



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.88 OF 2017

- 1] Ram s/o. Baban Shinde
Age: 26 years, Occu.: Mobile Shop,
R/o. Village Warudi, Tq. Banapur,
District Jalna.
- 2] Satish alias Khandya s/o Kashinath
Bhalekar
Age: 26 years, Ocu. and
R/o. As above.
- ..Appellants
(Orig. Accused Nos.1 & 2)

VERSUS

- . The State of Maharashtra,
through the Police Station, Gangapur,
Taluka, Gangapur, Dist.Aurangabad.
- ..Respondent

...
Mr.Nilesh S. Ghanekar, Advocate for Appellants
Mr.S.J.Salgare, APP for Respondent

...
**CORAM : SMT. VIBHA KANKANWADI &
ABHAY S. WAGHWASE, JJ.**

DATE : 8 SEPTEMBER, 2023

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. Appellants – Ram Baban Shinde and Satish alias Khandya Kashinath Bhalekar, who are convicted by the learned Additional Sessions Judge, Vaijapur in Sessions Case No.57 of 2014 are hereby taking exception to the Judgment and order passed on 20-01-2017 holding both of them guilty for offence under Sections 302 r/w 120B,

201 r/w 120B and individually 120B of the Indian Penal Code (IPC).

BRIEF CASE OF PROSECUTION

2. Prosecution has come with a case that deceased and accused are common friends of each other. Prior to the incident in question, deceased had extended hand loan of Rs.1,50,000/- to accused Ram as he was in dire needs of funds. It was agreed that accused Ram would repay the amount on a particular day and therefore, on the said day, deceased Ramesh put up demand. To avoid repayment, it is the case of prosecution, that accused no.1 Ram hatched conspiracy with accused no.2 Satish and took deceased towards spot. He was assaulted by means of iron rod and thereafter, to cause disappearance of the evidence, his dead body was thrown down the bridge.

On receipt of information, Police had paid visit to the spot. Even accused Ram visited the spot and some enquiry was made with him by the Investigating Officer, but he was found to be giving incomplete information and evasive answers and therefore, on further interrogation, accused Ram confessed about hatching conspiracy with accused no.2 Satish and committed murder of deceased Ramesh. Therefore, on receipt of such extra judicial confession, crime was registered and after its completion, accused

were chargesheeted.

Learned Additional Sessions Judge, Vaijapur, who was seized with matter, initially framed charge and on its denial, permitted prosecution to lead evidence during which prosecution has lead evidence of as many as fourteen witnesses and also relied on documentary evidence. After hearing both the sides and after going through the evidence of both the sides, learned trial Judge has reached to a finding that the charge is proved and thereby by its judgment and order dated 21-01-2017 sentenced both the appellants for above charge to suffer imprisonment for life and to pay fine.

Above judgment is now assailed before us in appeal.

SUBMISSIONS

On behalf of appellants :

3. On behalf of the appellants, leaned Counsel pointed out that prosecution has miserably failed to establish the charges as there is no direct evidence or incriminating circumstances in support of the case of prosecution. He pointed out that there is no evidence on the point of motive. He pointed out that there is no evidence to show that accused and deceased were in each others company to apply theory of last seen together. He pointed out that alleged extra

judicial confession, which is given to a Police Officer, is hit by Sections 25 and 26 of the Indian Evidence Act. Therefore, learned trial Court ought not to have accepted the case of prosecution. He took us through the evidence of each of the prosecution witnesses and submitted that their testimonies are not inspiring confidence and they are not lending support to each other. That there is no evidence about so called loan transaction and therefore, it is his submission that with such weak evidence, case of prosecution ought to have discarded, however, learned trial Judge, having failed to do the same, he prays to allow the appeal.

On behalf of State :

4. Per contra, learned APP for the respondent State pointed out that there is no dispute that accused persons and deceased were friends. Deceased had lent money on demand raised by accused Ram, but when it was demanded back by way of re-payment, out of annoyance and to avoid its repayment, both accused took deceased from his house. Mother and wife of deceased have deposed about accused being taken deceased out of house. Thereafter, deceased did not return alive and was rather found dead having met homicidal death. That moreover, accused Ram had already given extra judicial

confession about committing offence. There is forensic evidence. Therefore, taking such evidence into consideration, learned trial Court has committed no error for accepting the case of prosecution and according to him, there is no merit in the appeal and he prays to dismiss the same.

5. This being first appellate Court and last fact finding Court, is required to undertake the exercise of re-analyzing, re-appreciating and re-evaluating entire evidence adduced by prosecution in the trial Court.

On doing so, we have noticed that in support of its case, prosecution has examined in all 14 witnesses and their status and role are as under:

EVIDENCE ON BEHALF OF PROSECUTION

PW1 Babasaheb Laxman Waysal is Pancha to spot panchanama. His evidence is at Exh.20. Spot panchanama is at Exh.21.

PW2 Subhash Narayan Shinde is cousin brother of deceased. His evidence is at Exh.29.

PW3 Suvarna Ramesh Shinde is wife of deceased. Her evidence is at Exh.30.

PW4 Nandabai Kalyan Shinde is mother of deceased. Her evidence is at Exh.31.

PW5 Udhav Dhondiram Shinde is cousin brother of deceased. His evidence is at Exh.36.

PW6 Radhakisan Atmaram Shinde is Sarpanch of village Warudi. His evidence is at Exh.37.

PW7 Vithal Bhausaheb Shinde is a villager, and friend of cousin brother of deceased. His evidence is at Exh.38.

PW8 Ram Narayan Shirsath is a villager. His evidence is at Exh.40.

PW9 Babasaheb Gamaji Shinde is Pancha to seizure of clothes of accused and amount. His evidence is at Exh.41. Seizure panchanamas are at Exh.42 and 43.

PW10 Dr.Rupali Vishwnath Utikar is Autopsy Doctor. Her evidence is at Exh.46. Post mortem report is at Exh.47.

PW11 Arun Rangnath Dhopte is Pancha to seizure of clothes of accused Ram Shinde. His evidence is at Exh.52. Seizure panchanama is at Exh.53-B.

PW12 Balkrushna Kondiram Gaikwad is Police Patil of Kaigaon. His evidence is at Exh.64.

PW13 Raju Tejrao Bhise is villager of Warudi. His evidence is at Exh.65.

PW14 Aniruddha Shyamkumar Nandedkar (PI) is Investigating Officer. His evidence is at Exh.75.

6. In the light of charge under Section 302 of the IPC, it is necessary to see whether in the trial Court, prosecution has established death of Ramesh Shinde to be homicidal one. To get satisfied to that extent, we have visited evidence of **PW10** Dr.Utikar, medico legal expert, who conducted post mortem and who in her evidence at Exh.46 testified and narrated the surface wounds noticed by her on the person of deceased Ramesh, which are as under:

1. Lacerated wound at left rign finger 3 x 2 cm.
fracture proximal phalynx.
2. Lacerated wound at left elbow joint 2 x 2 cm.
3. Lacerated wound left wrist joint 1 x 1 cm.
4. Abrasion left knee joint 2 x 1 cm.
5. Abrasion right knee joint 3 x 2 cm.
6. Abrasion right iliac crest 1 x 1 cm.
7. Abrasion right forearm dorsal aspect 5 cxm x 2 cm.
8. Lacerated wound above right eye 4 x 4 cm with
underline fracture of frontal bone.

9. Lacerated wound just above left eye 3 x 2 cm. with underline fracture of frontal bone.
10. Lacerated wound left lateral side of nose 4 x 3 cm. with fracture of nasal bone.
11. Lacerated wound left ear 4 x 1 cm.
12. Lacerated wound left occipital region 6 x 5 cm. with underline fracture of occipital bone.
13. Crush injury complete fracture of right and left temporal bone, frontal bone, occipital bone with brain matter expelled out of the skull.

7. According to **PW10** Dr.Utikar, Autopsy Doctor, deceased Ramesh died due to head injury. She has identified post mortem report authored by her and according to her, injury no.13 which is a crush injury, is possible if a person is thrown from bridge whereas injury nos.8 to 13 to be possible by iron rod and the injuries are sufficient to cause dead.

Above witness is subjected to a very short cross-examination wherein she has answered that injuries are also possible by stone or stick and if a person falls from bridge on hard and blunt object, injury no.13 is possible.

On analyzing above evidence, there are as many as eight lacerated wounds on various parts including right eye, frontal bone, occipital region and rest are abrasions. Above nature of injuries on

distinct parts of body, in our considered opinion, are not possible on account of a single fall. Autopsy Doctor has opined that the injuries are sufficient to cause death and there is no effective cross of the Autopsy Doctor about the same. Therefore, there is no serious dispute regarding mode of death. Even in appeal, learned Counsel for appellants has not disputed mode and manner of death. Autopsy Doctor has further admitted that injuries are possible by use of iron pipe, which was apparently found lying near the dead body. Taking all circumstances into consideration, there is no hesitation to hold the death not only unnatural but even homicidal one.

8. Now let us see whether case of prosecution, as put forth by learned Counsel for the appellants, is not worthy of credence.

ANALYSIS

9. Indictment of both accused is on the accusation that they and deceased Ramesh are close friends. Accused no.1 Ram was in dire need of funds. Shortly before the incident, deceased had sold agriculture land and was possessing sale proceeds. Accused no.1 Ram borrowed hand loan of Rs.1,50,000/- from deceased on assurance to repay the same in fifteen days. Deceased extended the

hand loan and on due date demanded the repayment. Specific accusation of prosecution is that, getting annoyed by the demand and to avoid repayment, he hatched conspiracy with accused no.2 Satish and accordingly, on 02-04-2014, took deceased along with them from his house and thereafter, he was done to death by assaulting him with iron pipe and his body was thrown and dumped beneath a bridge. Hence, the charge.

10. In support of above case, prosecution has relied on above witnesses. Their being no direct evidence, case is obviously based on circumstantial evidence. The circumstances which seem to be pressed into service could be summarized as under :

- (I) Motive – Avoidance of repayment of loan.
- (II) Deceased taken from his house and both accused were last seen in the company of deceased.
- (III) Extra-judicial confession.
- (IV) Recovery of borrowed amount at the instance of accused.

11. Before testing the compatibility of above circumstances, we wish to give a brief account of the settled legal position regarding manner of appreciation of a case, which is based on circumstantial evidence.

Law with regard to conviction in case of circumstantial

evidence is fairly settled by numerous judicial pronouncements since the case of *Hanumant Govind Nirgudkar v. State of M.P.*; AIR 1952 SC 343 and *Sharad B. Sarada v. State of Maharashtra*; AIR 1984 SC 1622. Recently, in the case of *Pritinder Singh alias Lovely v. State of Punjab* [2023 SCC OnLine 811], the conditions which are required to be fulfilled for returning guilt in a case based on circumstantial evidence are given in paragraph no.16, which could be summarized as under :

“..... (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 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047]

“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.

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

It is thus settled that circumstances from which conclusion of guilt is to be drawn should be fully and firmly established beyond reasonable doubt.

FIRST CIRCUMSTANCE

12. Taking the case of prosecution into consideration, let us see whether motive is at the outset established. As case being based on circumstantial evidence, it is imperative on the part of the prosecution to establish motive.

In support of borrowing of hand loan, prosecution seems to be relying on evidence of **PW3** Suvarna, wife of deceased and **PW4** Nandabai, mother of deceased, as they are the only persons who are

aware about it. On visiting evidence of **PW3** Suvarna, we find her deposing that they had one acre land and they had sold half acre land for Rs.7,00,000/-. Rs.3,00,000/- was deposited in the account of her husband. After one and half month, her husband had given hand loan of Rs.1,50,000/- to accused no.1 for a period of fifteen days. On the end of the term, when amount was demanded, he avoided the same and took her husband on 02-04-2014 and thereafter, her husband did not return alive.

Similarly, **PW4** Nandabai is found to be testifying in her evidence at Exh.31 that accused and her son were friends. They had sold half acre of land and out of its consideration, Rs.3,00,000/- were in the account of Ramesh. Accused no.1 had taken Rs.1,50,000/- from her son by assuring to repay within 15 days. When her son demanded, accused no.1 did not repay it and took her son at 06:00 p.m. and directly she saw dead body of her son being brought to the village.

13. In **cross-examination**, **PW2** Suvarna, wife of deceased answered that she knew the bank transactions of her husband and that after depositing Rs.3,00,000/-, what amount had been withdrawn by her husband, but she is unable to give detail about it.

PW4 Nandabai, mother of deceased, on being questioned to this extent, in cross-examination answered that she is unable to give detail of the date and month of depositing amount in the bank in name of deceased son and she is unable to tell when her son had withdrawn amount from the bank.

PW14 Nandedkar (PI), Investigating Officer, has also not gathered any documents / bank record regarding deposit of Rs.7,00,000/-, withdrawal of Rs.3,00,000/- and details of currency. Consequently, there is no iota of evidence, except oral version of wife and mother of deceased, regarding hand loan taken by accused no.1 or about assurance of its repayment by accused no.1. There is nothing in black and white regarding so called agreement between accused no.1 and deceased. PW14 Nandedkar, Investigating Officer, also does not seem to have bothered to investigate and collect the so called sale transaction of land by deceased. Resultantly, there is no evidence on the point of motive, which is attributed by the prosecution that to avoid repayment of hand loan, deceased was done to death.

SECOND CIRCUMSTANCE

14. Allegations on behalf of prosecution are that on account of

demand of repayment, accused no.1 got annoyed and therefore, he conspired with accused no.2 and to do away with deceased, he was taken away from his house and murdered by use of iron pipe.

It is pertinent to note that there is absolutely no evidence on behalf of prosecution in support of so called conspiracy being hatched by both accused persons. So called borrowing of loan was obviously by accused no.1 and not by accused no.2. The question that arises is that then why at all for no reason, accused no.2 would join hands with accused no.1. Be it so, there is no evidence as to when the conspiracy was hatched, where they met, where there was meeting of minds for hatching conspiracy. The very essentials for invoking Section 120B of the IPC are patently missing from the entire prosecution evidence.

15. PW3 Suvarna, wife of deceased and PW4 Nandabai, mother of deceased are again relevant witnesses on the point of deceased being taken by accused and accused to be the last persons in the company of deceased.

On carefully going through the evidence of PW3 Suvarna and PW4 Nandabai, it is emerging that they both speak about deceased returning home from company at around 06:00 p.m. on 02-04-2014.

PW3 Suvarna speaks about only accused no.1 Ram coming and taking her husband outside. Even PW4 Nandabai, deposed and named only accused no.1 Ram to be coming to their house and taking deceased. Thus they both are not uttering or naming accused no.2 also to be with accused no.1. They both are silent by what mode deceased was taken by accused. Deceased left the house at around 06:00 p.m. – 6:30 p.m. on 02-04-2014.

PW14 Nandedkar, Investigating Officer, who lodged complaint, has received information on 03-4-2014 at around 09:10 a.m. about dead body lying beneath the bridge over Godavari river at Kaygaon. Therefore, since after almost 15 hours of deceased leaving the house, dead body is detected. According to PW10 Dr.Utikar, Autopsy Doctor, “deceased might have consumed his last meal more than 6 hours before his death”. Thus PW10 Dr.Utikar, Autopsy Doctor, in her substantive evidence, has not been asked as to atleast by approximation, how many hours prior to the post mortem, death might have occurred nor defence has bothered to question Autopsy Doctor on the point of time since death.

It is fairly settled that when theory of last seen together is attributed, it is necessary for prosecution to quote exact or atleast by approximation time since death. Here above discussed material is

missing this crucial aspect. PW3 Suvarna and PW4 Nandabai speak about deceased leaving house at 06:00 p.m. Where the meal was taken in the night is not clear. Therefore, in the light of such material on record, time gap or the proximity of time between accused last seen in the company of deceased being enormous, it is not open for prosecution to apply the said theory. Resultantly, even this circumstance fails.

THIRD CIRCUMSTANCE

16. Learned Counsel for appellants would strenuously questioned consideration of extra-judicial confession by the trial Court for recording the guilt. According to him, apparently very evidence of prosecution itself shows that accused, when was present at the spot, was enquired by Investigating Officer and since then he was under surveillance and custody of the Police. Therefore, any information given under such circumstances is apparently hit by section 25 and 26 of the Indian Evidence Act and therefore, it is banned from consideration. On this count, he invited our attention to evidence of PW14 Nandedkar, Investigating Officer. He pointed out that alleged extra-judicial confession is after a gap of almost two days and it is so evident from the very evidence of prosecution witness. For the above reasons, it is his submission that such circumstances ought to have

kept out of purview and consideration by trial Court and that has not been done and so he finds fault in the judgment under challenge.

In the light of above objection, we have visited the prosecution evidence, more particularly, PW14 Nandedkar, Investigating Officer, who deposed at Exh.75 that on behalf of State, he has set law into motion vide report Exh.76. He claims that from the persons gathered from the spot, he came to know that deceased went alongwith accused Ram and Satish towards Shirdi. He claims that he also learnt that accused Ram was also present at the spot and therefore, he took him in custody for enquiry, deposited Muddemal in Police Station and when according to him, Ram was not cooperating and giving evasive answers, on next day he arrested him. In paragraph 1 itself he stated that in enquiry with the accused he admitted the crime stating that he obtained Rs.1,50,000/- from deceased and deceased was insisting for repayment, therefore, alongwith accused no.2 Satish he committed the murder. Further accused no.1 gave disclosure and his clothes were recovered at his instance.

While under cross, PW14 Nandedkar, Investigating Officer has admitted that on 03-04-2014 he has not recorded statements of anyone from village Warudi. That he did not seek CDR of mobile of deceased. That he recorded statements of witnesses on 06-04-2014.

He admitted that he did not try to get confessional statements recorded through Magistrate.

Now let us visit the testimony of other witnesses. PW2 Subhash, cousin of deceased deposed that on 06-04-2014, Police brought accused Ram in the village and that time he admitted the crime. In paragraph 5 of cross-examination, he stated that immediately at arrival of accused Ram, Police suspected him and took him in custody. On 06-04-2014 in the evening he was brought to the village in the handcuffed condition.

PW3 Suvarna, wife of deceased while under cross-examination stated that after dead body was brought in the village, Radhakisan, Ram and Uddhav met her and she learnt about incident from them. It is pertinent to note that this witness does not speak about accused Ram being brought by Police on the evening of 06-04-2014 as narrated by PW2 Subhash . Similarly, PW5 Uddhav, who is also a cousin of deceased, has not stated anything about any extra-judicial confession given by accused. PW6 Radhakisan, Sarpanch of the village also deposed that on 06-04-2014 in his presence accused Ram told that due to money he murdered Ramesh. PW8 Shirsath deposed that accused Ram came near the spot and Police enquired him whether the vehicle belongs to him and appellant answered that

deceased had taken his vehicle but he knew nothing further. This witness also stated that at the bridge appellant Ram was taken in custody and enquiry was made with him and at that time, he told that due to money said incident has happened.

17. On carefully sifting the above testimonies, it appears that, according to PW14 Nandedkar, Investigating Officer, accused was taken in the custody on 03-04-2014 and on next day he confessed about committing crime, whereas remaining witnesses, whose evidence is dealt and discussed above, are giving contrary statements that accused Ram confessed about committing the murder, during enquiry at the spot in their presence. Either ways so called extra-judicial confession is apparently in presence of Investigating Officer, who had allegedly taken him in the custody from the very spot itself as a suspect. PW14 Nandedkar, Investigating Officer has deposed that after gathering Muddemal on the same day, accused was taken in the custody and on next day accused confessed. Therefore, here is a confession to the Police Officer at Police Station. PW14 Nandedkar, Investigating Officer has admitted that no efforts were done to take the appellant before the Magistrate to get confession recorded. Therefore, the so called extra-judicial confession is apparently hit by

Sections 25 and 26 of the Indian Evidence Act and has no evidentiary value. Even though prosecution claims that there was extra-judicial confession to persons present at the spot, their statements to that extent are not recorded promptly and apparently recorded after inordinate delay. This further contributes to credibility of the evidence on above circumstance. Therefore, said extra-judicial confession cannot be considered and act upon.

FOURTH CIRCUMSTANCE

18. Prosecution claims that while in custody, accused no.1 gave disclosure and took Pancha and Police to house of his brother namely Shyam and from there the currency taken by appellant Ram by way of hand loan was seized. It is the case of prosecution that Rs.1,50,000/- were borrowed, however, only Rs.1,00,000/- is shown to be recovered that too at the instance of brother of appellant Ram and not appellant Ram himself. Brother of appellant namely Shyam has allegedly handed over the currency and thereafter it was seized. Question arises how said handing over and seizure of money at the instance of brother of accused no.1 could be taken aid of to implicate accused Ram. PW14 Nandedkar, has admitted that he has not recorded statement of Shyam and even no receipt has been drawn regarding seizure of cash. There is no evidence to show that the

currency seized was the same currency, which was borrowed from deceased by accused no.1 and that was resultantly seized. Therefore, even so called circumstance of recovery of money comes under shadow of doubt and cannot be relied upon.

CONCLUSION

19. The sum total of the above discussion, on the basis of critical analysis and re-appreciation of evidence, is that none of the circumstances put forth by prosecution are firmly and cogently proved so as to accept the case of prosecution. Motive is not forthcoming from the evidence. Secondly, theory of last seen together has apparently failed for reasons discussed in aforesaid paragraph. So called extra-judicial confession is not voluntary being given to Police Officer and lastly, recovery of money is not shown to be the same money, which is allegedly lent by deceased.

20. We have carefully gone through the impugned judgment, it is surprising to find that the learned trial Court has not appreciated the evidence of prosecution as required by law while accepting the case of prosecution. In spite of so called extra-judicial confession being given to the Investigating Officer, the same has been considered and accepted by the trial Judge. Resultantly, finding it a fit case for

interference, appellants succeed and we accordingly proceed to pass the following order.

ORDER

(I) Criminal Appeal stands allowed.

(II) Conviction awarded to appellant no.1 - Ram s/o Baban Shinde and appellant no.2 - Satish alias Khandya s/o Kashinath Bhalekar by the learned Additional Sessions Judge, Vaijapur, District Aurangabad in Sessions Case No.57 of 2014 on 20-01-2017, after holding them guilty of committing offence under Sections 302 r/w 120B, 201 r/w 120B and 120B of the Indian Penal Code, stands quashed and set aside.

(III) The appellants stand acquitted of the offence punishable under Sections 302 r/w 120B, 201 r/w 120B and 120B of the Indian Penal Code.

(IV) The appellants be set at liberty, if not required in any other case.

(V) Fine amount deposited, if any, be refunded to them after the statutory period is over.

(VI) We clarify that there is no change in the order passed by the learned Additional Sessions Judge, Vaijapur, District Aurangabad regarding disposal of Muddemal.

(**ABHAY S. WAGHWASE**)
JUDGE

(**SMT. VIBHA KANKANWADI**)
JUDGE