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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 167 OF 2015

Ibarat Husain Kitabullah

Aged 60 years, Room No.5499,
New Bharat Nagar, H.P. Colony,
R.C. Marg Chembur, Vashinaka Nr.
Hanuman Temple, FCI
Mumbai- 400074

(At present Kolhapur Central Prison,
Kolhapur, Maharashtra)

Appellant

.. (Ori. Accused No.3)

Versus

The State of Maharashtra,

At the instance of Vasai Police Station in
CR No.166/1989 giving rise to Session
Case No.472/1992 Old giving rise to Case
No.16/2007.

.. **Respondent**

Mr. Rohan P. Surve, Appointed Advocate for Appellant.

Mr. Ajay Patil, APP for Respondent – State.

**CORAM : A.S. GADKARI &
MILIND N. JADHAV, JJ.**

DATE : 29th August, 2022.

JUDGMENT (PER : MILIND N. JADHAV, J.)

. This Criminal Appeal questions legality of Judgment and Order dated 17.08.2013 passed by learned Additional Sessions Judge, Vasai (for short “**Trial Court**”) in Sessions Case No.16 of 2007 convicting Appellant (Original Accused No.3) under Section 235(2) of the Code of Criminal Procedure, 1973 (for short “**Cr.P.C.**”) for offences punishable under:-

- (i) Section 302 of the Indian Penal Code (for short “**IPC**”) and sentencing him to suffer life imprisonment along with fine of Rs. 3,000/-, in default, to suffer simple imprisonment for three months;
- (ii) Section 307 IPC and sentencing him to suffer rigorous imprisonment for seven years along with fine of Rs.2,000/-, in default, to suffer simple imprisonment for one month;
- (iii) Section 201 IPC and sentencing him to suffer rigorous imprisonment for two years alongwith fine of Rs.1,000/-, in default, to suffer simple imprisonment for fifteen days; and
- (iv) Section 342 IPC and sentencing him to suffer rigorous imprisonment for six months alongwith fine of Rs. 500/-, in default, to suffer simple imprisonment for fifteen days; all above sentences to run concurrently.

2. Prosecution’s case is based on circumstantial evidence, which has been upheld by the Sessions Court while convicting Appellant. Appellant is original Accused No.3, part of a group of 6 Accused convicted for murder of one Ranjit Singh and attempt to murder of Ajit Singh (PW-4).

3. Prosecution case in brief is thus:-

3.1. On 19.04.1989, at around 10:00 to 11:00 p.m, deceased Ranjit Singh (driver) and PW-4 - Ajit Singh (cleaner) were proceeding to Ahmedabad on Mumbai - Ahmedabad highway with their truck (laden with polyester yarn) near Vasai. One red colour car blocked their truck; four to five occupants got down from the car; some of them entered the truck cabin and forced Ranjit Singh to disembark the truck; they forcibly took him to a nearby forest and returned back without him after 15 minutes. Thereafter, they blindfolded PW-4, tied his hands behind his back and alongwith him drove the truck for 10 to 15 kms. Then they made PW-4 get down from the truck, slashed/slit his throat and left him to die on the road and drove away with the truck.

3.2. PW-4 with the help of other truck drivers reached Priti Petrol Pump nearby at Chinchoti phata; he was admitted to Bhagwati Hospital for treatment for 27 days. PW-1 admitted injured PW-4 (whose throat was slit) in Bhagwati hospital and informed the police. PSI Hari Patil Investigating Officer (for short “**IO**”) attached to Vasai Police Station registered First Information Report (for short “**FIR**”) and Crime No. 166 of 1989 dated 19.04.1989 was registered.

3.3. PW-4 - Ajit Singh was unable to talk but could only write on paper. IO inquired with PW-4 and registered FIR i.e. Crime No.166 of 1989. He conducted investigation and arrested Appellant. The stolen truck used in the crime was recovered. Dead body of Ranjit Singh was

identified by PW-4. Appellant alongwith absconding accused was charged with committing murder of Ranjit Singh and attempting to murder PW-4. Defence in the present case has admitted inquest panchanama (Exh.105) and recovery and seizure panchanama (Exh.106 and Exh.107); post-mortem notes vide (Exh.139) are not disputed by defence. Recovery panchanama (Exh.142) about seizure of articles from Appellant; spot panchanama (Exh.133) and seizure panchanama of truck (Exh.135) have been admitted by defence during trial and hence its proof was dispensed with. IO - Hari Patil summoned PW-2 pancha witness and alongwith Appellant went to the spot of incident where Ranjit Singh was killed at the behest and as per the directions of Appellant. This spot of incident was about 150 ft. to 300 ft. inside the forest from the road of the inside lane on Mumbai - Ahmedabad highway.

3.4. IO conducted investigation, PW-2-Ajay Sitaram Raut (pancha witness) has deposed that IO arrested two of the accused for the offence committed; Appellant - Ibarat Hussain Kitabullah in his presence made a statement that they had taken the driver of the truck to the forest. PW-2 in his Examination-in-chief deposed that recovery of truck was made which is used in crime. He also deposed that dead body of deceased was found by IO at the instance of Appellant. Spot panchanama (Exh.124) was drawn in his presence. Clothes of Appellant and clothes & shoes of deceased (Ranjit Singh) were

recovered and seized. Statement of witnesses were recorded and chargesheet was filed against original accused Nos.3 to Nos.6 for offences punishable under Section 396, 397, 342, 412, 201, 120-B and 109 IPC before the Judicial Magistrate First Class (JMFC), Vasai for offences punishable under aforesaid Sections of IPC. Since the offence under Section 302 IPC is exclusively triable by the Court of Sessions, learned JMFC committed the case for trial to the Sessions Court on 06.06.1992. Charge against Appellant was framed vide Exh.97. It was read out and explained to him in vernacular. His defence being of total denial; he pleaded not guilty and claimed to be tried. After filing chargesheet IO (Hari Patil) expired.

4. In order to bring home the guilt of Appellant, prosecution examined 5 witnesses; defence did not examine any witness. PW-1 Girish G. Kamdar is owner of Petrol Pump at Chinchoti Phata on Mumbai - Ahmedabad highway; in his deposition (Exh.112), has stated that he was informed that one person was lying in an injured condition, he noticed that his neck was slit and therefore he informed the police; PW-2 - Ajay Setaram Raut and PW-3 - Suresh Bhimasharkar Reddy are pancha witnesses. PW-3 did not support prosecution's case.

5. PW-4 is the injured eye witness who witnessed abduction of Ranjit Singh from the truck before the incident. He was cleaner of the truck which was driven by Ranjit Singh. He has deposed that he saw assailants abduct Ranjit Singh and take him forcibly to the nearby

forest and return back after 10 – 15 minutes without him. Thereafter they blindfolded him and drove the truck to a distance of 10 to 15 kms. and dropped him along side the road after slitting his throat. Thus, it is seen that PW-4 is eye witness to the incident as it unfolded before his eyes. He is the person who last saw Ranjit Singh being abducted and taken to the nearby forest immediately before the incident. Later on PW-4 has identified the decomposed body of Ranjit Singh on the basis of clothes and shoes worn by him. He has also identified the Appellant before the Special Executive Magistrate in the Test Identification Parade (TIP). In so far as what transpired with Ranjit Singh in the forest is concerned, admittedly there is no eye witness to the killing of Ranjit Singh but strong circumstantial evidence in the nature of “last seen together” theory, motive of dacoity and identification of Ranjit Singh’s dead body by PW-4 at the spot of incident is relied by prosecution.

6. PW-4 in his deposition (Exh.163) witnessed the incident and sustained grievous injuries. He identified Appellant and Prabhakar Gaikwad (Original Accused No.5) before the Court and also identified clothes, watch and shoes of Ranjit Singh; PW-5 - Namdeo K. Kirdat, Special Judicial Magistrate, Kalyan conducted the T.I.P. (Test Identification Parade) at Thane Central Jail.

7. Mr. Rohan P. Surve, learned Advocate appearing for Appellant has taken us through the deposition of prosecution

witnesses and assailed the dissenting view expressed by the Trial Court and submitted that prosecution has failed to prove its case beyond reasonable doubt against the Appellant. He has submitted that, PW-4 has admitted in cross-examination that he was not sure about the accused persons as he did not see them properly and hence his testimony is a weak piece of evidence; that PW-4 was left to die at a spot 10 -15 kms. away, then both the spots of incidents have not been identified; that Appellant was arrested on 11.05.1989 and the identification parade was conducted on 31.07.1989 i.e. after more than 60 days. He submitted that the prosecution story is highly doubtful since if PW-4's throat was indeed slit, then blood stains would have been recovered from the spot on the highway, but no such evidence of blood stains were found. He submitted that there is material discrepancy in the entire prosecution case as evidence given by witnesses casts reasonable doubt on collection of the evidence against Appellant. Hence he has prayed for quashing of the impugned Judgment and Order.

8. **PER CONTRA**, Mr. Ajay Patil, learned APP has submitted that in the present case prosecution has proved its case beyond all reasonable doubts on the basis of circumstantial evidence. He submitted that prosecution has led positive evidence against Appellant to show his involvement in the dacoity and murder of Ranjit Singh (deceased) and attempt to murder PW-4. He submitted that PW-4 has

witnessed the incident as he is the star witness of the prosecution case; that PW-4 has identified the Appellant during the test identification parade; that recovery and seizure of incriminating articles belonging to deceased Ranjit Singh having recovered from the spot of incident are important circumstances connected with the commission of crime and PW-4 has been a witness to Ranjit Singh's abduction; that the entire chain of circumstance thus stands proved beyond reasonable doubt and therefore the present Appeal be dismissed.

9. Before we advert to adjudicate the evidence in the present case, it will be appropriate to refer to the law relating to reappraisal of evidence in a case based on circumstantial evidence.

9.1. The Supreme Court in the case of ***Shankarlal Gyarsilal Dixit vs. State of Maharashtra***¹ has laid down the fundamental principles to be kept in mind while adjudicating a criminal case founded on circumstantial evidence. Contents of paragraph Nos.31 and 32 of the decision are relevant and read thus:

"31. It causes us some surprise that the learned Additional Sessions Judge, Akola, who tried the case, has not shown any awareness of the fundamental principle which governs cases dependent solely on circumstantial evidence. Nowhere in his judgment has the learned Judge alluded, directly or indirectly, to the principle that in a case of circumstantial evidence, the circumstances on which the prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. It is not to be expected that in every case depending on circumstantial evidence, the whole of the law governing cases of circumstantial evidence should be set out in the judgment. Legal principles are not magic incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment. The simple expectation is that the

1 1981 AIR 765 : 1981 (2) SCC 35

judgment must show that the finding of guilt, if any, has been reached after a proper and careful evaluation of circumstances in order to determine whether they are compatible with any other reasonable hypothesis.

32. The High Court, it must be said, has referred to the recent decisions of this Court in *Mahmood v. State of U.P.* [(1976) 1 SCC 542 : 1976 SCC (Cri) 72 : AIR 1976 SC 69] and *Chandmal v. State of Rajasthan* [(1976) 1 SCC 621 : 1976 SCC (Cri) 120 : AIR 1976 SC 917] in which the rule governing cases of circumstantial evidence is reiterated. But, while formulating its own view the High Court, with respect, fell into an error in stating the true legal position by saying that what the court has to consider is whether the cumulative effect of the circumstances establishes the guilt of the accused beyond the “shadow of doubt”. In the first place, “shadow of doubt”, even in cases which depend on direct evidence is shadow of “reasonable” doubt. Secondly, in its practical application, the test which requires the exclusion of other alternative hypotheses is far more rigorous than the test of proof beyond reasonable doubt.”

[emphasis supplied]

9.2. In the case of ***Sharad Birdhichand Sarda Vs. State of Maharashtra***², in paragraph Nos.153 to 158, while enunciating the law relating to appreciation of evidence in a case based on circumstantial evidence, the Supreme Court has held as under:-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in ***Shivaji Sahabrao Bobade v. State of Maharashtra***, (1973) 2 SCC 793 : 1973 Cri LJ 1783 where the following observations were made:

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure

2 AIR 1984 SC 1622 :: (1984) 4 SCC 116

conclusions.

(2) 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,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) 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.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

154. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in The King v. Horry (1952) NZLR 111, thus:

Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt : the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for.

156. Lord Goddard slightly modified the expression 'morally certain' by 'such circumstances as render the commission of the crime certain'.

157. This indicates the cardinal principle of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction.

158.decision of this Court in Deonandan Mishra v. State of Bihar 1955 Cri LJ 1647, to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor-General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:

But in a case like this where the various links as stated above have been satisfactorily made out and the

circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation... such absence of explanation or false explanation would itself be an additional link which completes the chain."

9.3. In the case of ***G. Prashwanath Vs. State of Karnataka***³, in paragraph No.11, while enunciating the law relating to appreciation of evidence in a case based on circumstantial evidence, the Supreme Court has held as under:

"11. The evidence tendered in a court of law is either direct or circumstantial. Evidence is said to be direct if it consists of an eye-witness account of the facts in issue in a criminal case. On the other hand, circumstantial evidence is evidence of relevant facts from which, one can, by process of intuitive reasoning, infer about the existence of facts in issue or factum probandum. In dealing with circumstantial evidence there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion, however, strong cannot be allowed to take place of proof and, therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. However, it is not derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturisation of actual incident, but the circumstances cannot fail. Therefore, many a times it is aptly said that "men may tell lies, but circumstances do not". In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The Court thereafter has to

3 (2010) 8 SCC 593

consider the effect of proved facts. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. 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, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court.”

10. We have heard the learned Advocates appearing for the Appellant and learned APP at length and with their able assistance perused the entire evidence and record of the case.

11. In the present case it is seen that testimony of PW-4, injured witness is most relevant. PW-4 is the cleaner of the truck; he has given his eye witness account of the incident. He has deposed that, their truck was intercepted and stopped by the car from which four persons got down and they entered the truck cabin and forced Ranjit Singh (driver) to get down; thereafter they took Ranjit Singh in the nearby forest area and after 15 to 20 minutes returned back without him; that before his hands were tied and he was blindfolded, he saw the Appellant and others with his own eyes; that he specifically identified two of the accused in the Court and the Appellant in the

T.I.P. From his cross-examination it is seen that his testimony is not impeached at all and the defence has not brought on record or proved any materiel that would create the slightest of doubt about the evidence given by him in respect of the occurrence of the incident; that he has identified the decomposed body of Ranjit Singh from his clothes, watch and shoes worn by him. By virtue of the memorandum panchanama (Exh.126), clothes and shoes of Ranjit Singh were recovered and seized by IO; his deposition proves that the four Accused took Ranjit Singh into the forest and thereafter Ranjit Singh was never seen alive. In so far as Appellant (Accused No.3) is concerned, he has been specifically identified before the court as well as during the identification parade. The most crucial circumstance is that Appellant has been identified in the test identification parade by PW-4. From perusal of his evidence it is seen that PW-4 had sufficient time to identify the Appellant immediately before the incident of murder of Ranjit Singh.

12. Learned Advocate for Appellant has relied upon the decision of Apex Court in the case of *Umesh Chandra and Ors. Vs. State of Uttarakhand*⁴ to contend that though the Appellant has been identified by PW-4 in the TIP, the same by itself cannot form the substantive basis for conviction of Appellant. We have perused the said decision. In that case, prosecution had solely rested its case on the identification

4 2021 SCC Online SC 689

of Appellant in the TIP. The Supreme Court in paragraph Nos.9 and 10 has held as under:-

“9. A test identification parade under Section 9 of the Evidence Act is not substantive evidence in a criminal prosecution but is only corroborative evidence. The purpose of holding a test identification parade during the stage of investigation is only to ensure that the investigating agency prima facie was proceeding in the right direction where the accused may be unknown or there was a fleeting glance of the accused. Mere identification in the test identification parade therefore cannot form the substantive basis for conviction unless there are other facts and circumstances corroborating the identification.

10. But more important than that, the test identification parade being a part of the investigation, has to be proved by the prosecution as having been held in accordance with law. The onus lies on the prosecution to establish that the TIP was held in accordance with law. It is only after the prosecution prima facie establishes a valid TIP having been held, the question of considering any objection to the same arises. If the prosecution has failed to establish that a TIP was properly held by examining the witnesses to the same, there is nothing for the accused to disprove. In the present case, a Magistrate is stated to have conducted the TIP. The Magistrate has not been examined. No explanation is forthcoming why the Magistrate was not examined. The only evidence available is that of PW-4 the Station House Officer that during the investigation the TIP was held in the District Jail, Nainital and he identifies the proceedings in the Court. The identification of the proceedings is irrelevant as obviously he could not have been present during the TIP. The TIP, apart of the investigation, therefore cannot be said to have been proved much less that it was held in accordance with the law. Secondly there cannot be repeated TIPs till such time that the prosecution is successful in obtaining identification of the accused.”

13. Though it is argued in defence that the test identification parade was not conducted according to the jail manual in the present case, it is seen that PW-4 had specifically identified Appellant in the Court in his substantive evidence. In support of this proposition, we may usefully refer to the decision of the Supreme Court in the case of

Ronny and ors. Vs. State of Maharashtra⁵ wherein it is held that evidence of identification of accused at the trial by the prosecution witness even without the corroboration of the identification parade was rightly relied upon by the Trial Court as well as by the High Court.

Paragraph No.24 of the decision is relevant and reads thus:-

“24. The identification of appellants by PW-29, PW-34, PW-42 and PW-45 in court for the first time without prior identification by them in the test identification parade has been the subject matter of comment. Insofar as the identification of appellants by PW-42 and PW-45 are concerned, the trial court as well as the High Court had not accepted the same but the identification of appellants by PW-29 and PW-34 had been accepted by both the trial court as well as by the High Court and in our view rightly. We have already laid down above that the identification of the accused by a witness if he had an opportunity to interact with him or to notice his distinctive features lends assurance to his testimony in court and that the absence of corroborative evidence by way of test identification parade would not be material. From the above mentioned aspect, the evidence of PW-42 and PW-45 has been rightly rejected by the trial court and the High Court as PW-42 is a rickshaw driver who had no opportunity to see closely the appellants whom he took to Rooman bungalow in the night. So also PW-45's identification of A-1 in court without his participation in the TIP has also no probative value inasmuch as he went to the shop of the witness as one of the customers and there was no specific reason why he should watch A-1 closely. But the same is not the position with PW-29 and PW-34. They were talking to the deceased Rohan Ohol at the time when the appellants came to rooman bungalow. Indeed A-1 wished the deceased Rohan who introduced A-1 as Nitin Anil Swargey. Thereafter, A-1 introduced A-2 and A-3 to Rohan Ohol and PW-29 and PW-34. They talked together for about 7-8 minutes and on Rohan Ohol's saying them to sit inside the house, they left their soiled shoes in the verandah and entered the house it can safely be presumed that had they not given the name and description of the appellants at the earliest when their statement was recorded by the police on 24th July, 1992, the defence in their searching and lengthy cross-examination would have brought on record omissions and contradictions with reference to their earlier statement given to the police. As such evidence of identification of the appellants at their trial by the said witnesses even without the corroboration of the identification parade, had been rightly relied upon by the trial court as well as by the High Court. We,

5 AIR 1998 SC 1251 : (1998) 3 SCC 625

therefore, find no illegality in the judgment of the courts below in accepting their evidence of identification.”

14. Relying on the evidence led by prosecution in respect of identifying the Appellant to be one of the key person present and involved in the crime, it is further pertinent to note that discovery of dead body of Ranjit Singh is at the instance of the Appellant; that post-mortem note (Exh.111) having been proved in evidence and admitted by defence and finding of the beheaded dead body of Ranjit Singh at the instance of Appellant leaves no room for doubt that he was killed in the incident; that Appellant alongwith other accused further attempted to murder Ajit Singh also stands proved since they (one of them) slit his neck and left him on the road to succumb to his injury.

12. On minute perusal of the evidence on record, it is conclusively established that Appellant was part of the group of Accused persons who actively participated in the murder of Ranjit Singh and attempted to murder PW-4 - Ajit Singh. Hence, we do not find any infirmity in the reasoned Judgment and Order passed by the learned Trial Court and do not find any reason to interfere with the same.

13. Criminal Appeal is accordingly dismissed.

14. Before parting with the Judgment, we would like to place on record appreciation for the efforts put in by Mr. Rohan Surve, learned

Advocate appointed by the High Court Legal Services Committee, Mumbai for espousing the cause of Appellant; he was thoroughly prepared in the matter and rendered proper and able assistance to the Court.

[MILIND N. JADHAV, J.]

[A.S. GADKARI, J.]

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