IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1025 OF 2019

Saiyyad Musaddik Vahiduddin Kadri @
Imran Mansuri Hasani,
Age: 58 years, Occ.: Nil,
R/o. 1603, Zainab Manzil, Khadia Street,
Two Tank, Mumbai-400 008

Presently in Yerwada Central Prison,
Pune ... Appellant

Versus

The State of Maharashtra
Through Mira Road Police Station ... Respondents

Mr. Tehwar Khan Pathan a/w Mr. Khan Ishrat Ali Azhar Ali and Mr. Mohammad Ahmed Khan for the Appellant

Mrs. P. P. Shinde, A.P.P for the Respondent-State

CORAM : REVATI MOHITE DERE &
DR. NEELA GOKHALE, JJ.
RESERVED ON : 26th MARCH 2025
PRONOUNCED ON : 23rd APRIL 2025

JUDGMENT (*Per Revati Mohite Dere, J.*) :

1 By this appeal, the appellant has assailed the judgment and order dated 28th March 2019, passed by the learned Additional Sessions Judge, Thane, in Sessions Case No.29/2013,

convicting him for the offence punishable under Section 302 of the Indian Penal Code ('IPC') and sentencing him to suffer imprisonment for life and to pay a fine of Rs.5,000/- in default, to suffer rigorous imprisonment for one month.

2 The facts as are necessary to deal with the case are-

It is the prosecution case that between 8:00 p.m on 14th August 2003 and 7:35 a.m on 15th August 2003, the appellant committed the murder of one scrap vendor-Julfikar Umarkhan with a weapon or sharp edged knife and be-headed the said person and set him ablaze by pouring kerosene or a like substance. The body of the person was found in a bathroom in a flat, being Flat No. 302 of Sai Aashiyana Co-op. Society, A-Wing, Mira Road, Thane. It is further the prosecution case that the said act was done by the appellant to conceal his identity, by showing that he was murdered. The object/motive was to avoid court proceedings and cases which the appellant was facing.

The act came to light, when the neighbours saw smoke billowing out of the said flat. Fire-brigade was called and the fire in the bathroom was doused. A headless dead body was found in the bathroom. On inquiry, it was learnt that the flat belonged to Saiyyad Zuber Kadri, who was residing in Saudi. Inquiry also revealed that Saiyyad's brother-Musaddik (appellant) was residing in the said flat for about a year, alone, and that the appellant's another brother was residing in a nearby building. It appears that in the inquiry, the appellant's brother-Mansoor Kadri had disclosed to the police that his brother was staying in the flat in question. PW2-Avinash Bhamare, PI attached to Mira Road Police Station, Mumbai, lodged an FIR vide C.R. No. 169/2003 (Exhibit 30) as against unknown person. Spot panchanama and inquest panchanama were done and after investigation, the police filed an `A' Summary report in 2005 as the perpetrator of the crime, could not be found.

It is the prosecution case that the petitioner after committing the said act in 2003, went to reside at Malegaon from

2003 to 2006 and thereafter to Hyderabad between 2006 to 2010, to avoid his arrest.

It appears that the appellant was arrested on 6th October 2010 by ATS, Mumbai (Kalachowky) in C.R. No. 23/2010 for the alleged offences punishable under Sections 3, 25 of the Indian Arms Act. It is during the appellant's interrogation in the said case, that the police discovered that the appellant had killed someone in 2003 and portrayed to the police that it was he, who was killed and that the same was done by the appellant, to avoid facing prosecution in cases registered against him. Pursuant thereto, the police re-opened the case i.e. C.R. No.169/2003 since an `A' Summary was filed in the said case. The appellant came to be arrested in the said case and was remanded to custody in C.R. No. 169/2003. After investigation, charge-sheet was filed in the said case against the appellant for the alleged offences punishable under Sections 302 and 201 of the IPC in the District and Sessions Court, Thane, on 7th January 2013.

Since the offence under Section 302 of the IPC was triable by the Court of Sessions, the case came to be transferred to the Court of Sessions for trial.

Charge came to be framed against the appellant, to which, he pleaded not guilty and claimed to be tried.

The prosecution, in support of its case, examined as many as 14 witnesses- PW1-Kayamuddin Fakir Mohd. Shaikh, who drew the spot panchanama and inquest panchanama, which are at Exhibits 21 and 22; PW2-PI Avinash Bhagwan Bhamare, the first informant who came to the spot on 15th August 2003, on learning of smoke coming out from the flat in question. PW2-Avinash lodged the FIR (Exhibit 30); PW3-Mohd. Kuber Alam Sadik Husein, who had seen the appellant a week or two prior to the incident in the said flat, owned by the appellant's brother; PW4-Mohammad Afzal Haji Mohd. Akbar Shaikh, who had learnt that the dead body was of the appellant; PW5-Nafis Ahmed Nasiruddin Bhaldar, the President of the Society in which the flat

was situated; PW6-Mohd. Faruk Shaikh Hasan Mohd, who saw the smoke billowing from the flat owned by the appellant's brother; PW7-Dr. Ramchandra Mhasu Dhotre, who issued the Death Certificate (Exhibit 50) and the post-mortem report (Exhibit 51); PW8-Dr. Mohammed Ismail Mehndi Hasan Ansari, ENT Surgeon who performed septoplasty on the appellant on 26th August 2003; PW9-Riyaz Pasha Patel. For what purpose the said witness was sought to be examined by the prosecution, is far from clear. Infact, since the said witness deposed in his examination-in-chief that he did not know the accused person before the Court, the said witness ought to have been cross-examined by the Prosecutor and declared the said witness as hostile. However, the same has not been done. PW10-Waqar Ahmed Mohd. Yusuf, who had seen the appellant in the hospital of PW6-Mohd. Faruk Shaikh in 2003 (Infact, nothing has come on record to show that PW6 owns a hospital. It appears that PW6 has a chicken shop). He has stated that the appellant introduced himself as Imran Kadri; PW11-Bhimrao Savale Tele,

API who signed the spot panchanama and inquest panchanama at Exhibits 21 and 22 respectively. The said officer handed over the investigation to PI Shyamkumar Nipunge; PW12-PI Shyamkumar Bhikaji Nipunge, who recorded the statements of witnesses, collected fingerprints, prepared panchanama and did correspondence with the Chemical Analyser (CA) for DNA testing; PW13-Rajendra Sopanrao Ghule, Sr. PI, the subsequent Investigating Officer, who collected the Call Detail Records of the appellant and his relatives and sent the same to the Forensic Science Laboratory; and PW14-Mustak Ahmed Shaikh Sadar, Sr. PI who filed an `A' Summary report in the year 2005, which was later re-opened in 2010.

The defence of the appellant was that of total denial and false implication.

After recording the 313 statement of the appellant and after hearing the learned counsel for the respective parties, the learned Judge convicted the appellant as stated aforesaid in para 1 of the judgment.

3 At the outset, we may note that the prosecution case rests entirely on circumstantial evidence. The law relating to a case resting on circumstantial evidence is well settled. The Apex Court in the case of ***Hanumant Govind Nargundkar vs. State of Madhya Pradesh***[1] in para 12 has observed as under:

> *"12. It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused……."*

4 Similarly, in ***Sharad Birdhichand Sarda vs State of Maharashtra***[2]**,** the Apex Court has held that the onus is on the prosecution to prove that the chain of circumstance is complete and that falsity or untenability of the defence set-up by the accused, cannot be made the basis for ignoring any serious

1 1952 SCR 1091 : AIR 1952 SC 343 : (1952) 2 SCC 71
2 (1984) 4 SCC 116

infirmity or lacunae in the case of the prosecution. The Apex Court in para 153 then proceeded to indicate the conditions which must be fully established before a conviction can be made on the basis of the circumstantial evidence. The same are as under:

> *"(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
>
> *It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra[3] where the following observations were made: [SCC para 19, p. 807 : SCC (Cri) p. 1047]*
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> *Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.*
>
> *(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
>
> *(3) the circumstances should be of a conclusive nature and tendency,*

3 (1973) 2 SCC 793

> *(4) they should exclude every possible hypothesis except the one to be proved, and*
>
> *(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

5 Thus, in a case of circumstantial evidence, the onus is on the prosecution to establish the incriminating circumstances, by adducing reliable, cogent and legally admissible evidence. The circumstances so proved must form a complete chain of evidence, on the basis of which, no conclusion other than the one of guilt of the accused can be arrived at.

6 We have given our anxious consideration to the submissions advanced by the learned counsel for the appellant and learned A.P.P for the State and after going through the evidence on record, and keeping in mind the cardinal principles to be considered in a case resting on circumstantial evidence, we find that in the present case, the prosecution has failed to prove the

circumstances against the appellant, beyond reasonable doubt, for the reasons spelt out herein-under.

7 The fact, that a be-headed body was found in the flat in question on 15th August 2010, the same is not seriously disputed by the appellant. The only question that arises for consideration is, who was responsible for the same and whether the prosecution has proved its case, by adducing cogent, legal and admissible evidence on record, that it was the appellant and the appellant alone, who was responsible for the injuries caused to the person who was found in the flat.

8 At this juncture, we may note, that the prosecution has not been able to establish the identity of the person who was actually found dead in the flat, although, it is the prosecution case,that the person was one scrap vendor-Julfikar Umarkhan. Although, the charge against the appellant is that of having committed the murder of Julfikar Umarkhan, the prosecution has

not brought on record any evidence to show that the dead body was that of Julfikar Umarkhan, inasmuch as, no witness has been examined to show that the said person was missing since that day. Neither has the prosecution examined the relatives of Julfikar Umarkhan. Infact, on what basis, the prosecution has claimed that the dead body was of one Julfikar, is not clear, as no evidence has been adduced by the prosecution in this regard.

9 Be that as it may, the prosecution relies essentially on two circumstances *qua* the appellant i.e. alleged last seen theory and the fact that the appellant was staying in the flat in question i.e. Flat No. 302 of Sai Aashiyana Co-op. Society, A-Wing, Mira Road, Thane.

10 As far as the evidence of last seen is concerned, the prosecution seeks to place reliance on the evidence of PW3-Mohd. Kuber Alam Sadik Husein; PW4-Mohammad Afzal Haji Mohd. Akbar Shaikh; PW5-Nafis Ahmed Nasiruddin Bhaldar; and PW6-

Mohd. Faruk Shaikh Hasan Mohd.

11 PW3-Mohd. Kuber Alam Sadik Husein, in his evidence, deposed that the appellant was residing with his family on the 3rd floor of Sai Aashiyana in Flat No. 302; that the said flat was owned by appellant's brother-Saiyyad Musaddik; that he was residing there, for about one year prior to the incident; that the appellant would not talk to anybody and that he had seen the appellant a week or two before the incident and had not seen him thereafter. The said witness was residing in the very same building in Flat No. 104. According to PW3-Mohd. Kuber, on 15th August 2003, after *Namaaz*, he came and slept at home at 6:00 a.m; that one Dhanbahaddur knocked on his door at about 7:30 a.m and asked him to come on the third floor; that he went on the third floor and saw the fire-brigade personnel and police present at the spot, that smoke was coming out from Flat No.302; and that the police entered the room and saw one dead body. The said evidence which has come in the examination-in-chief, at the highest, would reveal that he had seen the appellant a week or two

before the incident and not thereafter. There is no evidence whatsoever to show that the appellant was last seen with the deceased.

12 PW4-Mohammad Afzal Haji Mohd. Akbar Shaikh, in his evidence, has stated that he resides in Sai Aashiyana Society in Flat No. A-402 since 2003; that the appellant was residing on the third floor; that one dead person was found inside the said flat on 15th August 2003; that there was rumour that the dead body was that of the appellant and that the head was cut from the torso. The said witness has further stated that he learnt after a couple of years that the dead body was not of the appellant; and, that he learnt, that the appellant had committed a murder in the flat, to conceal his identity. The said evidence does not, in any way, further the prosecution case and cannot be said to be last seen evidence.

13 PW5-Nafis Ahmed Nasiruddin Bhaldar has deposed that he is residing in Flat No. A-301 at Sai Aashiyana for about 22

years; that appellant's brother had a flat bearing No. A-302; that the appellant and his wife had come to reside in the said flat in 2002; and that thereafter, the appellant's children and wife started residing elsewhere and the appellant was residing alone. PW 5-Nafis Ahmed has further stated that on 15th August 2003, his neighbour Khayyam informed him at about 6:45 a.m that smoke was coming out from Flat No. 302; that a fire-brigade came there and that one headless body was found in the said flat. He has stated that the appellant's brother came there and informed that it was the appellant's dead body. He has further stated that he learnt that the appellant was arrested in a bomb blast case in 2010 and that he had done the act in 2003, only to conceal his identity. The said evidence also cannot qualify as last seen and as such, cannot be considered.

14 PW6-Mohd. Faruk Shaikh Hasan Mohd., in his evidence, has stated that he was residing on the second floor at Sai Aashiyana Building; that on 15th August 2003 at 6:00 a.m, he

heard shouts and went on the third floor; that he saw smoke coming out of Flat No. 302; that there were policemen and fire-brigade personnel; and that there was one dead body found in the room. He has stated that the appellant was residing in the said flat. This is all what the said witness has deposed. This evidence also cannot be termed as 'last seen evidence'. Last seen evidence means evidence of witnesses which reveal that the deceased was last seen in the company of the accused. This is not the case here. None of the witnesses had seen the deceased with the appellant.

15 Admittedly, there is no recovery of either any weapon/clothes of the appellant or the head of the deceased person.

16 As far as PW8-Dr. Mohammed Ismail Mehndi Hasan Ansari, ENT Surgeon is concerned, he was examined by the prosecution to show that the appellant had gone to his clinic on 26th August 2003 for his nose surgery. The said witness, in his

examination-in-chief has stated that the appellant had disclosed his name as Imran Abdulla Shaikh and that he had come from Janjira Murud, Raigad. PW8-Dr. Ansari has further deposed that the accused had nasal obstruction and headache, pursuant to which, he performed septoplasty on the appellant on 26th August 2003 and after surgery, the appellant had come for follow-up treatment to him upto 2006. There is nothing in the said evidence to show that the septoplasty was done on the appellant resulting in any change in his facial features or to disguise his identity. It is not even the prosecution case, that the appellant had changed his facial features to prevent his identification. Thus, the evidence of PW8-Dr. Ansari, does not, in any way, further the prosecution case.

17 The evidence of PWs 3 to 6 is also relied upon by the prosecution to show that the appellant was residing in the flat in question and therefore, according to the prosecution, the burden would lie on the appellant of proving the fact, especially within

his knowledge (Section 106 of the Evidence Act). It is the prosecution case that the evidence of PWs 3 to 6 clearly shows that the appellant was residing in the said flat at the relevant time and that the appellant had failed to give any plausible explanation to show to the contrary i.e. that he was not residing in the said flat.

18 The Apex Court in the case of ***Nagendra Sah vs. State of Bihar***[4]***,*** in paras 22 and 23 has observed as under:

> *"22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.*
>
> *23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section*

4 (2021) 10 SCC 725

106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused."

19 It appears that the learned trial Judge has convicted the appellant relying greatly on the fact, that the appellant had not afforded any explanation to show that he was not residing in the flat in question. It is well settled that the prosecution cannot absolve itself from proving the initial burden cast upon them i.e. of proving its case beyond reasonable doubt against the appellant. It is only when the chain is complete that Section 106 of the Evidence Act can be invoked as an additional link to the circumstances which have already been proved by the prosecution. Failure to offer a reasonable explanation in discharge of the burden placed on the appellant by virtue of

Section 106 of the Evidence Act, can only be considered as an additional link to the chain of circumstances. When the prosecution itself has failed to prove the circumstances and its case beyond reasonable doubt *qua* the appellant, failure of the accused to discharge his burden under Section 106 of the Evidence Act, would not be relevant.

20 Admittedly, the prosecution has not examined the appellant's brother, who disclosed that the appellant was residing in his flat. Infact, considering the prosecution case, the appellant's brother could have been well made an accused, as being part of the conspiracy to conceal the identity of the appellant, however, no investigation appears to have been carried out on the said lines.

21 Admittedly, the prosecution has not brought on record any material to show that there were any pending cases in 2003 for the appellant to commit the said offence. Thus, the

motive alleged by the prosecution that the appellant had committed the said act to conceal his identity, pales into insignificance. Even the report of the CA and the DNA report are inconclusive and do not in any way, further the prosecution case.

22 Having perused the record, we are at pains to observe that though the police had collected material i.e. to show cases prior to 2003 pending *qua* the appellant i.e. 7 cases; 2 under TADA (cases of 1994) and 5 cases under the provisions of IPC and under the Arms Act, the Prosecutor failed to bring the said evidence on record through any of the witnesses. The said evidence would have atleast helped the prosecution to some extent to show the motive for the appellant to commit the act in question i.e. murder of a person, for concealing his identity. The Prosecutor has failed in his duty to bring the same on record, despite the evidence being available on record and having been collected by the police. The prosecutor ought to have been

vigilant whilst conducting the case, which we find, he has not. It is pertinent to note that it is the duty of the prosecutor to minutely go through the charge-sheet; examine the witnesses and bring all material on record collected by the prosecution in support of their case. We are afraid that the prosecutor has conducted the case extremely casually and has failed in his duty to bring on record the material collected by the police, to show the motive for the appellant to commit the said act. Infact, even the examination-in-chief has not been properly conducted nor has the witness (PW9) been declared hostile, despite he not having supported the prosecution case.

23 Considering the evidence as stated aforesaid, we find that the prosecution has failed to prove the incriminating circumstances against the appellant. The benefit of the same will have to be given to the appellant. Accordingly, we pass the following order:

ORDER

(i) The appeal is allowed;

(ii) The judgment and order dated 28th March 2019, passed by the learned Additional Sessions Judge, Thane, in Sessions Case No.29/2013, convicting and sentencing the appellant, is quashed and set aside;

(iii) The appellant is acquitted of the offence, with which he is charged. The appellant is set at liberty forthwith, if not required in any other case. Fine amount, if paid, be refunded to the appellant.

24 Appeal is disposed of accordingly.

25 In the peculiar facts, we deem it appropriate to send a

copy of this order to the Director of the Prosecutions to take note of the same against the prosecutor, who conducted the said case. Registry to send a copy of the impugned judgment dated 28th March 2019, passed by the learned Additional Sessions Judge, Thane, in Sessions Case No.29/2013, the evidence of all witnesses along with a copy of this judgment.

26 All concerned to act on the authenticated copy of this judgment.

DR. NEELA GOKHALE, J. REVATI MOHITE DERE, J.