

Talwalkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 480 OF 2020

Ritesh @ Rajan Janaji Bhalerao
Age : 21 years, Occ: Nil.
R/o Indira Vikas Nagar,
Near Gulshan Bakery Deolali Gaon,
Rajwada, Nashik Road.
(At present Nashik Rd. Central ... Appellant.
Prison).

Versus

The State of Maharashtra
(At the instance of Nashik Road
Police Station) Dist. Nashik. ...Respondent.

WITH
CRIMINAL APPEAL NO. 205 OF 2021

Deepak Chhaganrao Jadhav,
Age-22 years, Occ. Nil.
R/o. Indira Vikas Nagar, Near
Gulshan Bakery Deolali Gaon,
Rahwada, Nashik Road. ... Appellant.

Versus

The State of Maharashtra
(At the instance of Nashik Road
Police Station) Dist. Nashik. ...Respondent.

Mr. Aniket Vagal, Advocate *for appellants.*

Ms. M.M. Deshmukh, APP, *for Respondent-State.*

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**M.S. SONAK &
S.M. MODAK, JJ.**

DATED :

13^{September} 2022

JUDGMENT(PER M.S. SONAK, J)

1. Heard Mr Aniket Vagal, learned Counsel for the Appellant in both the appeals and Ms M.M. Deshmukh, learned APP for the State.

2. Both these appeals challenge the Judgment and Order dated 17/12/2019 made by the learned Sessions Judge, Nashik, in Sessions Case No. 286 of 2015, convicting both the appellants for offences punishable under section 302, 201 read with section 34 of the Indian Penal Code. As a result, the appellants were sentenced to suffer imprisonment for life for the offence punishable under section 302 of the Indian Penal Code. Since both the appeals question the same Judgment and Order, learned Counsel for the parties agree that a common Judgment and Order can dispose of both these appeals.

3. One Rahul Bhalerao was also charged for the offence punishable under section 302, 201 read with section 34 of the Indian Penal Code, along with two appellants. However, by the above-impugned Judgment and Order, the learned Sessions Judge has acquitted him. Similarly, the learned Sessions Judge also acquitted the Appellant

and said Rahul for an offence punishable under section 364 of the Indian Penal Code.

4. The prosecution case is that one Smt. Surekha Pagare lodged a missing complaint on 14/2/2015 at about 11.30 a.m. concerning her son Vivek(deceased). After two days, i.e. on 16/2/2015 at about 9.15 a.m. Vivek's father Devidas stated about the appellants' quarrels about 4 to 5 days earlier and the threats to kill. On suspicion, two appellants were taken into custody. During the investigation, the appellants made a statement under section 27 of the Indian Evidence Act, pursuant to which Vivek's dead body was recovered from a septic tank in the vicinity. The post-mortem report suggested that the death was homicidal, caused due to stab injury to the neck. The investigation also revealed injuries on the body of Ritesh @ Rajan (Appellant in Cr. Appeal No. 480 of 2020).

5. Moreover, the prosecution claimed to have recovered a knife used, based on the statement of Deepak (Appellant in Cr. Appeal No. 205 of 2021). Based upon all these, the charge sheet was filed before the Judicial Magistrate First Class, Nashik Road. The matter

was then committed to the Sessions Court. As a result, by the impugned Judgment and Order, the Sessions Court has convicted two appellants and acquitted Rahul Bhalerao.

6. Mr Vagal learned Counsel for the appellants submits that evidence of the eye witness to the incident and the entire prosecution version is based purportedly upon circumstantial evidence. He, however, submits that test prescribed by the Hon'ble Supreme Court to sustain a conviction based on circumstantial evidence is not complied with by the prosecution. He relies on the Judgment in the case of **Sharad Birdhichand Sarda v/s. State of Maharashtra**¹ in support of this proposition. Mr Vagal submits that there is no clear evidence for invoking the "last seen theory". He presents that the prosecution has failed to establish, even by approximation, the timing of death. Without showing the timing of death, there is no question of invoking this theory. He, therefore, submits that this circumstance should have been excluded from consideration by the Sessions Judge.

¹AIR 1984 SUPREME COURT 1622.

7. Mr Vagal submits that no injuries were found on Dipak Jadhav. However, the injuries allegedly found on Ritesh were sufficiently explained by him. In any case, such injuries are inconsistent with the prosecution version. Therefore, this circumstance should not have been held against Ritesh.

8. Mr Vagal, learned Counsel for the appellants, submits that there are serious discrepancies regarding recovering the dead body or knife. He submits that the evidence on record, at least by a preponderance of probabilities, suggests that the appellants were arrested before any FIR would be formally lodged. The investigating agency adopting means impermissible under the law obtained the appellants' signatures on blank papers. He submits that the ingredients of section 27 of the Evidence Act are far from fulfilled in this case. Therefore, he proposes that even this circumstance could not have been held against the appellants.

9. Mr Vagal submits that it is the prosecution's version that the appellants' clothes or even the knife were attempted to burnt by the appellants. There is no

evidence to link the clothes and the knife with the crime. Therefore, the alleged recovery circumstance of these articles could never have been used against the appellants. The evidence based on such alleged recovery is vulnerable and deserves to be excluded.

10. Mr Vagal submits that since most of the circumstances relied upon by the prosecution have not been proved, the chain of circumstances essential to sustain the conviction on circumstantial evidence is snapped. Applying the principle laid down in **Sharad Birdhichand Sarda** (cited supra), therefore, the conviction and sentence of the appellants warrant interference.

11. Ms Deshmukh, learned APP defends the impugned Judgment and Order based upon reasoning reflected therein. She submits that several witnesses have clearly and cogently deposed to have last seen Ritesh and the deceased Vivek at about 1 a.m. near the public toilet on the night intervening 13 and 14 February 2015. She submits that on 14 February 2015, a missing report was lodged by Vivek's mother. There is no evidence that Vivek

was seen alive post 1 a.m. on the night intervening 13 and 14 February 2015. She submits that the "last seen theory" was legitimately invoked by the learned Sessions Judge in the said circumstances. Without any explanation forthcoming from Ritesh, this circumstance was legitimately used to convict Ritesh.

12. Ms Deshmukh submits that the prosecution proved the injuries on Ritesh, and there was no satisfactory explanation forthcoming from Ritesh. She submits that the dead body and knife used for the crime were recovered based on the Appellant's statement. Accordingly, the portion of such statement was admissible under section 27 of the Indian Evidence act. She submits that there was corroborating evidence in the form of blood-stained clothes, cell phone records, etc. Based on all these, Ms Deshmukh submits that these appeals may be dismissed.

13. The rival contentions now fall for our determination.

14. The entire prosecution case is based on circumstantial evidence. In paragraphs 152 and 153 of **Sharad Birdhichand Sarda(cited supra)**, the Hon'ble

Supreme Court of India has explained the five golden principles for evaluating circumstantial evidence. They are transcribed below for the reference of convenience:-

"152.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 & Anr. v. State of Maharashtra](#).(1973) 2 SCC 793:(AIR 1973 SC 2622) 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 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.

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

15. In this case, although the learned Sessions Judge has not enumerated the circumstances based on which he has convicted the appellants, the analysis of the impugned Judgment and order indicates that the learned Sessions Judge has based the conviction on the following circumstances:-

(a) The circumstance that Vivek's death was homicidal;

- (b) History of enmity and altercation between appellants and Vivek some days before the date of the murder;
(Motive;)
- (c) The circumstance that Ritesh and the deceased Vivek were last seen with each other on the night intervening 13th and 14th February 2015;
- (d) Recovery of Vivek's dead body from the septic tank, based on Ritesh's statement in police custody(Section 27 of the Indian Evidence Act);
- (e) Recovery of Ritesh's blood-stained clothes, based on Ritesh's statement in police custody(Section 27 of the Indian Evidence Act);
- (f) Recovery of Vivek's burnt clothes, based on Ritesh's statement in police custody(Section 27 of the Indian Evidence Act);
- (g) Recovery of knife and blood-stained clothes, based on Deepak's statement while in police custody(Section 27 of the Indian Evidence Act).

16 There can be no serious dispute about Vivek's death being homicidal. The medical officer Dr Nikhil Saindane(P.W. 11), has deposed in some details on this aspect. He opined that Vivek died because of hemorrhagic shock due to a stab injury on his neck. Apart from some suggestion that the wounds on Vivek's body might have

been caused when his body was removed from the sack in which it was dumped, there was no serious challenge, either to the deposition of P.W. 11 or the opinion expressed by him. Thus, Vivek's death being homicidal is proved beyond a reasonable doubt.

17. On the aspect of motive, P.W. 1, Vivek's father deposed that there was a quarrel between Vivek and the appellants 4 to 5 days before 13 February 2015, during which the appellants had threatened to kill Vivek. P.W.2, Vivek's mother, also deposed to the same effect. Kalpesh Gangurde (P.W.5), a friend of Vivek and Ritesh, deposed to the quarrels between Ritesh and Vivek. Abhijit Pagare(P.W.6), Vivek's brother, also deposed to the frequent conflicts between Vivek and Ritesh. Karan Gangurde(P.W. 7), again an acquaintance of both Ritesh and Vivek, also deposed to the quarrels between them.

18. P.W. 7 also spoke about some truce between Ritesh and Vivek on the date of the incident, in which Vivek was murdered. In the cross-examination, there was no serious challenge to all this evidence about the strained relationship between Ritesh and Vivek. Except for

P.W. 1, P.W.2 and P.W. 6, i.e. the parents and brother of the deceased Vivek, none of the other witnesses spoke about the strained relationship between Vivek and Deepak. Thus, the prosecution has established that at least Ritesh had sufficient motive to eliminate Vivek. However, there is no adequate evidence to establish this circumstance against Deepak beyond a reasonable doubt.

19. The prosecution offered that Ritesh and Vivek were last seen with each other on the night of intervening 13th and 14th February 2015 at about 1 a.m. near a public toilet. The prosecution has also offered that this was the last time Vivek was seen alive by any of the witnesses. On 14 February 2015, Vivek's parents filed a missing report. On 16/2/2015, they filed further information indicating that they suspected the appellants and Rahul Bhalerao of the kidnapping or disappearance of their son Vivek. Three suspects were arrested on 16 February 2015, and it is the prosecution case that, based on the statement of Ritesh, Vivek's dead body was discovered in a septic tank near a public toilet where Ritesh and Vivek were last seen together. The prosecution has thus invoked the 'last seen

theory as a circumstance against Ritesh. Admittedly, this circumstance does not apply to Deepak.

20. The evidence of Kalpesh Gangurde(P.W. 5) and, Karan Gangurde(P.W.7), Abhijit Pagare(P.W.6) is sufficient to establish beyond reasonable doubt that Ritesh and Vivek had not only attended the Haldi ceremony at Prashant Bhalerao's house on 13 February 2015, but both were seen in each others company near a public toilet at around 1 a.m. in the night intervening 13th and 14th February 2015.

21. Mr Vagal contended that P.W. 5, 6 and 7 were interested witnesses; therefore, their testimony should be discarded. He argued that the prosecution has failed to examine an independent witness, even though there is evidence that there were almost 200 persons attending the Haldi ceremony at Prashant Bhalerao's house on the night on 13 February 2015. At least P.W. 5 and P.W.7 are friends of not only the deceased Vivek but also Ritesh and his brother Abhijit.

22. Abhijit (P.W.6), Vivek's brother, was examined by the prosecution because he, too, was present for the Haldi

ceremony at Prashant Bhalerao's house. Abhijit Pagare has deposed in some details about his presence at the ceremony, about beating drums at the said ceremony, and his questioning his brother Vivek as to why Vivek was moving around with Ritesh.

23. Even the deposition of Kalpesh and Karan is quite definite and convincing. All these witnesses were near the public toilet, which is about 500 ft. away from Prashant Bhalerao's house, and it is, therefore, that at 1 a.m., they saw Ritesh and Vivek together. This was the last time anyone saw Vivek alive. Accordingly, the prosecution has proved beyond reasonable doubt the circumstance of Vivek and Ritesh being last seen together at 1 a.m. on the night intervening 13th and 14th February 2015.

24. Ritesh, despite an opportunity, failed to explain what happened to Vivek or the circumstance in which he parted company with Vivek. On the next two days, when Vivek's family members and the police searched Vivek, Ritesh is reported to have feigned ignorance. Moreover, to Abhijit's query about how Ritesh sustained injuries on his person, Ritesh is said to have given a divergent explanation. On

one occasion, he stated that he was involved in an accident on the night intervening 13th and 14th February 2015, due to which he sustained injuries. On the other occasion, he stated that he had fallen on a tiled floor and suffered injuries on the night intervening 13th and 14th February 2015. Significantly, Ritesh, in his statement under section 313 of the Code of Criminal Procedure, 1973, failed to offer any explanation in the context of the presumption which arises from the last seen theory or, for that matter, about the injuries on his person.

25. Mr Vagal, learned Counsel for the Appellants, submitted that there was no proper evidence about the precise or approximate time of Vivek's death. He submits that the medical evidence vaguely suggests the time of death as 15 February 2015. He, therefore, submits that over 24 hours passed between the time when Ritesh and Vivek were allegedly last seen together. He submits that the prosecution in this circumstance could not have invoked the last seen theory.

26. In this case, there is evidence that the missing report was filed by Vivek's parents on 14 February 2015. Soon after that, a search began. Vivek's body was discovered in a septic tank on 16 February 2015. The medical evidence suggests that it was put there approximately 30 to 35 hours earlier. This opinion is based upon the condition of the skin of the dead body. There is no evidence about Vivek being seen alive by any witness post 1 a.m. on the night of intervening 13th and 14th February 2015. Thus, in the peculiar facts of this case, the absence of medical evidence on the precise time of death is not sufficient to discard the invocation of the last seen theory.

27. The following circumstance concerns part of Ritesh's statement, which led to the discovery of Vivek's dead body in a septic tank near a public toilet. This is the same public toilet where Ritesh and Vivek were last seen at 1 a.m. on the night intervening 13th and 14th February 2015. The dead body was wrapped in a bed sheet and put in a sack. After that, it was found dumped in the septic tank.

28. The public toilet and septic tank are closed to the crematory of the Bohari community. Ritesh's statement was recorded in front of recovery panchas, and based upon his statement, Vivek's dead body was discovered in the septic tank. Therefore, the statement of Ritesh, which led to the discovery of fact and consequent recovery of the dead body, is admissible in evidence in terms of Section 27 of the Indian Evidence Act. Ritesh, except stating in 313 Cr. P.C. statement that he was made to sign some blank papers, has chosen to say nothing further on this incriminating circumstance. This circumstance, however, does not apply to Deepak.

29. There is overwhelming evidence on record that after Ritesh was arrested on suspicion on 16 February 2015 and sent for medical examination, Dr Kale(P.W.12), who examined him, found the following four injuries on his body:-

- (I) 0.5 x 0.5 cm. healed abrasion on the right arm,
- (ii) 1 x 1 cm. abrasion over the right forearm,
- (iii) 2 x 1 cm. abrasion on the right arm,
- (iv) 0.5 x 0.5. cm. abrasion on the left foot.

30. P.W. 12 deposed that the above injuries were more than 48 hours old. She opined that such injuries were possible in case of a scuffle or could be caused by a person who was defending an assault upon him. In cross-examination, no serious dent was made in the clear and convincing testimony of P.W. 12.

31. The line of cross-examination on behalf of Ritesh suggests that Ritesh desire to take up a defence about the injuries having some nexus with his fall from a motorbike on 13 February 2015 at midnight. Even P.W.6 had deposed about Ritesh, explaining the injuries as caused by accident on the night of 13 February 2015. This suggests that Ritesh does not seriously dispute the injuries were caused on the night of 13 February 2015. Suppose the injuries were caused by a motorbike fall or by accident. In that case, such an explanation should have been forthcoming in the 313 Cr. P.C. statement. Rather, Ritesh, in his statement, even denies that there were any injuries found on his person. The injuries on Ritesh's person, in the absence of explanation, is an incriminating circumstance that was correctly relied upon by the learned Sessions Judge to invoke Ritesh.

32. The recovery of blood-stained clothes, again based on the statement of Ritesh from Ritesh's house, is yet another circumstance the learned Sessions Judge relied upon. Learned Sessions Judge has not relied upon the recovery per se, upon the portion of Ritesh's statement, which led to the discovery of a fact that has nexus with the crime. Though the C.A. report states that the same was inconclusive, the report affirms that the stains were of human blood. Without any explanation from Ritesh, the statement and the circumstance were correctly regarded as incriminatory by the learned Sessions Judge.

33. The statement, which led to the discovery of Vivek's burnt clothes or some ashes, however, needs to be excluded from consideration. There is no clear evidence about the precise status of such ashes and burnt clothes. However, the non-establishment of such circumstance makes no dent in the chain of circumstances, consistent only with the hypothesis of the guilt Ritesh and his complicity in the crime with which he was charged.

34. The factual situation in **Mohd. Samir Mohd. Juber Shaikh v/s. The State of Maharashtra(Criminal**

Appeal No. 255 of 2009) is not comparable to the established fact in the present case. Therefore, the observations in paragraph 20 of the said decision will not apply in the present matter.

35. Thus, in this case, the prosecution, at least against Ritesh, has established the circumstances from which the conclusion of guilt can be reached. The facts so established are consistent only with the hypothesis of the guilt of Ritesh. The circumstances are conclusive in nature and tendency. They exclude every possible hypothesis except the one to be proved. The chain of evidence, in this matter, even if excluding one of the above circumstance, is so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of Ritesh. Thus based on the circumstantial evidence, learned Sessions Judge rightly concluded that in all human probability, the act must have been committed by Ritesh.

36. Considering all the above reasons, we think that there is no case made out to interfere with the conviction and the sentence awarded to Ritesh.

37. However, regarding Deepak's conviction, we think circumstances against him substantially fall short of the standard in **Sharad Birdhichand Sarda v/s. State of Maharashtra(supra)**. Deepak's conviction, therefore, will warrant interference. As noted earlier, the circumstance of motive is not proved qua Deepak. The last seen theory does not apply to Deepak. There were no injuries on Deepak's person. The recovery of the dead body of Vivek was not based on Deepak's statement. Learned Sessions Judge's reasoning about the impossibility of the single person being able to dispose of the dead body of a grown-up person in the manner in which it was disposed of cannot be the basis for convicting Deepak in the absence of clear and compelling evidence of his complicity. That would only be a surmise.

38. The prosecution relies upon Deepak's statement, which led to the alleged recovery of the knife with which the prosecution claims Vivek was stabbed in the neck. However, the prosecution also admits that this knife was burnt. The prosecution version is that ribit was found in Ritesh's and Rahul's house and the knife in Deepak. The CA report does not analyse any human blood on the knife

or any blood group. All these factors render it quite unsafe to sustain Deepak's conviction.

39. Prosecution also relies upon Deepak's statement leading to the discovery of certain blood-stained clothes. But, again, here, the C.A. report is inconclusive. In any case, based upon this solitary circumstance, Deepak's conviction cannot be sustained.

40. As observed in **Sharad Birdhichand Sarda v/s. State of Maharashtra(supra)**, the circumstances based upon which the prosecution seeks to establish guilt must be proved beyond a reasonable doubt. There is a distinction between "may be proved" and "must or should be proved". Besides, 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 this distance divides vague conjectures from sure conclusions.

41. Therefore, in these appeals, whilst Ritesh's conviction will have to be sustained, Deepak's conviction will have to be set aside. Accordingly, we dismiss Criminal

Appeal No. 480 of 2020 but allow Criminal Appeal No. 205 of 2021.

42. Deepak Jadhav, Appellant in Criminal Appeal No. 205 of 2021, is hereby acquitted of all the charges levelled against him. He is already out on bail. Accordingly, there is no question of his surrender. Accordingly, his bail bonds stand discharged.

43. In the facts of the present case, there shall be no order as to costs in both these appeals.

S.M. MODAK, J.

M. S. SONAK, J.