

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.851 OF 2015

Sanjaykumar @ Munna Shriram Lal,
Age 35 yrs., Occ.
R/o Shivpuri Kulwani, Baldeo Nagar,
Ambala City, Haryana State.

... Appellant

... Versus ...

The State of Maharashtra,
Through its Police Station Officer,
Police Station, Beed Rural,
Tq. & Dist. Beed.

... Respondent

...

Mrs. Uma S. Bhosale, Advocate (appointed) for appellant

Mr. R.D. Sanap, APP for respondent

...

CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.

DATE : 10th FEBRUARY, 2023

JUDGMENT : [PER : SMT. VIBHA KANKANWADI, J.]

1 The appellant – original accused has challenged his conviction by
learned Additional Sessions Judge, Beed in Sessions Case No.167/2013 on

15.05.2015 after holding him guilty of committing offence punishable under Section 302 of the Indian Penal Code, 1860. He has been sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/- (Rupees One Thousand only), in default to suffer simple imprisonment for one month.

2 We have heard learned Advocate Mrs. Uma S. Bhosale, who came to be appointed to represent the appellant by order dated 13.01.2023. Earlier, another Advocate Mr. S.P. Golegaonkar was appointed by the High Court Legal Services Sub-Committee, Aurangabad. Thereafter, Advocate Mr. D.G. Kamble caused his appearance on behalf of the appellant. That means, he was engaged by the appellant himself, however, he remained absent on several occasions and, therefore, a specific order was passed on 02.01.2023 that if he remains absent, different arrangement would be made. When again he remained absent, on 13.01.2023 Advocate Mrs. Uma S. Bhosale was appointed to represent the appellant. We have also heard learned APP Mr. R.D. Sanap for prosecution and with their able assistance we have considered the Record and Proceedings.

3 API Mr. Rangnath Phule attached to Beed Rural Police Station was informed by Police Head Constable on 07.09.2013 that a Cleaner is found dead in Truck at Manzeri Phata. The said information was given

around 7.35 a.m. and, therefore, API Mr. Phule along with his police party went to the said place. They found one truck bearing No.HR-42-G-5406 was standing by the side of Beed-Solapur road near Manzeri Phata. API Mr. Phule saw from the glass of the cabin of the truck that a person was lying in dead condition having bleeding injury to his head. Both the doors of the truck cabin were closed. With the help of the people gathered the driver side window glass was broken and they could find foul smell of the dead body. The dead body was taken out and after executing inquest panchnama, it was sent for Postmortem. Provisional certificate was given by the autopsy Doctor stating that the cause of death is head injury and, therefore, API Mr. Phule lodged First Information Report against unknown person for committing offence under Section 302 of the Indian Penal Code.

4 Investigation has been carried out and it was transpired that the truck from which the dead body was found was driven by the present accused and the relatives of the deceased also given the further information. In the investigation it was transpired that the dead body was of one Navinkumar Hukumchand, R/o Fatehpur, Tq. Pundri, Dist. Kaithal (Haryana State). Accused came to be arrested and the charge sheet was filed after the completion of investigation. After the committal of the case charge was framed against him and in the trial prosecution examined in all 10 witnesses

to bring home the guilt of the accused. After considering the evidence the learned Additional Sessions Judge, Beed has held the accused guilty of committing offence under Section 302 of the Indian Penal Code. It will not be out of place to mention here that the appellant has been acquitted of the offence punishable under Section 201 of the Indian Penal Code. Hence, this appeal.

5 It has been vehemently submitted on behalf of the appellant that the learned Trial Judge has failed to appreciate the evidence properly. Though it may not be disputed, taking into consideration the testimony of PW 3 Dr. Sukhdeo Rathod and his Postmortem Report Exh.28 wherein following surface wounds were found in column No.17 :

- 1 CLW deep injury with fracture of left frontal and temporal bone about 6 cm x 5 cm irregular shape and deep in brain, with Haematoma.
- 2 Fracture of temporo mandibular left joint.
- 3 Contusion on back about 16 cm x 10 cm irregular in shape.
- 4 Scrotal swelling.

Further, other two injuries which were the fractures were found on the frontal bone of temporal region and also left side of temporo mandibular joint. There was also haematoma near those fractures and the

cause of death that was given was 'hemorrhagic shock due to head injury'; that the death was homicidal in nature. However, in order to connect the accused with the crime the prosecution has not adduced evidence which can be said to be beyond reasonable doubt. PW 7 Jitendrasingh Balwantsingh was the friend of the deceased. He used to drive another truck i.e. truck bearing registration No.HR-55-L-6321. He used to drive his vehicle between Gudgaon to Bangalore. He had started from Gudgaon on 24.08.2013 and reached Bengaluru on 28.08.2013. He went to HRC Company, from where he met accused as well as deceased. He was knowing deceased since beginning due to business, and then he says that the truck belonging to himself as well as that of deceased was loaded in said HRC company on 03.09.2013. They both started from Bengaluru around 1.00 a.m. on 04.09.2013. After going 10 k.ms. from there he had taken halt. The truck of the deceased had not taken halt, but proceeded ahead. He then started around 6.00 a.m. He reached Vijapur around 10.30 p.m. Thereafter he started around 12.30 a.m. from that place and reached near Beed ghat around 6.30 to 7.00 a.m. He found the vehicle of the deceased was standing there. When he parked his vehicle, accused immediately went towards him. He asked accused as to why the vehicle has stopped. Accused told him that they have halted for nature's call. He then asked about deceased. Accused told him that he is sleeping. This witness started to go ahead by saying that

they will wake deceased up and would take tea together, but even after he proceeded further accused did not go along with him. After waiting for some time this witness went head. He then says that on 07.09.2013 he had received phone call from the uncle of the deceased making inquiry about the vehicle of the deceased. He gave information that the said vehicle was at Beed ghat and accused was in the vehicle. Uncle of the deceased then informed him that deceased has been murdered. Thus, from the said testimony of PW 7 Jitendrasingh it cannot be said that his statement about the presence of the accused at the said place can be taken as based on last seen together theory. Nobody has seen the incident and the case of the prosecution was based on circumstantial evidence. The another piece of evidence on which the prosecution intended to rely is the discovery of the hammer under Section 27 of the Indian Evidence Act. The said discovery is unbelievable. Further, discovery is stated to be that of shirt of the accused from the same truck. It cannot be taken as a discovery. The informant PW 8 Mr. Phule ought to have checked the entire truck when they recovered dead body from the said truck. Except these witnesses the other witnesses are formal in nature. Though PW 5 Gopal is the person who has stated that accused had taken hammer from his puncture shop at Manjarsumba. He says that it was taken around 5.30 a.m. The hammer was taken under the pretext of repairing pata of the truck. Interesting point to be noted is that the said

hammer was discovered from the shop of PW 5 Gopal itself. For the circumstantial evidence the prosecution has not even proved the motive and, therefore, the learned Trial Court totally erred in convicting the accused on the basis of such evidence. The appeal deserves to be allowed by setting aside the impugned Judgment.

6 Per contra, the learned APP strongly opposed the appeal and supported the reasons given by the learned Trial Judge while convicting the appellant. He submitted that PW 7 Rajendra Singh had seen the accused around 6.30 to 7.00 a.m. and as per the testimony of PW 5 Gopal, accused had taken the hammer from his shop around 5.30 a.m. Therefore, it can be said that the accused was seen with the deceased lastly. Thereafter there was discovery of hammer as well as blood stained clothes from the accused and the said memorandum has been proved by examining PW 2 Vaijinath Navle. Accused has not explained as to how blood stains were found on his shirt. Therefore, there was sufficient evidence to convict the accused. No interference is required in the impugned Judgment.

7 This Court being the Appellate Court has to re-appreciate the evidence to see whether the Trial Court was justified in arriving at the said conclusion that accused is the author of the crime. The first and the foremost

fact that is required to be considered is the prosecution has not examined the owner of the truck. Whether accused was employed as Driver or Cleaner has not been clarified. The information that was received to PW 8 API Mr. Phule was that the Cleaner has been found murdered in the truck. If the accused was the Driver and he had committed the murder, how he could have left the truck at that place and went to Ambala in Haryana, is a question. PW 8 Mr. Phule says that he had arrested the accused from Ambala in Haryana. It would have been the usual practice of the owner of the truck to get information from its truck drivers about the whereabouts of the truck and whether there is any difficulty to them. When the trucks, according to PW 7 Jitendrasingh, had started from Bengaluru on 04.09.2013, then what was the destination that was given to the vehicle of the accused and when the said truck was supposed to reach there, all these facts have been kept vague. There is no direct evidence and prosecution is heavily relying on the circumstantial evidence. Under such circumstance, each segment of the chain of the circumstantial evidence should unequivocally indicate that the accused is the author of the crime. Further, as regards the circumstantial evidence, the prosecution should prove even the motive also. Here, there is absolutely no evidence on the point of motive. PW 7 Jitendrasingh had stated that both the trucks left Bengaluru on 04.09.2013 at about 1.00 a.m. He halted after 10 k.ms., but truck of the deceased went ahead. He found

the truck of the deceased parked at 6.30 to 7.00 a.m. Then he says about meeting of the accused, but surprisingly when he says that he was knowing the deceased; yet, he did not try to check in the said truck as to whether really the deceased was in the truck and what was his condition. He says that accused told him that deceased is sleeping in the truck and he wants the Court to believe that he believed in the words of accused. He also states that he told accused that they would take tea and would wake up the deceased, but accused did not follow him. He does not say that he went towards accused to ask as to why he is not following him and why they had not thought of waking up deceased for tea. Everything is kept vague and, therefore, his testimony is of no use at all. In his cross-examination he has clearly stated that he had not seen deceased in Beed ghat. He had not seen deceased as well as the accused together in Beed ghat. He also admitted that there are many hotels and shops on the top of the ghat and he had found the truck of the deceased at the end of the ghat. With these admissions in the cross-examination the learned Trial Judge ought not to have considered his testimony on last seen theory. In **Uttar Pradesh vs. Satish** reported in (2005) **Supreme Court Cases 114**, it has been observed that -

“The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of

any person other than the accused being the author of the crime becomes impossible.”

Further, in **S. Kaleeswaran vs. State** reported in **2022 SCC OnLine SC 1511** also it is observed by the Hon’ble Supreme Court that -

“It is well settled that if there is considerable time-gap between the persons seeing together and the proximate time of the crime, the circumstances of last seen together, even if proved cannot clinchingly fasten the guilt of the accused.”

The said principle reiterated in **State of Goa vs. Sanjay Thakran [(2007) 3 SCC 755]** has been again reiterated in this case. Thus, from the testimony of PW 7 Jitendrasingh we will have to say that he had seen deceased and accused alive together only between 28.08.2013 to 1.00 a.m. of 04.09.2013 at Bengaluru. The dead body was found on 07.09.2013 and, therefore, the theory was that pressed into service by the prosecution i.e. last seen theory fails.

8 Now, as regards the second piece of evidence on which the prosecution case was rested is the discovery of the weapon as well as shirt of the accused. As per PW 8 Mr. Phule, he broke open the glass of the cabin of the truck on 07.09.2013. They had taken the dead body out of the truck. Then it was expected that at the time of drawing spot panchnama he along

with the panchas would have seen every corner of the cabin of the truck. He has not given any explanation for not carrying out the search. That discovery is therefore unbelievable. Secondly, there is discovery of hammer under Section 27 of the Indian Evidence Act and in order to prove the same the prosecution has examined PW 2 Vaijnath Navle, PW 5 Gopal and PW 8 Phule. Interesting point to be noted is that though all the three persons were corroborating each other on major aspects to the testimony of PW 1 Datta, who was the panch at the time of taking out the dead body from the cabin of the truck, it was suggested that police had seized one iron tommy and blood stained seat cover in his presence. He denied the same. Questions in the nature of cross were allowed to be put by learned APP to PW 1 Datta and he was shown with Article No.7 tommy. He flatly denied that it was seized in his presence. Now, the question is whether the article which was used in the commission of the crime was tommy or hammer. If tommy was already available in the cabin of the truck, then, why the accused should borrow hammer from the puncture shop, is a question. If we consider the testimony of PW 5 Gopal, it can be seen that he is running a puncture removing shop near Kanhaiyya Dhaba at Manjarsumba. He says that on one day around 5.30 a.m. a person had gone to his shop to demand hammer for repairing of pata. He says that he had given the hammer (hatoda) with direction to that person that he should return it to him. He does not say that the said person

had returned the said hammer to him after sometime. But then says that the same person was brought before him by police after about 10 to 15 days and then the said person gave hammer by taking it out from below the cot. Now, it is surprising that how PW 5 Gopal could not notice the hammer at any earlier point of time. Secondly, he does not say that, that hammer was concealed by the accused without his knowledge. In his cross-examination he has stated that accused has returned the hammer after 20 minutes of taking away and he had kept it under the cot. He had not seen the hammer at that time, but it was required by him around 9.30 a.m. and then he had seen it. He had not noted any blood stains on the same. Therefore, when the accused had returned the hammer 20 minutes thereafter, it cannot be said that it is a discovery by the accused. It does not fall within the parameters of Section 27 of the Indian Evidence Act. No doubt, Section 27 of the Indian Evidence Act makes the fact admissible in evidence which is discovered by the accused and it does not relate to a particular object. But even as regards the fact is concerned, PW 5 Gopal had the knowledge that accused had kept the hammer below the cot. Therefore, it is not a discovery.

9 It appears that PW 8 API Mr. Phule in over enthusiasm and to have some evidence, without verifying those pieces of evidence, which have come before him, has relied upon it and filed the charge sheet. Such

approach is definitely dangerous. The satisfaction of the Investigating Officer is the important factor.

10 Definitely, we agree with the fact that the testimony of PW 3 Dr. Sukhdeo Rathod and his Postmortem Report Exh.28 was proved by the prosecution that death of deceased Navinkumar was homicidal in nature, however, the other evidence that has been produced was absolutely weak and ought not to have been relied by the learned Trial Judge. None of the family members of the deceased have been examined to prove the motive. Therefore, we come to the conclusion that prosecution had miserably failed in proving that the accused/appellant had committed murder of deceased Navinkumar. The conviction awarded to the accused deserves to be set aside. Accordingly, it is set aside by allowing the appeal. Hence, following order.

ORDER

1 The appeal stands allowed.

2 The conviction awarded to the appellant – Sanjaykumar @ Munna Shriram Lal in Sessions Case No.167 of 2013 by learned Additional Sessions Judge, Beed on 15.05.2015 for the offence punishable under Section 302 of the Indian Penal Code, stands set aside.

3 The appellant stands acquitted of the offence punishable under Section 302 of the Indian Penal Code. He be set at liberty, if not required in any other case.

4 Fine amount, if deposited, be refunded to the appellant after the statutory period.

5 It is clarified that there is no change in the order passed by the learned Additional Sessions Judge, Beed, regarding disposal of muddemal.

6 The fees of learned Advocate Mrs. Uma S. Bhosale, who was appointed to represent the cause of the appellant, is quantified at Rs.10,000/- (Rupees Ten Thousand only), to be paid by the High Court Legal Services Sub Committee, Aurangabad.

(Abhay S. Waghware, J.)

(Smt. Vibha Kankanwadi, J.)