

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

CRIMINAL APPEAL NO.1046 OF 2013

Yogesh Ramdas More	... Appellant
Versus	
The State of Maharashtra	... Respondent

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**WITH
CRIMINAL APPEAL NO.569 OF 2014**

Vaishali Ishambar Maharnavar	... Appellant
Versus	
The State of Maharashtra	... Respondent

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**WITH
CRIMINAL APPEAL NO.831 OF 2013**

Jeetendra Dilip Patil	... Appellant
Versus	
The State of Maharashtra	... Respondent

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Mr. D.G. Khamkar, Advocate for the Appellants in Cri.Appeal Nos.1046/2013 and 831/2013.

Mr. Abhaykumar Apte, Advocate for the Appellant in Cri. Appeal No.569/2014.

Mr.S.S. Hulke, APP, for the Respondent-State.

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**CORAM : S. S. SHINDE AND
SARANG V. KOTWAL, JJ.**

RESERVED ON : 16th MARCH, 2022

PRONOUNCED ON : 30th MARCH, 2022

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

1 All these Appeals are decided by this common judgment as they arise out of the same case challenging the same impugned judgment and order of the trial Court. The Appellant in Criminal Appeal No.569/2013 Vaishali Ishambar Maharnavar was the original accused No.1, the Appellant in Criminal Appeal No.1046/2013 Yogesh Ramdas More was the original accused No.2 and the Appellant in Criminal Appeal No.831/2013 Jeetendra Dilip Patil was the original accused No.3, in Sessions Case No.229/2012 before the Additional Sessions Judge at Pune. For the sake of convenience, the Appellants are referred to as per their original status in the trial Court.

2 By the impugned judgment and order dated 8.7.2013 passed by the Additional Sessions Judge, Pune in Sessions Case No.229/2012. The Appellants were convicted and sentenced as follows :

- i. All the accused-Appellants were convicted for the offence punishable under Section 120-B read with 302 of the Indian Penal Code and they were sentenced to suffer rigorous

imprisonment for life and to pay fine of Rs.500/- each, in default to suffer rigorous imprisonment for six months.

- ii. All of them were convicted for the offence punishable under Section 302 read with 120-B of IPC and they were sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.500/- each, in default to suffer rigorous imprisonment for six months.
- iii. All of them were convicted for the offence punishable under Section 201 read with 34 of IPC and they were sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.250/- each, in default to suffer rigorous imprisonment for three months.
- iv. All the sentences were directed to run concurrently.
- v. They were however acquitted from the offence punishable under Sections 328, 404 read with 120-B and 34 of IPC. They were also acquitted from the offence punishable under Section 37(1) read with 135 of the Maharashtra Police Act.

3 The prosecution story, in brief, is that accused No.1 was cousin of the deceased Prabhakar Devkate. He had given financial

assistance to accused No.1 and he was demanding back his money. She was not returning the money. As per the prosecution case, on 13.11.2011, all the three accused first took the deceased to a hotel known as “Raigad Inn” situate near Tamhini Ghat. There they consumed alcohol and ate food. The deceased was given alcohol mixed with some tablets. After that he was taken to some secluded place. The accused committed his murder by assaulting him with an iron fighter on his testis and neck. His dead body was thrown in Vadmukhwadi area on Pune-Alandi Road. On the next day morning, the body was discovered. The offence was registered at Vishrantwadi Police Station vide C.R. No.268/2011. The investigation was carried out. The accused were arrested and at the conclusion of the investigation, charge-sheet was filed. The case was committed to the Court of Session.

4 During trial, the prosecution examined twenty-four witnesses. The defence of the accused was of total denial. At the conclusion of the trial, they were convicted and sentenced, as mentioned earlier.

5 Heard Shri D.G. Khamkar, learned counsel for the

Appellants in Criminal Appeal Nos.1046/2013 and 831/2013, Shri Abhaykumar Apte, learned counsel for the Appellant in Criminal Appeal No.569/2014 and Shri S.S. Hulke, APP, for the State.

6 Many of the witnesses were pancha witnesses for various panchnamas, viz., seizure of clothes of the deceased, those of the accused, seizure of register of a lodge where the accused Nos.1 and 2 had visited on some occasions, recovery of diary and cheques showing financial transactions etc..

7 PW-18 Ganesh Pawar and PW-20 Datta Angre were examined to produce the call data records.

- 8 The important witnesses in this case are:
- PW-3 Harishchandra Devkate, who was brother of the deceased and who had lodged the complaint about his missing since 13.11.2011.
 - PW-12 Santosh Kanade was the most important witness, who was a waiter at the hotel “Raigad Inn”. He had seen the accused and the deceased together in the evening on 13.11.2011.
 - PW-24 Ranjit Bhosle was the Tahsildar, who had conducted the

test identification parade to enable PW-12 Santosh Kanade to identify the accused.

- PW-17 Tarabai Devkate was the mother of accused No.1. She did not support the prosecution case.
- The other witnesses were the police officers who had conducted the investigation and the medical officers.

9 Learned counsel for the Appellants submitted that the case is based purely on circumstantial evidence. The main circumstance against the Appellants is about the 'last-seen together' theory. This evidence, in this particular case, is extremely weak as it is developed only through the evidence of PW-12. He was not a natural witness. His statement was recorded belatedly and identification by him is not proper. There was no proximity of the place where the dead body was found and the hotel at which PW-12 had seen the Appellants together with the deceased. The motive is not established. The financial transactions between accused No.1 and the deceased are not established.

10 They further submitted that, the relationship between accused No.1 and accused No.2 is not material in the present case.

That at the most will show their close association. It has nothing to do with the main offence. The cheques and the diary are not properly proved. Accused No.1 was the cousin of the deceased and due to some family dispute, she is falsely implicated. Accused No.2 was knowing her and, therefore, he is also roped in, whereas accused No.3 has no connection with any of the parties.

11 On the other hand, learned APP submitted that the circumstance of 'last seen together' is properly proved by the prosecution. On the next day of the incident, accused No.2 had taken the same car for washing. This is an incriminating circumstance. The motive is proved. There is no reason to disbelieve PW-12. The procedure for test identification parade is properly established. According to learned APP, learned trial Judge has properly appreciated this evidence and, therefore, the Appeals may not be allowed.

12 We have considered these submissions. We have perused the evidence with the assistance of all learned Counsel.

13 PW-13 Dr. Ajay Tavde had conducted the postmortem

examination between 4.00 p.m. to 5.00 p.m. on 14.11.2011. There were six injuries in the nature of contusions and abrasions. The main injuries were on the neck and on the testis. The internal injury was in the form of haematoma over strap muscles of neck. On cut section of left testis, it was found to be contused. The cause of death was mentioned as “death due to blunt injuries over testis and neck”. He opined that the injury on the neck was possible by strangulation with *odhani* and the injury on the testis was possible by a fighter, which was an iron instrument which could be worn on the fingers. He also opined that the time of death was between 12 hours to 24 hours before conducting the postmortem examination, meaning thereby it could be any time between 4.00 p.m. on 13.11.2011 to 4.00 a.m. on 14.11.2011.

In the cross-examination, he has stated that if the person had consumed liquor, it is not necessary that the liquor would be seen in the stomach. The viscera was preserved for analysis. He also admitted that no ligature marks were found on the neck.

14 The nature of the injuries mentioned in the postmortem shows that it was a homicidal death. The dead body was dumped

on a secluded spot. The question is whether the accused have committed this crime. To answer this question, the prosecution has examined many witnesses, as mentioned earlier.

15 PW-1 PSI Gajendra Sakhare was attached to Vishrantwadi police station. At about 8.15 a.m. on 14.11.2011, he received the information that a dead body was found near the road at Vadmukhwadi Amba Bus Stop on the Pune-Alandi Road. He went there and carried out the preliminary investigation. The spot panchnama was carried out. The dead body was sent to Sassoon Hospital. He lodged his FIR about finding of a dead body after the postmortem notes were received. The FIR was lodged against the unknown persons.

16 PW-2 Police Havalddhar Raghu Kakde had assisted PW-1 PSI Sakhare, in the first part of the investigation. He has stated that on 16.11.2011 Harishchandra Devkate, who was brother of the deceased, identified the dead body from the photograph. He also identified the dead body in the Sassoon Hospital.

17 PW-3 Harishchandra Devakate is the brother of the

deceased Prabhakar. He was residing with his own family, parents, sister and the deceased Prabhakar. 13.11.2011 was a Sunday, and Prabhakar was at home. This witness had gone to Nashik for delivery of goods by a tempo. On 15.11.2011 his cousin Vijay Thombre informed him telephonically that Prabhakar had left the house on 13.11.2011 and had not returned. PW-3 then came home and lodged a complaint regarding Prabhakar's missing at Mohan Nagar Police Chowky. He, then, has deposed about his identifying the dead body. He has further deposed that he had told the police that Prabhakar had given loan of Rs.3 Lakhs to their cousin accused No.1 Vaishali. Prabhakar was demanding that money back. He also gave mobile phone number of accused No.1.

In the cross-examination he could not give details about when Prabhakar had given money to accused No.1. According to him, it could be in the year 2009 to 2010.

18 PW-4 Premlal Pardeshi was a pancha for inquest panchnama and for seizure of the clothes of the deceased. He was also a pancha for the seizure of the clothes of accused Nos.2 and 3. The clothes of accused Nos.2 and 3 were seized on 18.11.2011.

They were produced by the parents of accused Nos.2 and 3.

19 PW-5 Ashish Khutwad was a pancha for arrest and personal search of all the accused on 17.11.2011.

20 PW-6 Aaftab Khan was a pancha, in whose presence, accused No.2 had taken the police to various places where they had allegedly visited during commission of this offence. However, nothing in particular was discovered pursuant to his statement. However, pointing out most of these spots is not material because nothing was recovered or discovered from there. The material aspect about this panchnama is regarding recovery of the weapon i.e. iron fighter, deceased's wallet and pointing out the place where the car was washed. The weapon was found at his instance near Morevasti Chikhali, Pune. The iron fighter was taken out from the bushes near one house named 'Viram Niwas'. Then at his instance wallet of the deceased was recovered from the open garbage near Sharad Nagar Slum. In that wallet photos of the deceased, his visiting card etc. were found. Thereafter he showed the service station where the car was washed.

As far as this evidence is concerned, the incriminating articles i.e. fighter and the wallet of the deceased were recovered from the open spaces which were accessible to all. Therefore, it cannot be held to be a strong circumstance against accused No.2. There is a separate evidence of the witness PW-14 regarding washing of the car.

21 PW-7 Rakhmaji Huchhe was a pancha, in whose presence, the car of the accused No.1 was recovered at her instance. She had also shown the washing centre where the car was washed.

22 PW-14 Appa Limbore had washed the car on 14.11.2011 at about 10.00 a.m. at his washing centre. His deposition does not show any incriminating signs in the car.

23 PW-8 Vijay Gujar was a pancha in whose presence the register of 'Sitai Lodge' was seized. The prosecution wanted to bring that register on record to show that accused Nos.1 and 2 used to visit that lodge indicating that they were in a serious relationship. However, this evidence is not of much importance in

the context of the case as assuming that they were in a relationship, that had nothing to do with the offence of murder of the deceased.

24 PW-9 Ashish Mahipal was a pancha in whose presence Rs.8,000/- were seized from the house of the accused No.3. The prosecution wanted to show that this money was paid to accused No.3 as his reward for committing the offence. However, finding of cash of Rs.8,000/- can hardly be said to be an incriminating circumstance connecting him unerringly with the crime in question.

25 PW-10 Namdev Kunjir was a pancha in whose presence, PW-3 Harishchandra produced a diary and some chques with accused No.1's name on them. Those articles were produced at the police station. However, there is no further linking evidence regarding these articles. The handwriting on those articles is not proved through an independent evidence. The articles were produced by PW-3 directly at the police station. The diary also mentions other names with different amounts against those names. The cheques do bear the name of accused No.1 and there were signatures on them, but, there is no further evidence as to why those cheques were not deposited in the bank and whether they

were actually signed by accused No.1 or that they were actually connected with her bank account. The prosecution has not led any further evidence in that behalf.

26 PW-11 Shridhar Maroli was a Manager of “Sitai Lodge”.

As mentioned earlier, that evidence is not material.

27 PW-15 Dr. Amol Borhade had given prescription for

‘Restyl tables’, used for sleeping; on 12.11.2011 to accused No.2.

The prosecution wanted to prove that those pills were mixed with alcohol and given to the deceased. However, again there is nothing to show that the viscera of the deceased showed presence of those tablets.

According to the prosecution case, PW-16 Nandram Pansare had sold three tablets of ‘Restyl 0.5’ to accused No.2 on 12.11.2011. There is no further evidence linking those tablets with the deceased. PW-16 was not knowing accused No.2 and no test identification parade was held to enable him to identify accused No.2. Therefore, this evidence of purchase of tablets and their use in the offence is not proved beyond reasonable doubt by the

prosecution.

28 PW-17 Tarabai Devkate was the mother of accused No.1 and she had not supported the prosecution case.

29 PW-18 Ganesh Pawar and PW-20 Datta Angre were the Nodal Officers, who had produced some records about the phone call details. However, learned Judge has not relied on the evidence in respect of the phone call details. Learned Judge has held that in the absence of requisite certificate, the electronic record was inadmissible and the evidence showed that the addresses of the towers kept on changing and this evidence was not held to be incriminating against the accused more particularly since the record and addresses of the tower location were undated.

30 According to the prosecution case, as stated by PW-3 Harishchandra Devkate, the mobile phone number of the deceased was '9822832108' and the mobile phone number used by accused No.1, which actually stood in the name of her mother, was '8805222775'.

31 PW-19 Pushpa Pulwal, was a pancha for seizure of the

clothes of accused No.1, which were produced by her mother.

32 PW-22 Sanjay Kharote was a Police Naik. He has deposed that the mobile phone number '8805222775' belonged to Tarabai and it was used by her daughter i.e. accused No.1. However, this information was given to PSI Kale.

33 PW-23 PI Pandurang Gofane attached to Vishrantwadi police station had conducted the investigation. He has deposed about the steps he had taken during investigation which are reflected in the evidence of deposition of various witnesses and in various panchnamas. He has deposed that the accused were in police custody remand from 17.11.2011 to 28.11.2011.

34 PW-24 Ranjit Bhosale was the Naib Tahsildar, who had conducted the test identification parade in which PW-12 had identified the accused.

35 PW-12 Santosh Kanade is the main witness in this case. He was a waiter at 'Raigad Inn' hotel, where all the accused had come with the deceased on the previous evening as per the prosecution case.

36 Besides this oral evidence, the prosecution has produced C.A. reports on record. No blood was detected in the nail clippings of the deceased. No blood was detected on the clothes of the accused and the deceased. The blood group of the accused could not be determined and the results were inconclusive. In the car neither blood nor saliva nor hair nor tissue matter was detected. The viscera did not reveal any poison. Thus, the prosecution case is based only on the following circumstances :

- i. Motive;
- ii. Recovery; &
- iii. Last seen together theory.

37 As far as motive is concerned, the prosecution has relied on the evidence of PW-3 Harishchandra Devkate to show that there was some financial transaction between the deceased and the accused No.1. However, the diary and the cheques produced before the police by PW-3 did not conclusively prove the handwriting on those diary and cheques. There is nothing to show that in the past there was any grievance made by either the deceased or the accused No.1 against each other. In the diary of the deceased,

there is mention of other persons to whom he had given money besides the accused No.1. Therefore, the motive is not sufficiently established by the prosecution.

38 As mentioned earlier, the recovery of the iron fighter and the wallet of the deceased was from open spaces, which were accessible to all. The postmortem notes do not show any external injury caused by that iron fighter. Though there was internal injury to left testis, but, there are no indications that the fighter was used on any part of the body of the deceased, which could have resulted in his death. Therefore, even this circumstance is not connected with the crime.

39 Therefore, the only circumstance which needs to be considered seriously is about the 'last seen together' theory. For that purpose, the prosecution has examined PW-12 Santosh Kanade. He was working as a waiter in the hotel 'Raigad Inn' situate in Tamhini Ghat, Adharwadi. He has deposed that on 13.11.2011 at about 7.30 p.m., three men and one woman had come to his hotel. He has given description of those persons in his deposition. He has deposed that they had consumed liquor. On

20.11.2011, the police had shown a photograph of the deceased and from that he had identified the deceased. He has deposed that on 13.11.2011, the deceased had accompanied the accused to his hotel. For some time, the accused No.1 and the deceased were in a room. All of them had consumed liquor. The deceased was unable to keep his balance while walking. They had left the place in a red car bearing registration No.MH-14-CS-7261 towards Pune. On 12.1.2012, he was called for identification parade to be held on 14.1.2012 at Yerwada Jail. He went there and according to him he identified all the accused at the parades separately held for accused Nos.2 and 3 and for accused No.1.

In the cross-examination, he was tested for his memory to remember the vehicle numbers which came to his hotel. On 13.11.2011, in the morning a bus had come there and many people had come to his hotel, but, he was unable to tell the number of that bus.

40 PW-24 Ranjit Bhosale was the Naib Tahsildar, who had conducted the identification parade.

41 PW-12 Santosh Kanade's evidence needs to be examined carefully. It is rather difficult to believe that after so many days he could remember the registration number of that particular car. He was unable to remember the registration number of the bus which had come on that very day to his hotel. Significantly nobody else working in that hotel was examined by the prosecution to corroborate his evidence. As mentioned earlier, accused were already arrested on 17.11.2011; and yet, the identification parade was held on 14.1.2012 though PW-12 was available for such parade. No explanation is offered.

42 PW-12's evidence about the 'last seen together' theory finds some support from the evidence of PW-20 Datta Angre, who was a Nodal Officer of a mobile-phone service provider. He has deposed that the CDR reports showed that the tower location of the mobile-phone number of the deceased at 8.38 p.m. on 13.11.2011 was at a open plot, MIDC, Roha, District-Raigad. The tower location of the mobile-phone number standing in the name of accused No.1's mother, which according to the prosecution case was used by accused No.1, was also at the same place at 8.55 p.m.

on 13.11.2011. Though, there was gap of about 15 minutes between these two times, there are indications that these two phones were at the same location at MIDC, Roha, District-Raigad. Therefore, there is some corroboration to the evidence of PW-12 that the accused No.1 and the deceased were together at about 8.55 p.m. on 13.11.2011 at MIDC, Roha.

There is, of course, no such tower location available for the phones used by the accused Nos.2 and 3. PW-20 has not deposed about their tower locations. Therefore, though the evidence of PW-12 is not sufficiently trustworthy, giving some concession to the prosecution case; there are certain indications that accused No.1 and the deceased were in the same area at about 8.55 p.m. on 13.11.2011.

43 The dead body was discovered at about 8.15 a.m. on 14.11.2011 within the jurisdiction of Vishrantwadi police station. Though the Doctor who had conducted the postmortem examination between 4.00 p.m. to 5.00 p.m. on 14.11.2011 has opined that the death could have occurred 12 hours to 24 hours before conducting the postmortem examination, the postmortem

notes themselves do not mention the possible time of death. The only indication in the postmortem about the time of death is regarding rigor mortis which was well marked over the entire body. There is no further explanation offered by the medical officer regarding the time of death. There, of course, can be some variation in the estimated time of death. Thus, it could have occurred anytime before 8.15 a.m. on 14.11.2011. The accused No.1 and the deceased as per their tower locations were together at about 9.00 p.m. on 13.11.2011. The Court will have to be extremely cautious in dealing with such a situation. In such cases, there is a possibility that any other person apart from the accused could have committed that offence and, therefore, the proximity of time and place is very important in the context of the theory of the accused and the deceased last seen together.

In that connection, the observations of the Hon'ble Supreme Court in such a situation, can be advantageously referred to. In the case of **Mohibur Rahman and another Vs. State of Assam**¹, the Hon'ble Supreme Court in paragraph-10 has held thus:

¹ 2002(6) SCC 715

“10. 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. There may be cases where on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own he liability for the homicide. In the present case there is no such proximity of time and place. As already noted the death body has been recovered about 14 days after the date on which the deceased was last seen in the company of the accused. The distance between the two places is about 30-40 kms. The event of the two accused persons having departed with the deceased and thus last seen together (by Lilima Rajbongshi, PW6) does not bear such close proximity with the death of victim by reference to time or place.

According to Dr. Ratan Ch. Das the death occurred 5 to 10 days before 9.2.1991. The medical evidence does not establish, and there is no other evidence available to hold, that the deceased had died on 24.1.1991 or soon thereafter. So far as the accused Mohibur Rahman is concerned this is the singular piece of circumstantial evidence available against him. We have already discussed evidence as to recovery and held that he cannot be connected with any recovery. Merely because he was last seen with the deceased a few unascertainable numbers of days before his death, he cannot be held liable for the offence of having caused the death of the deceased. So far as the offence under Section 201 IPC is concerned there is no evidence worth the name available against him. He is entitled to an acquittal.”

44 The same view was followed in a subsequent judgment of the Hon’ble Supreme Court in the case of **Ravi and another Vs. State of Karnataka**². In both these cases, though the time gap between the circumstance of last seen together and the death was

² 2018(16) SCC 102

running in few days, however, another important aspect was also about the proximity of the place where the deceased was last seen with the accused and the place from where the dead body was discovered.

45 In the case in hand before us, the prosecution has not led any evidence in respect of the distance between 'Raigad Inn' hotel, the MIDC area Roha, District-Raigad and the place within the jurisdiction of Vishrantwadi police station where the dead body was discovered. This aspect is important in the context of the present case because the last seen theory is the only circumstance alleged against the accused. As per the tower location at about 9.00 p.m. the mobile phone location of the accused No.1 as well as of the deceased was at MIDC, Roha, District-Raigad and the dead body was found at 8.15 a.m. on the next day within the jurisdiction of Vishrantwadi police station. Thus, definitely the body was not found in the vicinity where the accused allegedly were last seen together with the deceased. The prosecution has failed to travel this distance to remove that doubt regarding the evidence against the accused.

46 In this situation, it was necessary for the prosecution to have corroborated the circumstance of last seen together theory. However, as mentioned earlier, there is not a single circumstance corroborating the prosecution case in that behalf and, therefore, benefit of doubt must go to the accused. In view thereof, the judgment and order of conviction and sentence cannot be sustained. Hence, the following order:

:: O R D E R ::

- i. The Appeals are allowed. The judgment and order dated 8.7.2013 passed by the Additional Sessions Judge, Pune in Sessions Case No.229/2012 is set aside. The Appellants are acquitted of all the charges faced by them in said trial.
- ii. The Appellants – Vaishali and Jeetendra are on bail. Their bail bonds shall stand cancelled accordingly. The Appellant – Yogesh More is in jail. He shall be released from jail forthwith, if not required in any other case.
- iii. The fine amount, if paid, shall be refunded to the Appellants.
- iv. The Appellants shall execute PR bonds before the trial Court, under Section 437A of Cr.P.C., in the sum of Rs.30,000/- each (Rupees Thirty Thousand Only) with one or two sureties each, within a period of six weeks from today.
- v. Criminal Appeals are disposed of in aforesaid terms.

(SARANG V. KOTWAL, J.)

(S. S. SHINDE, J.)