and sentence awarded by the learned Judge are set aside.
- ii. The Appellant is on bail. His bail bonds shall stand cancelled accordingly.
- iii. The fine amount, if paid, shall be refunded to the Appellant.
- iv. Criminal Appeal is disposed of in aforesaid terms.

(SARANG V. KOTWAL, J.)**(SMT. SADHANA S. JADHAV, J.)**

Deshmane (PS)

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