

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

CRIMINAL APPEAL NO. 32 OF 2024

Rajkumar @ Bheli Ramtirth Nishad
@ Sunil Yadav
Age 33 years, Occ. Service
Residing at Khar Road, 6th Road
Gurugangeshwar Dham, Khar (W)
Mumbai
(Presently lodged at Nashik Central
Prison)

...Appellant
(Org. Accused No.1)

Versus

The State of Maharashtra
At the instance of Santacruz Police Station
in CR No.472 of 2011)

...Respondent

Mr. Jagdish Shetty for the Appellant.

Mr. Ajay S. Patil, A.P.P for the Respondent-State.

***CORAM : REVATI MOHITE DERE &
SHYAM C. CHANDAK, JJ.***

DATE : 26th JUNE 2024

JUDGMENT (Per Revati Mohite Dere, J.) :

1. This appeal is directed against the judgment and order dated 21st February, 2014, passed by the learned Additional Sessions

Judge, Mumbai, in Sessions Case No.149 of 2012, convicting and sentencing the appellant, as under:

- for the offence punishable under Section 328 r/w Section 34 of the Indian Penal Code, to undergo rigorous imprisonment for three years, and to pay a fine of Rs.500/- in default, to further undergo simple imprisonment for three months;
- for the offence punishable under Section 302 r/w Section 34 of the Indian Penal Code, to undergo imprisonment for life, and to pay a fine of Rs.1,000/- in default, to further undergo simple imprisonment for six months;
- for the offence punishable under Section 394 r/w Section 34 of the Indian Penal Code, to undergo rigorous imprisonment for three years, and to pay a fine of Rs.500/- in default, to further undergo simple imprisonment for three months.

All the substantive sentences were directed to run concurrently.

2. The prosecution case, in brief, is as under:

It is the prosecution case that the appellant (OA1) and absconding co-accused-Shrishyam Jagprasad Paswan @ Gujar (OA2) committed the murder of Aarti Chabalani (deceased) on 17th August

2011. It is the prosecution case that the appellant was working as a house help in the house of the deceased alongwith one Devendra and that on the day of the incident, the appellant gave a chocolate to Devendra, as a result of which he fell unconscious, after which the deceased was murdered and articles stolen. It is further the prosecution case, that Devendra on regaining consciousness informed PW1-Dilip Girdharilal Chabalani, (husband of the deceased) and PW3-Sonam Dilip Chabalani, (daughter of the deceased) that he was administered a chocolate by the appellant, pursuant to which he fell unconscious and that when he woke up, he saw the deceased lying in a pool of blood on the bed. When PW1-Dilip and PW3-Sonam came home, they saw the deceased lying in a pool of blood and found certain articles and money missing from the house. The motive for commission of the murder was robbery. PW1-Dilip, husband of the deceased on learning of the incident, lodged an FIR, which was registered vide C.R. No.472 of 2011, as against the appellant, alleging offences punishable under Sections 394, 397 and 302 of the Indian Penal Code.

During the course of investigation, the police arrested the appellant and co-accused-Shrishyam Jagprasad Paswan @ Gujar, recorded the statements of witnesses and after completion of investigation, filed charge-sheet in the said case in the Court of the learned Metropolitan Magistrate 32nd Court, Bandra, Mumbai, as against the appellant and co-accused - Shrishyam Paswan @ Gujar.

Since the offence under Section 302 of the Indian Penal Code was triable by the Court of Sessions, the Metropolitan Magistrate committed the case to the Court of Sessions, for trial.

The appellant and co-accused-Shrishyam Paswan @ Gujar pleaded not guilty to the charge and claimed to be tried. Their defence was that of denial and false implication.

Thereafter the statements of the accused were recorded under Section 313 of the Code of Criminal Procedure. The appellant did not examine any witness in support of their defence.

The prosecution, in support of its case, examined as many as fifteen witnesses i.e. PW1-Dilip Girdharilal Chabalani, (husband of the deceased and original complainant, who lodged the FIR); PW2-Dilip Tarachand Bulchandani, (panch to the spot panchanama); PW3-Sonam Dilip Chabalani, (daughter of the deceased); PW4-Ravi Ramesh Parab, panch to the recovery panchanama of a brass pot, at the behest of the appellant; PW5-Kuppu Swami Moka Harijan, panch to the recovery of a wrist watch at the behest of co-accused-Shrishyam Paswan @ Gujar; PW6-Usha Tukaram Khalvate, Nayab Tahsildar, who conducted the Test Identification Parade of accused No.2; PW7-Vasudev Chatur Singh Baberwal, panch to the recovery of article 4-Currency Notes at the behest of OA2; PW8-Jayraj Narsingh Rao Ranvare, Officer attached to DCB, CID, Unit-IX on the arrest of the accused on 23rd August 2011; PW9-Dr. Subodh Vishawanath Bhale Patil, the doctor who conducted the postmortem on the deceased; PW10-Deepak Bhimrao Gaikwad, Nayab Tahsildar, who conducted the spot panchanama, registered an FIR and who arranged for the dog-squad; PW11-Mani Shankar Bhailal Sharma,

watchman of the building; PW12-Tanaji Shankar Surulkar, (Investigating Officer), P.I. attached to Santacruz Police Station;; PW13-Sagar Jagannath Shivalkar, Assistant Police Inspector, attached to DCB, CID, Unit-IX, who brought the appellant to Mumbai on 21st August 2011; PW14-Prabhakar Dattaram Dhumak, neighbour of Shrishyam Jagprasad Paswan @ Gujar (OA2) and PW15-Dr. Prafulla Hindurao Bansode, the doctor who examined Devendra, as according to the prosecution, Devendra was administered a stupefying substance by the appellant.

3. After hearing the parties, the learned Additional Sessions Judge, Mumbai, convicted and sentenced the appellant and co-accused in Sessions Case No.149 of 2012 , as stated aforesaid in para 1 of this judgment.

4. At the outset, we may note that the appellant had initially filed Criminal Appeal No.444 of 2014 alongwith co-accused-Shrishyam Paswan @ Gujar (OA2), however, since Shrishyam Paswan @ Gujar, whilst on parole had absconded, the appellant filed the

aforesaid appeal, after obtaining necessary orders from this Court. The said appeal was admitted by this Court vide order dated 19th January 2024.

5. Heard learned counsel for the appellant and the learned A.P.P. for the respondent-State.

6. Mr. Shetty, learned counsel for the appellant submitted that the prosecution case rests on circumstantial evidence i.e. the evidence of last seen; recovery of a brass pot, at the instance of the appellant; and identification of the appellant by PW11-Mani Shankar Bhailal Sharma. Learned counsel for the appellant submitted that all the said circumstances suffer from several infirmities and as such cannot be relied upon and that the circumstances together do not form a chain, which would point to the complicity of the appellant. He submitted that even the CA report does not further the prosecution case, in any way.

7. Learned APP supported the judgment and order of conviction and sentence and submitted that no interference was warranted in the same.

8. At the outset, we may note that the prosecution case rests on circumstantial evidence. The law relating to circumstantial evidence no longer remains *res integra*.

9. In *Hanumant vs State of Madhya Pradesh*¹ which is one of the earliest decision, the Apex Court observed specifically in para 12, as under:

“12. It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all

1 (1952) 2 SCC 71

human probability the act must have been done by the accused.....”

10. In ***Sharad Birdhichand Sarda v/s State of Maharashtra***², the Apex Court 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 Maharashtra³ 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,

2 (1984) 4 SCC 116

3 (1973) 2 SCC 793

- (3) the circumstances should be of a conclusive nature and tendency,*
- (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.”*

Thus, it is clear from the aforesaid that it is the duty of the prosecution to prove each and every circumstance as against the accused, no chain of which should be missing. Each of the circumstance must point to the complicity of the accused and the established facts must be consistent / in consonance with only the guilt of the accused and must exclude any hypothesis consistent with the innocence of the accused.

11. It is on the touchstone of these principles that we proceed to analyze the evidence adduced by the prosecution.

12. At the outset, we may note, that as far as homicidal death of deceased-Aarti is concerned, the same is not disputed. The only question that arises for consideration before us, is whether the appellant is the author of the same?

13. The prosecution has relied essentially on three circumstances i.e. of last seen evidence, recovery of brass pot and the appellant's identification by PW11-Mani Shankar Bhailal Sharma (watchman).

14. As far as the evidence of last seen is concerned, the prosecution has relied on the evidence of PW1-Dilip and PW3-Sonam, husband and daughter of the deceased. A perusal of the evidence of PW1-Dilip and PW3-Sonam would reveal that on the day of the incident i.e. on 17th August 2011, PW1-Dilip alongwith his daughter PW3-Sonam, had left home to attend his office at 1:00 p.m; that at that time, the deceased alongwith their two servants was there in the house i.e. the appellant and Devendra; that they tried to call up the

deceased, however the deceased did not respond to the calls; that they called Devendra, however, he too did not respond to their calls; and, that finally at about 7:45 p.m. Devendra replied to PW1-Dilip's call and disclosed to PW1-Dilip, that his wife was lying in a pool of blood. According to PW1-Dilip and PW3-Sonam, Devendra was talking in an incoherent manner. According to both these witnesses, when they reached home at about 8:00 p.m., Devendra disclosed to them that the appellant had given him a chocolate to eat, pursuant to which he fell unconscious. Pursuant thereto, both the witnesses went to the bedroom and found the deceased lying on the bed with her legs tied by a rope and with a cut injury on her neck. The appellant was not found in the house. The witnesses on taking a search, found that an amount of Rs.40,000/- to Rs.50,000/- and the deceased i-phone was missing. Both, PW1-Dilip and PW3-Sonam have stated that the police took photographs and obtained fingerprints from the cupboards and took the deceased to Cooper Hospital, where she was declared to be dead. Pursuant thereto, PW1-Dilip lodged an FIR (Exhibit – 14). According to PW1-Dilip, later on, they found that

the deceased, Bentex Watch was also missing and as such informed the police of the same. PW1-Dilip has further stated that the police brought the appellant to their house, pursuant to which he produced a brass pot used to prepare *chatani*, from the bedroom of PW3-Sonam i.e. from below the dressing table in the bed room. According to PW1-Dilip, the said brass pot was having dried blood-stains.

15. The evidence of PW3-Sonam, daughter of the deceased is on similar lines.

16. We may note, that Devendra who disclosed what had happened to him and the deceased, was never examined by the prosecution. The question therefore, that arises for consideration is, whether the said evidence deposed to, by PW1-Dilip and PW3-Sonam can be termed as 'last seen evidence'? Our answer is to the negative. Admittedly, PW1-Dilip and PW3-Sonam were not present in the house at the time when the incident took place. PW1-Dilip and PW3-Sonam have deposed on the basis of what was disclosed by Devendra to them

i.e. of the appellant giving him (Devendra) a chocolate, pursuant to which he fell unconscious and on regaining consciousness he saw the deceased lying in a pool of blood. The said evidence i.e. the disclosure made by Devendra to PW1-Dilip being hearsay, cannot be relied upon, since the prosecution failed to examine Devendra, though he was available.

17. As far as the recovery of a brass pot from the house of the deceased i.e. from the bed room of PW3-Sonam is concerned, the said recovery appears to be doubtful. Firstly, the dog-squad was brought to the house, however nothing was found by the dog-squad; secondly, PW3-Sonam in her cross-examination has stated that there were about ten policemen who had come to their house on the said day; that they were in their house till 3 a.m.; that the police had taken search of the entire house; thirdly, the appellant was brought from Uttar Pradesh to Mumbai on 21st August 2011, was let out and thereafter, arrested on 23rd August 2011, on which day the brass pot was recovered at his instance from the deceased house i.e. from PW3-Sonam's room.

18. In the light of the evidence brought on record, we find it difficult to believe the recovery of a brass pot at the instance of the appellant. Apart from the aforesaid, the brass pot was sent to the Chemical Analyzer, however the report shows that the DNA profile obtained from the blood detected on the metal pot was not interpretable.

19. As far as identification by PW11-Mani Shankar Bhailal Sharma, watchman of the building is concerned, his evidence does not in any way, further the prosecution case vis-a-vis the identification of the appellant.

20. PW11-Mani Shankar Bhailal Sharma, in his evidence has stated that he was working as a watchman in the building in question where the deceased was residing since 2011; that on 17th August 2011, he attended duty at the gate of the society between 8:00 a.m. to 8:00 p.m. PW11-Mani Shankar Bhailal Sharma, had further deposed that at about 2:00 p.m. one person by the name Rajkumar came to him and

disclosed his name as Rajkumar; that when he questioned Rajkumar, Rajkumar told him that he wanted to meet one person by name Sunil, on the second floor of the building. PW11-Mani Shankar Bhailal Sharma identified Rajkumar before the Court by pointing out to the appellant. He has stated that the appellant went to the second floor of the building at 2:00 p.m. and returned back at 5:00 p.m. The evidence of PW11-Mani Shankar Bhailal Sharma was recorded almost 12 days after the incident. It is also pertinent to note, that the appellant's name is Rajkumar @ Sunil. It is the prosecution case, that the appellant who was working in the deceased's house administered a chocolate to Devendra, after which he fell unconscious and when he woke up, he saw the deceased lying in a pool of blood. According to PW11-Mani Shankar, the appellant had gone to the second floor of the building at 2:00 p.m. and had returned at 5:00 p.m. alongwith accused No.2. How and when accused No.2, who was not working in the building went to the said floor, is not clear. It appears from the evidence of PW11-Mani Shankar, that there is some confusion with respect to identification of the appellant.

21. As far as dog-squad being taken to the spot on the day of the incident is concerned, the same has been deposed to, by PW10-Deepak Gaikwad, Nayab Tahsildar, however, the report of the dog-squad has not been placed on record. Similarly, it is not disputed that fingerprints were also taken, however, no report was produced by the prosecution during trial, despite fingerprints being taken.

22. As far as administering stupefying substance to Devendra is concerned, Devendra was examined belatedly, after more than a month, as a result of which nothing was found in his medical report.

23. Considering the overall evidence as stated aforesaid, we find that the prosecution has failed to prove each of the circumstances adduced against the appellant, which would point to the complicity of the appellant in the crime in question.

24. Considering the aforesaid, we hold that the prosecution has failed to prove its case as against the appellant beyond reasonable

doubt and as such pass the following order:-

ORDER

- i) The Appeal is allowed;
- ii) The Judgment and Order dated 21st February, 2014, passed by the learned Additional Sessions Judge, Mumbai, in Sessions Case No.149 of 2012, convicting and sentencing the appellant, is quashed and set aside, only *qua* him;
- iii) The appellant is acquitted of the offences, with which he is charged. The appellant is set at liberty forthwith, if not required in any other case. Fine amount, if paid, be refunded to the appellant.

25. Appeal is allowed and accordingly disposed of.

All concerned to act on the authenticated copy of this judgment.

SHYAM C. CHANDAK, J.

REVATI MOHITE DERE, J.