

**(2015) 04 BOM CK 0301**

**In the Bombay High Court**

**Case No :** Criminal Appeal Nos. 1332 of 2007 and 83 of 2008

Rahul and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

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**Date of Decision :** 17-04-2015

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 201, 302, 34, 364

**Citation :** (2015) 04 BOM CK 0301

**Hon'ble Judges :** P.V. Hardas, J; Shalini Phansalkar Joshi, J

**Bench :** Division Bench

**Advocate :** Mahesh B. Zanwar, for the Appellant; H.J. Dedhia, APP, Advocates for the Respondent

**Final Decision :** Allowed

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## Judgement

P.V. Hardas, J.

1. Criminal Appeal No. 1332 of 2007 has been filed by Original Accused No. 2, while Criminal Appeal No. 83 of 2008 has been filed by Original Accused No. 1 as well as by Original Accused No. 2 challenging their conviction and sentence for offence punishable under Sections 302 read with 34, 364 read with 34 and 201 read with 34 of the Indian Penal Code and sentence of imprisonment for life and each accused to pay fine of Rs. 3000/-, in default to undergo RI for three months, RI for two years and each accused to pay fine of Rs. 1000/-, in default to undergo RI for three months and RI for one year and each accused to pay fine of Rs. 1000/-, in default to undergo RI for three months, by the Ad-hoc Additional Sessions Judge-5, Pune, by judgment dated 2/11/2007, in Sessions Case No. 185 of 2005.

2. Since Original Accused No. 2 had earlier filed a substantive appeal i.e. Criminal Appeal No. 1332 of 2007, the name of Original Accused No. 2 was directed to be deleted from Criminal Appeal No. 83 of 2008. Thus, Criminal Appeal No. 1332 of 2007 had been filed by Original Accused No. 2, while Criminal

Appeal No. 83 of 2008 has been filed by Original Accused No. 1. Since both these appeals arise against the same judgment of the trial court, they are being decided by this common judgment.

3. Facts in brief as are necessary for the decision of these appeals may be stated:-

PW 9 - PI Popatrao Lokhande, who was attached to the Wanwadi Police Station, received information from the Control Room that at Kakde vasti a dead body was noticed. PW 9 - PI Lokhande, along with the staff, proceeded to the scene of the incident, which was within the jurisdiction of the Kondwa outpost. He noticed the dead body lying near the compound wall by the side of the Kondwa - Bibvewadi Road. There were injuries on the dead body and it was lying in a pool of blood. In the presence of panchas, therefore, a panchanama of the scene of the incident was drawn at Exh. 60. From the scene of the incident, sample of ordinary mud, mud mixed with blood and blood sample of the blood stains from the compound wall, one big stone, which was blood stained and lock of hair were seized. The dead body was then forwarded for postmortem examination to the Sassoon Hospital. On the same day, PW 1 - Lalita Walsa, mother of deceased Rakesh, filed her report at Exh. 29. The said report was forwarded to the Sahakarnagar Police Station along with the report of PW 9 - PI Lokkhande at Exh. 61.

PW 10 - PI Ukhaji Sonavane, who was attached to the Sahakarnagar Police Station, registered an offence vide Crime No. 312 of 2004 on the basis of the report of PW 1 - Lalita at Exh. 29. Upon registration of the offence, he took over the investigation and on 8/10/2004 recorded the statements of seven witnesses. On 8/10/2004 PI Shelke seized an auto-rickshaw under seizure memo at Exh. 52. On 13/10/2004 all the accused were arrested under arrest panchanama at Exh. 65. On the same day, the clothes of the accused were seized in the presence of panchas under seizure memo at Exh. 66. On 16/10/2004, during custodial interrogation, accused No. 1 - Ganesh expressed his willingness to point out the place where the weapon sword-stick and knife had been concealed. A memorandum was accordingly recorded in the presence of panchas at Exh. 67. Accused No. 1 - Ganesh led the police and the panchas to an area near Indira Nagar and produced a blood stained sword-stick and knife, which were seized in the presence of panchas under seizure memo at Exh. 68. On the same day, accused No. 1 - Ganesh expressed his willingness to point out the place where his clothes had been concealed. A memorandum was accordingly recorded in the presence of panchas at Exh. 69. The accused led the police and the panchas to his house at Bibvewadi and produced blood-stained shirt which had been kept below a mattress. The said shirt was seized under seizure memo at Exh. 70.

On 20/10/2004, the seized articles were forwarded to the Chemical Analyzer under requisition at Exh. 71. On 1/11/2004, the Executive Magistrate was requested to conduct an identification parade and accordingly on 1/11/2004 an identification parade had been held. Supplementary statements of the witnesses were recorded. The reports of the Chemical Analyzer are at Exhs. 72 to 76. As

per the report of the Chemical Analyzer at Exh. 72, the sword-stick and the knife were stained with human blood, but the group could not be determined. The shirt of accused No. 1 was also found stained with human blood, but the group could not be determined. Further to the completion of investigation, a charge-sheet against the accused was submitted.

Postmortem on the dead body of deceased Rakesh was conducted by PW 11 - Dr. Milind Wabale, who noticed the following external injuries:

- (i) Incised wound on right side of head., 1 inch right lateral to occipital protuberance measuring 3.5 x 1.5", bone deep. Margins cleancut.
- (ii) Incised wound, 1" below ext. inj. No. 1 measuring 0.75 x 0.25", bone deep, margins cleancut.
- (iii) Oblique incised wound at the level of occipital protuberance, measuring 3 x 1" bone deep. Margins cleancut.
- (iv) Incised wound, 1.5" left lateral to occipital protuberance, measuring 1 x 0.5", bone deep. Margins cleancut.
- (v) Incised wound left parieto-temporal region, measuring 1 x 0.5" bone deep. Margins cleancut.
- (vi) Semicircular horizontal incised wound with convexity downwards above left eyebrow in the middle, measuring 1.5 x 0.25", bone deep, margins cleancut.
- (vii) Semicircular vertical incised wound in the middle of forehead, 2.5" above the angle of nose, measuring 1.5 x 0.25", bone deep. Margins cleancut convexity towards left.
- (viii) Abrasion, 0.5" above the medial angle of right eye, measuring 0.5 x 0.25".
- (ix) Abrasion, just above middle of right eyebrow, measuring 0.5 x 0.25".
- (x) Right black eye
- (xi) Left black eye
- (xii) Abrasion 1.5" above middle of left eyebrow, measuring 2 x 2.5".
- (xiii) Incised wound at left eyebrow, measuring 0.75 x 0.25", bone deep, margins cleancut.
- (xiv) Multiple linear abrasions at and below lateral angle of left eye, size varying from 1.5 x 0.25" muscle deep. Margins cleancut.
- (xv) Incised wound on inner aspect of pinna of left ear, in the middle measuring 1.5 x 0.25", muscle deep. Margins cleancut.
- (xvi) Abrasion 0.5" below the lobule of left ear, measuring 0.5 x 0.25".
- (xvii) Lacerations of upper gums at central incisors, upper central incisors absent

and show fresh shedding. Ante mortem blood clot adherent in the sockets.

(xviii) Multiple abrasions right side of face cheek, behind ear, over angle of mandible, size varying from 0.3" in diameter to 3 x 2.5".

(xix) Semicircular linear abrasion on left side at base of neck, measuring 2 x 0.25".

(xx) Multiple linear abrasions, all over chest, size varying from 4 to 6.5".

(xxi) Horizontal stab wound, 1" right lateral to midline in 6th Intercostal space measuring 1.25" x 0.5" opening in thoracic cavity. Angles and margins cleancut.

(xxii) Horizontal stab wound on left side of chest, 1" left lateral to midline, in 6th intercostal space, measuring 1 x 0.5" opening in thoracic cavity. Angles and margins cleancut.

(xxiii) Abrasion 2.5" above right wrist, measuring 3 x 0.5".

(xxiv) Lacerated wound lateral aspect of right wrist, measuring 1.5 x 0.5", bone deep.

(xxv) Incised wound at the base of right thumb on dorsal aspect, measuring 1.5 x 0.5", bone deep. Margins cleancut.

(xxvi) Contusion anterior aspect of left lower arm, measuring 5 x 3".

(xxvii) Abrasion on posterior of right shoulder measuring 5 x 3".

(xxviii) Abrasion over right thigh measuring 2 x 1.5".

(xxix) Multiple abrasion on right leg all over, size varying from 0.5" in diameter to 1.5 x 1".

(xxx) Multiple abrasion on left leg, all over, size varying from 1 x 0.5" to 2 x 1.5".

(xxxi) Stitched wound "<" shaped on middle of back at T-9 level, 3" long, 5 stitches present.

(xxxii) Stitched wound, 1.5" below inj. No. 24, 1" long, 1 stitch present.

He noticed the following internal injuries:

Corresponding to external injuries No. 1 to 18 except inj. No. 14.

Haematoma under scalp over left frontal, temporal, parietal, right parietal region 6 x 4".

Depressed, semicircular fracture of right temporal and occipital bone 3x2".

Fracture of body of sphenoid, left wing of sphenoid and bones of anterior cranial fossa.

Subdural haemorrhage all over brain surface and base of brain.

Subarachnoid haemorrhage with contusion of left parietal lobe, 2 x 1.5"

Subarchnoid haemorrhage with contusion of left frontal lobe 1.5" in diameter.

Subarchnoid haemorrhage with contusion of right fronto pareital region 3 x 2".

Corresponding to external injury No. 21.

Cleancut fracture of right 7th rib at coastal margin, 0.5" long.

Stab wound of pleura of right lung, middle lobe, measuring 1.25" x 0.25".

Stab wound of middle lobe or right lung 0.75 x 0.25 x 0.75".

Corresponding to external injury No. 22.

Cleancut fracture of left 6th rib at coastal margins 0.4" long.

Stab wound of pleura of lower lobe of left lung, measuring 1 x 0.25".

Stab wound of lower lobe of left lung, measuring 0.5 x 0.25 x 0.5"

He opined that all the injuries were ante mortem and recent and were sufficient in ordinary course of nature to cause death. He opined that deceased had died due to Traumatic and Hemorrhagic shock as a result of stab injuries associated with head injury. The postmortem report is at Exh. 58.

4. On the case being committed to the Court of Sessions, trial court vide Exh. 2 framed charge against the accused for offence punishable under Sections 364 r/w 34, 302 simplicitor or 302 r/w 34 and 201 r/w 34 of the IPC. The accused denied their guilt and claimed to be tried. Prosecution, in support of its case, examined 11 witnesses. The defence of the accused was of denial. The trial court, upon appreciation of the evidence, convicted and sentenced the appellants/ Original Accused Nos. 1 and 2 as afore-stated, while acquitting Original Accused No. 3 - Madan.

5. We have heard Dr. Yug Mohite Chaudhary, learned counsel for the appellant in Criminal Appeal No. 83 of 2008 and Mr. Mahesh B. Zanwar, learned counsel for the appellant in Criminal Appeal No. 1332 of 2007. We have also heard the learned APP and in order to effectively deal with the submissions advanced before us by the learned counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

6. Prosecution has examined PW 1 - Lalita, who deposes that on 1/10/2004 there was a quarrel between deceased Rakesh and accused No. 1 - Ganesh. Accused No. 1 - Ganesh had assaulted deceased Rakesh with glass bottle and had injured him. A complaint was accordingly lodged at the Nehru Stadium outpost on 2/10/2004. On 6/10/2004 at about 8.30 p.m. accused No. 1 - Ganesh and his mother had come to the house of Lalita and had requested for settlement of the dispute. On the same day, at about 3 p.m., accused No. 2 - Bapu had come to her house and had enquired from her whether deceased Rakesh was present in

the house. Deceased Rakesh was taking his meal and, therefore, he enquired from Bapu as to what work he had. Accused No. 2 - Bapu informed Rakesh as the dispute was to be settled, deceased Rakesh should accompany him. Accordingly, accused No. 2 - Bapu took deceased Rakesh in the rickshaw. Deceased Rakesh, however, did not return during the night. On 7/10/2004 at about 4.30 p.m. two policemen had come to her house and had informed her that dead body of Rakesh was found at Bibvewadi and had also informed her and her son Ganesh that the dead body was forwarded to the Sassoon Hospital at Pune. They went to the Sassoon Hospital and saw the dead body and thereafter Lalita lodged her report at Exh. 29.

7. In cross-examination, she has admitted that when accused No. 1 - Ganesh and his mother had come, there was a talk of settlement of the dispute and it was decided to compromise the dispute. Accused - Ganesh and his mother then left immediately. She has also admitted that the Swargate Police Station is at a distance of about 2 to 2.5 kms. from her house, while Bibvewadi police chowky is situated near her house. She has admitted that accused No. 2 - Bapu did not have any dispute with deceased Rakesh. According to her, accused - Bapu came and the deceased had accompanied him immediately. An omission has been elicited that she had not stated that accused No. 2 - Bapu had enquired from her if Rakesh was present in the house and that Rakesh had enquired from accused No. 2 - Bapu as to what work he had with him.

8. Prosecution has examined PW 2 - Ramesh, brother of deceased Rakesh and son of PW 1 - Lalita. According to him, on 1/10/2004, there was a quarrel between deceased Rakesh and accused No. 1 - Ganesh. Deceased Rakesh had informed PW 2 - Ramesh that deceased had been assaulted by accused No. 1 with a glass bottle. Rakesh had taken treatment in the Sassoon Hospital and thereafter had lodged his report on 2/10/2004 at Nehru Stadium outpost. On the next day, accused No. 1 - Ganesh and his mother had come to the house in the evening and had requested Ramesh and others to withdraw the complaint. According to Ramesh, the complaint was not withdrawn. Ramesh further deposes that on 6/10/2004 as he was indisposed, he did not take his auto-rickshaw and at about 3 p.m. while he, along with deceased, were taking their meals, accused Nos. 2 and 3 had come to the house and accused No. 2 - Bapu had informed deceased that the dispute with accused No. 1 - Ganesh was to be settled and that accused No. 1 - Ganesh was waiting. Accused Nos. 2 and 3 then took deceased along with them in the rickshaw. The deceased, however, did not return in the night. He further deposes that on 7/10/2004 at about 6 p.m. the police had come to their house and had informed them that the dead body of deceased Rakesh had been taken to the Sassoon Hospital. Ramesh accompanied by his other brothers and mother had gone to the Sassoon Hospital and had seen the dead body of deceased Rakesh. According to him his statement was recorded on 8/10/2004.

9. In cross-examination, he has admitted that there was no dispute between

accused No. 2 - Bapu and the deceased. He has further admitted that the person who had accompanied accused No. 2 was unknown to him. He then deposes that when accused Nos. 2 and 3 had come to his house, his elder brother Ganesh was out-side the house on the road. He has admitted that the family members had decided not to compromise the dispute with accused No. 1. According to him, despite that deceased Rakesh went with accused Nos. 2 and 3. He has admitted that he did not tell the deceased not to go with accused Nos. 2 and 3. He has admitted that he does not know as to where the deceased and the accused had gone. He has admitted that he also does not know the registration number of the auto-rickshaw, in which they had gone. He has then admitted that till evening of 7/10/2004, no missing report had been lodged at the police station. He has admitted that on way to the Sassoon Hospital the police had enquired from him if he had suspicion on anyone. He has admitted that his statement was recorded on 8/10/2004 and "till then I had not stated anything to the police".

10. Prosecution has also examined PW 7 - Rahul, who deposes that deceased Rakesh had informed him about being assaulted by accused No. 1 and taking treatment in the Sassoon Hospital. He further deposes that on the next day, he was present in the house of deceased Rakesh when accused No. 1 - Ganesh and his mother had come to the house of deceased. They had come for settlement of the dispute between deceased and accused No. 1. 2 or 3 days thereafter, accused No. 2 - Bapu had also come to the house of deceased for settling the dispute. On 6th, PW 7 - Rahul had gone to the market yard for obtaining work and since he did not get any work there, he was returning home at about 4 to 4.30 p.m. Near Mahesh Sanskrit Bhavan, he noticed deceased, accused Nos. 1 and 2 and one person with dark complexion going in a rickshaw. He has admitted that he does not know the registration number of the rickshaw. He further deposes that the rickshaw went towards the Gangadham side. He returned home and had seen the dead body of deceased Rakesh in the Sassoon Hospital on the next day.

11. In cross-examination, he has admitted that he had not informed the relatives of the deceased that he had seen the deceased going in a rickshaw along with the accused. He has admitted that on the next day when the police had come to the house of the deceased, PW 7 - Rahul was sitting on the platform and on seeing the police had gone to the house of the deceased. He has admitted that thereafter he, along with the family members of the deceased, had gone to the Sassoon Hospital along with the police. He has admitted that in the hospital, the police had enquired from him as well as brothers of deceased. He has admitted that his statement was recorded on 8/10/2004 at noon and till his statement was recorded, he did not inform anyone about the incident.

12. The learned counsel for the appellants have urged before us that the evidence of last seen, particularly, the credibility of the witnesses, is affected in view of the conduct as well as the variance in the evidence of these witnesses. The learned APP has supported the findings for the trial court.

13. PW 1 - Lalita does not refer to the presence of her son PW 2 - Ramesh. According to Lalita, it was accused No. 2 - Bapu who had alone come for taking the deceased along with him. PW 2 - Ramesh refers to the presence of PW 1 - Lalita and also deposes that accused Nos. 2 and 3 had come for taking the deceased. Curiously, if the deceased was taken by the accused in the presence of PW 1 - Lalita and PW 2 - Ramesh, we find it inexplicable and against the normal human conduct that these witnesses did not lodge a missing complaint, though the deceased had not returned at night. Even on the next day, no missing complaint was lodged, though by that time they must have suspected some foul play. Till arrival of the police and till the police informed them that the dead body of deceased Rakesh was found, no report had been lodged at the police station. In our opinion, therefore, this would be a strong indicator that they were not aware as to the person or persons with whom deceased Rakesh had gone. Since they were unaware about the identity of the person, a missing report was not lodged. In respect of the evidence of PW 7 - Rahul, we find that on the next day of the disappearance of Rakesh, this witness was present with the police in the hospital and the police had enquired from him. This witness did not choose to disclose having seen the deceased in the company of the accused to the police. The statement of PW 7 - Rahul was recorded on 8/4/2010 i.e. two days after the incident and till the recording of the statement, this witness had not disclosed having seen the deceased in the company of the accused. In our opinion, therefore, no reliance whatsoever can be placed on the testimony of PW 1 - Lalita, PW 2 - Ramesh and PW 7 - Rahul in respect of the circumstance of last seen.

14. The evidence of PW 11 - Dr. Wabale, the Medical Officer, who had performed the postmortem examination, reveals that according to him rigour mortis would start to appear on the dead body after 4 to 6 hours from the time of death and it takes about 10 to 12 hours to develop fully. The rigour mortis starts receding after 12 hours. According to him, the rigour mortis had partly appeared on the dead body of deceased Rakesh. That would certainly indicate that the death had occurred approximately more than 12 hours from the time the deceased was allegedly last seen in the company of the accused. The circumstance of last seen by itself is not an incriminating circumstance. The proximity of the time of death would make the circumstance of last seen an incriminating circumstance. If the prosecution has failed to establish that the deceased had died at about the time when he was last seen alive in the company of the accused, the circumstance of last seen by itself would not be sufficient for sustaining the conviction of the accused. In the present case, apart from the evidence of the three witnesses adverted to above, there is no other evidence which would corroborate that it was the accused and the accused alone who had committed the crime.

15. In cases resting on circumstantial evidence, the prosecution has to prove each and every circumstance on which the prosecution proposes to rely. The circumstances so proved should be of conclusive nature and the circumstances so proved should form a complete chain which should exclude every hypothesis

of the innocence of the accused and should unquestionably point to the guilt of the accused. In other words, the circumstances should be capable of only one hypothesis i.e. it is the accused and the accused alone who have committed the crime. In the present case, if the circumstance of last seen is left out of consideration, finding of human blood on the articles discovered at the behest of the accused, in the absence of any determination of the blood group, would be wholly inadequate for sustaining the conviction of the accused. The appellants/accused, in our opinion, therefore, are entitled to be given the benefit of doubt.

16. Accordingly, Criminal Appeals are allowed and the conviction and sentence of the appellant/Original Accused No. 1 - Ganesh Rajaram Waghmare and appellant/Original Accused No. 2 - Rahul @ Bapu Laxman Mankar is hereby quashed and set aside and they are acquitted of the offence with which they were charged and convicted. Fine, if paid by the appellants, be refunded to them. Since the appellant/Original Accused No. 1 - Ganesh Rajaram Waghmare is in jail, he be released forthwith, if not required in any other case. Bail bonds of the appellant/Original Accused No. 2 - Rahul @ Bapu Laxman Mankar stand cancelled.