Supreme Court of India
Caetano Piedade Fernandes And ... vs Union Territory Of Goa, Daman And ... on 1 September, 1976
Equivalent citations: AIR 1977 SC 135, (1977) 1 SCC 707
Author: P Bhagwati
Bench: N Untwalia, P Bhagwati, S M Ali
JUDGMENT P.N. Bhagwati, J.

1. This is an appeal under Section 2(1)(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970. The appellants were tried by the Sessions Judge, Panaji for the offence of intentionally causing the death of one Vincent Fernandes (hereinafter referred to as the deceased) on 19th October, 1971 at a place between two villages in Goa, namely, Cananguinim and Nuvem. The learned Sessions Judge acquitted both the appellants since in his opinion the evidence led on behalf of the prosecution suffered from serious infirmities and did not bring home the offence against the appellants beyond reasonable doubt. The State preferred an appeal against the acquittal of the appellants to the Court of the Judicial Commissioner, Goa. The learned Additional Judicial Commissioner, who heard the appeal, disagreed with the view taken by the learned Sessions Judge reversing the acquittal of the appellants, convicted them of the offence under Section 302 read with Section 34 of the Indian Penal Code for intentionally causing the death of the deceased and sentenced each of them to suffer imprisonment for life. The appellants challenge their conviction and sentence in the present appeal.

2. The prosecution case against the appellants was that the incident which took place on 19th October, 1971 resulting in the death of the deceased was the culmination of a long standing feud between the deceased and the members of his family on the one side and almost the entire village of Canenguinim on the other. The conflict centered round a plot of land adjoining the property of the Kananguinim Church and though the plot was in the actual possession of the deceased and the members of his family, a claim was made to it on behalf of the Church and the rest of the villagers were supporting the claim of the Church. There were various incidents of violence between the two groups since 1969 and there were complaints and cross-complaints resulting in prosecutions of persons belonging to both groups. This had led to great tension in the village and as a security measure, two con stables had been posted in the village as duty guards.

3. It appears that on 19th October, 1971 the deceased, who was an old man aged more than 60 years, accompanied by his grandson Xavier, went to the neighbouring village Nuvem to engage labourers for work in his paddy field. He left village Cananguinim at about 2.30 p.m. and after arranging for labourers in village Nuvam, he started for the return journey along with Xavier. The road from Nuvem to Kananguinim was a mere footpath and it led across a hill covered with dense thorny shrubs and trees. Whilst the deceased and Xavier were passing through the forest on the hill, the appellants came from behind and attacked the deceased. The first appellant had a knife and the second appellant a 'coita' and with these weapons they caused injuries on the neck and other parts of the body of the deceased resulting in his death. The appellants then dragged the dead-body from the footpath inside the forest. On seeing this Xavier ran towards the village shouting that his grand-father has been cut. On the way, he met his father Antonio who was returning from his field and on being questioned by Antonio, Xavier told him that 'Lundo', meaning thereby the first

appellant, and Jacki's son, meaning thereby appellant No. 2, had killed his grand-father. Antonio was accompanied by his servant Santana Costa and he sent Xavier home along with Santana Costa and himself rushed to the scene of the offence. After he had gone a little distance, he noticed a black cloth bag lying on the footpath and he also found blood stains and chappals of his father and following drag marks on the grass, which also bore blood stains, he walked down the slope of hill inside the forest and saw the dead body of the deceased lying on the ground with both the appellants gazing at it. On seeing this he shouted "Lundo, why are you killing my father" and also pretended to call for help, on which the appellants ran away. Antonio thereafter proceeded towards the village and on the way he met his sister, mother, daughter of his sister and Xavier who were coming towards the scene of the offence. Antonio took all of them to the place where the dead body was lying and after leaving them to guard the dead body, he came home with Xavier and then after leaving Xavier at home, he proceeded to Quepem for the purpose of lodging the first information report. The first information report was taken down by P.S.I. Benaulikar and he immediately thereafter, started the investigation. On the completion of the investigation the appellants were ultimately charge-sheeted and tried before the learned Sessions Judge. The trial ended in the acquittal of the appellants, but on appeal the acquittal was reversed and the appellants were convicted under Section 302 read with Section 34 and sentenced to suffer life imprisonment. Hence the present appeal.

4. It is evident from the judgment of the learned Additional Judicial Commissioner that the conviction of the appellants rests primarily on the oral evidence of Xavier and Antonio and certain circumstantial evidence relating to the arrest of appellant No. 1 and the recovery of 'coita' as a result of statement made by appellant No. 2. We will presently examine first the evidence, but before we do so, we must point out that this is a case where the acquittal of the appellants by the learned Sessions Judge has been reversed by the learned Additional Judicial Commissioner. It is now well settled that though the appellate court has the same powers as the trial Court of appreciating evidence and coming to its own conclusion on questions of fact, it should not interfere with an acquittal, unless it finds that the view taken by the trial Court is unreasonable or perverse. If the view taken by the trial Court is a reasonably possible view, the appellate court should not disturb an acquittal merely because it thinks that another view is better or more preferable. It is from this point of view that we must proceed to examine whether the learned Additional Judicial Commissioner was right in reversing the acquittal of the appellants.

5. Turning first to the evidence of Xavier, it may be pointed out straightway that he was a child witness aged only 6 years at the time when he gave evidence. His evidence is, therefore, to be approached with great caution. He was, according to the prosecution, the only eye-witness to the crime. We have carefully gone through his evidence, but we are constrained to observe that even after making the utmost allowance in his favour in view of the fact that he is a child witness, we find it difficult to accept his testimony. There are several contradictions from which his evidence suffers, such as who had which weapon, but it is not merely on account of these contradictions of a minor character that we are inclined to reject his evidence. There are serious infirmities affecting his evidence and of them, the most important is that he is supposed to have given the name of appellant No. 2 as the assailant of the deceased even though he had never seen him before the date of the incident. He stated in his evidence that when on seeing the appellants dragging the body of the

deceased after attacking him, he ran towards the village, he met his father Antonio on the way and on being questioned by Antonio, he said that the deceased had been cut by Lundi and Jacki Chaddo, that is appellants Nos. 1 and 2. However, in cross-examination, he admitted that he had not seen appellant No. 2 earlier and it was only at the time when appellant No. 2 attacked the deceased that he saw appellant No. 2 for the first time. Apprehending that the answer given by him in cross-examination may be the result of some confusion or misunderstanding, the learned Sessions Judge gave another opportunity and asked him whether he was knowing appellant No. 2 from before, to which he answered by saying that he had not seen appellant No. 2 at any earlier point of time. Now, if this witness had never seen appellant No. 2 before, it is impossible to understand how he could give his name as the assailant of the deceased when he met Antonio on the way to the village. How could he say that Jacki Chaddo had participated in the attack on the deceased when he had never seen Jacki Chaddo before. This answer given by Xavier clearly impairs the value of his evidence and casts a serious doubt on his veracity. It shows that he had been prevailed upon by the prosecution to falsely implicate appellant No. 2 and if his evidence in regard to the presence of appellant No. 2 cannot be accepted, it must react adversely against his evidence in regard also to appellant No. 1. There is also one other contradiction of a serious nature in the evidence of Xavier. He stated in his evidence that each of the two appellants dealt one blow : appellant No. 2 cut the throat of the deceased first with the coita and then appellant No. 2 cut his neck with the knife. Now, if only one blow was delivered by each of the appellants, there would be two injuries on the deceased, but the medical evidence shows that the deceased had received as many as nine injuries, which would mean that more than two blows were given to him. Then again, according to Xavier, his father Antonio sent him back home with Santana Costa and atone proceeded to the place where the body of the deceased was lying. That was also the evidence of Antonio. But it is difficult to believe that Antonio would send Xavier home with Santana Costa and proceed alone to find out the dead body of the deceased when he did not know the place where the offence was committed nor was he informed by Xavier as to where the dead body of the deceased was lying. Would he not take Xavier with him in order that Xavier may show him the place where the deceased had been killed, instead of going on a chase for hunting out the dead body of the deceased in the forest? Would he also not prefer to take Santana Costa with him rather than go alone to the spot where his father had been done to death? The only explanation given by Antonio for not taking Santana Costa with him was that Santana Costa was afraid of going with him, but that is hardly an explanation which can carry conviction. Santana Costa was his servant and it is difficult to believe that he would refuse to go with his master. However, turning back to the evidence of Xavier, we find that in the committal court Xavier narrated an entirely different story. There he stated that he accompanied his father Antonio back to the scene of offence and showed him the place where the deceased had been assaulted and then Antonio walked to the place where the dead body of the deceased was lying. When Xavier was confronted with this statement made by him in the committal court, he first refused to admit that he had made such a statement, but then he accepted it. This contradiction is again of a very serious nature and we do not think it would be safe at all to rely on the testimony of Xavier.

6. The evidence of Antonio also suffers from inherent improbabilities. It is difficult to accept that Antonio asked Santana Costa to take Xavier home and proceeded alone to the scene of offence not knowing where the offence had taken place. His entire conduct in not taking Xavier and Santana Costa with him to the scene of offence is unnatural and wholly inconsistent with the ordinary course

of human nature. Then again, when Antonio traces the body of the deceased by following the clues left on the foot path, he finds the appellants standing near the body gazing at it. That is again something wholly impossible to believe. Xavier, according to the evidence given by him, started running towards the village after the appellants had assaulted the deceased and dragged his body into the forest. Xavier ran for about 3 or 4 minutes before he met Antonio. Then he had a talk with Antonio and after sending Xavier back home with Santana Costa, Antonio proceeded towards the scene of offence. Antonio did not know where the offence had been committed, nor did he know where the dead body was lying and he must, therefore, naturally have taken some time before he could discover the place where the dead body of the deceased had been draged by the appellants. In the meantime, Antonio also met his sister Martinha on the way and he told her that the deceased had been killed. Antonio must have, therefore, taken at least 10 minutes to reach the place where the dead body of the deceased was lying. It is difficult to believe that during this period of 10 minutes, the appellants should be patiently waiting near the dead body in order that Antonio should be able to see them. It is not as if the appellants were trying to burn the dead body of the deceased or to bury it. They were, according to Antonio, gazing at the dead body as if they were hypnotized or entranced by it. This story narrated by Antonio is wholly improbable and has been introduced in order to strengthen the prosecution case which otherwise would have to depend only on the evidence of the child witness Xavier.

7. Then again, according to the first information report lodged by him, Antonio started running and shouting "don't kill my father, don't kill" as soon as he saw his father's chappals and the pool of blood near the foot tract. But in his evidence Antonio asserted that he did not shout before he discovered the dead body of the deceased and saw the appellants standing by its side. This is a rather important contradiction, because if what Antonio stated in his first information report were true, namely that he started shouting as soon as he saw his father's chappals and the pool of blood, the appellants would obviously, on hearing the shouts, have run away, but the prosecution wanted that Antonio should see the appellants standing by the side of the dead body of the deceased so that he could identify them as the assailants of the deceased and, therefore, Antonio had to change his story in his evidence before the Court and say that he did not shout until he saw the appellants near the dead body of the deceased. It is also interesting to note that though Xavier is supposed to have given the names of the appellants as the assailants of the deceased when he met. Antonio and Antonio is also supposed to have given their names to his sister, daughter of his sister and mother so that every one in the family must have known that the appellants had killed the deceased, no member of the family mentioned to constables Shiva and Laxman that the appellants were assailants of the deceased. Shiva and Laxman were the two constables who, it appears, were on duty in village Cananguinim and when they came to the village at about 5.30 p.m. in the evening, they heard some one crying in the house of the deceased and going into the house, they asked the daughter-in-law of the deceased as to what had happened. She answered by saying that her father-in-law, that is the deceased had been killed. But strangely enough, neither did Shiva and Laxman ask her as to who had killed the deceased nor did she tell them as to who were the assailants. It is impossible to understand this conduct on the part of constables Shiva and Laxman. They were policemen and when they were told by the daughter-in-law that the deceased had been killed, their immediate query would have been : how was he killed and who killed him? But, according to Shiva and Laxman, they did not inquire about the names of the assailants at that time,

nor did they make any inquiry from the relatives of the deceased who were present when they were taken to the place where the dead body of the deceased was lying. It was only after Shiva came back to the house of the deceased, after leaving Laxman to guard the dead body, that he asked the daughter-in-law and was informed that the appellants had killed the deceased. This is indeed strange and unnatural conduct on the part of Shiva and Laxman and we find it difficult to accept their testimony. It appears to us clearly that Shiva and Laxman must have asked the members of the family of the deceased as to who had killed and no names of the assailants must have been given to them, since the members of the family were possibly not aware as to who had killed the deceased. The evidence of Antonio also does not, therefore, inspire any confidence , and it cannot form the basis of conviction of the appellants.

8. There was also evidence of test identification parade of the appellants held by Vengurlekar, Mamlatdar of Salceta. Vengurlekar deposed to the holding of the test identification parade at which Xavier was supposed to have identified appellants as the assailants of the deceased. But this evidence as to the test identification parade has no meaning, since Xavier in his evidence did not depose that he had identified the appellants at the test identification parade; Ordinarily, the person who is supposed to have identified the assailants at the test identification parade must himself give evidence in regard to the identification. If he does not himself give such evidence and leaves it to the officer holding the identification parade to do so, the defence would be deprived of an opportunity of cross-examination for the purpose of showing that the witness had an opportunity of seeing the accused before they were brought for identification. In any event, the evidence in regard to identification at the test identification parade is at the highest corroborative piece of evidence and if the evidence of Xavier suffers from serious infirmities and cannot be accepted, the evidence in regard to identification by him at the test identification parade cannot improve the situation.

9. Then we come to three circumstances on which strong reliance was placed on behalf of the prosecution. The first circumstance was that when the police went to arrest appellant No. 1, he did not open the door for the purpose of letting in the police. But this cannot be regarded as an incriminating circumstance when it is remembered that the time at which the police went to the house of appellant No. 1 was about mid-night and there was nothing unnatural in appellant No. 1 refusing to open the door at such an unearthly hour. Another circumstance relied upon on behalf of the prosecution was the recovery of a black piece of cloth, a cord and a reel of white thread from the house of appellant No. 1. It was argued that the cloth of the black bag, which was found near the scene of offence, tallied with the back piece of cloth seized from the house of the first appellant and also the cord of the black bag and the thread used in the black bag tallied with the cord and the white thread recovered from his house and this circumstance showed that the black bag belonged to appellant No. 1 and established his presence at the scene of offence. But this circumstance has hardly any probative value because the black cloth, cord and white thread seized from the house of the first appellant were ordinary articles which would be found in many houses in the village and they had no such identifying marks as would establish their connection with the first appellant. The last circumstance on which reliance was placed was the, recovery of a coita as a result of a statement made by appellant No. 2, but the evidence in regard to this recovery is far from satisfactory. Rama Kant Naik was one of the Panchas who witnessed the recovery of the coita and he stated in his evidence that appellant No. 2 said in the presence of P. 1. Rasuinha and the Panch witnesses that he

was going to show them 'something' and then they all got into a jeep, went to Cananguinim, stopped the jeep there at a place which was on a higher level and then appellant No. 2 walked for about half a mile and after searching for a while, produced from under the leaves a coita and handed it over to them. Appellant No. 2 did not, according to the evidence of Rama Kant Naik, say anything about the commission of the offence, nor did he mention that he would show the place where he had kept the coita or the weapon used in the commission of the offence. The only thing which he said was that he would show something. But when we turn to the statement of appellant No. 2, Ex. P-27, we find that according to that statement, appellant No, 2 offered "to show the spot where I have kept the coita" and the Panchanama Ex. P-23, signed by Rama Kant Naik also mentioned that appellant No. 2 stated before the Panchas that he was going to show "the place where he has kept the weapon used for the commission of the offence". It will, therefore, be seen that there was material contradiction between the evidence given by Rama Kant Naik on the one hand and the statement of appellant No. 2 Ex. P-27 and the Panchanama Ex. P-23. Then again, according to Rama Kant Naik, the entire Panchanama Ex. P-23 was written at the scene of offence and no part of the Panchanama was written either in the jeep or at the police station before going to the spot. But, according to P. I. Rasuinha, the Panchanama regarding the recovery of the 'coita' M.O. 9 was written partly at the Margao Rural Police Station and the rest on the way and still one part (the concluding portion) at Kananguinim. The middle portion of the Panchanama was written in the jeep itself whilst it was moving from Margao to Kananguinim. I also wrote something when we stopped at Kananguinim. I made a mention in the panchanama that the accused told us to stop. The remaining portion of the panchanama was written after the 'coita' M.O. 9 was recovered.

This is also a material contradiction which shows that in fact the Panchanama Ex. P-23 was not a genuine document, but it was prepared at the police station and the signature of Rama Kant Naik was obtained on it. It cannot, in any event, be regarded as a piece of evidence inspiring confidence. The evidence regarding the recovery of coita cannot, therefore, be accepted by us and we cannot rely upon it as an incriminating piece of evidence against appellant No. 2.

10. We are, therefore, of the view that the learned Sessions Judge was right in not relying on the prosecution evidence and acquitting the appellants of the offence of intentionally causing the death of the deceased. The circumstances of the case, no doubt, raise suspicion against the appellants, especially appellant No. 1, but suspicion cannot take the place of proof. It may be stated that in any event, the view taken by the learned Sessions Judge was a highly possible view and the learned Additional Judicial Commissioner was in error in reversing that view and convicting the appellants. We accordingly allow the appeal, set aside the order of conviction and sentence recorded against the appellants and acquit them of the offence charged against them. The appellants are directed to be set at liberty forthwith.