



Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO. 28 OF 2024

Hira Lohar, s/o. Bahadur Lohar, age 24 years,
N/o. Manjhatoli, Vill Basantpur, PS-Simdega,
Basantpur Simdega, Jharkhand. Appellant

V e r s u s

1. State of Goa, thr. The Public Prosecutor & ... Respondents
anr.

Mr. Rohan Desai, Advocate for the Appellant.

Mr. S. G. Bhohe, Public Prosecutor for Respondent-State.

**CORAM: M. S. KARNIK &
VALMIKI MENEZES, JJ.**

DATE : 10th September, 2024

JUDGMENT (Per M. S. Karnik, J.)

1. The challenge in this appeal is to the judgment dated 24th /25th May 2023 passed in Sessions Case No. 19 of 2016 by the District and Sessions Judge, North Goa, Panaji, convicting the appellant-accused for the offence punishable under Section 302 of the Indian Penal Code. The accused was sentenced to undergo

imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code (IPC). The accused was also directed to pay a fine of Rs.1,00,000/- and in default of payment of fine, the accused was to undergo further imprisonment for a period of 3 years. If the fine amount was paid, an amount of Rs.50,000/- was to be paid as compensation to the relatives of the victim.

2. The date of the offence is on 15.07.2016. The FIR was lodged on 16.07.2016. The appellant-original accused was arrested for the offence punishable under Section 302 of IPC on the allegation that on 15.07.2016, at around 01.00 hours, at the under-construction site of Poonam Shanti at Shantaban, Merces, Goa, he committed murder of Bishnath Mehar, father of the complainant by strangulating him with the help of a rope like packing material, then hanged him to a cement beam and thereafter inflicted injuries in the stomach of the deceased with a koita. After the matter was committed to the Court of Sessions, the charge was framed. The accused pleaded not guilty.

3. The prosecution examined as many as 15 witnesses. Pw.1, Basant Mehar, is the complainant i.e. the son of the deceased.

Pw.2-Abbuswalcha Ranebennur, is a panch witness. Pw.3-Shahrukh Ali, is the panch witness for inquest panchanama. Pw.4-Jagir Pategoudra was examined as the panch witness for arrest panchanama. Pw.5-Aslam Pathan, was examined as the panch witness for attachment panchanama. Pw.6-Babajan was examined as panch witness for recovery panchanama. Pw.7-Aniket Devidas, was examined as a police witness. Pw. 8-Dr. Madhu Ghodkirekar conducted the post mortem examination on the dead body of the deceased and Pw.9-Dr. Girish Kamat, conducted the medical examination of the accused. Both the Doctors were examined by the prosecution. Pw.10-Abdul Sattar Karadgi was the contractor who had engaged the labourers at the construction site. Pw.11- Amit Dumdung is an eye witness to the incident. Pw.12-Rajesh Naik, is examined as a police witness. Pw.13-Shri Dattaram S. Angre, as a Nodal Officer with the Vodafone/Idea Cellular Company. Pw.14-Shri Shagun Sawant, who is examined as police witness and Pw.15-Shri Krishna Sinari, as the Investigating Officer.

4. Shri Desai, learned Counsel for the appellant took us through the evidence on record while submitting that the conviction is based on the sole testimony of Pw.11-Amit

Dungdung, an eyewitness, whose testimony is untrustworthy and unreliable. It is submitted that he is a tutored witness.

5. Shri Bhohe, learned Public Prosecutor vehemently opposed the submission of the learned Counsel for the appellant. He submits that the evidence of eyewitness Pw.11-Amit Dungdung, that of Pw.8 the Doctor and the other materials on record are sufficient to make out a case of conviction for the accused. Our attention is invited to the findings recorded by the trial Court which, according to the learned Public Prosecutor, cannot be said to be erroneous. Learned Public Prosecutor submitted that the conviction be sustained in view of the sterling quality of the evidence of Pw.11 and other materials on record corroborated by the recovery of the weapon at the instance of the accused.

6. Heard learned Counsel. On 15.07.2016, Pw.15-the Investigating Officer, recorded complaint of Pw.1-Shri Basant Mehar to the effect that on 15.07.2016, at around 01.00 hours, at the construction site of Poonam Shanti at Shantaban, Mercas, Goa, the accused Hira Lohar, son of Bahadur Lohar, committed murder of his father Bishnath Mehar, aged 48 years, by strangulating him with the help of a rope like packing material,

then hanged him to a cement beam and thereafter inflicted injuries on the stomach with a sharp weapon. The offence was registered vide Old Goa Police Station Crime no. 73/2016. On 15.07.2016, the investigating officer arrested the appellant and drew a detailed panchanama at the Old Goa Police Station. The panchanama was drawn in presence of panch witnesses namely Pw.4 and one Pappu Singh (not examined). The accused was wearing short sleeved red coloured T-shirt and blue coloured jeans. The appellant disclosed that he had worn the said T-shirt and jeans at the time of committing the murder of deceased Bishnath Mehar. The clothes were seized. Some reddish colour stains on the T-shirt on front portion at the stomach region which appeared to be blood stains was noticed. One mobile phone was seized from the accused. The T-shirt was seized in the presence of panchas. The mobile phone was then sealed in the presence of the panchas. The T-shirt was sealed and the envelope was marked as exhibit 5 and the mobile was seized and marked as exhibit 7. The panchanama commenced at 18.15 hours and concluded at 18.40 hours. The arrest panchanama is at exhibit 28 which bears the signature of the investigating officer. On 15.07.2016, the investigating officer visited Goa Medical College, Bambolim with a request to conduct post mortem examination

over the dead body of the deceased enclosing police report form and inquest panchanama. The cause of death vide autopsy was due to “asphyxia as a result of constriction of neck vide injury no. 1 which was ante mortem and fresh at the time of death.” The blood report of the deceased was collected from the blood bank. The department of Forensic Medicine and Toxicology was requested to conduct the medical examination of the accused vide exhibit 62. The report of the medical examination conducted on the accused by Police Surgeon Dr. Girish Kamat-Pw.9 was collected. The blood report of the accused was also collected from the blood bank. The reports of the deceased and the clothes of the deceased were sent for forensic examination.

7. In the examination in chief, the investigating officer (Pw.15) says that the contractor Pw.10-Abdul Sattar, handed over to the investigating officer railway tickets which were taken from the appellant Hira and the attachment panchanama was prepared in the presence of panch witness-Pw.5 Aslam Pathan and one Mausin Ismail Khan. The said tickets were of the railway journey of appellant Hira from Rourkela to Vasco da Gama. The investigating officer in his evidence deposed that on 16.07.2016, the accused voluntarily disclosed that he wanted to make a

disclosure regarding the case and the weapon. The investigating officer secured the presence of two panch witnesses i.e. Pw.6-Babajan and one Mr. Maqbul Khan. A detailed disclosure cum recovery panchanama under Section 27 of the Evidence Act, was conducted. The panchanama commenced at 5.20 hours and concluded at 05.45 hours.

8. Thus, the prosecution case is that the accused on 14.07.2016 along with deceased Bishnath and the eyewitness Pw.11-Amit Dungdung, came to Goa for work. The accused and the deceased Bishnath had a fight when they reached Margao Railway Station. The reason was that the deceased did not allow the appellant to sleep at night in the train. Thereafter, the three of them came to the construction site. There were other labourers with whom they shared alcoholic drinks. The deceased started harassing the accused and abused him. The deceased and the accused again had a fight. The deceased went downstairs and again came up. He started abusing the accused. The accused asked Bishnath to shut up but Bishnath continued abusing the appellant. Thereafter, the appellant took out a rope like thing from the packing material and strangled the deceased with the rope. Thereafter, the appellant hanged Bishnath with the rope to a cement beam. The

appellant found a koita with which he gave blows on the stomach of Bishnath. When the appellant was assaulting deceased Bishnath, Pw.11-Amit saw him. The appellant threatened Amit-Pw.11 not to disclose the incident to anyone. After conclusion of the panchanama at 5.45 hours, the koita was recovered at the instance of the appellant. The koita was found near some bushes between the open area of the under construction building and the compound wall. The koita was blood stained.

9. The investigating officer denied the suggestion that he purposely did not produce Cw.15-Barju, Cw.16-Sameer, Cw.17-Bikas, Cw.18-Raju, Cw.20-Arjun, Cw.21-Komal, Cw.22-Smt. Budni, Cw.23- Meena and Cw.24-Sudharshan, as they are not supporting the prosecution case. The investigating officer denied the suggestion that he planted blood on the MOs to falsely implicate the accused.

10. There is only one eyewitness to the incident i.e. Pw.11-Amit Dumdung. Pw.11 in his deposition stated that he is a resident of Jarkhand. He was in need of work. Bishnath approached him in the year 2016 and told him that there is work in Goa where he could earn money. Pw.11 did not have money to buy a train ticket.

Bishnath and the appellant, who is also from the same village as Pw.11-Amit, went together to Goa for work. Bishnath purchased a ticket for Hira as well. After getting down at Margao Railway Station, there was a quarrel between the accused and the deceased. Pw.11-Amit says that the appellant threatened to kill Bishnath as he was annoyed with the harassment. The three of them went to the construction site where they met Barju. Bishnath called one of the labourers and told him that the accused will kill him upon which the said Barju kept quite. The appellant, accused, Pw.11-Amit and the other labourers were enjoying alcohol on the first floor of the under construction building. Pw.11-Amit went to the hut of Komal for having dinner and after having dinner, he again went to the under construction building. Pw.11-Amit was watching a film with Raju along with one Sameer. The accused was talking on his mobile phone with someone whereas the deceased was walking on the ground floor. A quarrel took place between the accused and the deceased. They were abusing each other. The deceased woke Pw.11 from his sleep and told him that the accused threatened to kill him. The other labourers also woke up. The deceased went for a walk. Pw.11 then fell asleep. Pw.11-Amit heard some one coughing at night. He tried to wake up the other boys, however, they did not

respond. Pw.11-Amit realized that the sound he heard was that of the deceased. In the light of the mobile phone, he realised that the deceased was not in the room so also the accused.

11. Pw.11-Amit went to the second floor of the said building but did not find anybody. While Pw.11-Amit was getting down, on reaching the first floor, he again heard the coughing sound. Pw.11-Amit saw that accused was strangulating the deceased with a rope of like material which is used for packing. The deceased was trying to free himself. The accused was strangulating him with force. Pw.11-Amit went back to the room and tried to wake up the other boys, however there was no response. The incident took place on the other side of the first floor. Pw.11-Amit was staying on the other side of the same floor. Pw.11 went back and found that accused was strangulating and hanging the deceased on the cement beam with the help of a rope used for packing. Thereafter, the accused assaulted the deceased with some sharp weapon in the stomach on two to three occasions upon which blood started oozing out. At that time, the accused saw Pw.11-Amit. Pw.11 got scared and started running away. He was caught by the accused and threatened that the incident should not be disclosed to anyone otherwise the deceased would kill him. The

incident took place around 01.00 a.m. Thereafter, the accused washed his hands and went to sleep near the other boys. Pw.11 also went to sleep.

12. Since Pw.11 was frightened, he did not help the deceased and nor informed this incident to anyone. In the morning, the other boys on seeing the deceased hanging, started shouting. The contractor-Pw.10 was informed. Pw.10 came to the site and called the police. Thereafter, Pw.11-Amit was called to the Old Goa Police Station. At the Old Goa Police Station, Pw.11-Amit and others met Pw.1-Basant, the son of the deceased. Pw.11 says that when Basant inquired with him, he told him what he saw in the earlier night. On the same day, the statement of Pw.11-Amit was recorded in the late evening. Section 164 of Cr.P.C. statement of Pw.11-Amit was recorded after ten days or so. Pw.11 deposed that the accused was wearing red colour T-shirt and blue jeans. Pw.11 deposed that he will not be able to identify the weapon with which the accused assaulted the deceased as he was unable to see properly but it was a sharp weapon.

13. In the cross-examination Pw.11 deposed that there was no electricity and water connection given to the said building. There

was no facility of any kitchen and bathroom in the said building and the labourers were required to go outside for nature's call. The height of the building was around 15 feet. There was no painting or otherwise going on in the said building. Pw.11 deposed that he was using a mobile phone at that time. Pw.11 deposed that he handed over the phone to the police for inspection which was later returned to him. A suggestion was put to Pw.11 that he was not carrying any mobile phone with him when he came to Goa in the year 2016, which he denied. Pw.11 deposed that they were sleeping on the ground floor. The incident happened on the first floor. Pw.11 deposed that he quickly went to the second floor on hearing the noise but he did not find anything unusual. While coming down, he noticed the incident from the first floor. He deposed that there were no other articles found on the first and second floor of the building. He deposed that he tried to wake up the boys, i.e. Sameer, Raju and Barju, who were sleeping in the room. Pw.11-Amit deposed that there was no electricity on any of the floors of the said building. Pw.11 denied that he was instigated by the family members of the deceased and the police to depose against the accused. Pw.11 deposed that there were no doors and windows on the said construction site and that anyone could enter inside. He further

says that his mobile phone did not have facility of video recordings.

14. Pw.1-Basant, i.e. the son of the deceased, in his deposition says that on 15.07.2016 at 13.00 hours, one policeman came to his place and informed that his father Bishnath was found dead at the construction site. Pw.1 immediately went to the Goa Medical College morgue and found the dead body on the stretcher. He identified the dead body to that of his father. Thereafter, he went to Old Goa Police Station and at the Old Goa Police Station, he met Pw.11-Amit, who is a resident of his Village. They were known to each other. Pw.11 told him about the incident. In the cross examination, Pw.11 says that he deposed that he was at Goa Medical College till 4.30 p.m. He came to Old Goa Police Station at around 6.00 p.m.

15. Dr. Madhu Ghodkirekar was examined as Pw.8. Pw.8 conducted the post mortem examination of the dead body. In the cross-examination, Pw.8 deposed that injury like serial no.1, can be in case of hanging of the body with ligature around the neck. The hanging can be suicidal or homicidal as the case may be. Pw.8 was recalled by the Court as per the order dated 27.03.2023. Pw.8

on recall deposed that as regards her opinion to the exact cause of death, that is, whether suicidal or homicidal, her opinion is limited to within the limits of medical literature. She deposed that only what she could do is to give various possibilities of body being suspended as shown in the photograph with the background of the autopsy examination findings. So far as the incised wounds are concerned, Pw.8 deposed that the same are post mortem as there were no vital reactions seen in the wound at the time of autopsy. Pw.8, deposed thus :

“To consider whether this case is post mortem suspension the only finding in the autopsy are post mortem grazed abrasions on the right heel of the deceased which could be caused due to dragging of the dead body. In such cases, one question may arise is whether homicidal hanging, that is, strangulation and then hanging of the body would have to cause two different ligature marks on the neck and to this I say that considering the slipping knot which was for the ligature (hanging material) around the neck of the deceased usually the assailant catches a victim unaware, strangulates with such a ligature and once the victim is unconscious or dead, drags the victim and suspends him in the form of hanging. Partial hanging is when part of the body is touching the ground. Considering all the facts as are evident from the photographs, this is a case

of either homicidal hanging or strangulation and post mortem suspension of dead body.”

Thus, Pw.8 deposed that the hanging can be suicidal or homicidal as the case may be.

16. It is pertinent to note that the blood report of the deceased reveals that it is ‘O’ Rh positive. The blood group sample of the accused reveals that his blood group also is ‘O’ Rh positive. On the T-shirt of the accused, the blood detected was of group 'A' as per the FSL report. Thus, this does not match with that of the accused. A sealed envelope, which contained exhibit 3 a stained gauge piece by which blood was taken from the floor where the deceased body was lying reveals that the blood group 'A' is detected. A sealed envelope which contained koita is at exhibit H. Results of the examination of the blood group found on the koita revealed that human blood is detected.

17. From the FSL report, it can be seen that blood found on the T-shirt of the accused which he was wearing at the time of assault does not match with that of the deceased. There are no injuries on the body of the accused. The koita which is recovered at the

instance of the accused near the compound wall was found to be stained with human blood. The blood group is not disclosed.

18. It is pertinent to note that Pw.11, the sole eyewitness says that he saw the incident in the light of his mobile phone. The building was under construction. There was no electricity or light connection in this under construction building. Pw.11-Amit says that though the incident took place in the night between 15.07.2016 and 16.07.2016, he did not report about the incident to anyone till the next date in the evening because he was threatened by the accused not to disclose the incident.

19. From the deposition of Pw.11-Amit, it is seen that he had handed over the said mobile phone to the police for inspection which was later returned to him, however, the investigating officer in his deposition says that he does not know whether Pw.11 had a mobile phone at the relevant time. This fact assumes relevance as, according to Pw.11, he had watched the incident in the light of his mobile phone. Further Pw.11 deposed that he was sleeping with other labourers and on hearing the shouts of the deceased, though he tried to wake up the other labourers, they did not respond. Pw.11, who was sleeping on the ground floor, went

to the second floor only to realize that the incident was happening on the first floor. The accused threatened the Pw.11-Amit not to disclose the incident to anyone. Pw.11 deposed that after the incident, the accused washed his hands and went to sleep next to the labourers and even Pw.11 went to sleep in the same room. It is material to note that the deceased knew Pw.11 very well and in fact paid for the train ticket of Pw.11 to enable him to come to Goa for a livelihood. Pw.11 does not disclose the incident from 01.00 a.m. onwards on 15.07.2016 till 6.00 p.m. of the next day i.e. 16.07.2016. Pw.11 discloses the incident for the first time to the son of the deceased at the Police Station. Thereafter, on the basis of the complaint by Pw.1, the accused was arrested. The explanation of Pw.11 was that he was threatened by the accused. The conduct of Pw.11 on seeing the deceased murdered in front of his eyes who he knew so well and in fact had helped him, going off to sleep along with the accused and not disclosing the incident for such a long time, is quite unnatural.

20. The Supreme Court on multiple occasions has held that it is not the quantity but the quality of witnesses and evidence that can either make or break the case of the prosecution. It is the duty of the prosecution to prove that the testimonies of the witnesses that

it seeks to rely upon are of sterling quality, i.e. fully trustworthy and absolutely free from any kind of blemish. The screams of the deceased shouting for help not being heard by any other labourer except Pw.11, is unusual. The labourers not responding to Pw.11 who was trying to wake them up despite the cries of the deceased for help, the incident being witnessed in the light of the mobile phone and the over all conduct of Pw.11 is inconsistent in the ordinary course of human nature. According to the prosecution, the other labourers who were present at the site and whose statements were recorded, could not be found for the purpose of examination during the trial. Thus, there is no corroboration to the evidence of Pw.11 which is necessary in the present case. The FSL reports do not support the case of the prosecution. Even from the evidence of the Doctor, it cannot be ascertained whether the death is homicidal or suicidal. The version of Pw.1 is not supported by any other direct evidence. In the absence of any other evidence linking the accused to the murder of the deceased, the testimony of PW-11 will have to be discarded as doubtful in the absence of any other direct or circumstantial evidence, ocular or otherwise, linking the accused to the incident.

21. This case primarily rests solely upon the testimony of PW-11, which is full of blemishes, absolutely uninspiring in confidence. It is the settled principles of law that doubt cannot replace proof. Suspicion, howsoever great it may be, is no substitute of proof in criminal jurisprudence. Only such evidence is admissible and acceptable as is permissible in accordance with law. In the case of a sole eyewitness, the witness has to be reliable, trustworthy, his testimony worthy of credence and the case proven beyond reasonable doubt. Unnatural conduct and unexplained circumstances can be a ground for disbelieving the witness. No doubt, so long as the single eyewitness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eyewitness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction.

22. Pw.11 knew the victim, who allegedly saw the assault on the victim and yet kept quite about the incident. The incident was seen by Pw.11 in the light of the mobile phone in an under

construction building which had no electricity connection. The under construction building was open and was accessible to all. There were other persons sleeping along with Pw.11. It was only Pw.11 who claims to have heard the screams of the deceased and seen the incident that too in the light of the mobile phone. The Pw.11 deposed that he handed over the mobile phone to the police, yet Pw.5 (I.O.) says that he did not remember if mobile phone was handed over to him. These are circumstances which just do not match up with a convincing prosecution story. We must remember the well established principle in criminal law that if two views are possible in the evidence if adduced in a case, one points to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. As discussed earlier, the conduct of Pw.11 just does not match up to the conduct of an ordinary person who knew the deceased and his family. His testimony, therefore, deserves to be discarded.

23. We have carefully perused the judgment of the trial Court. In our opinion, the trial Court on the testimony of the sole eyewitness which it found trustworthy, convicted the accused.

24. For the aforesaid reasons, the appeal is allowed. The impugned judgment and order of conviction of the trial Court is set aside. The appellant is acquitted of the charges levelled against him. He be set at liberty forthwith. Appeal is disposed of

25. We are informed that the fine amount as well as the compensation which includes the compensation as directed by the trial Court has not been paid by the appellant. Since we are acquitting the appellant-accused, the question of payment of the fine amount by the accused now does not arise. However, so far as compensation to the kin of the deceased is concerned under the relevant schemes, the said aspect will be determined upon hearing the kin of the deceased.

26. Issue notice to the Pw.1 on this limited aspect. Place the matter for directions on 25.09.2024. Notice be served through the concerned incharge of the Police Station.

VALMIKI MENEZES, J.

M. S. KARNIK, J.