

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

**CRIMINAL APPEAL NO. 54 OF 2019
WITH
INTERIM APPLICATION NO. 2592 OF 2022
WITH
INTERIM APPLICATION NO. 899 OF 2019**

Pandhari Laxman Shendge

Age : 25 Years,

R/o. Khwaja Vasti, Miraj, Dist. Sangli

Presently at Kolhapur Central Prison,

Kalamba, Dist. Kolhapur

...Appellant/Applicant

Versus

State of Maharashtra

Through Mahatma Gandhi Chowk

Police Station, Miraj

...Respondent

**WITH
CRIMINAL APPEAL NO. 89 OF 2019
WITH
CRIMINAL APPLICATION (APPA) NO. 1326 OF 2018
WITH
INTERIM APPLICATION NO. 1305 OF 2019**

Rahul Alias Gorya Pravin Sinha

Age : 24 Years,

Presently at Kolhapur Central Prison,

Kalamba, Dist. Kolhapur

...Appellant/Applicant

Versus

The State of Maharashtra

At the instance of Mahatma Gandhi

Chowk Police Station, Miraj

...Respondent

Mr. Amit Mane for Appellant in Appeal No.54 of 2019 and Applicant in Interim Application No.2592 of 2022.

Ms. Nasreen S. K. Ayubi, Appointed Advocate for Appellant in Appeal No.89 of 2019 and for Applicant in Interim Application No.1305 of 2019 and 1326 of 2018.

Mrs. M. H. Mhatre, APP for Respondent – State.

CORAM : A. S. GADKARI AND
PRAKASH D. NAIK, JJ.
RESERVED ON : 24th FEBRUARY, 2023.
PRONOUNCED ON : 18th JULY, 2023.

JUDGMENT : (PER – PRAKASH D. NAIK, J.)

1. The Appellants were prosecuted for offences under Sections 302 r/w 34 of Indian Penal Code (for short 'IPC') in Sessions Case No.16 of 2016 before the Court of Sessions at Sangli. They were convicted vide Judgement and order dated 30th June, 2018 passed by the learned Additional Session Judge, Sangli and sentenced to suffer life imprisonment.

2. The prosecution case is as follows :-

Informant Maya and deceased Gajanan were in relationship. Gajanan was addicted to liquor. He committed theft. There were differences between them. They separated from each other about two years prior to the incident in question. On 1st August, 2015 dead body of Gajanan was found near the railway track. Maya identified the body as that of Gajanan. In her statement to the Police she stated that, she had seen Gajanan having quarrel with two persons under the influence of liquor. Gajanan called them 'Bhadkhau'. They were angry. They assaulted Gajanan in front of grocery shop of Yuvraj. All of them went towards railway bridge. Police investigated the matter and arrested

Accused. Stone used for giving blow on Gajanan was seized. Clothes of the Accused were seized. Charge-sheet was filed for offence punishable under Section 302 of IPC.

3. Charge was framed. Prosecution examined 15 witnesses. PW-1 Maya Rajput is the first informant. PW-2 Vishal Vinayak Gosavi is Pancha of spot Panchanama. PW-3 Arjun Satvekar is the Panch witness for seizure of clothes of victim. PW-4 Rahim Dhanawade is the Panch witness for statement and recovery of clothes from Accused No.1. PW-5 Mayur Sathe is the Panch witness for statement and recovery of clothes from Accused No.2. PW-6 Sanjay Durve is the witness to whom Accused No.2 made extra judicial confession. PW-7 Mustafa Shaikh is the owner of hotel in which Accused were working. PW-8 Ranjana Bhajnavale is sister of deceased. PW-9 Ajmuddin Shaikh, Panch for inquest Panchanama. PW-10 Shamrao Sawant is Executive Magistrate who conducted test identification parade. PW-11 Subodh Gore is photographer and video grapher. PW-12 Dr. Surekha Gawade is Medical Officer who conducted postmortem. PW-13 Dr. Arati Apate is the Medical Officer who examined the Accused. PW-14 Dr. Shital Shinde, is the Medical Officer who collected blood samples on the stone. PW-15 Sangeeta Mane is Investigating Officer.

4. Learned Advocate for Appellant in Criminal Appeal No.54 of 2009 submitted as under :-

i. The prosecution has failed to establish the involvement of the Appellant/Accused No.1 in this case. The evidence of the witnesses suffers from discrepancies. The case of the prosecution is based on circumstantial evidence. The chain of circumstances is not proved. Evidence of complainant suffers from doubt. Test identification parade was conducted belatedly. After filing of charge-sheet no permission was sought for bringing on record the memorandum of test identification parade which was recorded after the charge-sheet was filed. PW-1 had admitted that, she did not inform the Police that two persons took deceased with them to railway bridge and could not give explanation for not stating the same. She could not provide the date on which she was called at Police Station at 7:00 p.m. She did not state that the time when the incident of abuses took place and when the deceased was taken to railway bridge.

ii. PW-2 stated that, the spot shown by Arun Khatib on 1st August, 2015. However, it is not categorically stated that it was a spot of incident. The prosecution has relied upon the extra judicial confession. PW-6 stated that Accused No.2 was

working in hotel Anarkali as cook and also working with Accused No.2. He admitted that he is illiterate. He cannot read and write. He did not report the incident to Police about quarrel between Accused and Gajani. The extra judicial confession cannot be relied upon. It is weak piece of evidence. The theory of last seen together suffers from doubt.

iii. Reliance is placed on the following decisions :

i. *State of Rajasthan V/s. Raja Ram, (2003) 8 SCC 180.*

ii. *Sahadevan and Another V/s. State of Tamil Nadu, (2012) 6 SCC 403.*

iii. *Hari Charan Kurmi And Jogia Hajam V/s. State of Bihar, 6 SCR 623.*

iv. *Dana Yadav @ Dahu and Others V/s. State of Bihar, (2002) 7 SCC 295.*

v. *Shahaja @ Shahajan Ismail Mohd. Shaikh V/s. State of Maharashtra, 2022 SCC Online SC 883.*

5. Learned Advocate for Appellant in Criminal Appeal No.89 of 2019 adopted the submissions of learned Advocate in other appeal.

6. Learned APP submitted that, although there is no eye witness to the incident, the circumstances brought on record. Proves the involvement of the Appellants. The evidence of PW-1

shows that the Appellants were quarreling with the deceased and all of them went together towards railway bridge. She has identified the Appellants as persons who were quarreling with deceased. There is evidence of extra judicial confession made by one of the Appellant. Stone used for giving blow on the deceased was seized. There is strong circumstantial evidence against Appellants.

7. There is no eye witness to the incident of assault and murder of deceased Gajanan. The case is based on circumstantial evidence. Prosecution is relying on circumstance of last seen together and extra judicial confession by one of the Accused.

8. As per the legal precedents of the Apex Court the foundation of 'last seen together' theory is based on principles of probability, cause and connection. Where a fact has occurred with series of acts, preceding or accompanying it, it can safely be presumed that the fact was possible as a direct cause of the preceding or accompanying acts, unless there exists a fact which breaks the chain upon which the inference depends. 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 Accused and the crime.

9. It is the settled position of law that, extra judicial confession, if true and voluntary, can be relied upon by the Court to convict the Accused. It would depend on the nature of the circumstances, the time when the confession is made and the credibility of witness who speak for such a confession. The Court has to be satisfied that it is voluntary and not result of inducement, threat or promise. The extra judicial confession is a weak piece of evidence by itself. It has to be examined by the Court with great care and caution. It should inspire confidence. It should be voluntary and truthful. It attains greater credibility and evidentiary value, if it is supported by chain of cogent circumstances as further corroborated by other evidence for conviction on extra judicial confession, it should not suffer from any material discrepancies and inherent in probabilities.

10. We have examined the evidence on record to ascertain whether there is sufficient evidence to convict the Appellants for the charged offences.

11. PW-1 Maya Raju Rajput has deposed that, after death of her husband, she was acquainted with Gajanan Vilas Paras alias Gajani (Deceased). He stayed with her for two years. However, subsequently he was addicted to liquor and indulging in commission of theft. In view of his conduct, she told him not to

visit her house. After a period about two years, she saw him having quarrel with two persons. They were abusing him. They took him towards railway bridge. She returned home. On the next day she saw the crowd near the bridge. She saw the dead body of Gajani. She identified the same. She noticed injuries on his person. Police arrived at the spot and prepared Panchanama etc., and thereafter took away the dead body. The Police visited her house. She was questioned whether she had seen anyone beating Gajani. She told the Police that she did not see anybody while beating Gajani. She was having suspicion regarding those two persons having quarrel with Gajani. After three months of incident one person came to her house and instructed her to visit Sangli Jail. She visited Sangli. She identified the man who was having blackish complexion as the one with Gajani on the previous day of incident. She also identified another person having quarrel with Gajani on the earlier day of incident. She know names of those persons. They are Pandhari and Gorya. She identified accused sitting in the Court. She identified the accused having blackish complexion as Pandhari and fair complexion as Gorya. In the cross-examination it was deposed that few cases were registered against Gajani in the past for committing offence of theft. Her children were aggrieved of the relationship between her and Gajani. Vishal and Sagar had beaten Gajani on

that count. The parents of Gajani and sisters were opposing the relationship between her and Gajani. She did not state to Police that, those two persons took Gajani with them to railway bridge. She did not inform Police about the quarrel going on between Gajani and two persons on the earlier day of incident. Since she had concluded all the relations with Gajani she did not inform the same to Police. She do not know the date on which she was called to Sangli Jail to identify those two persons.

12. The prosecution is relying upon the circumstances of deceased being last seen in the company of Accused on the basis of evidence of PW-1. However, evidence of this witness suffers from glaring infirmity as she has not disclosed to Police that the two persons took Gajani with them towards railway bridge and the quarrel was going on between Gajani and two persons on the earlier day of incident. As per the evidence of this witness the deceased was in relationship with her and they were not in touch for a period about two years. She suddenly saw him having quarrel with two persons and on the next day she saw some crowd gathered near the railway bridge where the body of the deceased was found lying with injuries on his person. Surprisingly she did not go to Police immediately and informed them about the quarrel which had occurred on the previous day of the said incident. She is

not the eye witness to the incident of assault resulting in death of the deceased. The Police visited her residence and made inquiry with her. She told them that she did not see anybody beating Gajani but she only saw the dead body. Even at that point of time she did not disclose the Police about the quarrel of previous day and fact that the deceased was accompanied by the assailants while they proceeded towards railway bridge. The Accused were unknown to PW-1. She was called to Sangli Jail after three months. She do not know the date on which she was called to Sangli Jail to identified those two persons. In her cross-examination in chief PW-1 has stated that, she knows the names of Accused and she named named them in the Court and identified them. Test identification parade was conducted after filing of charge-sheet. It is not clear how PW-1 was knowing the names of Accused. The version of this witness speaks volumes of doubt and no reliance can be placed on her evidence to convict the Appellants.

13. PW-2 Vishal Vinayak Gosavi is the Panch witness to the spot Panchanama. His evidence refers to the visit of the Police to the spot and recording spot Panchanama. He stated that spot was brought to their notice by one Arun Khatib. He is working with Subodh Gore. He used to work with him. Mr. Gore is photographer.

He accompanies Subodh Gore for work. Mr. Gore used to go whenever he receives call from Police. Subodh Gore received call from Police. When they reached the spot police were already present at spot.

14. PW-3 Arjun Satvekar is the Pancha witness to the seizure of the clothes of the deceased. He was called by Police. He was told that two persons are ready to produce something. He was shown clothes. He was told that the clothes were worn by deceased and he had brought the same from hospital. Panchanama was prepared. He could not give name of Police who called him. From his deposition it is not clear who had shown the clothes of deceased and identified them as his clothes.

15. PW-4 Rahim Dhanvade is the Pancha witness for Panchanama relating to disclosure statement made by Accused No.1/Appellant No.1. He refers to the spot of incident being shown by the Accused and recovery of clothes by the said Accused. On 3rd August, 2015 he was called by Police. One person who gave his name as Pandhari Laxman Shendge was at Police Station. He was ready to disclose the clothes worn by him at the time of offence. He took the team towards backside of railway bridge. He showed spot of incident. He took out one shirt from heap of scrap material. Thereafter he handed over pant from hotel.

16. PW-5 Mayur Sathe has acted as Pancha witness for disclosure statement made by Accused No.2 with regards to recovery of his clothes. On 4th August, 2014 he was called by Police Officer. He stated that he hidden the clothes worn by him at the time of commission of alleged offence. Accused produced clothes. Police seized them.

17. PW-6 Sanjay Durve has deposed that he is acquainted with both the Accused. On 31st July, 2015 he was working in railway station parking. Accused Gorya came in the parking with motorcycle. One Amit Nikam was present with PW-6. Accused Gorya told him that he has given blow of small stone to Ganya and Pandhari is beating him with big stone. Subsequently he came to know from Police that they committed murder of Ganya. He was called in Miraj Court. His statement was also recorded in Miraj Court. The statement recorded under Section 164 of Cr.P.C. of this witness was marked as Exh.36. In the cross-examination he stated that, he did not report to the Police that Accused Gorya told him that he and Pandhari were having quarrel with Gajani and they beat him by stone. He could have reported the matter to Police. He is personally not observing the persons coming and going from the railway station.

18. Accused No.2 has retracted his extra judicial confession which is evident from the explanation given by him while recording his statement under Section 313 of Cr.PC. It is relevant to note that according to this witness the confession was made by Accused No.2. The Accused No.2 has allegedly stated to him that he gave blow by small stone and the Accused No.1 assaulted the deceased with big stone. He also told him that there was quarrel amongst them. Thus, the Accused No.2 has allegedly attributed the role of assaulting the deceased with bigger stone to Accused No.1 and assault by smaller stone to him. This witness did not approach Police and lodge complaint. His silence speaks doubt about genuineness of his version.

19. PW-7 Mustafa Omar Shaikh has stated that he was acquainted both Accused. On 30th July, 2015 at about 11:45 p.m. the Police came to his stall while he was closing his stall. They found that the stall is about to be closed. They filed a complaint under Section 33(w) of Bombay Police Act. On next day he sent Accused in the Court on motorcycle to pay fine. Both Accused came to stall on next day. He sent them to Court. They paid the fine. Police came to his stall and informed him about incident of murder. Sachin informed him that Accused were having dispute with Gajani.

20. PW-8 Ranjana Bhajnavale is the sister of deceased. She identified the dead body of deceased. She came to know that somebody murdered him by giving stone blow out of quarrel.

21. PW-9 Ajmuddin Khatib is the witness to inquest Panchanama. He stated that dead body was found on spot. One lady by name Maya was present at the spot. She identified the body. There was head injury on body.

22. PW-10 Shamrao Savant was working as Nayab Tahasildar. According to him he received letter for conducting test identification parade on 26th November, 2015. He fixed parade on 5th November, 2015. There was only one witness. PW-1 identified Accused by touching them. He stated that PW-1 has identified the Accused in the parade. In the cross-examination he states that he did not make any entry about presence of clerk with him in office register. He did not call the Police to inform them about his visit to the jail. PW-1 had arrived in the jail. The incident had occurred on 31st July, 2015. PW-1 had witnessed the incident of quarrel between Accused and deceased for a brief period. Parade was conducted on 26th November, 2015.

23. PW-11 Subodh Gore is the photographer. He snapped photographs of dead body on the spot. He videographed the statement of Accused No.1 on 3rd August, 2015. On 4th August,

2015 he again videographed and took photographs. It was regarding statement by Accused No.2.

24. PW-12 Dr. Surekha Gawade was posted as Medical Officer in Miraj College. She conducted postmortem. She found CLW over left pinna of size 2x1x1 cm. She found cut outside the ear, CLW on the left eye brow. CLW over left temporal region. She noticed haematoma under scalp at left temporal region. She found that left temporal bone had depressed fracture. There was subdural haematoma over the left temporal parietal region. She found diffused subarchanoid hemorrhage. She stated that there is difference in age mention in inquest Panchanama, advance death certificate and postmortem.

25. PW-13 Dr. Arati Apte was serving as CMO in Government Medical Hospital, Miraj. She conducted examination of Accused. She did not find any abnormality.

26. PW-14 Dr. Shital Shinde has stated that she received letter on 2nd August, 2015 from Mahatma Gandhi Police Station, Miraj. Police requested to her to take dried blood stains on the stones brought by them. She collected the samples in bottle.

27. PW-15 Sangeeta Mane was posted as API at Mahatam Gandhi Police Station, Miraj. She conducted investigation. Accused were arrested. Charge-sheet was filed. In the cross-examination it

was stated that it is necessary to make entry in the station diary if the police wants to go out of Police Station. She has not produce any document to that effect. PW-1 was present on the spot before their arrival. PW-1 did not lodge any complaint to the Police Station regarding the incident of quarrel as stated by her. She did not record statements of two sons, daughter and mother of PW-1. She recorded statements of Amit Nikam, Sanjay Durve and Ranjana Bhajnavale at Police Station. Sanjay Duve and Amit Nikam had not lodged any complaint against Accused on 31st July, 2015. She did not record statement of owner of parking. There is no timing mentioned in the log book showing as to exactly when they left for investigation of present matter. She had sent a letter for opinion of the Medical Officer regarding the possibility of injuries by stone. The Medical Officer communicate to sent stones. However she did not provide stones though there were blood stains on it. She did not produce the bills issued by the photographers alongwith the charge-sheet. The Executive Magistrate informed her that he was going to conduct T.I. parade.

28. Blood group of Accused could not be determined and it was inconclusive. The blood group on clothes seized during investigation was inconclusive. The species origin was human blood.

29. From the evidence of aforesaid witnesses it can be seen that, there is no strong evidence to establish the chain of circumstances to prove that the Appellants have committed murder of the deceased. The two circumstances relied upon by the prosecution are weak in nature and are not sufficient to prove the guilt.

30. In the case of *Hari Charan Kurmi And Jogia Hajam V/s. State of Bihar*, 6 SCR 625, it is observed that a confession cannot be treated as evidence which is substantive evidence against a co-accused in dealing with a criminal case where the prosecution relies upon the confession one Accused against another Accused, the proper approach to adopt is to consider the other evidence against such Accused and if the said evidence to be satisfactory and the Court is inclined to hold that the said evidence may sustained the charge framed against the said Accused, the Court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right.

31. In the case of *State of Rajasthan V/s. Raja Ram*, (2003) 8 SCC 180, it is held that in the case of circumstantial evidence the conviction can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the Accused or the guilt of any other persons. The circumstances

have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principle fact sought to be inferred from those circumstances. Extra judicial confessions are those which are made by the party else where then before a Magistrate or Court. Extra judicial confessions are generally made by a party before private individual. The confession cannot be used against an Accused unless the Court is satisfied that it was voluntary and at that stage the question whether true or false does not arise. If the facts and circumstances surrounding the making of a confession appear to caste a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon it even if it is admissible in evidence.

32. In the case of *Sahadevan and Another V/s. State of Tamil Nadu*, (2012) 6 SCC 403, it is observed that extra judicial confession is a weak piece of evidence. Court must ensure that it inspires confidence. In *DANA Yadav and Others V/s. State of Bihar* (2002) 7 SCC 298, it is observed that though primary evidence, the identification of Accused in T.I. parade is not substantive one.

33. Considering the nature of evidence adduced by the prosecution, we are of the considered opinion that, the prosecution has failed to establish that the Appellants have committed murder

of deceased. The Appellants deserves to be acquitted. Hence the following order.

ORDER

- i) Criminal Appeal No.54 of 2019 and Criminal Appeal No.89 of 2019 are allowed;
- ii) Judgment and order dated 30th June, 2018 passed by the learned Additional Session Judge, Sangli in Sessions Case No.16 of 2016 convicting the Appellants for offence under Section 302 r/w 34 of IPC is set aside and the Appellants are acquitted.
- iii) The Appellants be set at liberty, unless required in any other case.
- iv) Interim Applications are disposed off.

[PRAKASH D. NAIK, J.]

[A. S. GADKARI, J.]