
(2012) 11 BOM CK 0023
In the Bombay High Court
Case No : Criminal Appeal No. 541 of 2005

Shamshul Yadali Sheikh	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 29-11-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 201, 302, 328, 34

Citation : (2013) 3 BomCR(Cri) 180

Hon'ble Judges : V.K. Tahilramani, J;A.R. Joshi, J

Bench : Division Bench

Advocate : Aniket Vagal, for the Appellant; P.P. Bhosale, APP for the State, for the Respondent

Final Decision : Allowed

Judgement

A.R. Joshi, J.—Heard rival submissions on this Criminal Appeal preferred by appellant/orig. accused challenging the judgment and order of conviction dated 29th September, 2004 passed by the IV Adhoc Additional Sessions Judge, Thane in Sessions Case No. 89 of 2004. Appellant/accused was convicted of the offence punishable u/s 302 and was sentenced to suffer imprisonment for life and to pay fine of Rs. 5000/-, in default imprisonment for one year. He was also convicted for the offence punishable u/s 328 and was sentenced to suffer RI for two years and fine of Rs. 5000/-, in default RI for six months. He was also convicted for the offence punishable u/s 201 of IPC and was sentenced to suffer RI for two years and to pay fine of Rs. 5000/- in default RI for six months. The case of prosecution, in nutshell, is as under :-

Complainant PW-2 Abdul Razzak Gulab Shaikh was originally from native place from Jharkhand came and settled down in Navi Mumbai and having his business premises at Crawford Market, Mumbai. His cousin brother victim Harun Shaikh also came to Mumbai about 14 years prior to the incident which took place on or about 12th September, 2003 and 13th September, 2003. Victim was doing the business of selling scents and other cosmetics. Complainant who was running a

business of fruit juice business at APMC Market and also has one shop at Crawford market which was looked after by his son Muzzaphar Shaikh PW-4. On the night of 12th September, 2003 victim Harun, one Attaullah Shaikh who is brother of PW-2 and Muzzaphar Shaikh (who is son of PW-2) left Crawford Market area after closure of the business. That time, victim Harun received a phone call on his mobile No. 9820883407. After receiving said call, Harun told other persons that he had some work and he will go home alone. On this, other persons went to their work. From the next day morning the whereabouts of victim Harun were not found and the shop of the complainant could not be opened as the keys were with victim Harun. House of Harun was visited by Muzzaphar (PW-4). However, he was not present and two other persons in the house informed that victim had not come to the house even on the earlier night. Thereafter the shop was opened by calling the person to prepare duplicate key. However, the whereabouts of Harun were not found. Also according to the prosecution, the complainant was told by the maternal brother of victim and some other people that victim was in the company of appellant/accused on the night of 12.9.2003 at about 11:00 p.m. and that time both had consumed liquor. On 25.9.2003 also there was no trace of victim Harun, and as such PW-2 complainant went to MRA Marg Police Station to lodge complaint. However, as the residence of Harun was at Shivdi, he was directed to lodge complaint with Dongri police station and as such a missing report was lodged with Dongri police station bearing No. 37 of 2003.

2. According to prosecution, even on 16.9.2003 there was no trace of victim Harun, but, on that day enquiries were made regarding appellant/accused and revealing his address through one lady by name Haseena resident of Crawford Market, Dongri, he was taken to Dongri police station. There he was detained for enquiry. However, on 21.9.2003 he was released from custody as there was no material available against him as to his involvement in missing of victim Harun.

3. It is also case of prosecution that on 22.9.2003 according to complainant (PW-2) one boy came to him and informed regarding appellant/accused chit-chatting along with his two other associates i.e. the absconding accused Mahabali Shaikh and Akbar Shaikh and they were talking about tablets having stupefying effect. In short, said boy informed the complainant that appellant/accused has taken in custody those tablets from co-accused Akbar and crushed them in a powder and stored it in empty packet of Goa gutkha. According to said boy, it happened on 12.9.2003 at night and it was told by said boy to PW-2 on 22.9.2003.

4. Also according to the prosecution, on 24.9.2003 photograph of victim Harun was shown on the TV on Drushti Channel and it was reported that said unknown person was found dead near the railway track at Navi Mumbai. Accordingly, the complainant and his son contacted Turbhe police station and thereafter identified the dead body of victim Harun in NMMC hospital, Vashi. According to the case of prosecution, earlier on 13.9.2003 the dead body of victim was found by the side

of the railway track at Navi Mumbai and the matter was enquired into by Turbhe police after registering of accidental death report. Inquest panchnama was conducted. Postmortem on the dead body was also conducted. Clothes on the person of dead body were also taken charge of under panchnama. As such, on knowing that victim Harun Shaikh had died and was last seen with appellant/accused on the night of 12.9.2003, PW-2 Abdul Shaikh lodged his complaint with Turbhe police. It was registered as First Information Report as Exh. 8. Investigation was started. The names of present appellant/accused and his other two other absconding accused i.e. Mahabali Shaikh and Akbar Shaikh were revealed. Search was taken for all the three accused. Mahabali Shaikh and Akbar Shaikh remained untraceable even till completion of investigation and filing of chargesheet, and even till completion of the trial against appellant/accused. Search for accused was conducted - as by that time he was already released by Dongri police station on 21.9.2003 as there was no material against appellant/accused so far as his involvement in the missing of Harun. Subsequently appellant/accused was put under arrest from Pune District on 30.9.2003. He was sent for medical examination as he had sustained some injuries and which were sustained by him 4-5 days prior to his medical examination which took place on 1.10.2003 at the hands of Dr. Narayane (PW-8). Also according to the case of prosecution, on 2.10.2003 alleged memorandum statement of appellant/accused was recorded under panchnama and in furtherance of the same allegedly appellant/accused showed the telephone booth run by PW-10 Ashish Kadam from where allegedly appellant/accused made a telephone call to victim Harun on the night of 12.9.2003. Also during investigation statement of PW-12 Parvej Shaikh was recorded. According to him, he gave mobile and sim card to victim Harun. It was the same mobile/sim card number on which victim Harun received a telephone call on the night of 12.9.2003.

5. On completion of investigation, charge-sheet was filed against appellant/accused and case was committed to the Court of Sessions and ended in conviction, as mentioned above.

6. Admittedly, case of the prosecution is entirely based on circumstantial evidence. The apparent circumstances are as under :

[I] According to PW-3 Taimur Shaikh, victim Harun was seen in the company of appellant/accused on the night of 12.9.2003 and that time victim Harun was under the influence of liquor.

[II] In the afternoon of 12.9.2003 appellant/accused was seen in the company of said absconding accused Mahabali Shaikh and Akbar Shaikh and during that time there was a talk between Akbar Shaikh and appellant/accused. Appellant/accused asked Akbar Shaikh regarding some tablets having stupefying effect. On this, Akbar Shaikh gave some tablet to appellant/accused which appellant/accused took and crushed into powder and kept the said powder in his custody and these events were witnessed by PW-1 Mohammad Shaikh.

[III] Appellant/accused made voluntary statement on 2.10.2003 showing the telephone booth from where he had made telephone call to victim Harun on the night of 12.9.2003.

7. It is to be ascertained whether the evidence led before the trial Court is sufficient to establish the above mentioned circumstances, and further whether such circumstances are sufficient to connect the present appellant/accused with the offence of murder and hiding evidence of murder.

8. So far as the first circumstance is concerned, there is substantive evidence of PW-3 one Taimur Shaikh. According to this witness, victim Harun was his cousin brother and on 12.9.2002 he was sleeping at his house at Wadibunder and that time victim Harun came along with appellant/accused and introduced appellant/accused as his friend. That time Harun was under the influence of liquor. According to PW-3 Taimur Shaikh, victim and appellant/accused met the other relatives also and PW-3 asked appellant/accused to take Harun to his house. So far as this circumstance is concerned, it must be mentioned that initially appellant/accused was taken in custody by Dongri police station for enquiry in the missing complaint lodged by PW-2. However on not finding any material against appellant/accused, he was allowed to go and was released from custody. In our considered view, this first circumstance as to last seen together is not of such a clinching nature so as to only indicate towards appellant/accused as the author of murder.

9. So far as the second circumstance is concerned, according to PW-1 he noticed appellant/accused in the company of other absconding co-accused in that afternoon of 12.9.2003 and all the accused had some discussion and during which appellant/accused taken charge of tablets from absconding accused Akbar Shaikh and kept in his custody said tables after preparing powder. It is significant to note that statement of said PW-1 was recorded during the investigation only on 29.9.2003 and not prior to that, as such, hardly it can be said that this is an incriminating circumstance against appellant/accused.

10. So far as the third circumstance is concerned, we have seen that panch witness PW-7 Shantaram Patil did not support the case of prosecution so far as alleged memorandum statement and discovery of place i.e. a telephone booth at the instance of appellant/accused. On this aspect, another panch PW-9 Krishna Hegde was also examined and memorandum statement Exh. 30 and discovery panchnama Exh. 31 were taken on record. However, again in our considered view, still if it is considered that accused had shown the telephone booth to police on 2.10.2003, hardly this circumstance can be said to be so clinching as against appellant/accused so far as his involvement in the offence of murder. Even for the same reason, the substantive evidence of PW-10 Ashish Kadam, operator of the telephone booth and substantive evidence of PW-12 Parvej Shaikh the person who gave mobile and sim-card to victim, cannot be taken as clinching evidence against appellant/accused.

11. So far as the homicidal death of victim Harun is concerned, there is no doubt regarding the findings in the postmortem conducted by Dr. Bhushan Jain (PW-5). However, still the link between appellant/accused and death of the victim cannot be established, in the absence of any other material other than the substantive evidence of above referred prosecution witnesses. As such in our considered view the trial Court had erred in appreciating the circumstances, as mentioned above, as against appellant/accused so as to convict him for the offences charged. In the result, in our view, the prosecution has failed to establish the guilt of appellant/accused beyond reasonable doubt and as such the present appeal is required to be allowed and the impugned judgment and order is required to be set aside. Hence, the following order :

ORDER

I. Criminal Appeal No. 541 of 2005 is allowed.

II. The impugned judgment and order of conviction dated 29.9.2004 passed by the IV Adhoc Additional Sessions Judge, Thane in Sessions Case No. 89 of 2004 is set aside. The appellant/accused is acquitted of the offence punishable under Sections 302 read with 34, 328 read with 34, and 201 read with 34 of Indian Penal Code.

III. The appellant/accused be released from jail custody, if not required in any other matter.

IV. If fine amount is already paid by the appellant, the same shall be refunded back to him;

V. Writ of the order is expedited.

VI. Present order be communicated to the concerned jail authorities where the appellant/accused is presently lodged.