



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

CRIMINAL APPEAL NO.598 OF 2020

Syed Farhan Syed Musa,
Age 34 years, Occ. Agri.
R/o New Plotting ahead of
Madina Patil, Parbhani

... **APPELLANT**

VERSUS

The State of Maharashtra
through Police Station Officer,
Nanalpeth Police Station,
Parbhani, Taluka & District Parbhani

... **RESPONDENT**

.....
Mr. P.S. Paranjape, Advocate for appellant
Mrs. Uma S. Bhosle, A.P.P. for respondent
.....

**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

Date of reserving judgment : 18th September, 2024.

Date of pronouncing judgment : 15th October, 2024.

JUDGMENT (PER R.G. AVACHAT, J.) :

The challenge in this appeal is to a judgment and order of conviction and consequential sentence, passed by the Court of Session Judge, Parbhani (Trial Court) on 14/9/2020 in Sessions Case, No.61/2019, whereby the appellant has been convicted for the offence punishable under Section 302 of the Indian Penal Code and therefore, sentenced to suffer imprisonment for life.

2. The case of the prosecution before the trial Court was as follows :-

The appellant and Mobin (deceased) were friends. They were residing at Madina Pati area, Parbhani. Mobin was allegedly a chain-smoker. He would smoke sitting in front of the house of the appellant and make inappropriate gestures. The appellant was annoyed thereby.

It was 8.45 a.m. on 23/12/2018. Mobin was present in front of his house. He was taking selfie on his cell phone. Shaikh Rahim (P.W.1), cousin of the deceased was with him. The appellant came on his Pulsar motorbike and asked Mobin to accompany him for some work. Mobin handed over his cell phone to P.W.1 Sk. Rahim and went along with the appellant. The appellant took him to an isolated place on the campus of Mahavir Theatre. The appellant hit on the head of Mobin number of blows with a tile. The appellant thereafter fled away.

3. Somebody had informed the Nanalpeth Police Station, Parbhani. The brothers of appellant had also rushed to the crime scene in an autorickshaw. P.W.1 Sk. Rahim having

seen them shouting, "Farhan, Farhan". He too followed them on his motorbike along with P.W.3 Moin, brother of deceased.

4. A crime scene panchanama (Exh.26) was drawn. The dead body was shifted to the hospital. Inquest panchanama (Exh.22) was drawn. Mortal remains of Mobin were subjected to post mortem examination. P.W.1 Sk. Rahim lodged the First Information Report (F.I.R. Exh.9) by little past 5.00 p.m.

5. Based on the F.I.R. (Exh.9), crime bearing No.495/2018 at Nanalpeth Police Station, Parbhani for the offences punishable under Section 302 of the Indian Penal Code was registered against the appellant. The appellant was arrested little past 9.00 p.m. on the same day. Blood stained clothes on his person were seized under the panchanama (Exh.28). Statements of persons acquainted with the facts and circumstances of the case were recorded. All the seized articles were sent to Forensic Science Laboratory, Nanded. On completion of the investigation, the charge sheet was filed against the appellant.

6. The Trial Court framed the Charge (Exh.5). The appellant pleaded not guilty. His defence was of false implication.

7. To establish the charge, the prosecution examined eight witnesses and produced in evidence certain documents. The Trial Court, on appreciation of the evidence in the case, convicted and consequently sentenced the appellant as stated above.

8. Heard. Learned advocate for the appellant would submit that the incident took place by 8.45 a.m. on 23/12/2018 at an isolated place. The F.I.R. was lodged 8 hours after the incident. The informant and other relatives of the deceased were present at the crime scene from 9.00 a.m. onwards up to 12.00 noon. Neither the informant nor the so called eye witnesses related the police anything about the appellant to have taken the deceased with him or having seen him assaulting the deceased. One of the persons in the crowd had claimed to have seen the incident. He was not examined. The station diary entry regarding report of the incident by some unknown person was not placed on record. According to learned Advocate, what was informed to the Police Station officer first in point of time about the murder to have been

committed at Mahavir Theatre premises was in fact the First Information Report and not the report (Exh.9) was lodged by P.W.1 Sk. Rahim. He would further submit that, the material witnesses in the case are either relations or friends of the deceased. The seized articles were sent to FSL 4 days after the seizure. The same gave scope for the investigating officer to tamper with the said articles. The learned Advocate meant to say that the blood of the deceased was applied on the clothes of the appellant said to have been on his person when the incident took place. The learned Advocate has placed on record notes of his submissions. We have perused the same. We do not propose to reproduce the contents thereof. All in all, learned Advocate for the appellant would submit that the prosecution evidence did not establish the guilt of the appellant beyond reasonable doubt. He, therefore, urged for allowing the appeal.

9. Learned A.P.P. would, on the other hand, submit that, P.W.1 Sk. Rahim was the witness to the last seen of the appellant and the deceased together. The incident took place within 15 minutes of the appellant taking away the deceased with him. It was, therefore, for the appellant to come clean and explain the circumstances about what had happened with the

deceased. He failed to explain and, therefore, an inference has to be drawn that it was the appellant and none else who committed the murder. She then took us through the evidence of P.W.2 Azhar, an eye witness to the incident. He had seen the appellant assaulting the deceased with a tile. According to her, P.W.3 Moin was also witness as regards last seen of the deceased in the company of the appellant soon before the deceased breathed his last. The C.A. reports (Exhs.13 to 17) indicate the clothes on the person of the appellant were stained with blood of the blood group of the deceased. She took us through the entire evidence on record and the reasons given by the trial Court and ultimately submitted for dismissal of the appeal.

10. Considered the submissions advanced. Perused the evidence on record. Also perused the judgment impugned herein. Let us advert to the evidence and appreciate the same.

11. Admittedly, Mobin met with homicidal death on 23/12/2018. P.W.7 Dr. Amol conducted autopsy on his mortal remains. He noticed following injuries on the person of the deceased.

- 1) Punctured wound over left occipital region with fracture skull of size 4 x 2 x 3 cm.

- 2) Left ear pinna CLW and crush of size 6 x 2 cm.
- 3) CLW over left ear of size 4 x 2 cm.
- 4) CLW over left eye brow of size 2 x 2 cm.
- 5) Abrasion over left shoulder of size 2 x 2 cm.
- 6) Abrasion over left shoulder near injury No.5 of size 4 x 2 cm.

The injuries were ante-mortem. All these injuries were sufficient in the ordinary course of nature to cause death. He claimed to have preserved blood, clothes on the person of the deceased and his finger nails. In his opinion, Mobin died of intracranial haemorrhage due to multiple fracture of skull with head injury. The post mortem report finds place at Exh.36.

12. During his cross-examination, it has been brought on record that the pieces of tile seized from the crime scene were sent to him by the investigating officer to solicit his opinion as to whether the injuries suffered by the deceased could be caused with an assault with those tiles. His evidence indicates that the tiles were sent in a packet. He did not prepare panchanama as to opening of the envelope containing the tiles nor did he draw a panchanama of sealing of the tiles after having been inspected.

13. The question is whether the appellant has committed the murder of Mobin. P.W.1 Sk. Rahim lodged the F.I.R. (Exh.9) little past 5.00 p.m. He referred the same in his oral evidence before the Court. The F.I.R., therefore, came to be admitted in evidence so as to corroborate his oral evidence before the Court. It has been specifically stated in the F.I.R. that, Shakil, cousin of P.W.1 Sk. Rahim had informed him in the last week that, Farhan (appellant) had warned Mobin (deceased) since he (Mobin) used to sit in front of his house and smoke cigarettes. He (Mobin) would also make inappropriate gestures. The appellant had even warned that if Mobin (deceased) did not behave properly, it would result into dire consequences. This matter in the F.I.R. has been reiterated by P.W.1 Sk. Rahim in his oral evidence on oath. **The question would, therefore, be whether Mobin (deceased) could have readily accompanied the appellant to go with him alone when he had a threat from appellant.**

14. It is in the evidence of P.W.1 Sk. Rahim that on 23/12/2018 he had gone near to the house of his parental aunt Karimabi. Mobin (deceased) was Karimabi's son. He was present outside of his house. Mobin was watching Tik-tok on his cell phone and even took a selfie. He was sporting a black

cap and enquired with P.W.1 Sk. Rahim as to how did he look with the cap. It is further in his evidence that, within 15 minutes the appellant came on his motorbike and asked Mobin to accompany him as he had some work for 10 minutes. The appellant took Mobin with him. Mobin handed over his cell phone to P.W.1 Sk. Rahim before leaving with the appellant. After a while, his another cousin Moin (real brother of Mobin) came with a hand-cart. He saw Imran and Javed (brothers of appellant Farhan) were running along the road. Moin enquired with them what had happened. They only said, "Farhan". They engaged an autorickshaw and proceeded further. P.W.1 Sk. Rahim and Moin, therefore, followed them on a motorbike to see what had happened. It is further in his evidence that, they told him to reach Mahavir Tehatre. He, therefore, went to the premises of Mahavir Theatre and saw Mobin lying in injured condition. Moin had suffered head injury. Pieces of tiles stained with blood were lying there. Mobin was not responding. People gathered at the spot. One of the persons from the crowd informed that he knew Mobin. He also informed to have seen the assailant inflicted on the head of Mobin with tile. He even claimed that he could identify the assailant. Thereupon, he came to know name of the assailant as Shaikh Farhan (appellant). He, therefore, approached

Nanalpeth Police Station and lodged F.I.R. (Exh.9). The articles taken charge of from the crime scene were shown to him. He identified the clothes of the appellant and deceased as well besides pieces of tile, Islamic Handkerchief and the cap.

15. P.W.1 Sk. Rahim was subjected to a searching cross-examination. His evidence indicates that, he was resident of Rahim Nagar area. While the deceased Mobin was residing at Madina Pati. The deceased was son of his paternal aunt. Since it was a Sunday, he had a holiday. He did not disclose in the F.I.R. any reason for which he had been to the house of his aunt Karimabi by 8.30 in the morning on the fateful day. In his evidence, he did not state why for he had been to the house of his aunt. When the deceased was taking selfie, no third person was present around. He did not have any talk with Imran, Javed or Moin by 8.30 in the morning. A topography at the crime scene was brought on record through his cross-examination. The same indicates that there were hotels, tea stalls and Pan shops as well. A Police Chowki was situated at a distance of 50 ft. from the crime scene. The police had arrived at the crime scene. Panchanama was drawn in his presence. Even he was present in the hospital while post mortem examination was conducted. In his

presence, the police were making enquiry with the people present there as to how the incident had happened. No one stated anything. According to him, he disclosed the police that Mobin had accompanied the appellant. He, however, did not suspect the appellant to have killed Mobin. He did not lodge the report to the police on the spot itself. According to him, he was not aware about the exact incident and therefore, he did not lodge the report then and there. He admitted that the F.I.R. is silent to state therein what kind of clothes were on the person of the appellant and the deceased as well. He had lodged the report in Hindi. He denied to have given false evidence in view of his relationship with the deceased.

16. P.W.2 Sk. Azhar testified that, by 7.30 in the morning on 23/12/2018, he left the house for purchasing vegetables. His friend Shamsuddin was with him. They went to the market on motorcycle. After having purchased vegetables, they stopped for taking tea in Bombay Hotel, situated in front of Mahavir Theatre. It was about 8.45 a.m. Both, the appellant and Mobin came at a Pan Centre adjacent to Bombay hotel. Mobin took two cigarettes. Then they entered the premises of Mahavir Theatre. It is further in his evidence that, as he knew that Mobin never smoke cigarette,

therefore, he followed them to see what they were going to do. It is further in his evidence that, he saw quarrel between both, the appellant and Mobin. The appellant had fallen Mobin on the ground. The appellant hit on Mobin's head with tile. He was frightened and, therefore, came out of the premises of Mahavir Theatre to seek help of people. However, no one came to rescue. He then went to the house of cousin of Mobin in Rahim Nagar and informed him about the incident and again came back to the spot. On his return to the spot, he learnt Mobin to have passed away.

17. It is in his evidence that, his statement was recorded by police late in the evening on the next day. It was he himself who went to the Police Station to give his statement. He was a childhood friend of the deceased Mobin. Mahavir Theatre was surrounded by shops and hotels. It was a crowded place. Vegetable market was also around. He did not go to the house of deceased Mobin to inform his family members about the incident. He directly went to Rahim Nagar instead of Madina Pati area. He denied that Mobin had habit of smoking. He used to meet Mobin twice a week. It is further in his evidence that the crime scene was a place visited by people for urinating. He did not intervene to save Farhan. A

Police Chowki was situated in the nearby besides Nanal Peth Police Station at a distance of 500 to 600 ft. away from Mahavir Theatre. He did not approach the Police Station the same day. It is further in his evidence that, he was at the crime scene for 2/3 hours. The police were making enquiry as to how did the incident took place. He did not relate the police anything.

18. P.W.3 Sk. Moin was the brother of deceased Mobin. It is in his evidence that, little past 8.00 in the morning on 23/12/2018, he was proceeding with his cart for business. Mobin was present outside the house. The appellant came there on his motorbike and asked Mobin to accompany him for a cup of tea. Then both, the appellant and Mobin went on the motorbike. He then saw the brothers of the appellant running. They were shouting, "Farhan". Both of them then engaged an autorickshaw and went ahead. He, therefore, along with P.W.1 Sk. Rahim followed them on motorbike. They went to Mahavir Theatre premises. He saw his brother Mobin lying in front of a Pan Stall. Mobin had suffered head injury. Thereafter one unknown person came and said that he had seen one person assaulting Mobin.

19. It is in his cross-examination that, it was 9.00 in the morning, Imran and Javed (brothers of the appellant) had asked them to proceed towards Mahavir Theatre. He was not in the know towards which place Mobin had gone along with the appellant. Police had also come to the spot. He did not disclose the police the appellant to have taken Mobin with him.

20. Exh.22 is the inquest panchanama. The person who showed the dead body was named – Nilesh Namdeo Mitkari.

21. P.W.4 Sk. Mohsin is a witness to the inquest panchanama (Exh.22) and crime scene panchanama (Exh.26). His cross-examination indicates that, he would live nearby the house of the deceased. It is surprising as to why the investigating officer did not avail services of persons, who had gathered as on-lookers, to act as a panch witness. Be that as it may.

22. P.W.5 Sk. Shadul is a witness to the arrest panchanama (Exh.28). It is in his evidence that, a white colour shirt, a pant and Islamic Rumal (handkerchief) were seized besides a slipper pair. He was confronted with the seizure panchanama. He admitted that the panchanama did not

contain that the articles taken charge of were kept in a packet and sealed. He also admitted that, he would reside in the locality in which the deceased would.

23. P.W.6 Rajesh was a Police Naik who carried the seized muddemal articles to FSL, Nanded on 1/1/2019. He tendered in evidence the office copy (Exh.32) of the forwarding letter. His cross-examination indicates that, the packets of tiles were returned by the FSL with a direction to resubmit them with separate numbering. He further stated that the sample articles were opened by the officials of FSL in his presence.

24. P.W.8 Sunil did the investigation of the crime. His evidence indicates that, he reached the crime scene pursuant to the information given to him by the Police Station Officer. The said Police Station Officer has not been examined as a witness nor station diary entry has been placed on record. He claimed to have prepared the crime scene panchanama (Exh.26), inquest (Exh.22) and seized articles from the crime scene. He then arrested the appellant under panchanama (Exh.47) and seized the clothes on his person. According to him, he sent all the seized articles to FSL through P.W.6 Rajesh.

25. In the cross-examination, the investigating officer testified that, in spite of having come to know that a cognizable offence is committed, he did not record statement of the Thane Ammaldar (Police Station Officer). He did not make efforts to find the person who had informed the Police Station about the murder to have taken place on the premises of Mahavir Theatre. He did not file on record the station diary entry in that regard. He has recorded the statements of Pan Stall owner and Hotel owner as well. He reached the crime scene by 9.30 in the morning. There was a crowd. Since he did not receive the information about the name of the assailant, he could not mention the name in Column No.13 of the inquest panchanama. He admitted that, the clothes of the deceased were not sent to him in sealed condition by the Medical Officer. He denied to have tampered with the clothes of the appellant with the blood of the deceased. According to him, Constable Aghav had collected the blood of the deceased in a sealed condition from the Medical Officer. Constable Aghav has not been examined. The appellant was medically examined. No injuries were seen on his person. According to him, he learnt from the F.I.R. that Mobin was a smoker. He testified that, he learnt from other witnesses that Mobin did not smoke. Neither the cigarette, its butt or lighter or match box was found at the

crime scene. The dead body was lying near a Pan Stall. He did not record statement of a Pan Stall owner. The panchas were not from the vicinity of the crime scene. The panchanama of seizure of clothes of appellant is silent to record therein that substituted clothes were brought from his house and provided him to put on his person. According to him, P.W.1 Sk. Rahim has not stated the nature of clothes the appellant was wearing while he had come to take Mobin with him. He further testified that the labels bearing signature of the panchas were not pasted on the envelopes. He volunteered to state that those were put in the envelope.

Aforesaid is the evidence in the case.

APPRECIATION:

26. The incident took place little past 8.45 a.m. on 23/12/2018 on the premises of Mahavir Theatre at Parbhani. The appellant had allegedly come to the place of the deceased to take him with him for some work. It was so stated by P.W.1 Sk. Rahim in his evidence. P.W.1 Sk. Rahim is admittedly a cousin of the deceased. He was resident of Rahim Nagar. He could not state either in his oral evidence or in the F.I.R. the reason for his visiting the housing of his parental aunt

Karimabi, mother of the deceased. The same indicates he was a chance witness. His evidence indicates that the brothers of the deceased were seen running along the road, shouting with the name of the appellant. They engaged an autorickshaw and proceeded further. He, therefore, along with P.W.3 Moin followed them on a motorbike. They went to the premises of Mahavir Theatre to notice Mobin to have been lying in injured state. He had suffered head injury. Many persons had gathered. Police too arrived in a short while. One of the persons gathered claimed to have seen the incident and even stated that he could identify the assailant. The record indicates the said person might be Nilesh Mitkari. For the reasons best known to the investigating officer, he was not examined. When the incident took place in front of a Pan Stall, statement of the Pan Stall owner was also not recorded. The evidence of P.W.1 Sk. Rahim is only to the extent of the appellant to have been lastly in the company of the deceased and gap between the company of the deceased breathing last was so short to implicate the appellant in the crime, still he did not express suspicion about the appellant to have committed murder. In spite of the fact that the police had been at the crime scene up to 12.00 noon and he was there all along till then, he did not state the same to the police although he

stated to have told the police accordingly, if the police had not recorded the same, admittedly, the Police Chowki was at a distance of 50 ft. away from the crime scene. While Nanalpeth Police Station was at a distance of about 600 ft. away from the crime scene. Still P.W.1 Sk. Rahim did not approach the Police Station immediately to lodge the F.I.R. The F.I.R. indicates it was lodged little past 5.00 p.m. i.e. little over 8 hours after the incident. The presence of P.W.1 Sk. Rahim was sought to be fortified by the evidence of P.W.3 Moin who claimed to have accompanied him to the crime scene. While the evidence of P.W.1 Sk. Rahim indicates that allegedly the appellant came and took Mobin with him, nobody was around and after a while, P.W.3 Moin came with a cart. Even we accept that P.W.3 Moin was there at the crime scene along with P.W.1 Sk. Rahim, he too did not disclose the police about the incident or expressed suspicion against the appellant. When there is evidence to indicate that the appellant and the deceased had bought two cigarettes from the Pan Stall and then went on the campus of Mahavir Theatre. Neither the cigarette nor its butt or a match box or lighter was found at the crime scene. The motive behind the crime is said to be the deceased used to smoke sitting in front of the house of the appellant. While the investigating officer testified that some of

the witnesses disclosed him that the deceased was non-smoker. In spite of availability of independent witnesses, none of them has been examined. According to P.W.1, appellant had threatened the deceased earlier with dire consequences as he used to sit in front of his house and smoke a and make inappropriate gestures. Then it is doubtful to believe that the deceased would readily accompany the appellant.

27. P.W.2 Azhar was a childhood friend of the deceased. He too is, therefore, interested witness. According to him, he was in the market along with Shamsuddin. He testified that, the deceased never smoke and still purchased the cigarettes. He followed him to the Campus of Mahavir Theatre to see a quarrel between the appellant and the deceased. He testified the appellant to have assaulted the deceased on his head with a tile. He was a childhood friend of the deceased and was accompanied by another person named Shamsuddin, still did not intervene to save Mobin. His conduct is unnatural. Same is the case of about having not reported about the incident, being an eye witness, at the earliest point of time, when a Police Chowki was at 50 ft. away from the crime scene and Nanalpeth Police Station at a distance of little over 500 ft. Even after the incident, he did not go to the house of

the deceased to relate his family members about having witnessed the incident. It is only after about 60 hours he on his own went to the Police Station and gives the statement to have witnessed the incident. His conduct in not intervening to save the deceased and not approaching the police at the earliest point of time lead us to observe his evidence to have not been inspiring confidence. In spite of availability of independent witnesses for various panchanamas, the investigating officer preferred to avail the services of the persons who were the residents of the locality wherein the deceased would reside. As such, except the carrier and the investigating officer, all the witnesses examined by the prosecution were either the relatives, close friends and/or the residents of the locality wherein the deceased resided.

28. Then what remains is the evidence as regards blood stains on the clothes of the appellant. Admittedly, the appellant was arrested little past 9.00 p.m. i.e. after 12 hours of the incident. It is just difficult to imagine that he would wander or conceal himself with the very clothes which were stained with blood of the deceased until he was arrested. The arrest panchanama is silent to indicate wherefrom the clothes were obtained to give the appellant for replacing the clothes on his

person at the time of arrest. The arrest panchanama is in a printed form, indicating one of the clauses therein that the articles were seized and sealed. When all the articles relating to the crime were seized on the same day, those remained at the Police Station for 4 days before sending them to FSL, Nanded. It was specifically suggested to the investigating officer that he tampered with the clothes of the appellant with the blood of the deceased.

29. The record indicates that, at the fag end of the conclusion of the trial, the C.A. reports (Exhs.14 to 19) were received. They were straightaway admitted in evidence. The blood of the deceased was found to be unfit for ascertaining his blood group. It is only from the clothes on his person his blood group is stated to be "O", while the blood group of the appellant is "A". There is nothing to indicate the defence to have allowed the C.A. reports to be admitted in evidence as it is. True, by virtue of Section 293 of the Cr.P.C., the reports could be read in evidence. When the C.A. report pertaining to the clothes of the deceased is an incriminating material, the same has not been put to the appellant in his examination under Section 313 of the Cr.P.C. We are conscious of the fact that the said exercise can be done at appellate stage. We

could have done so, but for the rest of the evidence to have been found to be not inspiring confidence to lead us to conclude the appellant to be author of the crime. On reappreciation of the evidence in the case, we find the Trial Court ought not to have convicted the appellant based on such evidence. We are, therefore, not at one with the findings recorded by the Trial Court holding the appellant guilty of the offence of murder. Interference with the order impugned herein is, therefore, warranted. In the result, the appeal succeeds. Hence the order:

ORDER

- (i) The Criminal Appeal is allowed.
- (ii) Conviction of the appellant for the offence punishable under Section 302 of the Indian Penal Code vide judgment and order dated 14/9/2020 in Sessions Case No.61/2019, passed by learned Session Judge, Parbhani is hereby set aside. The appellant is acquitted thereof. The appellant be set at liberty forthwith if not required in any other case.

(NEERAJ P. DHOTE, J.)

(R.G. AVACHAT, J.)

fmp/-