

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

CRIMINAL APPEAL NO. 119 OF 2016

Arjun Ishwara Gejage,
Age : 25 years, Occ: Labour,
R/o. Watambare, Tal. Sangola,
District: Solapur

... Appellant
(Original Accused)

Versus

The State of Maharashtra,
Through Bhujinj Police Station,
District: Satara

... Respondent

Ms. Payoshi Roy a/w Mr. Aneesh Shetty i/b Dr. Yug Mohit
Chaudhry for the Appellant

Mr. R. M. Pethe, A.P.P for the Respondent-State

**CORAM : REVATI MOHITE DERE &
MANJUSHA DESHPANDE, JJ.
WEDNESDAY, 31st JANUARY 2024**

ORAL JUDGMENT (Per Revati Mohite Dere, J.) :

1 This appeal is directed against the judgment and order dated 2nd December 2015 passed by the learned Sessions Judge, Satara, in Sessions Case No.113/2014, convicting and sentencing the appellant, as under :

- for the offence punishable under Section 302 of the Indian Penal Code, to suffer imprisonment for life and to pay a fine of Rs. 5,000/-, in default, to suffer RI for 2 years;
- for the offence punishable under Section 379 of the Indian Penal Code to suffer rigorous imprisonment for one years and to pay a fine of Rs. 1,000/-, in default, to suffer rigorous imprisonment for 6 months;
- Both the aforesaid sentences were directed to run concurrently.

2 The prosecution case, in nutshell, is as under :

According to the prosecution, the incident took place on 18th February 2014, in which the appellant quarrelled with the deceased in the deceased's Eeco car and assaulted him with a sickle on his neck. It is the prosecution case, that after the assault, the deceased ran towards PW3's hotel i.e. Amit Hotel, and disclosed to him that four persons had assaulted him.

Pursuant thereto, PW3 lodged an FIR (Exhibit 17) on the very same day i.e. on 18th February 2014 at 6:45 a.m. Thereafter, inquest and spot panchnamas were prepared and the dead body was sent for post-mortem. It is further the prosecution case, that the appellant thereafter, took a lift from PW12-Tukaram Jadhav, a truck driver and made an extra-judicial confession to him i.e. he had killed the deceased with a sickle. On 20th February 2014, the appellant was arrested and a mobile phone was seized from his person. The said mobile phone is stated to be that of the deceased. Thereafter, the appellant made a disclosure statement under Section 27 of the Evidence Act, pursuant to which, sickle was recovered at his instance.

After investigation, charge-sheet was filed in the said case in the Court of the learned Judicial Magistrate, First Class, Satara, for the offences punishable under Sections 302 and 379 of the Indian Penal Code ('IPC'). Since the offence under Section 302 was triable by the Court of Sessions, the case was committed to the Court of Sessions for trial.

Charge was framed as against the appellant, to which, he pleaded not guilty and claimed to be tried.

3 The prosecution, in support of its case, examined as many as 17 witnesses i.e. PW1-Dashrath Pawar, Panch to the spot panchnama and the seizure of Ecco vehicle; PW2-Swapnil Jadhav, Panch to the inquest panchnama; PW3-Amit Pawar, complainant (owner of Amit Hotel), to whom an oral dying declaration was made; PW4-Rajendra Pawar, Panch to the spot panchnama; PW5-Atul Jadhav, Panch to the arrest and seizure panchnama; PW6-Ramchandra Pawar, Panch to the recovery of sickle at the instance of the appellant; PW7-Shankar Ghadge, Panch to the recovery panchnama i.e. recovery of sickle at the instance of the appellant; PW8-Amit Salunkhe, Panch for the seizure of CCTV footage from Anewadi Toll Naka; PW9-Nilesh Babar, who saw the deceased, soon after the assault; PW10-Dr. Sandip Yadav, the doctor who performed the post-mortem on the deceased; PW11-Ajay Ahivale, to whom an extra-judicial confession was made

(the said witness has turned hostile); PW12-Tukaram Jadhav, to whom an extra-judicial confession was made by the appellant (PW12 is the truck driver who ferried the appellant, after the assault); PW13-Atul Patel, waiter of Amit Hotel (the said witness had neither seen nor heard anything and as such, his evidence is of not much consequence); PW14-Ranjit Yadav, who last saw the deceased, in front of Aaram hotel, in his vehicle at 2:45 a.m; PW15-Vinay Charwad, the nephew of the deceased, who identified the deceased's Samsung mobile phone; PW16-Ravi Pardeshi, Nodal Officer, working in a mobile company-Vodafone Cellular Limited (admittedly, no tower location has been brought on record through this Nodal Officer); and PW17-Hemant Shedge, the Investigating Officer.

4 Ms. Roy, learned counsel for the appellant submitted that the prosecution case rests on circumstantial evidence. She submitted that the prosecution has miserably failed to prove the circumstances as against the appellant and as such, the appellant

be acquitted of the offences for which he is convicted. She submitted that the evidence of last seen i.e. of PW14-Ranjit Yadav, cannot be termed as last seen, inasmuch as, the photograph of the deceased was not shown to this witness either when his statement was recorded under Section 161 or during his deposition. She further submitted that as far as extra-judicial confession is concerned, PW11-Ajay Ahivale has turned hostile and as such his evidence would have to be ignored. She submitted that as far as PW12-Tukaram Jadhav, to whom an alleged extra-judicial confession was made, cannot be relied upon, considering that no sane person would make an extra-judicial confession to a stranger, whom he does not know. She submitted that even otherwise, the statement of this witness was recorded belatedly, after almost 12 days of the incident, rendering it suspicious. As far as recovery of sickle is concerned, Ms. Roy submitted that admittedly no blood stains were found on the sickle, so as to connect the appellant with the alleged incident. She further submitted that the prosecution case itself is doubtful, inasmuch as,

the prosecution case, right from the time of registration of the FIR to conducting the spot panchnama and inquest panchnama, was that the deceased had disclosed to PW3-Amit Pawar (complainant) that four persons had assaulted him. She submitted that this oral dying declaration made by the deceased to PW3, is contrary to the prosecution case of assault by one person on the deceased. She submitted that no motive that has come on record to show why the appellant would assault the deceased. She submitted that if the motive was to commit theft, gold chain and money would not have been found on the deceased's person. She submitted that as far as the recovery of the mobile phone of the deceased is concerned, the same cannot be believed and as such, the possibility of the mobile having been planted on the appellant, in the facts, cannot be ruled out. Thus, according to Ms. Roy, in the light of the evidence that has come on record, the conviction of the appellant for the offences under Section 302 and 379 cannot be sustained.

5 Learned A.P.P supported the impugned judgment of conviction and sentence and submitted that no interference was warranted in the same.

6 We have perused the evidence and documents with the assistance of the learned counsel for the respective parties.

7 PW3-Amit Pawar is the complainant, to whom, the deceased had disclosed that four persons had assaulted him. He is the owner of the Amit Hotel. PW3 has stated that on 17th February 2014, Amit Hotel was opened at 4:00 a.m. and it was closed in the night at about 11:00 p.m. He has stated that he and Atul Patel (PW13) were watching television in the hotel till upto 3:00 a.m, after which, he went to sleep. According to PW3, Atul Patel (PW13) was watching T.V; that at 4:30 a.m, Atul Patel woke him up and told him that, "*Bahar Adami Aya Hai.*", pursuant to which, they went outside; that they saw a person lying on the road in front of the hotel; that the said person was saying,

"Vachava, Vachava"; that he asked the said person what had happened, to which he replied, he was assaulted; that he pointed out to his vehicle i.e. Eeco vehicle; that he saw that the said person had sustained injury on the left side of the neck and that the person succumbed to the said injury soon thereafter. PW3 has further stated that he telephoned the Bhuinj Police Station, pursuant to which, the police as well as an ambulance came. He has stated that alongwith police, they went to search the Eeco vehicle and found the said Eeco vehicle in front of Aaram Hotel and that there were blood stains around the vehicle and chilly powder was seen in the vehicle.

In his cross-examination, PW3 has admitted that he had disclosed to the police at the time of lodging of his complaint that the said person (deceased) had said, *"Mala Vachava, Mala Vachava"* and on asking him what had happened, he disclosed that he was assaulted and that there were four persons. The same has been recorded in the FIR, which is at

Exhibit 17 i.e. the disclosure made by the deceased to PW3. The same also finds place in the inquest panchnama as well as the spot panchnama, with respect to the disclosure of assault and there being four persons.

8 As far as PW13-Atul Patel is concerned, he was the waiter, working in Amit Hotel i.e. with PW3. We have perused his evidence. The said evidence is of not much significance, inasmuch as, the said witness has neither seen nor heard anything and as such, it is not necessary to discuss his evidence.

9 Apart from the aforesaid, the prosecution has relied on the evidence of PW14-Ranjit Yadav, who allegedly saw the appellant with the deceased. PW14, in his evidence, has stated that he was working in Aaram Hotel as a Watchman, at the relevant time; that his duty was from 7:00 p.m. to 7:00 a.m; that the nature of his work was to take rounds in the locality of Aaram Hotel and to give alarm after every one hour. He has further

stated that on 17th February 2014, he started his duty at 7:00 p.m; that at about 2.45 a.m on 18th February 2014, he saw that one Maruti Eeco vehicle had come at Aaram Hotel and had stopped; that he went near the said vehicle; that there were two persons sitting in the said vehicle; that he asked the person who was sitting on the rear seat of the vehicle not to stop there; that the said person said that the vehicle would be stopped for one hour and then they would go; that the person was wearing white coloured shirt and pant; that there was another person in the vehicle, who was sleeping on the driver's seat; that the person who said that they would stop for an hour, was the appellant. Accordingly, PW14 identified the appellant in Court as being the same person, who was sitting in the vehicle (rear seat).

It is pertinent to note, that nowhere in the evidence of PW14, there is anything to show that the person sitting in the driver's seat, was the deceased. Admittedly, no photograph of the deceased was shown to PW14, at the time of recording of his

statement under Section 161 nor at the time of his deposition and as such, the said evidence that has come on record of PW14, cannot be termed as 'last seen evidence'. Thus, the prosecution has not proved that the deceased was last seen in the company of the appellant on 18th February 2014 at 2:45 a.m.

10 The next evidence is that of extra-judicial confession made to PW11-Ajay Ahivale and PW12-Tukaram Jadhav. As noted earlier, PW 11 has turned hostile and as such, his evidence is not of any consequence.

11 As far as PW12-Tukaram Jadhav is concerned, it is the prosecution case that the appellant made an extra-judicial confession to him. PW12-Tukaram Jadhav was working as a driver on the truck of one Santosh Kale of Karad. He has stated that on 17th February 2014 at about 9.30 p.m, he loaded the said truck at Pune; that he proceeded towards Kolhapur at about 4:15 a.m i.e. on 18th February 2014; that after Vele at about 5.30/5.45

a.m, he stopped near Panchratna Hotel to answer the nature's call; that one person came and stopped near his truck; that the said person asked him as to where he was going, to which, he responded that he was going to Kolhapur; that the person disclosed that he had no money and asked him to take him, in his truck upto Karad; that he had taken him in the truck and had asked him where he was going; that the said person disclosed to him that he was proceeding to Alandi; that the said person also disclosed to him that there was a quarrel with a driver and that he killed the driver and that he was going to Sangli to his house; that pursuant thereto, he stopped at Vadhe Phata for tea at about 7:00 a.m; that the person had a sickle with him; that he dropped the said person at Karad and thereafter went to Warunji, after which, he parked the truck with the owner and went to his house.

PW12 was cross-examined at length. It has come in his evidence that he had not given any information to any police station/person, pursuant to the disclosure made by the said

person (appellant) that he had killed a driver, nor did he disclose the same to the truck owner. It has also come in the cross-examination of PW12 that after 10 to 12 days from the date of incident, the owner of the truck had received a phone call from the police station, pursuant to which, the truck owner called him, and he went to the police station alongwith the truck owner. He has stated that thereafter, after a few days, he was called to the Tahsil Office and in the identification parade at Tahsildar's office, he identified the appellant. Holding of Test Identification Parade's (TIP's) in the office of Tahsildar or Police Station has been deprecated by Courts time and again, in view of the lurking suspicion that the witnesses might have seen the suspects prior to the TIP. There are infirmities in the TIP held and hence, it is difficult to place implicit reliance on the identification of the appellant by PW12-Tukaram Jadhav, for the said reasons and reasons discussed hereinunder.

12 It is pertinent to note, that extra-judicial confession in its very nature, is a weak piece of evidence. In the facts, we find it difficult to believe the testimony of PW12, to whom an extra-judicial confession was allegedly made by the appellant. First and foremost, the person (PW12) was a stranger to the appellant and the manner in which appellant allegedly made the disclosure, appears to be doubtful.

 Having perused the evidence of PW12, we are of the opinion that the evidence of PW12, does not inspire confidence and lacks plausibility. It is also difficult to believe that an accused would carry the weapon of assault i.e. sickle with him in the truck. Even otherwise, the statement of PW12 was recorded almost after 10 to 12 days of the incident. Admittedly, as has come in the evidence of PW12, PW12 had not informed about the disclosure made by the appellant to the police or any member of his family or to the truck owner, till he was called by the police.

Accordingly, the said evidence vis-a-vis extra-judicial confession allegedly made by the appellant to PW12 does not inspire confidence and as such, we do not, in the facts, deem it appropriate to rely on the same.

13 Coming to the recovery of the sickle at the instance of appellant, admittedly, the sickle was found from an open place, accessible to all. Admittedly, the sickle had no blood stains on it, as evident from the Panchanama. The same is fortified by the Chemical Analyser's report, which shows that no blood stains were found on the sickle.

14 As far as motive is concerned, the alleged motive is theft of mobile of the deceased. The said motive alleged by the prosecution also does not inspire confidence, inasmuch as, if the motive was to commit theft, the gold chain and money would

not have been found on the person of the deceased. Although the mobile has been identified by the deceased's nephew (PW15-Vinay Charwad), we find it difficult to believe that the appellant would take the mobile and not the gold chain and money, if the motive was to commit theft. In these circumstances, mere recovery of a mobile phone on the person of the appellant at the time of his arrest, does not inspire confidence.

15 As far as PW8-Amit Salunkhe is concerned, although the CCTV footage from Anewadi Toll Naka is produced, the said witness has stated that he does not know the contents of the said CCTV nor was the Section 65B Certificate produced along with the said CCTV footage. Thus, nothing turns on the evidence of PW8.

16 The law on circumstantial evidence is no longer *res integra*. The Apex Court in the case of ***Sharad Birdhichand***

Sarda v. State of Maharashtra¹, has laid down the five golden principles (Panchsheel) which govern a case based only on circumstantial evidence. Para 153 of the said judgment is reproduced hereinunder:-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

(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 Maharashtra² where the following 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,

1 (1984) 4 SCC 116

2 (1973) 2 SCC 793

(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.”

17 Keeping in mind the aforesaid principles laid down in a case of circumstantial evidence, we, in the facts of the case, do not find that the prosecution has proved the circumstances as against the appellant, nor is the chain of circumstances complete, so as to point to the complicity of the appellant in the crime. As noted above, the deceased had disclosed to PW3 (complainant) that four persons had assaulted him, whereas, it is the prosecution case that the appellant on account of a quarrel with the deceased, and with the object of committing theft, had assaulted him with a sickle on his neck. Thus, the oral dying declaration made to PW3 that ‘he was assaulted and there were four persons’ is not consistent with the prosecution case, of assault by one person i.e. appellant.

18 We may note, that it is not in dispute that the deceased died a homicidal death. The only question that arises before us is, whether the appellant is the author of the same. We, in the facts, for the reasons discussed hereinabove, cannot place implicit reliance on the evidence as adduced by the prosecution to convict the appellant on the aforesaid circumstances, which have come on record. Accordingly, we pass the following order :

ORDER

- i) The Appeal is allowed;
- ii) The impugned judgment and order dated 2nd December 2015, passed by the learned Additional Sessions Judge, Satara in Sessions Case No.113/2014, convicting and sentencing the appellant, is quashed and set-aside;
- iii) The appellant is acquitted of the offence, with which he is charged. The appellant be set at liberty forthwith, if not required in any other case;

iv) The fine amount, if paid, be refunded to the appellant.

19 All concerned to act on the authenticated copy of this operative order.

MANJUSHA DESHPANDE, J.

REVATI MOHITE DERE, J.