

(2020) 01 BOM CK 0110
In the Bombay High Court
Case No : Criminal Appeal No. 27 Of 2019

Dular Munda

APPELLANT

Vs

State Of Goa And Anr

RESPONDENT

Date of Decision : 09-01-2020

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 304, 304(ii), 325
Code Of Criminal Procedure, 1973 — Section 13, 164, 164, 164(4), 313

Citation : (2020) 01 BOM CK 0110

Hon'ble Judges : M.S. Sonak, J; M.S. Jawalkar, J

Bench : Division Bench

Advocate : Salil Saudagar, Pravin Faldessai

Final Decision : Disposed Of

Judgement

M.S. Sonak, J

1. Heard Mr. Salil Saudagar appointed under the Legal Aid Scheme to represent the Appellant.
2. Heard Mr. P. Faldessai, learned Additional Public Prosecutor for the Respondents- State.
3. This appeal is directed against the judgment and order dated 13th November, 2018 made by the learned Sessions Judge, South Goa, at Margao in Sessions Case (302) No.9/2017 convicting the Appellant of the offence punishable under Section 302 of the Indian Penal Code (IPC) and sentencing him to undergo imprisonment for life and to pay fine of Rs.10,000/- and in default of the payment of fine, to undergo simple imprisonment for a period of three months.
4. On 10th October, 2017, the charge was framed against the Appellant alleging that on 12th February, 2017, at about 19.30 hours, in an open field at Vaddie, Benaullim, the Appellant committed murder of Shri Sachin Oraon by assaulting him with a wooden danda on his head and face with an intention and knowing

that such bodily injury would cause his death thereby committing offence under Section 302 of IPC. Upon the Appellant pleading "not guilty" the trial commenced in which, the prosecution examined in all, fourteen witnesses including the Investigating Officers. Thereafter, the statement of the Appellant under Section 313 of the Code of Criminal Procedure Code (Cr.PC.) came to be recorded. The Appellant neither examined himself nor led any other defence evidence. The learned Sessions Judge, vide impugned judgment and order dated 13th November, 2018 has convicted the Appellant for offence under Section 302 of IPC and sentenced him to life imprisonment as aforesaid. Hence, the present appeal.

5. Mr. S. Saudagar, learned counsel for the Appellant submitted that the case of the prosecution is entirely based upon circumstantial evidence. He pointed out that most of the circumstances referred to by the learned Sessions Judge in paragraph 61 of the impugned judgment and order, are not at all incriminatory and in any case the same, have not even been proved in accordance with law. He therefore submits that this is not a case where the Appellant could have been convicted on the basis of any circumstantial evidence.

6. Mr. Saudagar submits that in the present case, the learned Sessions Judge has treated the so called declaration recorded by the Special Judicial Magistrate (PW7), as some extra judicial confession. He submits that the evidence of PW7 is required to be excluded in its entirety because PW7, in terms of the Notification dated 16th January, 2015 issued under Section 13 of the Code of Criminal Procedure, was empowered to function as such only for the local areas of Salcete and Mormugao Talukas. He points out that in the present case PW7 has purported to record a confession at Goa Medical College, Bambolim, which is way beyond the areas defined in the Notification dated 16th January, 2015.

7. Mr. Saudagar without prejudice to the aforesaid submits that even otherwise the so called recording of declaration by PW7 and the testimony of PW7 is required to be discarded on account of inherent inconsistencies therein. He submits that there has been no compliance whatsoever with the salutary provisions of Section 164 of the Criminal Procedure Code as also the guidelines framed by the Bombay High Court in the matter of recording of dying declaration and confession. He submits that in the absence of such compliances, the testimony of PW7 can never pass muster. He relies on Bhausahab Vs State of Maharashtra 1997 CriLJ 467 in support of the same.

8. Mr. Saudagar submits that even otherwise the so called extra judicial confession is extremely weak type of evidence and in absence of any corroboration whatsoever the learned Sessions Judge erred in placing reliance upon the same. He submits that if the so called extra judicial confession is excluded from consideration, then, there is a significant breach in the chain of circumstances and the conviction of the Appellant on the basis of circumstantial evidence is required to be set aside.

9. Mr. Saudagar submits that the learned Sessions Judge without saying so in so

many words appears to have relied upon the "last seen theory" in order to convict the Appellant. He submits that there is absolutely no cogent evidence on the aspect of "last seen theory". In any case, he points out that the doctors have been unable to satisfy, even some reasonable level of approximation the precise time and date of demise of Sachin. He submits that in the absence of this crucial evidence, there is no question of resort to "last seen theory". He relies on Ramreddy Rajeshkhanna Reddy and others Vs State of Andhra Pradesh (2006) 10 SCC 172.

10. Mr. Saudagar further submits that in the present case the prosecution has failed to establish any motive for the crime. He submits that it is the case of the prosecution that three dandas were used to assault Sachin and that the blood was detected on each of the three dandas. The prosecution has however not explained as to whether it was their case that the Appellant had at one and same time used three dandas to assault Sachin. Mr. Saudagar pointed out several other discrepancies arising out of evidence on record and submitted that in this state of record, the Appellant could not have been convicted for the offence under Section 302 of IPC.

11. Mr. Faldessai, learned Additional Public Prosecutor submits that the criminal case against the Appellant was registered at Colva Police Station, which pertains to the local area of Salcete. He submits that in terms of the Notification dated 16th January, 2015 therefore, the Special Judicial Magistrate was very much empowered to record confession of the Appellant. He submits that mere fact that the confession was recorded at Goa Medical College, Bambolim, does not mean that the Special Judicial Magistrate has acted beyond the limits of local area for which she came to be appointed. He submits that such a condition was never raised in the course of the trial and on such basis, the evidence of PW7 can never be discarded.

12. Mr. Faldessai submits that it is settled position in law that dying declaration can as well be read as a statement under Section 164 of the Criminal Procedure Code if the person giving such declaration, ultimately survives. He relies on Shrawan Bhadaji Bhirad and others Vs State of Maharashtra (2002) 10 SCC 56 in support of this proposition. He submits that the learned Sessions Judge has rightly relied upon this decision to hold that the statement given by the Appellant to the Special Judicial Magistrate was admissible as extra judicial confession in the present case.

13. Mr. Faldessai submits that the "last seen theory" has been established by the prosecution. He refers to the testimonies of PW2 and PW4 and on the basis of the same, submits that there is ample evidence which establishes that the Appellant and the deceased were last seen together on the night intervening 11th and 12th February, 2017. He submits that the medical evidence establishes that Sachin died somewhere around 12th February, 2017. He therefore submits that the time gap between the Appellant and the deceased being last seen together is quite short and the onus was upon the Appellant to explain the

circumstances in which Sachin was found dead in the open field after some days. He submits that in this case the prosecution has also established the motive for commission of crime.

14. For all the aforesaid reasons, Mr. Faldessai submits that the prosecution has succeeded in establishing the guilt of the Appellant beyond reasonable doubt and therefore, there is no warrant to interfere with the impugned judgment and order.

15. The rival contentions now fall for our determination.

16. According to us, in the peculiar facts of the present case, it is really not necessary to consider Mr. Saudagar's contention based upon the Notification dated 16th January, 2015 by which PW7 came to be appointed as a Special Judicial Magistrate in terms of Section 13 of the Criminal Procedure Code. This is because even if we were to hold that PW7 was entitled to function as a Special Judicial Magistrate, for reasons discussed hereinafter, we are satisfied that the so called statement given by the Appellant could not, in the present case be regarded as some confession or even extra judicial confession. Further, we are satisfied that even if the statement could have been regarded as extra judicial confession in the absence of any corroboration on the material particulars, such statement, ought not to have been made virtually the basis for conviction of the Appellant. Accordingly, there is really no necessity to decide Mr. Saudagar's first contention based upon the Notification dated 16th January, 2015 though we must say that at least prima facie, we did not find much merit in the same.

17. The case of the prosecution was that the Crime No.27/2017 came to be registered at Colva Police Station against one Raju Naik and Rahul Jain for having assaulted the Appellant with fist blows, slaps, kicks, thereby causing injuries to the Appellant. This case indicated that the said Raju Naik and Rahul Jain were alleged to have committed the offences under Section 325 read with Section 34 of the IPC. It is the case of the prosecution that on account of injuries sustained by the Appellant, the Appellant was admitted by them in Ward No.104 of the Goa Medical College. It is the case of the Appellant that this assault on the Appellant took place on 16th February, 2017 and the Appellant was admitted to the G.M.C. on 21st February, 2017, as the victim of such assault by Raju Naik and Rahul Jain. It is further the case of the prosecution that the doctor who was treating the Appellant opined that his condition was deteriorating and that he had requested to record dying declaration. There is absolutely no evidence placed on record by the prosecution that the doctor had indeed opined that the condition of the Appellant was deteriorating and that he had requested for record of dying declaration. There is absolutely no evidence on record in regard to condition of the Appellant's health either during the period from 21st February 2017 when he was admitted at G.M.C. and 26th February, 2017, on which date the Special Judicial Magistrate recorded the so called statement or dying declaration or confession or extra judicial confession of the Appellant. It is necessary for the prosecution to have placed on record such evidence, if any, if any credence was indeed required to be extended to the so called statement alleged to have been

voluntarily given by the Appellant in the present matter.

18. On 23rd February, 2017, a FIR came to be registered under Crime No.30/2017, again at the Colva Police Station by Shri Sameer Haldankar, PSI of Colva Police Station (PW11). This complaint/FIR states that "enquiry also reveals that the accused had assaulted the deceased with wooden danda on 12th February, 2017 at around 19.30 hours in an open field at Vaddie Benaullim". PW11 who has deposed in this matter, failed to explain the source of this information or failed to give any details of the enquiry allegedly made by him on the basis of which the FIR came to be lodged.

19. The circumstances in which the request was made to PW7, the Special Judicial Magistrate to record dying declaration of the Appellant have also not been explained by the prosecution. PW7, who is supposed to have come to the G.M.C. to record "dying declaration" of the Appellant has singularly failed to comply with any of the predicates of Section 164 of the Criminal Procedure Code or guidelines framed by this Court in the matter of record of dying declaration.

20. PW7 has nowhere recorded that before recording the confession of the Appellant, she explained to him that he was not bound to make such confession and that, if he does so it may be used against him. There is absolutely nothing on record to establish that the Special Judicial Magistrate posed any question to the Appellant in order to ascertain whether or not the confession was being made voluntarily. There is no compliance with the provisions of Section 164(4) of the Criminal Procedure Code. There was no time given to the Appellant to reflect as is required under the law. Clearly therefore in the present case there is total breach in the matter of compliance with the predicates of Section 164 of the Cr.P.C. The decision of the learned Single Judge of this Court in Bhausahab (supra) indeed assists the case of the Appellant inasmuch as in the said decision, the learned Single Judge of this Court has held that the confession not in accordance with the provisions of Section 164 of Cr. P.C. cannot ordinarily be looked into as legal evidence.

21. The learned Sessions Judge has relied upon Shrawan Bhadaji Bhirad (supra) upon which reliance was also placed by the learned Public Prosecutor in the present appeal. In the said case, the Hon'ble Apex Court has held that when a statement is recorded as a dying declaration and the victim survives, such a statement need not stand the strict scrutiny of a dying declaration but may be treated as a statement under Section 164 of Cr.P.C.

22. The ruling in Shrawan Bhadaji Bhirad (supra) is entirely distinguishable. In the said case, the so called dying declaration was given by the victim of the crime. Such victim ultimately survived and even deposed at the trial. It is in these circumstances, the Hon'ble Apex Court held that there need not be any strict compliance with the predicates of Section 164 of Cr.P.C. The fact situation in the present case is entirely different. The Special Judicial Magistrate, no doubt, was called to record dying declaration of the Appellant but now claims to have

recorded the confession of the Appellant. To such a situation the ruling in *Shrawan Bhadaji Bhirad* (supra) obviously cannot apply. The learned Sessions Judge has failed to notice this significant distinction and has chosen to rely upon the statement of the Appellant as an extra judicial confession in the matter.

23. In *S. Arul Raja Vs State of Tamil Nadu* (2010) 8 SCC 233, the issue as to whether a statement which is inadmissible as a dying declaration can be admissible either as a confession or extra judicial confession did arise. However, upon reading of the said ruling, the question does not appear to have been answered one way or the other. Instead the Hon'ble Apex Court ruled that the extra judicial confession is a weak piece of evidence though it can be made the basis of conviction, due care and caution must be exercised by the Courts to ascertain the truthfulness of the confession. Rules of caution must be applied before accepting an extra judicial confession. Before the Court proceeds to act on the basis of an extra judicial confession, the circumstances under which it is made, the manner in which it is made and the persons to whom it is made must be considered alongwith the two rules of caution. First, whether the evidence of confession is reliable and second, whether it finds corroboration. Applying this test, the Hon'ble Apex Court held that the so called extra judicial confession could never been form basis for sustaining conviction. From the reading of the decision, it is apparent that the Hon'ble Apex Court proceeded on the basis that even if the statement could be recorded as extra judicial confession, the same, was not sufficient to sustain conviction particularly when such confession was found to be unreliable and backed with any corroborative evidence.

24. If the statement dated 26th February, 2017 is perused, then, the same hardly inspires any confidence. The statement does not say that the Appellant has murdered the deceased. In any case in the absence of any corroboration on the material particulars, the learned Sessions Judge was not justified in placing virtually the wholesale reliance on such statement without noticing peculiar facts and circumstances alleged to have been made. In the present case also there is hardly any corroboration or corroborative circumstances established by the prosecution. In fact, at places there are variances between the case of the prosecution and the statement which the learned Sessions Judge has treated as extra judicial confession.

25. In the aforesaid state of evidence, we are satisfied that the statement dated 26th February, 2017 allegedly made by the Appellant to the Special Judicial Magistrate would not qualify as any extra judicial confession as such. However, even if the same was to qualify as extra judicial confession, it is difficult to hold that the same was reliable and in any case in the absence of corroboration of the material particulars the learned Sessions Judge, was not justified in basing its conviction upon the same.

26. The aspect of "last seen theory", the prosecution has relied upon the evidence of PW2 and PW4. PW2, the owner of "Pedro Bar and Restaurant" has deposed that both the Appellant as well as the deceased joined the employment

as dishwashers on 8th February 2017. On the fourth day of joining the work at about 11.00 to 11.30 pm, he noticed that both of them were drunk and he therefore told them to sleep on the terrace where all the workers sleep. Both of them went on the terrace and after some time assaulted one of the workers Raju who was sleeping on the terrace and then assaulted one Vinay who was talking on the mobile phone. This assault according to him was with a wooden danda. PW2 has then deposed that after he heard noise and before he could reach the terrace, both the Appellant as well as the deceased jumped from the terrace and ran away leaving their belongings behind.

27. From the deposition of PW2, it is clear that he really did not see anything about assault on terrace. Further, he has clearly deposed that before he could reach at the terrace both the accused as well as the deceased jumped from the terrace and ran away leaving behind their belongings.

28. PW4 is a Waiter at Pedro Bar and Restaurant and he has deposed that on 11th February, 2017 when he was sleeping on the terrace he was awakened by shouting of one Tilakraj. As he got up, the deceased i.e. Sachin hit him on his left palm with something of iron. He has then deposed that the deceased and the Appellant ran away when the owner of the restaurant went to the terrace.

29. Apart from there being some inconsistencies between the deposition of PW2 and PW4, their testimonies are hardly sufficient to invoke "last seen theory". This is more so because the medical evidence i.e. Autopsy Report which was conducted on 22nd February, 2017, gives approximate time since death was around "one to two weeks".

30. This means that according to the medical evidence the death may have taken place any time between 9th February, 2017 to 16th February, 2017. The gap between the Appellant and the deceased running away on the night intervening 11th and 12th February, 2017 and the time of death of the deceased cannot be said to be so short as to rule out the possibility of any third party intervention. But the prosecution seeks to invoke "last seen theory". It is incumbent upon the prosecution to bring home some better evidence on the date and timing of death.

31. In this case, the Appellant, in the course of his 313 statement has very clearly stated that on 11th February, 2017, the deceased and he did run away but in different directions. The learned Sessions Judge, has taken some cognizance of the answers given by the Appellant in 313 statement but has failed to give any credence on the alleged ground that the Appellant has failed to prove that there was some staircase in the restaurant. Since the Appellant had very clearly stated that the deceased and he fled separately, there was necessity to have some objective consideration of this circumstance.

32. In the case of Ramreddy Rajeshkhanna Reddy (supra) the Hon'ble Apex Court held that the "last seen theory" comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any

person other than the accused being the author of the crime becomes impossible. Even in such a case the Courts should look for some corroboration. Applying this principle, this is hardly a case where "last seen theory" could have been invoked by the prosecution.

33. The prosecution has also attempted to make out a case that the deceased was assaulted by three dandas which have been attached and marked as exhibits. However, the prosecution has failed to explain as to how the Appellant could have used three dandas in order to assault the deceased. The medical evidence indicates that there was basically one assault on the head/face of the deceased.

34. It is now well settled that in order to base a conviction on the circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well settled that suspicion, however, grave may be cannot be a substitute for a proof and the Courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. [See Anil Kumar Singh Vs State of Bihar : (2003) 9 SCC 67 and Reddy Sampath Kumar Vs State of A.P. : 2005 CriLJ 4131]. In the present case, if circumstances emerging from the so called extra judicial confession and last seen theory are excluded from consideration, then remaining circumstances can hardly said to be not incriminating circumstances so as to sustain conviction of the Appellant.

35. In this case, we find that even if the prosecution were to have been successful in making out a case that the Appellant was indeed the author of the crime, the material on record was not at all sufficient to convict the Appellant under Section 302 of IPC. In fact, the material, at the highest would have pointed out a case under Section 304 Part II of the IPC. This aspect too has not been considered at all by the learned Sessions Judge.

36. In this case, the prosecution has failed to produce any material whatsoever on record regards the Crime No.27/2017, in which the Appellant was indicated as victim of assault by Raju Naik and Rahul Jain. This was necessary because it was the duty of the prosecution to explain the injuries on the person of the Appellant. Besides, in this matter, there is no explanation as to why the prosecution did not even examine Tilakraj Singh whom the deceased alleged to have assaulted on 11th February, 2017.

37. The prosecution, has failed to establish any cogent motive in this case. It is the case of the prosecution itself that the deceased Sachin had assaulted Tilakraj Singh a co-worker on 11th February, 2017. It is the case of the prosecution itself that the Appellant and the deceased had fled together and thereafter stayed in the open field on the night intervening 11th February, 2017 and upto the evening of 12th February, 2017. It is then the case of the prosecution that because the

Appellant repeatedly enquiring with the deceased Sachin as to why he has assaulted Tilakraj Singh, the deceased Sachin got irritated and altercation took place between the Appellant and the deceased. This is hardly some motive which can said to have been established by the prosecution. In any case, on the basis of the case of the prosecution itself, the learned Sessions Judge was not justified in convicting the Appellant for offence under Section 302 of IPC and at the highest, the case, if proved by the prosecution might have come under Section 304 Part II of IPC.

38. In the aforesaid circumstances, we are satisfied that the prosecution has failed to prove beyond reasonable doubt that it is the Appellant who is the author of the crime in question. In these circumstances, the conviction of the Appellant cannot sustain and is required to be set aside.

39. The impugned judgment and order and the conviction of the Appellant recorded therein is hereby set aside. The Appellant is to be set at liberty forthwith, if not required in any other case.

40. Registry to do the needful in the matter, at the earliest.