
(2009) 01 BOM CK 0033
In the Bombay High Court
Case No : Criminal Appeal No. 3 of 2008

Ram Shankar Sahane

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 30-01-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164
Evidence Act, 1872 — Section 27, 59, 6, 60
Penal Code, 1860 (IPC) — Section 302

Citation : (2009) 01 BOM CK 0033

Hon'ble Judges : P.B. Majmudar, J; N.A. Britto, J

Bench : Division Bench

Advocate : S.G. Dessai, S. Kalshawkar and S. Rodrigues, for the Appellant; W. Coutinho, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

N.A. Britto, J.—This appeal is filed by the accused who has been convicted for uxoricide u/s 302 IPC and has been sentenced, inter alia, to suffer life imprisonment, by judgment/order dated 5/06/2007 of the learned Sessions Judge, Margao, in Sessions Case No. 20/2005.

2. The accused and the deceased Rita, aged about 20 years, were natives of and married in Gorakpur in the State of U.P., about 7-8 years prior to the incident. The deceased had three more sisters, two of whom were married to PW16/Lalji Sahani and PW17/Akhilesh Sahani, respectively. The accused and the deceased had two children. The first is PW8/Ragini, who was about three years of age and the second Nirjela who ought to have been of less than one year of age, as she was required to be carried, by the said PW8/Ragini. A third child appears to have been on the way. The accused, the deceased and the brother of the accused, namely, PW14/Harishankar were all residing in an outhouse, of the house of Engineer Achillees Gracias, the son of PW3/Sunamites Gracias at Cana, Benaulim. The deceased was found murdered at about 5 p.m. on 11/04/2005. That is also

the time given by PW7/Dr. Sapeco as the probable time of death and which timing is also in consonance with the facts stated by other witnesses. Around that time PW8/Ragini came to the place where PW1/Ana Maria Rodrigues was drying her paddy, close to the said outhouse, and told her in hindi that her mother had expired and upon hearing that, the said PW1/Ana Maria Rodrigues was emotionally disturbed and went and met PW2/Sister Satornila D'Costa at the Divine Providence Convent Home which is close by, and told her about it whereupon both of them went to the outhouse and saw that the deceased was lying on the cemented floor with blood around her and they returned and reported the matter to another sister from the said convent by name Sister Delphine, who informed the police on telephone No. 100. An FIR was lodged at about 6.30 p.m. on the same day by the said Sister Satornila and apparently no person was named in the said FIR. After recording the said FIR, the Police Inspector Shri Albuquerque of Colva Police Station (I.O.) came to the said outhouse and prepared a scene of offence panchanama and an inquest panchanama in the presence of PW4/Ramakant Naik. Photographs of the scene of offence were taken by PW9/Sagun Gaude. No finger prints could be lifted. A dog squad was summoned but gave no clue whatsoever.

3. The body of the deceased was sent for post mortem examination which was conducted by PW7/Dr. Sapeco who found that there were 2 injuries on the person of the deceased namely a stab chop wound of 11 x 5 x 5 cms at the neck front directed from right to left with minimal tailing with cutting for trachea, strept muscle of neck, blood vessels, thyroid and neck structures which was 8 cms below chin and 6 cms above super sternal notch of neck. He also found another injury below 2 cms of the first injury, which was another stab chop wound of 10 x 5 x 5 cms, and, he opined that the deceased had died due to haemorrhagic shock as a result of impacts to the neck with sharp cutting weapon vide injuries No. 1 and 2, which were necessarily fatal to a pregnant woman. When the knife - Exhibit F was shown to him he opined that the injuries could have been caused with the said knife. Thus far, there is no contest to the case of the prosecution and otherwise also it is not disputed at the Bar, by the learned Senior Counsel appearing on behalf of the accused, that the death of the deceased was homicidal, and, it is proved to be so.

4. Although the I.O. Shri Albuquerque conducted the scene of offence panchanama at about 7.30 p.m., he did not send for the accused, and as stated by him, he suspected the accused as the accused, only late in the night on 12/04/2005 and arrested him on the next day i.e. on 13/04/2005 at 8.00 hrs. at Colva Police Station after the accused was brought from Sinquetim, Benaullim. Shri Albuquerque has not given any basis as to why he suspected the accused or for that matter, he did not suspect PW14/Harishankar, the brother of the accused, or the other two persons named by him as the persons, who according to the case of prosecution, were having frequent sexual intercourse with the deceased. Least which was expected from Shri Albuquerque, even in case he had not suspected the accused at the time of carrying out the scene of offence

panchanama, was to send for the accused, as the wife of the accused was found murdered, and there was no one to look after their two minor children.

5. The accused was, therefore, charged and tried on the allegation that on 11/04/2005 at 17.00 hrs. the accused in the rented room (outhouse) of H. No. 34/C at Cana, Benaolim committed murder of his wife, the said Smt. Rita Sahani by slitting her throat with knife, suspecting her of having illicit relations with the brother of the accused, the said PW14/Harishankar, and, in support of the charge prosecution examined as many as 19 witnesses. The case of the accused was one of denial simpliciter, and, in fact the accused stated that he was falsely implicated. The accused did not examine any witnesses.

6. Admittedly, the case of the prosecution is based on circumstantial evidence and the law on this aspect is well settled with catena of decisions of the Apex Court: Firstly, the circumstances from which the conclusion of guilt is to be drawn should be established by proof beyond reasonable doubt; secondly, the circumstances proved must be consistent with the guilt of the accused and inconsistent with his innocence; and thirdly, all the circumstances proved cumulatively or when taken together should point out to the guilt of the accused i.e. sufficient to conclude that within all human probability it is the accused who committed the crime.

7. Since the case of the prosecution, is based on circumstantial evidence, it was expected of the learned trial Court to have picked up the circumstances one by one and after analysing the evidence produced in support of each to come to the conclusion whether they or any of them were proved beyond reasonable doubt and thereafter to come to a further conclusion whether all the circumstances proved beyond doubt taken together were sufficient in all probability to establish the guilt of the accused. This effort has not at all been done by the learned trial Court, but the learned trial Court proceeded to frame only one point and discuss the entire evidence under that point and came to the conclusion that every circumstance unerringly pointed only to one hypothesis i.e. the guilt of the accused.

8. That takes us to the evidence of motive, to find out whether the same is proved by the prosecution. We are unable to agree with the submission of Shri Dessai, the learned Senior Counsel that the prosecution had alleged twin motive. As can be seen from the charge framed, the motive alleged by the prosecution is that the accused murdered the deceased suspecting her of having illicit relations with the brother of the accused. The motive that the accused had made a demand for a motorcycle at the time of marriage is a motive which was introduced for the first time during the course of evidence by the relatives of the deceased namely PW16/Lalji, PW17/Akhilesh and PW18/Degiri. In our view, the evidence of this motive has been rightly rejected by the learned trial Court. It is basic and well settled proposition of law that prosecution cannot reconstruct a story different from the one initially set up. It must prove the very story it alleges and nothing more. The learned trial Court held, and in our view rightly,

that the demand for the said motorcycle was a later development and further observed that if one sees the entire tenor of cross-examination, particularly of PW18/Degiri, it could be gathered that the prosecution had later built up a case of demand for dowry by examination of the said PW16/Lalji, PW17/Akhilesh and PW18/Degiri and that nowhere was it the case of the prosecution from the inception that the deceased was harassed by the accused for alleged non-fulfillment for his demand of dowry,etc. However, the learned trial Court rejected the contention raised on behalf of the accused, that the prosecution had failed to establish the motive of illicit relationship of PW14/Harishankar with the deceased, since the testimony of that witness was shown to be totally coloured to protect the accused, when the Special Judicial Magistrate PW15/Faria was not shaken on the material disclosure made before him by the said PW14/Harishankar. In other words, the learned trial Court appears to have relied upon the statement made by PW15/Faria when the maker thereof had himself rescaled from it. The learned trial Court entirely lost sight of the fact that a statement recorded u/s 161 or for that matter 164 of the Code of Criminal Procedure, 1973 could not be considered as evidence. Such statements can be used only for contradiction, and, by way of corroboration in case of a statement made u/s 164 of the Code when it is adhered to by the witness whose evidence is recorded. That PW14/Harishankar, the brother of the accused, used to have illicit relations with the deceased is the statement given by him to the police as well as to the learned Special Judicial Magistrate which he did not adhere to when he was examined by the prosecution and in fact he was declared hostile and crossexamined.

In fact, the decision of the Apex Court in the case of State of Rajasthan v. Kartar Singh 1970 Cr.L.J. 1144 was brought to the notice of the trial Court wherein the Apex Court had held that statement u/s 164 of the Code of Criminal Procedure was no evidence, but was corroborative of what had been stated earlier. Learned trial Judge considered the matter from emotional point of view and not on the point of law. We all are required to follow the law. *Obedientia est legis essentia*. Way back in AIR 1946 45 (Privy Council) it was held that when the Court is of the view that the witness has been won over by the defence, his statement u/s 164 must be ignored. It is well settled that a statement recorded u/s 164 cannot be admitted as substantive evidence against an accused person but it can be used only for the purpose of corroborating or contradicting the maker of the said statement (see Sawal Das Vs. State of Bihar,). Since PW14/Harishankar had rescaled from his earlier statement, there was no other evidence before the learned trial Court, to have come to the conclusion that the prosecution had proved the motive alleged against the accused. Thus prosecution has failed to prove the motive attributed to the accused.

9. As far as the motive is concerned, it is now well settled that motive is always relevant in criminal cases and in case based on circumstantial evidence, it is of special importance, but is of no consequence, if the evidence is strong. There is no doubt that there is motive behind every crime and that is why the

investigation agency as well as the Courts while examining the complicity of an accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question. This is a clear case where motive was alleged by the prosecution and the prosecution has failed to prove the same. In a case based on circumstantial evidence and where the evidence is very weak, motive is of special significance to the prosecution and prosecution having alleged it but having failed to prove the same certainly it does break one link in the chain of circumstance. This is a view held by a Division Bench of this Court in Shri alias Shrikant Ramchandra Gaonkar v. State of Goa 2006 (2) Bom.Cr.R. (Cri.) 353 and followed in the case of Deepesh Raiker v. State Criminal Appeal No. 35/2006 decided on 2/06/2008 to which one of us (N.A. Britto, J.) was a party.

10. The learned trial Court has considered the evidence of PW1/Ana Maria as evidence of *res gestae* and that of PW3/Sunamites, PW10/Auda Viegas and PW13/Querobina as if their evidence was of eye witnesses, with a view to convict the accused at the same time taking note of the fact that PW8/Ragini had lent no support to the case of prosecution and further observing that that would not be fatal for the case of the prosecution as it was the accused who had motive to eliminate his wife. Curious reasoning indeed! The learned trial Court has further observed that the said witnesses had no reasons to make statements against the accused and therefore had no reason to depose falsely against the accused. Ms. Coutinho, the learned Public Prosecutor concedes that the evidence of the aforesaid witnesses was hearsay but stops at that without making a further submission that being hearsay it was inadmissible and therefore unreliable and could not be the basis for recording a conviction.

11. Before dealing with the evidence of the said witnesses, it is necessary to take note of another decision which was cited before the learned trial Court, in the case of Himachal Pradesh Administration Vs. Om Prakash, wherein the Apex Court had stated that in appreciating the evidence against the accused the prime duty of a Court was firstly, to ensure that the evidence is legally admissible, that the witnesses who speak to it are credible and have no interest in implicating the accused or have ulterior motive (emphasis supplied). All that PW1/Ana Maria had stated is that PW8/Ragini came and told her at about 5 p.m. that her mother had expired. The story of the I.O. and that of PW3 Sunamites and PW10/Auda Viegas that PW8/Ragini was so shocked that she could tell the truth without much coaxing, has been demolished by PW13/Querobina. According to her, when she was taken by the Police to the tenement to see the dead body at that time PW8/Ragini came running to her and caught hold of her and embraced her and when she inquired with her as to what had happened to her mother, she told her that her father had killed her mother by poking the knife in the throat by making an action to that effect. As per the version of PW3/Sunamites, it is at the request of the nun of the Divine Providence Convent that the said two minor children came to be given in her custody and were looked after by her maids. She stated that PW8/Ragini was totally shocked when she was brought to her house on 11/04/2005 and was not speaking to any person and although she brought them

at about 6.30 p.m. PW8/Ragini was unable to sleep and on the next date i.e on 12/04/2005 at about 6 p.m. she was playing with Ragini in the courtyard and when she questioned her in Hindi as to who had killed her mother, she disclosed to her that her father had killed her mother with a knife. She also stated that PW8/Ragini had told her that she was frightened and had picked up her sister from the ground and ran towards aunty's house and told the aunty that her mother was killed and the said aunty had taken them to the convent. PW10/Auda Viegas had yet another story to tell. As per her, on 13/04/2005, the I.O. had called her on phone and was asked to talk to PW8/Ragini and she was told that Ram Shankar Sahane (the accused) had murdered Rita Sahane (the deceased) and accordingly she went to the residence of engineer Achilles Gracias and saw that the girl was traumatized and it took her lot of coaxing to win her confidence and she was with her for about 5 hours and after that she told her that two days before, her father had come home and fought with her mother and she also informed her that father was boxing the mother and the mother was crying and giving bad words to her father and then her father poked her mother on the neck with something and she told her father not to beat her mother. She also stated that she wanted to know what particular item was used to poke her mother's neck and as such she showed her a steel patti, a knife and one more item which she did not recollect and PW8/Ragini pointed out to the knife and stated that her father had used the object which resembled the knife to poke the neck of her mother and therefore she took her sister Nirjela and went to her neighbours's house and informed her that her mother was dead.

12. As already stated, the statement of PW8/Ragini was not recorded by the IO and it appears that he abdicated his duty in favour of PW10/Auda Viegas. Certainly, it was his duty to have recorded a statement of PW8/Ragini in the course of investigations and in case he wanted any assistance he could have certainly obtained the same from a social worker like PW10/Auda Viegas.

13. PW8/Ragini was subsequently examined before the trial Court on 20/01/2006 and in order to verify whether she was competent to depose, various questions were put to her by the then learned presiding officer who at the end of it recorded a certificate which reads as follows:

On the basis of questions and answers given by the witness, I am of the opinion that witness has not developed sufficient understanding. She does not understand the duty of speaking in the Court. On noticing her manner, outlook she lacks matured understanding. She was asked the questions in very conducive atmosphere and without the presence of police and any other authority. Hence, I am of the opinion that she is not a competent witness and therefore question of recording her statement does not arise.

It may be observed that PW8/Ragini did not even respond when she was asked about her own name or that of her mother. The learned trial Court therefore proceeded to observe that, he was of the opinion, that PW8/Ragini was not competent witness and therefore the question of recording her statement did not

arise. In other words, PW8/Ragini did not support what the aforesaid witnesses alleged, she had told them.

14. The main question which ought to have been answered by the learned trial Court is whether the evidence of PW1/Ana Maria, PW13/Querobina, PW3/Sunamites and PW10/Auda Viegas could at all have been accepted as legal evidence to convict the accused.

15. Chapter 4 of the Evidence Act deals with oral evidence, and Section 59 appearing therein states that all facts, except contents of documents or electronic records, may be proved by oral evidence. Section 60 of the Evidence Act further requires that oral evidence must, in all cases whatever, be direct; and, inter alia, it states that if it refers to a fact which could be seen, or be heard, it must be the evidence of a witness who says he saw it or heard it. Direct evidence is the best evidence. Derivative or second hand evidence is always excluded owing to its infirmity as compared with the original source. It is the cardinal rule of law of evidence that the best evidence should be brought before the Court. Hearsay evidence which is not based on personal knowledge but which is based on what is heard from others is always inadmissible except in cases where it has been so made admissible by the relevant provisions of the Evidence Act, Section 6 being one of them i.e. evidence of *res gestae*. A statement of a witness not based on his personal knowledge but what he heard from others is clearly inadmissible. Section 6 provides that facts which though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places. The rationale behind making certain statements of facts admissible u/s 6 is on account of spontaneity and immediacy of such statement or fact in relation to the fact in issue and it is necessary that such fact or statement must have been made contemporaneously with the act which constitute the offence or atleast immediately thereafter. It would be interesting to note what Sir John Woodroffe and Syed Amir Ali have got to say in their Law of Evidence at page 2789. Thus say the learned Authors:

The rule against hearsay is one of the most important and commonly applied rules of the law of evidence, and yet at the same time, the least understood by students, the profession and the judiciary. Many definitions of hearsay have been advanced. An assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted.

As per Peter Murphy, at page 2789 (*supra*) "Hearsay evidence is evidence from any witness which consists of what another person stated (whether verbally, in writing, or by any other method of assertion such as gesture) on any prior occasion, is inadmissible, if its only relevant purpose is to prove that any fact so stated by that person on that prior occasion is true. Such a statement may, however, be admitted for any relevant purpose other than proving the truth of facts stated in it.

Stephen in his report on the Indian Evidence Act has this to say:

The word "hearsay" is used in various senses. Sometimes it means whatever a person is heard to say; sometimes it means whatever a person declares on information given by some one else; sometimes it is treated as nearly synonymous with "irrelevant" (see page 597 of C.D. Field's Law of Evidence, 12th Edition).

In this context by way of illustration, we may refer to the case of *Vijender v. State of Delhi* 1997 SCC (Cri) 857. In this case PW5 had stated that Raju gave him the number of the vehicle and the names of three appellants as the miscreants. The said Raju who was examined as PW4 had not stated that he had seen the three appellants kidnapping Khurshid nor had given the number of the vehicle in which Khurshid was taken away and it was held that in the absence of such direct evidence of Raju/PW4, the testimony of PW5 to that extent would be hit by Section 60 of the Evidence Act. The Apex Court noted the facts which could be seen were that Kurshid was kidnapped, that the appellants kidnapped him and that he was kidnapped in car No. DDB 5067 and therefore PW4/Raju was the only person (in the absence of any other eye witness) who was legally competent to testify about this fact and since PW4/Raju did not testify to the said two facts namely the car number and the person who kidnapped him, the statement of PW5 that he was also told about the above facts would not be admissible being hearsay. What follows from the above discussion is that PW8/Ragini, having not supported PW3/Sunamites, PW10/Auda Viegas and PW13/Querobina as to what they said was told to them, their evidence was clearly hearsay and therefore inadmissible in support of the facts stated by them and as such could not be used against the accused. However, the same thing could not be said in case of PW1/Ana Maria, for, in law there is distinction between proving factum of a statement and proving the truth of a statement and in case only the factum of the statement is sought to be established it can be considered as admissible and cannot be rejected. The next question which might be posed, as sought to be done by the learned Public Prosecutor, is as to why the aforesaid witnesses deposed in the manner they did, but there can be no easy answer to the same in criminal cases. As stated by the Apex Court in *Shankarlal Gyarasilal Dixit v. State of Maharashtra* 1981 SCC (Cri.) 315 human nature is too willing, when faced with brutal crimes, to spin out stories out of strong suspicion. That probably is the reason why we have in this case varying, conflicting and confusing versions given by the said witnesses.

16. The other evidence produced by the prosecution to connect the accused is the evidence of recoveries, namely, blue long sleeves shirt (Exhibit D) and the wooden handle knife (Exhibit F) at the instance of the accused which were found with human blood, the blood group of which could not be detected due to disintegration of blood group specific substance. The recovery of the long pant (Exhibit D1) and the plastic handle knife (Exhibit G) would be of no consequence. Apart from the fact that these recoveries were of feeble circumstances, the said

recoveries are not free from doubt.

17. Admittedly, the clothes of the deceased were not attached by the Investigating Officer and this only shows his casual approach. When he was cross-examined on that aspect, he stated that he had deputed PSI Dalvi to Goa Medical College with the dead body, but he returned without clothes of the deceased but the same were not traceable thereafter although he personally pursued the matter further. The blue colour long sleeves shirt (Exhibit D) and the black colour long pant (Exhibit D1) and the knife (Exhibit F) were all recovered, as per the Investigating Officer, as per the disclosure statement made by the accused and in support of the same, prosecution had examined PW5/Joe Goes. He stated that the accused had told them about the said black long pant and blue long sleeves shirt which were kept by him in a bag in a room of Engineer Gracias's house situated at Cana, Benaullim and the knife used by him was hidden by the side of the compound wall near the zambool tree and pursuant to the said information the accused had shown to them the room and had removed the bag which was hung to a nail to a wall of the room and thereafter the said clothes were put in a polythene bag and then into a paper bag and the same was sealed and the I.O. and the panchas signed on it at the place of recovery and thereafter the accused took them near the zambool tree where there was a log of stones and dry leaves and removed the knife which was hidden under the log and informed them that the same was used to murder his wife. As per PW5/Joe Goes the said knife was put in a polythene bag and in it was placed a slip/tag and the bag was sealed and the panchas and the I.O. signed on the slip. However, when the signature on the envelope (containing the clothes?) was shown to him, he stated that the signature was not his, and when the pant and the shirt were shown to him, he stated upon verification, that the long pant was not the same and he was not sure about the shirt. He was neither re-examined, nor the other panch was examined to bring about clarity in the evidence of recovery, particularly, of the shirt (Exhibit D). As regards the knife, when another envelope was opened, received from CFSL, he identified the knife (Exhibit F) shown to him but stated that along with the knife a slip was inserted in the polythene bag on which details of the MO were written and their signatures were obtained but he stated that the said slip was missing. In cross-examination he stated that there was no signature effected on the polythene bag but signatures were effected by him and the others on the slip/tag which is missing. One does not know why separate procedures were followed in sealing the clothes (Exhibit D and D1) and the knife (Exhibit F and G). In the case of clothes no separate slip was put, while in the case of knives separate slip was put and the same was found missing from the polythene bag in which the knife (Exhibit F) was put and sealed. The I.O., in his evidence, conceded that he had not taken the signature of the panchas on the polythene packet. The learned trial Court has proceeded on the assumption that the slip which was put in the polythene bag in which the knife was put, was lost in CFSL. If that be the case, nothing prevented the prosecution to have examined the chemical analyzer from the said CFSL. In the

absence of the said slip, it would have been difficult for PW5/Joe Goes to have identified the said knife (Exhibit F) and in any event such an identification could not have been accepted by the trial Court. The controversy does not end there, either. As regards the second knife (Exhibit G), PW6/Angelico stated that the slip found with it, did not bear his signature and the I.O., tried to explain that the slip/tag which was put with the second knife Exhibit G/MO7 was missing and the slip which was put with the first knife Exhibit F/MO6 was found in Exhibit G/MO7. More assuring, if there was any evidence, that could have come from the second panchas to the respective panchanamas but no such evidence was produced. Moreover, the IO as well as PW11/Prabhavati Siddi have stated that the knife was shown to her 16/04/2005. If that be the case, the knife might have not remained in a sealed condition till it was forwarded to CFSL. It may be noted that it is not the case of PW5/Joe Goes or for that matter the IO or the said PW11/Prabhavati Siddi that the knife was shown to her from a transparent polythene bag. If such was the case then the matter could have been looked at differently. In the absence of proper identification of the shirt (Exhibit D) and the knife (Exhibit F) by PW5/Joe Goes it cannot be said that the knife was sealed properly so as to avoid any manipulation. In other words, PW5/Joe Goes himself has stated that he is not sure that the shirt (Exhibit D) was the one recovered at the instance of the accused and in the absence of the tag he could not have been sure that the knife (Exhibit F) was the same which was shown by the accused. Therefore, that these articles were blood stained would not be of any significance. In the facts of this case, learned Senior Advocate Shri Dessai, is right, in contending that, there was no mention either in the panchanama or the evidence of PW5/Joe Goes that they had noted any blood stains. It is well settled that the Courts are very vigilant to ensure credibility of evidence by the Police because the provision of Section 27 of the Evidence Act is so vulnerable to abuse. A Division Bench of this Court in the case of State of Maharashtra Vs. Prabhu Barku Gade, stated that the possibility that the prosecution may have put human blood on the articles has to be eliminated before any reliance on the aforesaid evidence could be placed and the question is not whether the human blood was actually put on the recovered articles but the question was whether it could have been put. Since PW5/Joe Goes was unable to identify the clothes and the identification of the knife in the absence of the slip not being free from doubt, the benefit of that doubt has got to be extended to the accused. In other words, these two recoveries were not proved by the prosecution beyond reasonable doubt. The entire chain of circumstantial evidence has snapped so badly that it affects the credibility of the prosecution case as a whole.

18. Before concluding we must reiterate that in the absence of any allegation of abscondance, the accused was certainly not required to explain his presence in Sinquetim in Benaullim only because the I.O. stated that the accused was arrested from there, as otherwise held by the learned trial Court. It is well settled law that the case of the prosecution has to be tested independently of the defence version and the Court has to be cautious to avoid the risk of allowing

mere suspicion however strong to take the place of proof. That is why, we often say that it is not the defence which wins but it is the prosecution which loses. A mere moral conviction or a suspicion, however grave it may be, cannot take place of proof. Acquitting the guilty is as much doing injustice, as convicting the innocent, and both are to be scrupulously avoided. The bulk of the evidence produced in this case was legally inadmissible and two of the circumstances sought to be proved have not been proved beyond reasonable doubt against the accused and, therefore, the accused was certainly entitled to be given the benefit of doubt and acquitted.

19. We, therefore, allow the appeal and set aside the impugned judgment and acquit the accused u/s 302 IPC. The accused shall be set to liberty forthwith, in case he is not required in any other case.