



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 499 OF 2018
WITH
CRIMINAL APPLICATION NO. 3368 OF 2023

Vishal Changdeo Gaikwad
Age : 25 years, Occ : Labour,
R/o. Chikhali, Tal : Haveli,
Dist. Pune.

... Appellant/Applicant

Versus

The State of Maharashtra

... Respondent.

...
Mr. Vikram S. Undre, Advocate for Appellant/Applicant.
Mrs. V. S. Choudhari, APP for Respondent – State.
...

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

DATED : 29th NOVEMBER, 2023

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

1. Appellant, a convict for offence under section 302 of Indian Penal Code takes an exception to the judgment and order passed by learned Additional Sessions Judge, Ahmednagar dated 22.06.2018 in Sessions Case No. 220 of 2016 awarding life imprisonment.

2. In short case of prosecution is that, appellant Vishal was addicted to liquor and used to harass his parents. Therefore, he was sent to stay with his maternal grandparents at Telangshi.

He worked as a driver, but used to regularly demand money for liquor from deceased grandfather.

3. On 17.02.2016, according to prosecution, he demanded money from deceased grandfather, who refused to comply and therefore, it is the case of prosecution that, appellant Vishal assaulted his grandfather by means of stone as well as spade and committed his murder. It is further case of prosecution that, after the incident, appellant himself gave extra judicial confession to his mother, and therefore was arrested and on investigation charge-sheeted and tried and finally held guilty by the learned trial court.

Precisely, the said judgment and order of conviction which is now assailed before us by way of present appeal.

SUBMISSIONS

On behalf of Appellant :-

4. Learned counsel for appellant would submit that, there is no evidence either direct or circumstantial to connect appellant with the death of deceased Chaturbhuj. He submitted that, prosecution is only relying on so called extra judicial confession which is admittedly and legally weak type of evidence. That, except so called extra judicial confession, there is no other evidence. He pointed out that, nobody has seen deceased and

accused together that day and further there is no evidence about appellant demanding money from deceased and that too for a liquor. Therefore, it is his submission that, evidence of prosecution was very weak. Though prosecution has adduced evidence of wife of deceased, mother of appellant, police patil etc., they have no knowledge about the actual occurrence as they were all distinctly placed and have received mere telephonic information. He pointed out that, even FIR is on hearsay information. Learned counsel pointed out that, though there is recovery and scientific evidence, reasons are inconclusive. That, with such quality of evidence, it is his submission that, conviction ought not to have been recorded and rather benefit of doubt ought to have been extended as the case was not proved beyond reasonable doubt. For all above reasons, he prays to allow the appeal by setting aside the judgment under challenge.

On behalf of State :-

5. In reply, learned APP while supporting the judgment and order under challenge, submitted that, very mother and grandmother of appellant have deposed about his conduct, bad vices and about harassment to them by appellant for not meeting his demand of money to drink. That, appellant was put up with deceased. On the day of occurrence also, they both were together in the house. Appellant is solely responsible for homicidal death of his

grandfather. It is pointed out by her that, moreover, appellant himself gave extra judicial confession to his mother. She has deposed against him and thus it is her submission that charges are proved and there is no error on the part of trial Judge in convicting and, according to her, there is no merit in the appeal and so she prays that the same be dismissed.

6. We have re-appreciated the entire evidence both oral and documentary adduced by prosecution. There is no dispute raised before us regarding manner of death of Chaturbhuj. PW6 Dr. Yuvraj Kharade, autopsy doctor opined about death to be due to head injury. For above reasons, we need not re-examine the point about homicidal death.

7. Now we proceed to see whether as claimed by prosecution in the trial court appellant is the author of fatal injuries on deceased.

8. Precise case of prosecution seems to be that, appellant was addicted to liquor and he used to demand money for the same and harassed his parents, and therefore he was sent to stay with grandparents. According to prosecution, on 17.02.2016, he demanded money from grandfather and on refusal, he hit with the stone on the head as well as spade and further himself telephoned

mother about killing her father. Thus, prosecution has come with a case of availability of extra judicial confession.

9. Before advertig to ascertain evidentiary value of extra judicial confession, we wish to get satisfied whether as claimed by prosecution appellant was put up with deceased.

10. **PW1** Arjun, who is the informant and also a police patil, his evidence at Exh.17, stated that, he knew appellant as he is grandson of deceased. However, what this witness has deposed that he knew appellant because he used to come to the village. He does not speak about appellant residing with deceased as is claimed by the prosecution.

PW2 Vinita, mother in her evidence speak about appellant son consuming liquor, committing thefts, and therefore, sent to stay with her parents, i.e. appellant's maternal grandparents since one and half year.

PW3 Jankabai, grandmother also states about appellant or grandson staying with them since one and half years and he driving vehicle. Therefore, mother and grandmother both are confirming that appellant was staying at Telangshi.

11. PW2 Vinita mother is resident of Chikhali, whereas, PW3 Jankabai grandmother though a resident of Telangshi, she was at Gavalwadi to her daughter's place to attend the function and therefore there is no witness who had seen appellant and deceased together on 17.02.2016. Immediate neighbours are not examined. No witness is examined confirming both appellant and deceased to be together that fateful day so as to accept prosecution story that appellant while staying with deceased demanded money from deceased grandfather and on its refusal, committed his murder.

12. There being no direct evidence, case is admittedly based on so called extra judicial confession and circumstantial evidence.

13. We would advert to the aspect of extra judicial confession at later point, but we have not noticed any circumstance to show that on a fateful day appellant was in the house and in the company of deceased and he further demanded money from deceased that too for consuming liquor. No witness has been examined to demonstrate so called bad vice of appellant and that he was addicted to liquor. The place where he purchased liquor or

visited for consumption has not been inquired and investigated by the investigating machinery. Mere death of deceased in his own house in absence of evidence about presence of appellant also in the house would not be sufficient to connect the appellant to the death of his grandfather. No other incriminating circumstances except scene of occurrence has been put-forth by prosecution.

14. The only trump card for prosecution is so called extra judicial confession. Before touching the merits of the case, on such aspect we wish to give a brief account of the settled legal position regarding evidentiary value of extra judgment confession.

Whenever there is extra-judicial confession, it is fairly settled legal position that there has to be other incriminating material or circumstances to connect a person for an offence and that extra-judicial confession is weak type of evidence. On the sole basis of extra-judicial confession, conviction cannot be recorded. It has been held in numerous cases that when extra-judicial confession is surrounded by suspicious circumstances, its credibility become doubtful and it loses its importance. After dealing with numerous previous cases, Hon'ble Apex Court in the case of *Sahadevan and Another v. State of Tamil Nadu; (2012) 6 SCC 403* held as under:

“16. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused.

i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

ii) It should be made voluntarily and should be truthful.

iii) It should inspire confidence.

iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

vi) Such statement essentially has to be proved like any other fact and in accordance with law.”

Very recently the Hon’ble Apex Court in the cases of ***Nikhil Chandra Mondal v. State of West Bengal***; 2023 LiveLaw (SC) 171, ***Pawan Kumar Chourasia v. State of Bihar***; (2023) LiveLaw (SC) 197 and ***Moorthy v. State of Tamil Nadu***; 2023 LiveLaw SC 679 touched the above aspect of evidentiary value of extra-judicial confession.

15. In the light of above requirements, if we examine the evidence in hand, it transpires that there is alleged extra judicial confession by appellant to his own mother that too on phone. However, investigating machinery has not gathered and placed on record CDR to substantiate alleged extra judicial confession given on phone to mother. Details of phone of appellant as well as his mother are not placed on record to demonstrate its use. Even according to mother, phone call was received from her son Vishal on 16th and she claims that he told her that her father is killed and to go and see and mother later on claims to have informed her mother i.e. PW3 Jankabai and then PW3 Jankabai learnt from her other daughter Urmila about receiving phone call from PW2 Vinita that deceased was killed and to go and confirm it. Apparently PW1 Arjun has lodged report on 17.02.2016 i.e. on receipt of information received from one Haridas, but even said person is not examined by prosecution.

16. It is also pertinent to note that, mother claims that her son - appellant informed about killing her father by stone and spade, but PW1 Arjun in his substantive evidence claims about visiting house and finding deceased lying on the cot in injured condition with a stone near the pillow and in chief he further denies coming across any other articles at such time. But, during

second visit he claims to have come across spade which was also blood stain kept in standing position. However, PW7 Avinash pancha to spot panchanama claims that, the spot where there was a tin cattle shed, a stone was near the pillow on the bed, but spade was lying at the distance of 4 to 5 feet away from the cot. Resultantly, informant and pancha witnesses are giving different locations of article spade rendering their evidence contradictory.

17. The sum total of above evidence shows that, except extra judicial confession regarding which there are serious doubts, there is no other strong, incriminating evidence on circumstance so as to base conviction on the basis of extra judicial confession.

18. We have gone through the impugned judgment under challenge. Learned trial Judge has straightaway accepted extra judicial confession without going into above aspects discussed by us. In absence of cogent, reliable and independent evidence about presence of appellant in the house and in the company of deceased and further in absence of any evidence about appellant demanding money for liquor, case of prosecution seems to be accepted. It seems that learned trial court has straightaway accepted the evidence of PW2 Vinita and held that, there is extra judicial confession to none other than mother. However, as discussed

above, there is no evidence about telephonic conversation during which alleged extra judicial confession was given.

19. Therefore, in our opinion, appreciation is improper and even conclusion drawn is erroneous. Law on evidentiary value of extra judicial confession has not been applied and therefore, we constrained to interfere and accordingly we proceed to pass following order :-

:: ORDER ::

- I) The appeal stands allowed.
- II) The conviction awarded to the appellant - Vishal Changdeo Gaikwad in Sessions Case No.220 of 2016 by learned Additional Sessions Judge, Ahmednagar on 22.06.2018 for the offence punishable under Section 302 of Indian Penal Code stands quashed and set aside.
- III) The appellant - Vishal Changdeo Gaikwad stands acquitted of the offence punishable under Section 302 of Indian Penal Code.
- IV) He be set at liberty, if not required in any other case.
- V) The fine amount deposited, if any, be refunded to the appellant after the statutory period.
- VI) We clarify that there is no change as regards the order in respect of disposal of muddemal.

VII) In view of disposal of Criminal Appeal No.499 of 2018,
Criminal Application No.3368 of 2023 stands disposed
of.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)