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**(2022) 02 BOM CK 0030**

**In the Bombay High Court**

**Case No :** Criminal Appeal No. 662, 685 Of 2010 With Interim Application No. 1435 Of 2020, 1941 Of 2021

Mansoorali Khan Ahmed Khan And Others

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

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**Date of Decision :** 14-02-2022

**Acts Referred:**

Indian Penal Code, 1860 — Section 34, 201, 302

Evidence Act, 1872 — Section 27, 30

Code Of Criminal Procedure, 1973 — Section 157

**Citation :** (2022) 02 BOM CK 0030

**Hon'ble Judges :** Sadhana S. Jadhav, J; Prithviraj K. Chavan, J

**Bench :** Division Bench

**Advocate :** M.M. Khokhawala, Megha Puralkar, Devyani Kulkarni, G.P. Mulekar

**Final Decision :** Allowed

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**Judgement**

Sadhana S. Jadhav, J

1 The appellants herein are convicted for the offence punishable under section 302 read with section 34 of the Indian Penal Code and each of the

accused is sentenced to suffer R.I. for life and to pay fine of Rs. 500/-, in default to suffer R.I. for two years. The appellants are further convicted of

the offence punishable under section 201 read with section 34 of the Indian Penal Code and each of them is sentenced to suffer R.I. for 5 years and

to pay fine of Rs. 500/-in default to suffer further R.I. for six months by the Additional Sessions Judge, Greater Bombay vide Judgment and Order

dated 7/7/2010 in Sessions Case No. 807 of 2006. Hence, this appeal.

2 Such of the facts necessary for the decision of these appeals are as follows :

(a) On 21/5/2006 one Nurul Hasan Khan lodged a report with Trombay Police

Station alleging therein that his uncle Nadir Khan owned Shop No. 24

in E-Sector of Chita Camp, which is given on rent to one Akbar Khan who runs a grocery shop in the name and style of Khan store. One Suresh

Murav works in the said shop alongwith Dilshad, brother-in-law of Akbar Khan. Dilshad was also residing in the said shop on the mezzanine floor.

(b) On 21st May, 2006 at about 8.30 p.m. Nurul Khan(P.W.1) was surprised to see shop closed as the shop normally remains open till midnight. He

called upon the people in the locality and opened shutter and saw that fans and lights were on. Similarly, cash drawer was found open. He therefore,

called out for Dilshad who resides on the mezzanine floor, but there was no response. When he lit candle, he noticed legs of someone on first floor and

therefore, he called upon Trombay Police Station.

(c) Then they noticed dead body of Suresh Murav whose throat was slit. The dead body was found in the bed room. A knife was seen lying nearby.

Soon thereafter, they saw the dead body of Dilshad Khan in the bathroom with his face submerged in milk crate filled with water. There were marks

of strangulation around neck of Dilshad Khan.

(d) On the basis of the report filed by Nurul Hasan, Crime No. 167 of 2006 was registered at Trombay Police Station for the offence punishable under

section 302 of the Indian Penal Code against unknown persons.

3 At the trial, prosecution has examined as many as 16 witnesses to bring home the guilt of the accused. The prosecution has placed reliance upon the

evidence of P.W. 1 Nurul Hasan Khan, P.W. 2 Jilani Vasi Mirza, P.W.3 Suraya Sakharkar, P.W. 4 Abdul Rashid Shaikh, P.W. 5 Munna Shaikh to

substantiate involvement of the accused persons in the said offence.

4 P.W. 1 Nurul Hasan Khan has proved the contents of FIR on the basis of which the offence is registered. It is elicited in the cross- examination that

he looks after the shop and he had stated so before the police. However, it does not find place in the FIR. There is no documents to show that the

shop of Nadir Khan was being run by Akbar who happens to be the maternal cousin of Nadir. Khan Kirana Store consisted of ground plus one floor.

The shop has two doors i.e. iron shutter on the west side and on south side there is wooden door. On the south side of the shop, it is surrounded by

other shops.

5 It is the case of the prosecution that the accused No.1 met P.W. 2 Jilani Vasi Hyder Mirza on 22/5/2006 at about 11 a.m. and had made an extra

judicial confession to the effect that he was in love with Ms. Anjum, sister of Dilshad Khan. That on 21/5/2006 Mansoor and his associates visited the

shop to talk to Dilshad. They requested Suresh Murav to look after the shop and they took Dilshad to the mezzanine floor. They questioned him as to

why she was being married to some other person when they knew that she is in love with Mansoor. There was verbal altercation. Mansoor caught

hold of him, whereas Shahjad gagged mouth of Dilshad so that he does not scream. Thereafter, Arman had given 2 to 4 fists blows on his chest and

finally, Mansoor strangled him with wire. The accused were conscious of the fact that Suresh had realised that something had happened and

therefore, Suresh was called and his throat was slit by Arman. Soon thereafter, P.W. 2 approached Trombay Police Station and informed the police.

He had reiterated the statement before the Senior Police Officer Mr. Bakhare. According to P.W. 2, accused No. 1 was working as waiter in hotel

Metro, which was often visited by P.W. 2. According to P.W. 2, extra judicial confession was made by accused No. 1 near Karbala Maidan when he

was on his way to work place. It is elicited in the cross-examination that P.W. 2 had found accused No. 1 sitting on the stair case of Gym at Karbala

ground.

6 P.W. 3 Suraiya Sakharkar claims to have visited the said shop on 21/5/2006. Dilshad was at the counter. She saw 3 persons who had come to the

shop. She gave description of the clothes worn by 3 customers. She purchased sugar and left the shop. At 12 a.m. she returned from Dadar after

making purchases and saw that people had gathered near Khan Kirana store and learnt from two females that Dilshad and his servant Suresh were

murdered and therefore, she approached the police station and informed the police about 3 persons she had seen in the shop. She was called upon by

the police to Thane jail for identifying the accused and she identified 3 persons whom she had seen in the shop on 21/5/2006. It is elicited in the cross-

examination that she is working as house-maid at different places. According to her, Karbala Maidan is situated on the road exactly opposite grocery

shop and is at a very close distance. She claims to be at the shop hardly for 5 to 10 minutes when she saw 3 accused persons. There are material

omissions and contradictions in the evidence of P.W. 3. The very fact that she had seen 3 persons coming to the shop when Suresh was packing sugar is in the nature of omissions.

7 P.W. 4 Abdul Rashid Shaikh was looking after the shop of Akbar Khan after the incident. According to him, on 20/21 May, 2006 Dilshad had called upon him and informed him that Akbar is returning from his native place within 2 to 3 days. That some 2 to 4 persons were present in the shop. The witness could identify one person out of 2 to 4 person, who was present in the shop. He had identified Mohd. Arman i.e. accused No. 1.

8 P.W. 5 Munna Mohd. Kasim Shaikh was also acquainted with Akbar Khan and therefore, he used to visit the shop run by Dilshad. According to him, one day in the month of May, he had seen a scuffle between Arman and Dilshad. Upon enquiry, he was informed by Dilshad that since Arman had uttered something inappropriate about his sister, they were quarreling. Arman was accompanied by two other persons. Dilshad had requested

P.W. 5 not to disclose about the said incident to any one since it involves the honour of his sister. Dilshad had disclosed that the other two persons were cousin of Dilshad. The material omissions in the evidence of P.W. 5 go to the root of the matter since he claims that when the incident was

going on, Suresh had informed him that Dilshad and others are on the mezzanine floor. It appears from the evidence of P.W. 5 that he used to borrow money from Dilshad. It is pertinent to note that he had visited the police station at 1 a.m. on 22/5/2006 and informed about the said incident.

9 After receipt of information from P.W. 1 police had called upon finger print expert Sharad Shalu(P.W. 9) at 10.30 p.m. P.W. 9 had received

wireless message from Trombay Police Station. He had immediately approached the police station and reached the scene of offence at about 12

midnight. That at the scene of offence, they had seen melanin tin box lying on the floor. They had collected two finger prints from the mirror, which

was hanged on the wall. Photographer was not available. He had developed the chance print collected from the mirror. On 19/6/2006 he had received

the finger prints slips of 3 accused persons from Trombay Police Station. Upon comparison, he could identify the finger prints of accused No. 1 which

was found identical with the chance print collected from the mirror. The report submitted by P.W. 9 is at Exh. 25.

10 Test identification is conducted by P.W.13 Nirmala Singh. It is pertinent to note that P.W. 13 had no document to show that at the time of conducting test identification parade, she was working as Special Executive Officer. She had started writing panchanama at about 5.45 p.m. and completed writing of the panchanama at 6.15 p.m.. She had categorically admitted that she is not aware of any rules prescribed by High Court for conducting test identification parade. She could not recollect as to whether the accused were brought at the place of test identification parade after arranging the dummies in the row or before that and that the accused persons were not similar in appearance. She could not recollect as to whether the dummies brought for test identification parade resembled the accused in any way.

11 P.W. 14 Shenshah Khan happens to be the brother of the deceased Dilshad. He has categorically admitted that he knows all the 3 accused persons as they happened to be his cousins. The witness is declared hostile. He has denied to have stated the portion marked 'A', which is to the effect that his mother has proposed marriage of Mansoor with Anjum which was not accepted by Mansoor's mother. Dilshad had warned Mansoor not to contact his sister Anjum and that was the reason why Mansoor was annoyed with Dilshad.

12 P.W.15 PSI Arvind Parab was attached to Trombay Police Station on 21/5/2006. He was deputed by PI Mr. Panpatte to visit the scene of offence. He had taken steps in the course of investigation. He had prepared inquest panchanama on the dead bodies of Dilshad and Suresh. He had also conducted scene of offence panchanama and at that time, had noticed that in the bath room on the mezzanine floor of Khan Kirana stores, water and blood was mixed. They had taken charge of the knife and aluminum wire, which was lying near the bathroom. He was not sure as to whether panchas for the scene of offence were stock panchas. That the bath room is not immediately visible upon entering into the loft. It is submitted that the crate in which the face of Dilshad was immersed, was not seized.

13 P.W. 16 Manik Bakhre was also attached to Trombay Police Station. Investigation of Crime No. 167 of 2006 was entrusted to him on 22/5/2006. He had recorded statement of the witnesses. It is admitted that he had been to Gonda, District Uttar Pradesh in search of the accused. They were

first called for interrogation. They were then brought to Trombay Police Station and arrested. He had taken finger prints of the accused persons in the

presence of panchas. Clothes of the accused were seized at their instance under section 27 of the Indian Evidence Act. He was on leave on

21/5/2006 and therefore, he visited the scene of offence on 22/5/2006. According to him, Karbala ground is at a distance of half kilometer from the

scene of offence. He has proved the omissions in the evidence of P.W. 3 Suraiya that she had stated before the police that 3 persons had visited the

shop in her presence and they were talking loudly. It is also admitted that the arrest panchanama of the accused was not prepared in Uttar Pradesh. It

is also admitted that there is non-compliance of section 157 of the Code of Criminal Procedure and FIR was not sent to court within 24 hours.

According to him, he had recorded the statement of Nurul Hasan. It is also admitted that he had not obtained transit warrant from Magistrate of

Gonda District. There was no search taken of the dwelling houses of the accused in Gonda, nor the statement of the family members was recorded. It

is admitted that he had not arrested the accused in Gonda district, but simply asked the accused to accompany the police to Mumbai. It is alleged that

in the course of investigation, bloodstained clothes were recovered at the instance of the accused under section 27 of the Indian Evidence Act.

However, the Investigating officer had admitted before the Court that he had not enquired the connection of the places with accused from where the

clothes were recovered.

14 Cross-examination of P.W. 16 would show that after seizure, the clothes were not sealed and they were kept in muddemal room. The place from

where the clothes were seized is accessible to members of the public. Knife was recovered at the instance of accused No. 1. It is apparent on the

perusal of the said document that the names of the panchas was written subsequently and marked as Exh. 18A.

15 Respective Counsel for the accused have urged before the Court that the extra judicial confession would not inspire the confidence of the Court

since P.W. 2 was a stray acquaintance with the accused. The omissions and contradictions in the evidence of P.W. 3, 4 and 5 would go to show that

they are got up witnesses and in that view, the identification itself would fail. Hence, it is vehemently urged that the prosecution has not stood on

itâ??s own leg and therefore, the accused deserves to be acquitted.

16 Per contra, learned APP submits that the prosecution has established the motive for commission of offence. That accused No. 1 was in love with

the sister of deceased Dilshad, who had warned him not to keep in contact with his sister. It is submitted that the recovery of weapons of offence and

the clothes of the accused itself makes it clear that they are the perpetrator of the crime and the most important factor in the present case is that the

prosecution has proved the extra judicial confession and in view of the same, learned APP submits that the Judgment and order passed by Additional

Sessions Court calls for no interference.

17 With the help of the respective Counsel, we have perused the papers meticulously and upon appreciation of the evidence adduced by the

prosecution, following points would emerge :

(i) It is admitted that deceased Dilshad was the cousin of the accused persons. That Dilshad and his servant Suresh were murdered in the shop, which

was being run by Dilshad, brother-in-law of Akbar Khan, who had been to his native place at the time of the incident.

(ii) P.W. 1 happens to be a chance witness. That at about 8.30 p.m. on 21/5/2006 he was surprised to see shop closed and that it was not locked. He

therefore, entered the shop premises only to see that lights and fans were on. However, there was darkness on the mezzanine floor. He could notice

feet in the bed room on the mezzanine floor. His call was not answered and therefore, he was constrained to call upon the police.

(iii) The investigation was set in motion and the accused were brought from their native place Gonda, Utter Pradesh. They were not arrested in Utter

Pradesh, but at the request of the police, accused accompanied them.

(iv) That the accused were not even the residents of Bombay/Trombay.

18 The question that falls for determination before this Court is as to whether extra judicial confession alleged to have been made by accused No. 1 on

22/5/2006 at Karbala ground is voluntary, truthful and has been a north star for the investigating agency. Firstly, P.W. 2 was a stray acquaintance with

the accused No. 1. It is admitted by P.W. 2 that accused No. 1 was working as waiter in Hotel Metro, which was visited by P.W. 2 once in a week.

There was no reason for accused No. 1 to repose faith in customer of the hotel. Moreover, the location of Karbala ground is just across the road from

the scene of offence. He met P.W. 2 by chance and divulged his guilt to P.W. 2 which does not appeal to a prudent mind. Extra Judicial confession

necessarily is to be made to a person in whom maker of the statement reposes faith. Moreover, accused had given graphic details of the act

committed by him including the role of each of the accused persons and the manner in which they had killed both the deceased. It is rather very

difficult to accept that the accused would make an extra judicial confession to a stranger, passing by the road, who is only acquainted.

19 The material on record would show that immediate disclosure was made by P.W. 2 to investigating agency. However, there is no material on

record to show that the investigating agency had made any efforts to apprehend the accused immediately. There is no material to show as to when the

accused had left Bombay for Gonda after commission of offence. It is neither the case of the prosecution that they had absconded due to an

apprehension of being placed under suspicion after disclosure was made by P.W. 2 to the police. However, suddenly the police had gone to Gonda in

the month of June, 2006. In fact, extra judicial confession made to P.W. 2 was more than sufficient for the police to arrest the accused in Gonda itself

and return to Bombay after obtaining a transit warrant from the Magistrate in Gonda. The accused had not resisted to go to Bombay. That the

conduct of the accused would show that they had not absconded since their place of residence has not been brought on record by the police. There is

no reference to taluka Karmalganj from where the accused were brought to Bombay. The Investigating Officer had made no attempts to record the

statement of accused No. 1 under section 30 of the Indian Evidence Act, although he had stated graphic details before P.W. 2.

20 Section 30 of the Indian Evidence Act reads as under :

30. Consideration of proved confession affecting person making it and others jointly under trial for same offence.â?" When more persons than one are

being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the

Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

[Explanation.â?"â?"Offenceâ??", as used in this section, includes the abetment of, or attempt to commit the offence.]

21 It appears from the record that the investigation was directed on the basis of the statement of the P.W. 2 and the same is supplemented with

motive. It would therefore be necessary to ascertain as to whether there is any independent, reliable corroboration in order to place implicit reliance

upon extra judicial confession of accused No. 1 to P.W. 2.

22 In fact, extra judicial confession has to be proved like any other evidence and the value of the same would depend upon veracity of the witness, to

whom it was made. The confession is normally made to a person to avoid harassment from the police or the people concerned and also it is made to a

person, who could otherwise protect the accused. P.W. 2 is neither influential and not even of any help to accused No. 1. It does not appeal to a

prudent mind that the accused, who is not apprehended by police nor under any suspicion would confess the guilt before a stranger.

23 The Supreme Court in the case of Balwinder Singh v/s. State of Punjab 1996 AIR SC 607 has held as follows :

“An extra-judicial confession by its very nature is rather a weak type of evidence and requires appreciation with great deal of care and caution.

Where an extrajudicial confession is surrounded by suspicious circumstances its credibility becomes doubtful and it loses its importance. The courts

generally look for independent reliable corroboration before placing any reliance upon an extra judicial confession.”

24 It would also be trite to refer to the Judgment of Supreme Court in the case of State of Rajasthan vs Rajaram (2003) Cr. L. J. 3901, wherein the

Supreme Court has held as follows:

“It is not open to any court to start with the presumption that extra judicial confession is a weak type of evidence. It would depend on the nature of

the circumstance, the time when the confession was made and the credibility of witnesses who speak to such a confession. Such a confession can be

relied upon and conviction can be founded there on if the evidence about the confession comes from the mouth of witnesses who appeared to be

unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a

motive for attributing an untruthful statement to the accused, the words spoken by the witness are clear unambiguous and unmistakably convey that

the accused is the perpetrator and nothing is omitted by the witness which may

militate against it. If the evidence relating to extra judicial confession is found credible after being tested on the touch stone of credibility and acceptability, it can solely form the basis of conviction. The requirement of corroboration is a matter of prudence and not an invariable rule of law. It is improbable that the accused would repose confidence on a person who is inimically deposed towards him and confess his guilt.â??

25 Upon meticulous examination of the evidence of P.W. 3, the manner in which it is narrated, the juncture at which the alleged extra judicial confession is said to have been made to P.W. 2 and the fact that the motive is falsified by the brother of the deceased (P.W. 14), we are of the opinion that this is not a fit case where implicit reliance could be placed on the extra judicial confession of the accused No. 1 for upholding the conviction. It is also clear that there is no independent corroboration to the alleged extra judicial confession. The manner in which it is said to have been made appears to be improbable and imprudent.

26 There is no doubt that P.W. 3 is a got up witness, as she claims to be a chance witness, who seems to recollect even clothes worn by the accused when she saw them in the shop for hardly 5 minutes. In view of that, the evidence in the nature of test identification would also fail. Moreover, the Special Executive Officer (P.W. 13) has failed to demonstrate before the Court that her nomination as Special Executive Officer was in place and that she was authorised to conduct test identification parade.

27 The learned Judge has placed reliance upon the recovery under section 27 of the Indian Evidence Act at the instance of the accused. The question is as to whether in a case of circumstantial evidence, recovery by itself would be sufficient to uphold the conviction. The learned Sessions Judge has given undue importance to the recovery of blood-stained clothes at the instance of the accused under section 27 of the Indian Evidence Act after about 20 days. It is further pertinent to note that it is the case of the prosecution that the accused were not resident of Bombay. They were arrested on 6/6/2006. The chronology of the events would be as follows :

- (i) FIR was lodged on 21/5/2006 against unknown persons.
- (ii) An extra judicial confession was made to P.W. 2 on 22/5/2006.
- (iii) The accused were arrested on 6/6/2006 from Karnalganj, district Gonda,

Uttar Pradesh.

(iv) Recovery of blood stained clothes was made on 11/6/2006. The knife was seized from the scene of offence on 21/5/2006 itself.

28 It is pertinent to note that the Chemical Analyser's report does not establish that the blood stains on the clothes recovered at the instance of the accused matched with the blood group of the deceased. The blood group of the deceased was 'O' and blood of 'O' group was found on the knife, electric wire and key chain. The reports are inconclusive and therefore, it cannot be said that the recovery of blood stained clothes after more than 3 weeks of the alleged incident is sufficient material to convict the accused for offence punishable under section 302 of the Indian Penal Code.

29 The first and foremost fact that the weapons such as knife and wire were noticed while conducting the scene of offence panchanama and therefore, it is only the recovery of blood-stained clothes at the instance of the accused. The said evidence does not inspire the confidence in as much

as the scene of offence panchanama does not even show as to whom the premises belonged from where the accused had produced the clothes.

Moreover, after seizure, the clothes were not sealed. Panchas to the scene of offence panchanama appeared to be stock panchas of police. The recovery of the clothes is made approximately after more than 20 days of the incident.

30 On elimination of the material in the form of extra judicial confession and the recovery of blood-stained clothes, this could be a case of circumstantial evidence. Therefore, the onus would lie upon the prosecution to show that there are cogent, incriminating circumstance against the

accused which would lead to the only inference that the accused are guilt of the offence alleged. The motive for commission of the offence is not

proved, which could have in all probabilities established a link in the chain of circumstantial evidence. Brother of the deceased is declared hostile. In

this premise, the learned Counsel has placed reliance upon the Judgment in the case of Anwar Ali & anr. v/s. State of Himachal Pradesh (2020) 10

SCC 166 . The Apex Court has observed that -

'It is also required to be noted and it is not in dispute that this is a case of circumstantial evidence. As held by this Court in catena of decisions that

in case of a circumstantial evidence, the circumstances, taken cumulatively,

should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else and the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.â??

31 There is no unimpeachable, legal, reliable and admissible evidence to prove the guilt of the accused. The prosecution has been unable to discharge the onus cast upon it to adduce such evidence which would prove the guilt of the accused beyond reasonable doubt.

32 The Apex Court in the case of Sarwan Singh v.s. State of Punjab 1957 AIR 637 . The prosecution has to travel the distance between â??may

beâ?? and â??must beâ??. It was held as follows :

â??considered as a whole, the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel

and the whole of this distance must be covered by legal, reliable and unimpeachable evidence.â??

33 In view of the above observations, the appeals deserve to be allowed.

34 Before parting with the Judgment, this Court appreciates the Ms. Devyani Kulkarni, learned Counsel appointed, for giving able assistance to

espouse the cause of the appellants. She is entitled to the professional fees as per rule.

35. Hence, following order is passed :

ORDER

(I) The appeals are allowed.

(II) The conviction and sentence imposed upon the appellants vide Judgment and Order dated 7/7/2010 by the Additional Sessions Judge, Greater

Bombay in Sessions Case No. 807 of 2006 is hereby quashed and set aside.

(III) The appellants are acquitted of all the charges levelled against them.

(IV) The appellants be released forthwith if they are in jail. If they are on bail, their bail bonds stand cancelled.

(V) The appeals are disposed of accordingly.

(VI) In view of disposal of appeals, nothing survives in the interim applications.

The same is disposed of accordingly.