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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 706 OF 2017

Akshay @ Chhotya Kachar Jedgule
Aged 26 years, Occ. Labour,
residing at Indira Nagar, Belhe,
Taluka Junnar, District Pune. ..**Appellant**

Versus

The State of Maharashtra.
[At the instance of Narayangaon
Police Station, District, Pune] ..**Respondent**

Mr. Pawan Mali, Advocate for Appellant.
Mr. S.S Hulke, APP for Respondent – State.

CORAM : A.S. GADKARI &
MILIND N. JADHAV, JJ.

RESERVED ON : 17th August 2022.
PRONOUNCED ON : 08th September 2022.

JUDGMENT (PER : MILIND N. JADHAV, J.)

. This Appeal questions legality of Judgment and Order dated 30.12.2016 passed by the Additional Sessions Judge, Khed-Rajgurunagar, District Pune (for short, **"Trial Court"**) convicting the Appellant (original accused) under Section 235(2) of the Code of Criminal Procedure, 1973 (for short, **"Cr.P.C."**) for the offence punishable under Section 302 of the Indian Penal Code 1860 (for short, **"IPC"**) arising out of C.R. No. 320 of 2013 registered with Narayangaon Police Station and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 5000/- and in default of payment of fine to suffer rigorous imprisonment for 4 months.

2. The gist of facts which emerge for consideration are as under:-

2.1. On 19.11.2013 at about 7:30 a.m., Vitthal Hadasare gave a phone call to complainant, Bhaskar Popat Kale and informed him that his father Popat Kale was lying dead behind Belheshwar School at Belhe. After receiving the information, the complainant along with his cousins Chandrakant Kale, Jaganath Kale, Ganesh Kale and Vitthal Hadasare rushed to the spot of incident at Belhe, Tal. Junnar at about 8:15 a.m. After arriving they identified the body of deceased Popat Kale lying in the field of Anil Shankar Gunjal behind the Belheshwar High School, Belhe. They saw injury on his head. One wooden baton and another piece of wood was lying next to him. They also saw one blood-stained stone lying next to his head with a bag of vegetables; his face was completely smashed. Offence was registered under Section 302 IPC vide C.R. No. 320 of 2013 at Narayangaon Police Station.

2.2. According to prosecution, on 17.11.2013 Kashinath Kale (uncle of first informant) gave a phone call to Popat Kale and informed him that he intended to sell his bullocks in the market at Belhe on the next day and called him to come to his house in the evening. At about 8:00 p.m. Popat Kale went to the house of Kashinath Kale.

2.3. According to prosecution, in the night of 18.11.2013, PW-2 - Raman Mutayya Devar and PW-3 - Irshad Mustak Ansari had last seen

the accused and deceased together. Deceased was sleeping near Bipinkumar’s shop on that night when accused woke him up and took him towards Belheshwar School. Deceased was last seen together in the company of accused at about 9:00 p.m. by PW-2 and PW-3. According to prosecution, in the night of 18.11.2013 PW-2 and PW-3 both saw deceased sleeping near Bipinkumar’s shop and saw accused waking him up and taking him along with him.

2.4. Spot panchanama (Exh.29) was conducted by PW-8 on 19.11.2013. In the spot panchanama, 13 articles were recovered and seized from the spot of incident namely blood-stained soil, blood samples from stone, stone, shawl, two wooden battens, one pair of chappal, white cap, two bags, two pouches of tobacco and one empty cigarette packet. PW-8 prepared the inquest panchanama and sent the dead body for conducting autopsy and recorded statements of witnesses. On 20.11.2013, accused was arrested.

2.5. On 22.11.2013, at the instance of accused and in presence of panch witnesses (Exh.25) clothes i.e. jeans pant and shirt worn by accused were seized from his house. The seized articles were sent for chemical analysis/ CA Report. After receiving post-mortem report and all relevant documents after completion of investigation, filed a charge-sheet before Judicial Magistrate First Class (JMFC), Junnar. Since the charge was under Section 302 IPC, the offence was triable

exclusively by Court of Sessions, learned JMFC, Junnar committed the case to the Sessions Court for trial.

3. Prosecution's case is based on circumstantial evidence. Prosecution has relied on the "last seen together" theory which has been upheld by the learned Trial Court in convicting the Appellant.

4. To bring home guilt of accused, prosecution examined 8 witnesses; viz. PW-1 Bhaskar Popat Kale complainant (Exh.8), PW-2 Raman Mutayya Devar (Exh.12), PW-3 Irshad Mustak Ansari (Exh.14), PW-4 Kashinath Baban Kale (Exh.17), PW-5 Popat Rambhau Borude (Exh.18), PW-6 Dr. Ramesh Mohanrao Karhad Medical Officer (Exh.20), PW-7 Rahul Vasant Jagtap Panch (Exh.27), PW-8 Manohar Balawant Ranmale Investigating Officer (Exh.30)

5. Case of Prosecution is based on "last seen together" theory. Prosecution has relied upon depositions of PW-2 and PW-3 who had last seen the deceased with Appellant. Appellant's case in defence is that though on the previous night he was last seen with the deceased, since deceased was in an inebriated state and completely drunk, he tried to help him and shifted him from the roadside to a safer place to avoid meeting any accidental mishap. According to the prosecution, PW-2 and PW-3 went for a walk together after dinner at about 8:30 p.m.; that at about 9:00 p.m. to 9:15 p.m. they noticed that Bipinkumar's shop was closed; that accused saw deceased lying on the

roadside and he tried to wake him up; he woke up after accused sprinkled some water on his face; they saw deceased was in an inebriated state as his gait was unsteady; at that time they saw accused walking with deceased towards Belheshwar School. Prosecution relied on the fact/circumstance that accused and deceased were last seen together by PW-2 and PW-3 and that deposition of these witnesses is not shattered in cross examination. On the other hand, accused has not disputed the fact that he approached the deceased or denied that he tried to take him to safety at the side of the road.

6. PW-6 - Dr. Ramesh Mohanrao Karhad, Medical Officer, Rural Hospital Narayangaon conducted autopsy on the dead body of Popat Kale on 19.11.2013 and prepared Post-mortem (PM) Report which was marked in evidence as Exh. 21. He opined that, there were three external injuries on the body of deceased, viz;

(i) left eye was compressed and partially opened and right eye was compressed and closed;

(ii) face was compressed, upper jaw and lower jaw were also compressed;

(iii) CLW was on occipital bone of size 8cm x 2cm x 0.5cm

6.1. Following internal injuries were noticed:-

I. hematoma was on occipital bone under the scalp;

II. fracture of occipital bone of size 8cm x 2cm x 0.5cm.

6.2. The time of death of Popat Kale as opined in the PM Report was at about 1:00 a.m. on 19.11.2013. This was 4 hours after PW-2 and PW-3 had last seen the accused alongwith deceased at about 09:00 p.m. to 09:15 p.m.

7. In the case ***G. Parshwanath Vs. State Of Karnataka***[1], in paragraph No.11, while enunciating the law relating to appreciation of evidence in a case based on circumstantial evidence, the Supreme Court has held as under: -

> *"11. The evidence tendered in a court of law is either direct or circumstantial. Evidence is said to be direct if it consists of an eye-witness account of the facts in issue in a criminal case. On the other hand, circumstantial evidence is evidence of relevant facts from which, one can, by process of intuitive reasoning, infer about the existence of facts in issue or factum probandum. In dealing with circumstantial evidence there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion, however, strong cannot be allowed to take place of roof and, therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. However, it is not derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturisation of actual incident, but the circumstances cannot fail. Therefore, many a times it is aptly said that "men may tell lies, but circumstances do not". In cases where 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. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events*

1 (2010) 8 SCC 593

and to human conduct and their relations to the facts of the particular case. The Court thereafter has to consider the effect of proved facts. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved fact, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even thought it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. 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, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

8. In the case ***Surajdeo Mahto Vs. The State of Bihar***[2]**,** paragraph Nos.29 and 30 has laid down the fundamental principles to be kept in mind while adjudicating a criminal case founded on "last seen together" theory is read as under:-

"29. The case of the prosecution in the present case heavily banks upon the principle of 'Last seen theory'. Briefly put, the last seen theory is applied where the time interval between the point of when the accused and the deceased were last seen together, and when the victim is found dead, is so small that the possibility of any other person other than the accused being the perpetrator of crime becomes impossible. Elaborating on the principle of "last seen alive", a 3-judge bench of this Court in the case of Satpal v. State of Haryana (2018) 6 SCC 610 has, however, cautioned that unless the fact of last seen is corroborated by some other evidence, the fact that the deceased was last seen in the vicinity of the Accused, would by itself, only be a weak kind of evidence. The Court further held:

> *"...Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly.*

2 AIR 2021 SC 2643

> *But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the Accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine.*
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> *30. We may hasten to clarify that the fact of last seen should not be weighed in isolation or be segregated from the other evidence led by the prosecution. The last seen theory should rather be applied taking into account the case of the prosecution in its entirety. Hence, the Courts have to not only consider the factum of last seen, but also have to keep in mind the circumstances that preceded and followed from the point of the deceased being so last seen in the presence of the Accused."*

9. In the present case, Mr. Mali has drawn our attention to the supplementary statement of Appellant recorded under Section 313 of Cr.P. C. on 03.12.2016, which is marked in evidence as Exh.39. On perusal of the supplementary statement it is revealed that Appellant has given a clarification and disclosure of the incident. Appellant has stated that at about 09:00 p.m. on the date of incident i.e. 18.11.2013 while passing through the shop belonging to Binilkumar he saw deceased in an inebriated state lying/sleeping near the cycle puncture shop on the road; since there was movement of heavy vehicular traffic on the road and deceased was lying near edge of the road, he approached him, woke him up and in order to prevent any accidental

mishap took him on the opposite side of the road and made him lie down next to Prerna hotel; that thereafter at about 9:30 p.m. he went to his residence. Mr. Mali has submitted that in view of this statement it is highly unlikely that Appellant can be said to have committed murder of deceased, merely on the basis of the depositions of PW-2 and PW-3 who had last seen both of them together at about 09:00 p.m. He submitted that the entire prosecution case is based upon the "*last seen together theory*" which incidentally has never been denied by the Appellant.

10. Mr. Mali submitted that, the case of prosecution has to be based upon clear, cogent and unimpeachable evidence produced by prosecution and in the case of circumstantial evidence, guilt of accused is to be proven on the basis of proof beyond reasonable doubt; that reasonable doubt is not an imaginary, trivial or merely a probable doubt, but a fair doubt that is based upon common sense.

11. In order to emphasis the settled legal position qua Section 313 of Cr.P.C. Mr. Mali placed on record for consideration the decision of the Apex Court in case of ***Sujit Biswas Vs. State of Assam***[3]; paragraph Nos. 18 to 20 of the said judgment read thus:-

> *"18. Thus, in view of the above, the Court must consider a case of circumstantial evidence in the light of the aforesaid settled legal propositions. In a case of circumstantial evidence, the judgment remains essentially inferential. Inferences are drawn from established facts, as the circumstances lead to particular inferences. The Court must draw an inference with respect to whether the chain of circumstances is complete, and when the*

3 (2013) 12 SCC 406

circumstances therein are collectively considered, the same must lead only to the irresistible conclusion, that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused.

19. This Court in Babu v. State of Kerala, (2010) 9 SCC 189 has dealt with the doctrine of innocence elaborately, and held as under:

> *"27. Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like the Negotiable Instruments Act, 1881; the Prevention of Corruption Act, 1988; and the Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact.*
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> *28. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as those of statutes as referred to hereinabove, that the burden of proof is on the accused. The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution."*

20. It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person under Section 313 Cr.P.C., is to meet the requirement of the principles of natural justice, i.e. audi alterum partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., cannot be used against

> *him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement."*

12. In the present case, it is seen that the case of prosecution is based entirely upon one singular circumstance i.e. depositions PW-2 and PW 3 of having seen deceased with the accused together at about 9:00 p.m. on 18.11.2013. Admittedly, there is no direct evidence or eye witness to the incident/death of deceased. Supplementary statement of Appellant recorded under Section 313 of Cr.P.C gives a clear explanation in relation to the last seen together theory argued by the prosecution as an incriminating circumstance against Appellant.

13. In our considered opinion Appellant has infact discharged the burden under Section 106 of the Indian Evidence Act, 1872 of the fact of having accompanied deceased on 18.11.2013 when they were last seen by PW-2 and PW-3; the explanation offered by Appellant is cogent, clear and ought to have been considered by the learned Trial Court. On the contrary in paragraph Nos. 28 and 29 of the impugned judgment the learned Trial Court after considering the explanation has deemed it to be not satisfactory. We do not agree with the conclusion given by the Trial Court in discarding it as not satisfactory. Infact there is no reasoning given by the Trial Court at all.

14. In the present case, Appellant has clearly explained the facts which are especially within his knowledge. It is pertinent to note that

save and except the "last seen together" theory there is no other circumstance proved to indict the accused. Admittedly prosecution has also not proved any motive in the case. On a minute perusal of the record of the case, it is seen that there is satisfactory explanation given by accused in his supplementary statement recorded under Section 313 of Cr.P.C. which is a probable explanation and thus it requires due consideration.

15. We may also usefully refer to the factors etched by the Apex Court which are required to be taken into account in adjudication of cases of circumstantial evidence. In para 14 of the decision in the case of ***Anjan Kumar Sarma and Ors. Vs. State of Assam***[4], the Apext Court has held as under:-

> *"14. Admittedly, this is a case of circumstantial evidence. Factors to be taken into account in adjudication of cases of circumstantial evidence laid down by this Court are:*
>
> > *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must" or "should" and not "may be" established;*
> > *(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;*
> > *(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. (See: Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116 - 153; M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200 – 18)."*

4 (2017) 14 SCC 359

16. In the present case, it is further seen that save and except the circumstance that PW-2 and PW-3 had last seen the accused with the deceased four hours before the probable time of death, there is no other cogent evidence bought on record by the prosecution to link the accused to the commission of the offence. Admittedly merely on the basis of "last seen together" theory relied upon by the prosecution in the facts of the present case cannot be held to be the basis for conviction of the accused.

It is further pertinent to note that the accused was not confronted with the CA report in the present case when his statement was recorded under Section 313 of Cr.P.C.. No question was put to the accused with respect to the CA report having reference to the blood-stained clothes and the blood group found thereon. Hence, in that view of the matter the reliance of the prosecution case on the CA report and the recovery and seizure of the blood-stained clothes needs to be discarded and cannot be countenanced.

It has also come in evidence that deceased had on the date of incident sold his cattle (bullocks) and therefore was having money on his person; that apart, he was admittedly in an inebriated state; hence the possibility of the deceased having been robbed and killed by some third person cannot be completely ruled out. This is so because according to the medical evidence, death of deceased occurred around

1:00 a.m. on 19.11.2013, whereas PW-2 and PW-3 had last seen the accused and deceased together at 9:00 p.m. on 18.11.2013. It is further seen that prosecution has not propounded any motive in the present case.

17. Thus, in the present case we are of the considered view that, the chain of circumstances is incomplete and the prosecution has failed to prove its case beyond reasonable doubts.

18. In view of the above discussion and findings, the impugned Judgment and Order dated 30.12.2016 is quashed and set aside. Appellant (accused) be released forthwith unless required to be imprisoned in any other offence.

19. Criminal Appeal No. 706 of 2017 is allowed in the above terms.

20. Before parting with the Judgment, we would like to place on record appreciation for the efforts put in by Mr. Pawan Mali, learned Advocate appointed by High Court Legal Services Committee, Mumbai for espousing the cause of the Appellant; he was thoroughly prepared in the matter and rendered proper and able assistance to the Court.

[MILIND N. JADHAV, J.] **[A.S. GADKARI, J.]**