IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 224 OF 2018

1. Gautam Kamlakar Pardeshi.
Age: 32 years, Occ. Unemployed.
R/o. Room No. 16, Thakurwadi,
Kharodi Naka, Virar (W).

2. Rahul @ Lalya Yogesh Jadhav
Age: 19 years, Occ. Student,
R/o. Green View Society, E/53,
2nd floor, Virar(W).
(Both at present detained at Central
Prison, Thane.) ... Appellants.

V/s.

The State of Maharashtra,
At the instance of Arnala Police Station. … Respondent.

Ms. Vrushali Maindad, Advocate appointed a/w. Ms. Shaheen Kapadia a/w. Ms. Ankita Nishad, advocate for appellants.

Ms. P.P. Shinde, APP for State.

CORAM : SMT. SADHANA S. JADHAV &
MILIND N. JADHAV, JJ.

RESERVED ON : APRIL 21 2022.

PRONOUNCED ON : JUNE 10, 2022.

JUDGMENT (PER SMT. SADHANA S. JADHAV, J)

1 The appellants are convicted for the offence punishable under section 302 of the Indian Penal Code and sentenced to suffer Life Imprisonment and to pay fine of Rs. 10,000/- each in default to suffer R.I. for

six months. The appellants are further convicted for the offence punishable under section 201 of the Indian Penal Code and sentenced to suffer R.I. for 5 years and to pay fine of Rs. 5,000/- each in default to suffer R.I. for 3 months, by the Additional Sessions Judge, Vasai vide Judgment and Order dated 16th February, 2018 in Sessions Case No. 76 of 2014. Hence, this appeal.

2 Such of the facts necessary for the decision of this appeal are as follows:

(i) That on 4/1/2014 at about 7.45 a.m. Joseph Rodrigues had been to his wadi (a small piece of agricultural land) for giving water to Banana trees through water pump. Since flow of the water was not proper, he had been to the water pump and at that time, he had noticed that a dead body was floating in the well. The backside of the dead body was open from waist to leg. It was in a plastic gunny bag.

(ii) Joseph Rodrigues (P.W.1) returned home and informed to his brother about the same. He then called upon the Councillor of the area who further passed on the information to the police patil. At the instance of the police patil a fire brigade team alongwith police came to the spot. The dead body was pulled out of the well by the fire brigade.

(iii) P.W. 7 then reported the matter to the police, on the basis of which accidental death was registered vide ADR No. 3 of 2014.

(iv) Investigation of the ADR No. 3 of 2014 was given to P.W. 2 Hemantkumar Katkar, PSI of Palghar Police Station. He had carried out initial steps in investigation. The inquest panchanama was drawn by him, which is marked at Exh. 25. A coir rope was seized which is marked at Article B and Article A is the plastic gunny bag. The advance death certificate was served upon P.W. 2 on the next day. After initial enquiry, P.W. 2 registered Crime No. 1 of 2014 at Palghar Police Station.

(v) In the course of investigation, the Investigating officer recorded the statement of one Jeris @ Anna Falix Pillai (P.W.8) and Martin Niel Moris(P.W.9) who had lastly seen the accused with the deceased. One Hitesh Raut(P.W.11) who was running a pan stall disclosed to the police that he had seen a mentally ill person standing near his pan shop. On the basis of the statements of P.W. 8 and P.W. 9, the accused were arrested and charge-sheeted.

(vi) It was the case of the investigating agency that accused Pravin

had also made an extra judicial confession to P.W. 9.

3 At the trial the prosecution examined as many as 13 witnesses to bring home the guilt of the accused. However, the entire case of the prosecution rests on the evidence of P.W. 3 Vinay Muley, a panch for recovery of the clothes of the deceased at the instance of accused Gautam; P.W. 4 Dr. Anant Kulkarni who performed the autopsy on the dead body of the deceased ; P.W. 7 Joseph Rodrigues who set the law into motion; P.W. 8 Jeris Pillai, who saw the deceased in the company of the accused; P.W. 9 Martin Moris to whom extra judicial confession was made and P.W. 12 API Santosh Barge who conducted investigation and filed charge-sheet.

4 According to P.W. 7 Joseph Rodrigues, he had filed a report thereby informing the police that when he had been to the well to start the motor pump, he had noticed that an unidentified dead body was floating in the well. On the basis of his report, ADR No. 3 of 2014 was registered and investigation was set in motion. In the cross-examination, he had admitted that he had not informed the police that upon seeing the dead body in the well, he had first informed his brother, who called the local councilor and then on the basis of the information of the police patil, the police had arrived at the spot. It is categorically stated in the cross-examination that the said

well was a common well and the residents in the wadi used to draw water from the well turn by turn. That there was no fencing around the wadi and therefore, trespassers had an easy access to the wadi. According to him, whenever a thief is apprehended in the wadi, the thief used to be assaulted by the agriculturists. That the accused were not residents of the wadi and therefore, he had not seen the accused in the close vicinity of the wadi. That when he saw the dead body, he had not noticed any injury on the dead body and therefore, he had presumed that the said person must have had an accidental fall.

5 P.W. 8 Jeris Pillai has deposed before the court that he is a resident of Virar Garden. On 31st December, 2013 he was celebrating the New Year Eve alongwith the accused Pravin, Gautam, Rahul and Raj Martin. They had enjoyed the party. At about 3 a.m. to 4 a.m. they all dispersed and went to their respective houses. On 1st January, 2014 in the morning Raj Martin approached him and informed him that his cousin Cyril has arranged a party and that he should join him. P.W. 8 obliged. P.W. 8 was in the company of Raj Martin till 11 to 11.30 p.m. in Gokul township. In his presence, Raj received a phone call from Pravin. Pravin asked both of them to come behind the MM Bar. They reached there by 1 a.m. and saw a mentally ill person wandering on the road. The said person had dashed

Gautam. They had tried to inquire with the said person but he gave no reply. Then under the pretext of giving food to the said person, Pravin, Gautam and Rahul led him to pump house and started assaulting him. The accused then denuded the said person of his clothes. In the meanwhile, P.W. 8 and Raj Martin were being invited for the party and therefore, they left. P.W. 8 stayed in the house of Raj Martin till 3.30 a.m. and went to his own house.

6 On 2nd January, 2014 Pravin and Raj asked P.W. 8 to reach Chaware wadi at about 8 to 8.15 p.m. When he visited Chaware wadi, he saw all the three accused were present and at that time, Gautam informed everybody that the mentally ill person, they encountered in the previous night was in fact a demon(Khavis). Gautam then disclosed that they had assaulted the said person on the head, killed him and threw his body in the well situated behind Sakharambaba Sankul. They were performing some ritual and then handed over a lemon to P.W. 8 informing him that the said lemon will protect him.

7 On 4/1/2014 P.W. 8 had seen the fire brigade taking out the dead body from the well. It is elicited in the cross-examination that P.W. 8 is an alcoholic. After consuming alcohol he used to consume ganja. Martin was his good friend and used to consume alcohol with P.W. 8. In a state of

intoxication, his mind used to be out of control. That from 31st December, 2013 to 4th January, 2014 he had enjoyed parties every day. He has further admitted that on 1st January, 2014 he returned from Gokul township to Martin at about 9.30 p.m. and Cyril's party had started at 9.30 p.m. He was under the influence of alcohol when he reached MM. Bar at about 1 a.m. They had again consumed liquor at MM. Bar. The fact that Pravin had called upon Raj is an omission. In fact, Gautam had told Pravin that the said person is not a beggar but a thief. That they were aware that there was some tussle between the said unknown person and a rickshawalla who had asked said unknown person to get out of the rickshaw and after that the unidentified person had disappeared from the spot.

8 According to P.W. 8, all the three accused were under the influence of liquor and therefore, were not in position to walk properly. The pump house is situated in the wadi and there is no facility of light near the pump house. That he had accompanied Martin to Bolinj Naka and then they both returned to the house of Martin. That Martin was in a hurry to reach home since the family members were calling him persistently. On 2nd January, 2014 he woke up at about 3 p.m. and thereafter, had not visited any of the places like Sakharababa Sankul and Pump house. In the evening of 2nd January, 2014, he found nothing objectionable. It is specifically admitted that

he had not suspected Rahul, Pravin and Gautam as the assailants of the unknown person as he had not seen any one of them assaulting the said unknown person. He had not seen the dead body nor the police had called upon him to see the dead body. There are material omissions in the evidence of P.W. 8 which go to the root of the matter.

9 P.W.9 Martin Moris was resident of Virar Garden. P.W.9 was a good friend of accused and used to consume liquor alongwith them in the premises of pump room which is situated behind the Sakharambaba Sankul. According to P.W. 9, on 31/12/2013 he had accompanied P.W. 8 to Gokul township and then they returned home at about 9 p.m. A party was going on. They joined the party. P.W. 8 Jeris was receiving calls from Pravin persistently and therefore, they both decided to meet Pravin at Bolinj Naka. Pravin was not present at the spot but a beggar was wandering here and there. The said beggar had a bad smell. Pravin asked them to come behind MM Bar. P.W. 8 and P.W. 9 obliged. He saw all the accused present there. The beggar had dashed Gautam and the said gesture annoyed Gautam. The beggar was apprehended by Gautam and Pravin, but he was unable to speak except uttering the words “Mumbai station”. They suspected him to be a thief. Pravin caught hold of the beggar whereas Gautam and Rahul gave him fists and blows. Then they went to pump house. P.W. 8 and P.W. 9 were

asking the accused to release the beggar and not to assault him. Rahul and Pravin denuded the beggar of his clothes and assaulted him. P.W. 9 received phone call from his sister and therefore, left the spot. On 2nd January, 2014 accused Pravin called P.W. 9 at Bolinj Naka and informed him that the said person was not a human being but a demon and all three of them killed the said person with a stone. Pravin also informed that the dead body of the said person was thrown in a well. All the three accused suspected the said person to be a demon. While handing over lemon, they informed P.W. 9 that the said spirit could cause harm to him and his family. He has also admitted to be an alcoholic. That they used to consume drugs together. On 31st December, 2013 the party continued for the whole night and spilt over till 8 a.m. of 1st January, 2014. He was a good friend of Pravin and vouched for him as a good person with a helping nature and no criminal antecedents. He admits that he has not given description of the said unknown person to the police. There are material omissions in the evidence of P.W. 9. His evidence that his friend had threatened him of dire consequences in the eventuality of disclosing facts to the police is a material omission.

10 P.W.4 Dr. Anand Kulkarni has performed autopsy on the dead body. His qualification was B.A.M.S.(Bachelllor of Aurvedic Medical Science). According to him, the injuries were antemortem. On external

examination, he found following injuries on the said dead body.

(i) Contusion size 3 cm. x 1 cm. on chest right side 2 cm. above nipple, colour black.

(ii) CLW size 5 cm. x 2 cm. x bone deep on right temporal region, 3" above right ear, brain protruding from fracture skull, colour was black and angles were broad and borders were irregular,

(iii) CLW size 1 cm. x ½ cm. x bone deep, just above injury no.2, colour was black, angles were broad and borders irregular,

(iv) CLW 1 cm. x 3 mm. X bone deep, just above injury no. 3, colour was black and angles were broad and borders irregular,

(v) Contusion size 6 cm. x 1 cm. near left shoulder tip, colour was black.

(vi) Contusion size 1 cm. x 1 cm. on left forearm lateral side midway, between elbow and wrist, colour was black.

All injuries nos. 1 to 6 were possible due to hard and blunt object within 36 hours to 7 days of examination. Injury nos. 2 , 3 and 4 were grievous whereas injury nos. 1, 5 and 6 were simple injuries. Injury no. 2, 3 and 4 were sufficient in the ordinary course to cause death. On internal examination, he found following injuries:

(i) Subcutaneous haematoma 2 cm. x 4 cm. on left temporal region,

(ii) fracture skull, right temporal region 7 cm. x 2 cm. horizontal below injury No. 2, 3 and 4 described under Col. 17.

(iii) Brain covering were contused below injury No. 2, 3, 4 described under col. 17 on right temporal region,

(iv) Subdural blackish Haemotoma on right temporal region irregular sized and shape.

The autopsy was performed alongwith Dr. D. A. Jadhav. But the PM. Notes were prepared in the handwriting of P.W. 4. The same are proved and marked at Exh. 43. On 13th January, 2014 police had shown a stone to P.W. 4. It is admitted that injury Nos. 1, 2 and 6 are not possible by the stone, which was seized in the course of investigation. The dead body was in swollen condition, but there was no water in the lungs. There were no clothes on the dead body when the body was sent for post mortem and therefore, there was no question of dry and wet clothes. According to P.W. 4, after completion of post-mortem he had handed over the clothes mentioned in column no. 8 to police. It is clarified that the dead body was wrapped in a curtain and the said curtain was wet. Column No. 12 and 13 of the postmortem reports shows as follows :

12.	Extent and signs of decomposition, presence post-mortem lividity of buttocks, loins, back and thighs or any other part. Whether bullae present		Whole body swollen and disfigured. Bullae formation & ruptured all over body skin flaccid and detach on pulling tongue protruded outside mouth maggots all over body (pupae) ½ cm. long p.m. lividity on back buttocks and scapular regions fixed.

	and the nature of their contained fluid. Condition of the cuticle.	
13.	Features- Whether natural or swollen, stale of eyes, position of tongue: nature of fluid (if any) oozing from mouth, nostrils- or ears.	Swollen eyes swollen & closed. Tongue protruded outside mouth due to decomposition, blood clots present in limb right ear.

The cause of death was “due to intracranial hemorrhage due to head injury.

11 P.W. 12 Santosh Barge, API has deposed before the court the steps taken by him in the course of investigation. According to him, accused Pravin Wagh had burnt his bloodstained clothes. Stone was recovered at this instance. The clothes of the deceased were recovered at the instance of accused Gautam from the lake. The clothes of the accused Gautam were also recovered from his house. There were blood stains on the pant below the knee area. Similarly, there is recovery of clothes of Accused Rahul. He disclosed that he had thrown the clothes with bloodstains in lake. P.W. 12 has admitted that no blood stains were seen on the scene of offence. There was no material to show that the dead body was dragged from pump house to well. P.W. 12 had admitted that he has not recorded the statement of the owner of land Joseph Rodrigues, in which the well and pump house were situated. There was no compound to the well as well as the pump house. The dead body was not identified. According to him, he did not feel it necessary

to record statement of the owner of the land. There is no investigation besides the evidence of P.W. 8 and P.W. 9 that the deceased was a beggar nor it had transpired that the deceased was a thief. But in the course of investigation, it had transpired that on the day of the incident, an auto rickshaw driver had teased the deceased but the said auto rickshaw driver could not be tressed.

12 The accused were not subjected to alcoholic examination. There was no evidence to show that anyone in the locality besides P.W. 8 and P.W.9 had seen the deceased in the locality. In the course of investigation, clothes of deceased were not shown to eye witnesses for verification. In the panchanama at Exh. 31, it is specifically mentioned that the clothes were wet and therefore, the signatures of the panchas will be obtained after the clothes dried. There is no evidence to show that after seizure, the clothes were sealed. Some currency notes were recovered in the course of seizure of clothes, but there is no reference from whom the notes were seized and to whom they were given. The currency notes are not deposited in the court either. The big stone which was seized was not sent for chemical analysis. During investigation, P.W. 12 had opened the seal of stone for the purpose of showing the same to the medical officer. There is a distance of 50 to 60 ft. between the pump room near lake and the pump room near the well. But there were no marks of dragging the dead body nor there was trail of blood.

No liquor bottles were found near any of the pump room. During investigation, P.W. 12 had not collected the call details records of accused and witnesses. P.W. 12 had proved the omissions and contradictions in the evidence of the witnesses. It is categorically admitted by P.W. 12 that in the present case, there is no eye witness to the murder.

13 The learned Counsel for the appellants has vehemently submitted that the prosecution has not proved its case beyond reasonable doubt. It is argued that it is the case of the prosecution that accused had assaulted the deceased with fists and blows. The medical evidence is otherwise. The medical evidence shows that the assault was with hard and blunt object. That the accused had no reason to assault the deceased and that they have been falsely implicated only because they happened to be alcoholic and drug addict. However, that by itself is not sufficient to hold that the accused are the perpetrators of the crime. Hence, they deserve to be acquitted. It is also urged that the accused have not fled from the scene of offence. They did not have a guilty mind. That in the eventuality they had committed an offence, they would have fled from the spot. There are no independent witnesses. P.W. 8 and P.W. 9 were in the company of the accused from 31st December, 2013 to 4th January, 2014. They have suppressed the facts and hence, their evidence does not inspire the confidence

to convict the accused.

14 Learned counsel for the appellants placed reliance upon the **Sahadevan and anr. v.s. State of Tamilnadu[1].**

> "14. It is a settled principle of criminal jurisprudence that extra-judicial confession is a weak piece of evidence. Wherever the Court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. If, however, the extra- judicial confession suffers from material discrepancies or inherent improbabilities and does not appear to be cogent as per the prosecution version, it may be difficult for the court to base a conviction on such a confession. In such circumstances, the court would be fully justified in ruling such evidence out of consideration.
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> 16 Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra- judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused.
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> The Principles
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> i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.
>
> ii) It should be made voluntarily and should be truthful.
>
> iii) It should inspire confidence.
>
> iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

1 **(2012) 6 SCC 403**

> v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.
>
> vi) Such statement essentially has to be proved like any other fact and in accordance with law."

The learned Counsel for the appellants has placed reliance upon the same judgment to substantiate that the factum of last seen has to be corroborated and shall not suffer from any and discrepancies as well.

15 Per contra, the learned APP has submitted that P.W. 8 and P.W. 9 are eye witnesses and they had seen the deceased lastly in the company of the accused.

16 The evidence in the present case is in the nature of the circumstances of last seen theory and extra judicial confession to P.W. 9. The prosecution has only relied upon the evidence of P.W. 8 and P.W. 9 who were under the influence of alcohol throughout that period. P.W. 8 and P.W. 9 were in the company of the accused when the incident of assault had taken place. The fact that they had tried to persuade the accused not to assault the deceased is in the nature of a material omission and the said omission is proved in accordance with law. P.W. 8 and P.W. 9 were also not in a proper frame of mind even to understand the events which they have seen. They have not disclosed anything to police immediately. It is not known as to what

was the material on record to show that the accused and the witnesses were in each other's company at the time of incident. It is true that the accused had no animus or intention to assault the deceased much less to kill him. The identity of the deceased has not been established. The deceased was also not apprehended when he was attempting to commit theft. It is the case of the P.W. 8 and P.W. 9 that the accused had assaulted only with fists and blows. There is no recovery of weapon. However, according to P.W. 4, the assault was with a hard and blunt object. The evidence in the nature of extrajudicial confession is week, since there is no material on record to show that it was a voluntary disclosure to its fullest extent. The accused were not in their senses till late in the afternoon of 1st January, 2014 and that they had continued the party for 4 days after the incident. The dead body was found on 4th January, 2014 and the condition of dead body shows that the death must have occurred atleast four days before. P.W. 11 Hitesh Raut has disclosed that he had seen a mentally ill person standing near pan shop on 1/1/2014 at about 12 to 12.30 a.m. P.W. 11 has been declared hostile by the prosecution. P.W. 11 was also not called by the police for identifying the dead body.

17 The prosecution has failed to establish that P.W. 8 and P.W.9 had seen the deceased in the company of the accused. The only description is that he was a mentally ill person. But the identity of the person as the deceased

has not been established. The statement of P.W. 8 and P.W. 9 are recorded after the arrest of the accused. Therefore, again there is no material to show that it was on the basis of their statement that the accused were arrested.

18 The extrajudicial confession does not inspire confidence as P.W. 9 was in the company of the accused on 31st December, 2013 as well as on 1st January, 2014. There was no reason for the accused to tell P.W. 9 on the eve of 2nd January, 2014 that they had killed the deceased. Moreover, P.W. 9 had neither reported it to the police nor he had verified that the body was thrown in the well. The body was recovered on 4th January, 2014. The material infirmities in the evidence of P.W. 8 and P.W. 9 do not inspire the confidence of the court.

19 "Last seen theory" by itself is not sufficient to prove that the accused are the authors of the fatal injuries sustained by the deceased. In fact, the prosecution has to establish the time when the deceased was lastly seen in the company of the accused and the time of death. Unless there is proximity in the time of last seen and the time of death, the evidence cannot be taken into consideration to convict the accused.

20 In view of the above discussion, it can be safely inferred that the

prosecution has failed to establish the guilt of the accused beyond reasonable doubt. The appellants deserve to be acquitted of all the charges levelled against them. Hence, following order is passed :

ORDER

(i) The Criminal Appeal is allowed.

(ii) The conviction and sentence imposed upon the appellants vide Judgment and Order dated 16th February, 2018 passed by the learned Additional Sessions Judge, Vasai in Sessions Case No. 76 of 2014 is hereby quashed and set aside. The appellants are acquitted of all the charges levelled against them.

(iii) The appellant be released forthwith if not required in any other offence. Fine amount if paid be refunded.

(iv) The Criminal Appeal is disposed of accordingly.

(MILIND N. JADHAV, J) (SMT. SADHANA S. JADHAV, J)