

nAmrut/Niti

**IN THE HIGH COURT OF BOMBAY AT GOA  
CRIMINAL APPEAL NOS.29 OF 2023 AND 20 OF 2023  
CRIMINAL APPEAL NO. 29 OF 2023**

Mr Osban Lucas Fernandes,  
s/o Caro Rumaldo Fernandes,  
Age 55 years,  
r/o H.No.250, Poilembhat,  
Mercea-Goa,  
Presently r/o Ribandar Patto, ... Appellant  
Ribandar, Tiswadi Goa.

***Versus***

1 State (Through)  
The Police Inspector,  
Old Goa Police Station  
Old Goa.  
  
2 Public Prosecutor,  
High Court of Bombay  
At Porvorim Goa. ... Respondents

Mr Rohan Desai, Mr A. Priolkar and Mr Nishikar Raut Desai,  
Advocates for the Appellant.  
Mr S. G. Bhobe, Public Prosecutor for the Respondents.

**WITH  
CRIMINAL APPEAL NO. 20 OF 2023**

Mr Ramesh Bhagve alias Maratho  
Son of Tayaji Bhagve (50 yrs of age)  
Resident of Village Masure, Tal-Malwan  
Dist. Sindhudurg Maharashtra  
Presently Judicial Lockup

Mordern Jail Colvale.

...Appellant

**Versus**

1 Police Inspector,  
Old Goa Police Station,  
Old Goa – Goa.

2 State

Through Public Prosecutor,  
High Court of Bombay at Goa,  
Porvorim – Goa.

...Respondents

Mr Anoop A. Gaoker, Advocate for the Appellant under Legal Aid Scheme.

Mr S. G. Bhobe, Public Prosecutor for the Respondents.

**CORAM:**           **M. S. SONAK &  
VALMIKI SA MENEZES,JJ.**

**Reserved on :**   **14<sup>th</sup> DECEMBER 2023**  
**Pronounced on:**   **19<sup>th</sup> JANUARY 2024**

**JUDGMENT (Per M. S. Sonak, J.)**

1. Heard Mr Rohan Desai with Mr A. Priolkar and Mr N. Raut Desai for the Appellant in Criminal Appeal No.29 of 2023 and Mr Anoop Gaoker (Under Legal Aid Scheme) for the Appellant in Criminal Appeal No.20 of 2023. Mr S. G. Bhobe, learned Public Prosecutor appears for the State in both the appeals.

**2.** Both these appeals challenge the judgment and order dated 27.08.2020 in Sessions Case No.53/2013 to the extent it convicts the Appellants for offences punishable under Sections 302 and 201 of the Indian Penal Code (IPC). The impugned judgment and order sentenced the two Appellants to simple imprisonment for life and a fine of ₹1,00,000/- each for the offence under Section 302 of IPC and simple imprisonment for a period of seven years and a fine of ₹50,000/- each for the offence under Section 201 of IPC respectively.

**3.** Both these appeals were instituted after considerable delay. However, in April 2023, this delay was condoned, and the appeals were admitted. The final hearing in the appeals concluded on 14.12.2023, and the appeals were reserved on the said date for orders.

**4.** By the impugned judgment and order dated 27.08.2020, the Sessions Court, while convicting the Appellant Osban Fernandes (A1) and Ramesh Bhagve alias Maratho (A2), noted that Jeetendrakumar (A3) and Annapurna (A4) were already discharged vide order dated 12.02.2015. The Sessions Judge also noted that Manappa (A5), Lamani (A6) and Master Lamani (A7) were absconding.

5. The case of the prosecution concerns an unfortunate couple (Shivaji and his wife Sujata) engaged as labourers at the Old Goa work site of A1 (referred to as 'Patrao') and their two minor children, then aged about 7.6 and 5.4 years, respectively. According to the prosecution, on or about 09.05.2013, A1 and A2, *inter alia*, tied Shivaji to a pole and mercilessly assaulted him with dandas. Sujata intervened and treated the wounds of her husband on the night intervening 9/10th May 2013 by applying turmeric. Unfortunately, by 12 noon on the 10<sup>th</sup> of May, 2013, Shivaji died. A1 and A2, on the pretext of taking Shivaji to the hospital, moved Sujata and the two minor children to A1's residence at or near the work site itself, where they remained for 2 to 3 days. A1 and A2 thereafter, with the help of a JCB, buried Shivaji at the work site behind a toilet.

6. The Prosecution alleges that upon Sujata questioning A1 and A2 about the whereabouts of her husband, A1 and A2 offered to take Sujata and the two minor children to their native place in Maharashtra. By hatching a conspiracy to eliminate them, A1 and A2 took them to Anmod Ghat in the dark night, intervening between 13.5.2013 and 14.05.2013. There, A1 and A2 strangulated Sujata, removed her clothes so as to avoid detection and threw her into a valley. Shivaji's minor son was then

strangulated, his clothes removed and thrown outside the car in the ghats. A little later, Shivaji's minor daughter was also strangulated, stripped and sexually assaulted by A2 and thrown outside the car in a similar manner.

7. The minor son and the minor daughter, however, almost miraculously survived and climbed up to the road's edge at the dawn of 14.05.2013, where a passerby, one Bonaventure (PW23), spotted them, naked, traumatized and injured. At the spot, the minor girl spoke to Bonaventure about the strangulation of their mother and themselves by the 'Patrao' and 'Maratho'. Bonaventure reached the two minor children at the nearest Police Outpost at Mollem, where he lodged an FIR No. 29/2013 at about 07.00 hours on 14.05.2013 against A1 and A2, from which point the investigations commenced into the crime of Sujata's murder and the attempt to murder the two minor children.

8. Investigations were carried out concerning FIR No.29/2013, and eventually, a chargesheet was filed in the Children's Court by invoking *inter alia* provisions of the Goa Children's Act 2003. By judgment and order dated 30.04.2019, the Children's Court convicted A1 and A2 and sentenced them, *inter alia*, to life imprisonment. By judgment and order dated 07.08.2020 in

Criminal Appeal No.52/2019 and 6/2020, this Court upheld the convictions and sentences imposed upon A1 and A2. Accordingly, A1 and A2 are presently serving their sentences.

**9.** In the course of investigations, it was revealed that A1 and A2 had murdered Shivaji at the work site within the jurisdiction of the Old Goa Police Station. Accordingly, on 14.05.2013, at about 22.30 hours, FIR No.70/2013 was lodged, *inter alia*, against A1 and A2, alleging offences under Sections 302 and 201 of IPC. After investigations, a chargesheet was filed against A1, A2 and five other accused persons. By order dated 12.02.2015, the Sessions Judge discharged A3 and A4. A5, A6 and A7 were absconding. By impugned judgment and order dated 27.08.2020, the learned Sessions Judge convicted A1 and A2 and sentenced them to undergo, *inter alia*, life imprisonment. Hence, these appeals.

**10.** The learned Counsel for the parties agreed that common judgment and order could dispose of both the appeals, particularly since both the appeals challenge the common judgment and order dated 27.08.2020 in Sessions Case No.53/2013, convicting A1 and A2.

**Appellants' Submissions:**

**11.** Mr R. Desai and Mr A. Gaoker, learned Counsel for the Appellants, at the outset, submitted that two alleged crimes involving the murder of Shivaji and his wife, Sujata, or attempt to murder their minor children constituted the same offence or two parts of the same offence. Accordingly, there was no justification for lodging a second FIR No.70/2013 with the Old Goa Police Station. They submitted that the lodging of two FIRs and two separate prosecutions was violative of Article 21 of the Constitution and caused immense prejudice to A1 and A2. They submitted that the prosecution based on FIR No.70/2013 at the Old Goa Police Station was illegal and unconstitutional. They submitted that conviction and sentence based upon this second FIR ought to be declared as nullity and be set aside. They relied upon *T.T. Antony V/s. State of Kerala & Ors.*<sup>1</sup> to support this contention.

**12.** Mr R. Desai and Mr A. Gaoker submitted that since A1 and A2 were already convicted for the crimes concerned with FIR 29/2013, their further conviction for the same offence concerned with FIR No.70/2013 was violative of Section 300 CrPC and

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<sup>1</sup> (2001) 6 SCC 181

Article 20(3) of the Constitution. They invoked the doctrine of “double jeopardy.” They relied upon *T.P. Gopalakrishnan V/s State of Kerala*<sup>2</sup>, *State Through Superintendent of Police, CBI/SIT V/s Nalini*<sup>3</sup> to support this contention.

**13.** Mr R. Desai and Mr A. Gaoker submitted that A1 and A2 were not identified as the perpetrators of the crime. They submitted that there were serious flaws in the Test Identification Parade (TIP), which was held after considerable delay. The procedure prescribed under the Criminal Manual was observed only in breach. The minor son refused to identify at the TIP. The so-called identification by PW9 (minor daughter) was also not in accordance with the law and even otherwise extremely doubtful. They submitted that, in any case, the evidence about TIP is not substantive evidence. They submitted that the accused were never identified in the Court. They submitted that the evidence of the minor daughter (PW9) was unreliable. They submitted that there were several contradictions and omissions. They submitted that the learned Sessions Court, therefore, erred in relying upon the evidence of TIP to convict A1 and A2. Mr R. Desai and Mr A. Gaoker relied upon *Ramkishan Mithanlal Sharma V/s State of*

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<sup>2</sup> (2022) 14 SCC 323

<sup>3</sup> (1999) 5 SCC 253

*Bombay<sup>4</sup>, Bhagwan Singh V/s State of M.P<sup>5</sup> and Golla Yelugu Govinda V/s. The state of A.P.<sup>6</sup>* to support these contentions.

**14.** Mr Desai and Mr Gaoker submitted that the Sessions Court incorrectly let in evidence under Section 27 of the Evidence Act on the issue of the accused's alleged knowledge of the place from which Shivaji's mortal remains were exhumed. They submitted that at the time when the accused are alleged to have made their statements based upon which Shivaji's mortal remains were exhumed, no FIR was lodged against A1 and A2 for the offence of murdering Shivaji. Thus, A1 and A2 were neither in police custody nor were they accused of any offence to murder Shivaji. Since these basic ingredients of Section 27 of the Evidence Act were not fulfilled, the Sessions Judge was not justified in invoking the provisions of Section 27 of the Evidence Act and letting in evidence-based thereon. The learned Counsel submitted that the conviction recorded being based upon inadmissible evidence, warrants interference. They relied upon the decisions of the Hon'ble Supreme Court in *State of Haryana V/s Ram Singh<sup>7</sup>*,

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<sup>4</sup> AIR 1955 SC 104

<sup>5</sup> (2003) 3 SCC 21

<sup>6</sup> (2008) 16 SCC 769

<sup>7</sup> (2002) 2 SCC 426

*Digamber Vaishnav and Another V/s State of Chhattisgarh<sup>8</sup>, Manoj Kumar Soni V/s State of Madhya Pradesh<sup>9</sup>, Mustkeem V/s State of Rajasthan<sup>10</sup>, Abhinandan Patel V/s State of Goa<sup>11</sup>, Rajesh and Anr. V/s State of Madhya Pradesh<sup>12</sup>.*

**15.** Mr Desai and Mr Gaoker submitted that the CCTV footage relied upon by the Sessions Court was inadmissible in the absence of a Section 65B Certificate. Further, they submitted that such CCTV footage was never sent for facial identification to the CFSL or any other competent laboratory. The record suggests that the contents of the DVR were perused by the IO only after the CFSL returned the DVR. They submitted that there was no sanctity to the attachment process and, therefore, potential tampering could not be ruled out. Mr Desai and Mr Gaoker relied upon the decision of the Hon'ble Supreme Court in *Anvar P.V. V/s P.K. Basheer and others*<sup>13</sup>.

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<sup>8</sup> (2019) 4 SCC 522

<sup>9</sup> 2023 SCC OnLine SC 984

<sup>10</sup> (2011) 11 SCC 724

<sup>11</sup> Criminal Appeal No.689 of 2022 (F)  
and connected appeals decided on 28.06.2023

<sup>12</sup> 2023 SCC OnLine SC 1202

<sup>13</sup> (2014) 10 SCC 473

**16.** Mr Desai and Mr Gaoker, without prejudice to the above contentions, submitted that the exhumation of the mortal remains of Shivaji was carried out without conducting any videography of the process. As such, the so-called recovery or the alleged statement based on which such recovery was made could not have been relied upon to convict A1 and A2. They submitted that mere recovery of the mortal remains of Shivaji, by itself, cannot lead to even the presumption, much less the conclusion that the accused persons were the authors of the crime. They relied upon *Kanbi Karsan Jadav V/s State of Gujarat*<sup>14</sup> to support this contention.

**17.** Mr Desai and Mr Gaoker submitted that the medical evidence was far from reliable or, in any case, insufficient to convict A1 and A2. They submitted that the post-mortem report nowhere conclusively stated the cause of death. The injuries found on the body could very well have been caused by the soil that laid atop the dead body or by some fall of the deceased on hard soil. These aspects have not been sufficiently considered by the learned Sessions Judge calling for interference with the conviction recorded.

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<sup>14</sup> AIR 1966 SC 821

**18.** Mr Desai and Mr Gaoker submitted that if the prosecution version about the quarrel between Annapurna and Shivaji is to be accepted, then the further version of one Lamani assaulting the deceased should not have been excluded from consideration. The learned Counsel, without prejudice, submitted that the role of A1 and A2, at the highest, could have been limited to burying the dead body or attempting to conceal the evidence. They submitted that there was no legal evidence to infer that A1 and A2 were the authors of the crime of murdering Shivaji. They submitted that even this aspect had not been sufficiently considered by the Sessions Court warranting interference with the conviction recorded.

**19.** Mr Desai and Mr Gaoker submitted that the alleged confessional statement of A2 was inadmissible for failure to comply with legal provisions and the procedure prescribed in the criminal manual. A2 was incorrectly administered the oath, and no sufficient time was granted to him to reflect upon the consequences of confession. The Sessions Judge, therefore, incorrectly relied upon such a confession to convict A1 and A2. Learned Sessions Judge also failed to appreciate that the so-called conviction by A2 could not have been relied upon to convict A1. For all these flaws, they submitted that the impugned conviction warrants interference. Mr Desai and Mr Gaoker relied upon the decision of

the Hon'ble Supreme Court in *Bhagwan Singh V/s State of M.P.* (supra).

**20.** Mr Desai and Mr Gaoker, finally and without prejudice, submitted that the material on record does not establish a case of culpable homicide amounting to murder. They submitted that there was absolutely no intention to commit any murder. At the highest, therefore, they submitted that this would amount to a case of causing grievous hurt to the deceased or a case of culpable homicide not amounting to murder. They submitted that since this aspect has not been considered, the impugned conviction under Section 302 of IPC warrants interference.

**21.** Mr Desai and Mr Gaoker submitted that the respective appeals be allowed and the impugned judgment and order convicting A1 and A2 be set aside. In the alternative, they submitted that the conviction under Section 302 of IPC and the sentence for life imprisonment may be set aside.

**State/Prosecution's Response:**

**22.** Mr Bhobe, the learned Public Prosecutor, defended the impugned judgment and order and the conviction recorded therein. He submitted that the prosecution, in this case, had

established beyond reasonable doubt that A1 and A2 murdered Shivaji and concealed material evidence concerning such murder.

**23.** Mr Bhobe, based on the record, referred to the timeline of events. He then referred to the evidence of PW9, who was an eyewitness to the murder. He submitted that Sessions Judge was justified in relying upon the evidence of the eyewitness PW9, particularly since her evidence was clear and cogent.

**24.** Mr Bhobe submitted that there was no flaw in the identification process. He submitted that the evidence on record established without doubt that PW9 knew A1 and A2 well before the incident and, therefore, there was no issue with identification. He submitted that, in any case, the TIP was held in accord with the law and the Sessions Court was justified in appreciating the trauma that PW9 and her minor brother went through at the hands of A1 and A2.

**25.** Mr Bhobe submitted that Shivaji's mortal remains were discovered based upon the statements of A2, who was in police custody after he was accused of the offence of murdering Shivaji's wife and attempting to murder their minor children. He, therefore, submitted that A2's statement, to the extent the same was corroborated by the discovery of Shivaji's mortal remains, was

very much admissible under Section 27 of the Evidence Act. Mr Bhobe submitted that Shivaji's mortal remains were discovered pursuant to A2's statement from A1's property, which was substantially enclosed from all sides. He submitted that members of the public did not have any easy access to the spot where mortal remains were found to be buried. He pointed out that the mortal remains were buried almost 2.5 metres below the ground surface of the property owned by A1. He submitted that all this evidence was relevant *inter alia* under Section 8 of the Evidence Act and, therefore, there was no infirmity in relying upon such evidence.

**26.** Mr Bhobe submitted that provisions of Section 106 of the Evidence Act were clearly attracted, and it was for A1 and A2 to explain how Shivaji's dead body was found buried almost 2.5 metres deep in the A1's property. By referring to the evidence on record, Mr Bhobe submitted that the presence of A1 and A2 at the time of the alleged offence was amply proved by the prosecution.

**27.** Mr Bhobe pointed out that Shivaji's burial almost 2.5 metres below the surface was possible due to the use of JCB machine. Such a JCB machine was attached from the spot, and there was no dispute about A1 owning this JCB machine. Mr Bhobe submitted

that these circumstances were more than sufficient to conclude that A1 and A2 were the authors of the ghastly crime.

**28.** Mr Bhobe submitted that A1 was identified as ‘Patrao’ by PW9. Besides, A1 was identified by PW9 during the TIP as is evident from the testimony of Mamlatdar Shri Satish Prabhu (PW5). Mr Bhobe also referred to the testimony of PW17 and the implications of such testimony that had withstood the onslaught of cross-examination.

**29.** Mr Bhobe submitted that A1 and A2 are already convicted for the murder of Shivaji’s wife and the mother of their two minor children. He submitted that the decision convicting and confirming the conviction of A1 and A2 were a part of the record before the Sessions Court. In any case, judicial notice could always be taken of this fact. Based on all these, Mr Bhobe submitted that no interference is warranted in the impugned judgment and order.

**30.** Mr Bhobe referred to cross-examination on behalf of A1 and A2 of the prosecution witness. Relying on *Ramanand @ Nandlal Bharti V/s State of Uttar Pradesh*<sup>15</sup> and *Balu Sudam Khalde & Anr. V/s State of Maharashtra*<sup>16</sup>, Mr Bhobe submitted that A1

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<sup>15</sup> 2022 SCC Online SC 1396

<sup>16</sup> 2023 SCC Online SC 355

and A2 cannot now distance themselves from the questions posed on their behalf during cross-examination of the prosecution witnesses. Based upon such cross-examination, Mr Bhobe attempted to demonstrate how A1 and A2 had not denied their presence at the site at the time of the event, and further from the line of cross-examination, even assault was admitted or could be inferred.

**31.** Mr Bhobe relied on *A.N. Venkatesh V/s. State of Karnataka*<sup>17</sup> explaining the scope of Section 7 and Section 8 of the Evidence Act. He submitted that the evidence was correctly considered and evaluated by resorting to these two legal provisions. Mr Bhobe also elaborated upon the doctrine of judicial notice in criminal cases by relying on *Harendra Rai V/s. State of Bihar and Ors.*<sup>18</sup>.

**32.** Mr Bhobe submitted that there was no infirmity in lodging a separate FIR at the Old Goa Police Station. He submitted that the decisions relied upon by the learned Counsel for the parties were clearly distinguishable. He submitted that, in any case, the objection now sought to be raised was never raised at the earliest

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<sup>17</sup> (2005) 7 SCC 714

<sup>18</sup> 2023 SCC Online SC 1023

instance. Instead, A1 and A2 not only went through the entire trial process but also relied upon the evidence in this trial in an attempt to contradict the statements of witnesses in their trial for the murder of Shivaji's wife. Mr Bhobe stressed upon the need to raise such a contention if at all at the earliest stage, as also that it was incumbent upon the appellants to show that a failure of justice had occasioned. He relied upon *H. N. Rishbud and Inder Singh V/s State of Delhi*<sup>19</sup>.

**33.** Mr Bhobe submitted that no prejudice was either urged or established by A1 and A2 on account of lodging a fresh FIR and holding an independent trial for Shivaji's murder. He relied on the provisions of Section 465 of Cr.P.C. He also relied on *Nasib Singh V/s State of Punjab and Anr.*<sup>20</sup> to submit that separate trial is the rule and joint trials in relation to two or more offences may be permissible only under certain circumstances. He submitted that there was no question of any double jeopardy involved in the present matters.

**34.** Mr Bhobe submitted that a clear case of culpable homicide amounting to a gruesome murder was proved by the prosecution

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<sup>19</sup> AIR 1955 SC 196

<sup>20</sup> (2022) 2 SCC 89

beyond any reasonable doubt. He submitted that there are no mitigating circumstances, and no case was made out to accept any of the alternate contentions about the act being one of culpable homicide not amounting to murder. Mr Bhobe pointed out that A1 and A2 mercilessly thrashed Shivaji and after he was dead buried him with the help of JCB machine almost 2.5 metres below the ground surface in A1's property to destroy the corpus delicti.

**35.** For all the above reasons, Mr Bhobe submitted that these appeals may be dismissed.

**36.** In rejoinder, Mr Desai and Mr Gaoker submitted that the judgment of this Court in *Osban Fernandes V/s State, Through P.P*<sup>21</sup> was irrelevant in so far as this trial was concerned and that the evidence led therein could not be relied upon in this matter. To support this contention, Mr Desai and Mr Gaoker relied upon the decision of the Hon'ble Supreme Court in *Rajan Rai V/s State of Bihar*<sup>22</sup>.

#### **Evaluation of the rival contentions:**

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<sup>21</sup> Criminal Appeal No. 52/2019 - 2020 SCC OnLine Bom 845

<sup>22</sup> (2006) 1 SCC 191

**37.** The rival contentions now fall for our determination.

**Validity of the ‘second’ FIR:**

**38.** The first point to be determined in these appeals is whether the lodging of the second FIR No.70/2013 at the Old Goa Police Station at 22.30 hours on 14.05.2013 after an FIR No.29/2013 was lodged on the same date at 7.00 hours at the Collem Police Station, was legal or not. Assuming that such lodging was improper, the next question is whether the same vitiates the trial and the conviction recorded by the impugned judgment and order given the law laid down in *T.T. Antony V/s. State of Kerala* (supra) relied upon by the Learned Counsel for the Appellants.

**39.** In *T.T. Antony V/s. State of Kerala* (supra), the Hon’ble Supreme Court has held under the scheme of the various provisions of CrPC, only the earliest or the first information in regard to the commission of a cognisable offence satisfies the requirements of Section 154 CrPC. Thus, there can be no second FIR. Consequently, there can be no fresh investigation on receipt of every subsequent information in respect of the same cognisable offence or the same occurrence or incident giving rise to one or more cognisable offences. Therefore, it follows that if the charges in the two FIRs, *in truth and substance, are the same*, registering

the second FIR undertaking fresh investigations and forwarding a separate report under Section 174 CrPC *will be irregular*, and the Court cannot take cognisance of the same.

**40.** In *Babubhai V/s State of Gujarat*<sup>23</sup>, the Hon'ble Supreme Court explained that the '*test of sameness*' is to be applied to find out whether both the FIRs relate to the same incident in respect of the same occurrence or are in regard to the incidents which are two or more parts of the same transaction. If the answer is in the affirmative, then the second FIR becomes vulnerable. However, if the contrary emerges from the record, and the second FIR is found to be different or the two FIRs relate to two different incidents/crimes, the second FIR is valid. The Court held that even in respect of the same incident, where the accused in the first FIR comes forward with a different version or a counterclaim, investigations on both FIRs have to be conducted. This position was reiterated in *Anju Chaudhary V/s State of U.P.*<sup>24</sup>

**41.** In *Anju Chaudhary* (supra) and *Mohan Baitha V/s. State of Bihar*<sup>25</sup>, the Hon'ble Supreme Court has held that the expression "*same transaction*" from its very nature is incapable of

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<sup>23</sup> (2010) 12 SCC 254

<sup>24</sup> (2013) 6 SCC 384

<sup>25</sup> (2001) 4 SCC 350

exact definition. This expression is not to be interpreted in any artificial or technical sense. Common sense in the ordinary use of language must decide whether or not, in the very facts of a case, it can be held to be one transaction. Further, it is not possible to enunciate any formula of universal application for the purpose of determining whether two or more acts constitute the same transaction. Such things are to be gathered from the circumstances of a given case indicating *proximity of time, unity or proximity of place, continuity of action, commonality of purpose or design*. Where two incidents are of different times with the involvement of different persons, there is no commonality, and the purpose thereof is different, and they emerge from different circumstances, it will not be possible for the Court to take the view that they form part of the same transaction and therefore, common FIR or subsequent FIR could not be permitted to be registered, or there could be a common trial.

**42.** Therefore, for the bar on the second FIR to become operational in terms of the law laid down in *T.T. Antony* (supra) and *Babubhai* (supra), the test to be applied is that of “*sameness*”, as explained in *Anju Chaudhary* (supra), and *Mohan Baitha* (supra). Further, there can be no straight jacket formula for determining sameness and this question has to be answered on the

facts of each case. The expression “sameness” or “same transaction” should not be interpreted in any artificial or technical sense but a common sense approach is to be adopted. There is no formula of universal application to determine whether two or more acts constitute the same transaction. Such things are to be gathered having regard to proximity of time, place, continuity of action and commonality of purpose or design. Not too much emphasis can be laid on the circumstance that the victims are from one and the same family or even that the motive for committing the second and the distinct offence was to avoid the detection of the accused involvement in the first offence for which an FIR may have already been registered.

**43.** Applying the above test to the circumstances borne out from the records in the present case, we cannot agree with the contentions of Mr Desai and Mr Gaoker that the offences alleged in FIR No.29/2013 lodged at Collem Police Station were the same as the offence recorded in FIR No.70/2013 lodged at the Old Goa Police Station. At the highest, there may be some overlapping of facts. The test about the proximity of time, unity or proximity of place, continuity of action and commonality of purpose or design was not fulfilled when expressing the allegations in the two FIRs.

The offences in the two FIRs were distinct offences spaced by time and place.

**44.** As noted earlier, A1 and A2 were alleged to have murdered Shivaji on 09.05.2013 at Old Goa. This is the subject matter of FIR No.70/2013 (the second FIR). Similarly, A1 and A2 murdered Shivaji's wife, Sujata and attempted to murder their two minor children on 13.05.2013 in the Anmod Ghat within the jurisdiction of the Collem jurisdiction. Clearly, therefore, the two offences were substantially spaced by time and place. Therefore, merely because the victims were a part of the same family or because the second offence was to silence the witnesses to the first offence, we cannot conclude that the two offences were either the same or were part of one and the same transaction. The argument based on lodging a second FIR must, therefore, fail.

#### **Double Jeopardy:**

**45.** Linked to the argument of the second FIR is the argument based on the doctrine of double jeopardy, which is prohibited under Article 20(3) of the Constitution and Section 300 of CrPC. This doctrine, which is now incorporated in Article 20(3) of the Constitution and Section 300 of CrPC, provides that the person, once convicted or acquitted, should not be tried for the same

offence. This is based on the maxim *nemo debet bis vexari, si constat curiae quod sit pro una et eadem causa*, which means that a person cannot be tried a second time for an offence which is involved with which he was previously charged.

**46.** The doctrine of double jeopardy is explained by the Hon'ble Supreme Court in *T.P. Gopalakrishnan* (supra) and *Vijayalakshmi V/s Vasudevan*<sup>26</sup>, and lays down that in order to bar the trial of any person already tried, it must be shown that (i) a competent Court has tried him for the same offence or one for which he might have been charged or convicted at a trial, on the same facts, (ii) he has been convicted or acquitted at the trial, and (iii) such conviction or acquittal is in force.

**47.** Again, the emphasis is on the expression “*same offence*”. *T.P. Gopalakrishnan* (supra) explains that the expression “*same offence*” in the context of the doctrine of double jeopardy or the provisions of Article 20 of the Constitution in simple language means *where the offences are not distinct, and the ingredients of the offences are identical*. Where there are two distinct offences made up of different ingredients, the embargo under Article 20 of the Constitution of India has no application, even though the offences

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<sup>26</sup> 1994 (4) SCC 656

may have some overlapping features. The crucial requirement of Article 20 is that the offences are the same and identical in all respects. To a similar effect are the observations in *State (NCT of Delhi) V/s Navjot Sandhu*<sup>27</sup> to explain this position.

**48.** *T.P. Gopalakrishnan* (supra) further explains that double jeopardy is often confused with double punishment. This decision holds that there is a vast difference between the two. Double punishment may arise when a person is convicted for two or more offences charged in one indictment. However, the question of double jeopardy arises only when a second trial is sought on a subsequent indictment following a conviction or acquittal on an earlier indictment. This doctrine is certainly not a protection to the individual from the peril of a second sentence or punishment, nor to the service of a sentence for one offence, but is a protection against double jeopardy for the same offence, that is, against a second trial for the same offence.

**49.** In the present case, as noted in paragraph 43 above, the offences alleged in the two FIRs were distinct, and the ingredients of the two offences were also not identical. Merely because the two offences may have had some overlapping features, the doctrine of

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<sup>27</sup> 2005 11 SCC 600

double jeopardy cannot be said to be attracted. An attempt to invoke this doctrine based upon arguments very similar to those raised by the appellants in the present case was turned down by the Hon'ble Supreme Court in *Kharkan V/s State of U.P*<sup>28</sup> discussed hereafter.

**50.** In *Kharkan* (supra), the Hon'ble Supreme Court held that the provisions of Section 300 of Cr.P.C. or Article 20 of the Constitution would not apply to the facts before it because the two offences were distinct and spaced slightly by time and place. The Court held that even if the two incidents could be viewed as connected so as to form a part of one transaction, it is obvious that the offences were distinct and required different charges. The Court explained that the assault on Tikam in fulfilment of the common object of the unlawful assembly was over when the unlawful assembly proceeded to the house of Tikam to loot it. A new common object to beat Puran was formed at a time when the common object with respect to Tikam had been fully worked out.

**51.** Therefore, the Court held that even if the two incidents could be taken to be connected by unity of time and place (which

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<sup>28</sup> AIR 1965 SC 83

they were not), the offences were distinct and required separate charges. Therefore, prior acquittal on the charge of assaulting Tikam did not attract the doctrine of jeopardy with respect to the conviction reached concerning the assault on Puran.

**52.** The Appellants' arguments in the present case are almost similar when they seek to link the offence of Shivaji's murder with Sujata's murder or the attempt to murder the two minor children. Shivaji's murder on 09.05.2013 was the first offence, and Sujata's murder and the attempt to murder the minor children on 13.05.2013 was the second offence. They were committed at two different places considerable distances apart and within the jurisdictions of two different police stations. The two distinct offences were removed over time and space. After Shivaji was murdered, the accused felt the necessity of eliminating Sujata and the minor children, who were potential eyewitnesses to Shivaji's murder. A new common object to murdering Sujata and the minor children was formed after the common object of murdering Shivaji was fully worked out.

**53.** Therefore, the contentions about the second FIR concerning Shivaji's murder being irregular or the conviction for Shivaji's murder violating the doctrine of double jeopardy as enshrined in

Article 20 of the Constitution and Section 300 of CrPC cannot be accepted. Neither do the facts nor the law support such arguments.

**Validity of Separate Trial and ‘Failure of Justice’:**

**54.** At least in the context of the arguments based upon the lodging of the second FIR, the provisions of Section 465 of CrPC and the law laid down in *Nasib Singh* (supra) about joint trials assume significance. This is without prejudice to the finding that such arguments do not deserve to be accepted.

**55.** Section 465 of CrPC provides that even if any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during the trial or any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution occurs, the appellate court, as in this case, shall not reverse or alter, unless the Court is of the opinion that such an occurrence has occasioned a failure of justice. The onus to show that a failure of justice has occurred lies on the party seeking the reversal or alteration of the sentence and judgment.

**56.** In the present case, admittedly, FIR No.70/2013 lodged at Old Goa Police Station was never challenged by A1 and A2 by

instituting any petition before this Court for quashing the same. Even in the course of the entire trial, beginning from the framing of the charge, FIR No.70/2013 was never challenged. During the trial, not even an attempt was made to demonstrate prejudice, if any, or the failure of justice, if any, by cross-examining the prosecution witnesses or leading any defence evidence.

**57.** Only at the final arguments stage was an attempt made to argue this issue by relying upon the decisions in *T.T. Antony* (*supra*). If A1 and A2 were serious about the objection based on the record of the second FIR, it was incumbent upon them to have raised such an objection at an earlier instance or at least demonstrated prejudice or the failure of justice, if any, given the provisions of Section 465 of CrPC.

**58.** In *Rattiram V/s State of M.P.*<sup>29</sup>, the Hon'ble has explained that raising any objection in that regard after conviction attracts the applicability of the principle of “failure of justice”, and the convict appellant becomes obliged in law to satisfy the appellate Court that he has been prejudiced and deprived of a fair trial or there has been a miscarriage of justice. The concept of fair trial and the conception of miscarriage of justice are not in the realm of

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<sup>29</sup> (2012) 4 SCC 516

abstraction. They do not operate in a vacuum. They are to be concretely established on the bedrock of facts and not to be deduced from the procedural lapse or an interdict-like commitment as enshrined under Section 193 of the Code for taking cognisance under the Act. It should be a manifestation of reflectible and visible reality but not a routine matter which has roots in appearance sans any reality.

**59.** Similarly, in *Pradeep S. Wodeyar V/s State of Karnataka*<sup>30</sup>, the Hon'ble Supreme Court explained that the general principle embodied in Section 465 CrPC is that a finding or order is not reversible due to irregularities unless a 'failure of justice' is proved. Further, Section 465(2) CrPC provides that while determining whether there has been a failure of justice, the appellate Court shall have regard to whether the objection regarding the irregularity could and should have been raised at an earlier stage in the proceeding. As noted earlier, in the present case, there is no explanation why the objection based upon the lodging of the second FIR was never raised at the earliest instance, and, further, there was not even any attempt to prove prejudice or the failure of justice.

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<sup>30</sup> 2021 SCC OnLine SC 1140

**60.** In *Darbara Singh V/s. State of Punjab*<sup>31</sup>, the Hon'ble Supreme Court explained that while judging the question of prejudice or guilt, the Court must bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

**61.** The Court explained that failure of justice is an extremely pliable or facile expression which can be made to fit into any situation in any case. The Court must endeavour to find the truth. *There would be a “failure of justice” not only by unjust conviction but also by acquittal of the guilty as a result of unjust failure to produce requisite evidence.* The Court added that, of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be overemphasised to the extent of forgetting that the victims also have rights. Therefore, it must be shown that the accused has suffered some disability or detriment in respect of the protections available to him under the Indian criminal jurisprudence.

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<sup>31</sup> (2012) 10 SCC 476

**62.** The Court further explained that the expression “prejudice” is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects and that the same has defeated the rights available to him under criminal jurisprudence, then the accused can seek benefit under the orders of the Court.

**63.** In *H.N. Rishbud and Inder Singh* (supra), the Hon’ble Supreme Court has held there can be no doubt that the result of the trial, which follows cognisance, cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of an investigation does not affect the competence and the jurisdiction of the Court for trial is well settled as appears from the cases in *Prabhu V/s. Emperor*<sup>32</sup> and *Lumbhardar Zutshi V/s. King*<sup>33</sup>. These cases related to the illegality of arrest in the course of the investigation, while in *H.N. Rishbud and Inder Singh*

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<sup>32</sup> AIR 1944 Privy Council 73

<sup>33</sup> AIR 1950 Privy Council 26

(supra), the Court was concerned with illegality in taking cognisance and the collection of the evidence.

**64.** In *Nasib Singh* (supra), the Hon'ble Supreme Court, in the context of Section 218 CrPC, has held that separate trials shall be conducted for distinct offences alleged to be committed by a person. Sections 219 to 221 provide exceptions to this general rule. If a person falls under these exceptions, then a joint trial for the offences with a person charged with may be conducted. Similarly, under Section 223, a joint trial may be held for persons charged with different offences if any of the clauses in the provision are separately or in combination, satisfied.

**65.** The Court has held that while applying the principles enunciated in Sections 218 to 223 on conducting joint and separate trials, the Trial Court must apply a two-pronged test, namely: (i) whether conducting a joint/separate trial will prejudice the defence of the accused, and/or (ii) whether conducting a joint/separate trial will cause judicial delay. *The possibility of conducting a joint trial will have to be determined at the beginning of the trial and not after the trial based on the result of the trial. The appellate Court may determine the validity of the argument that there ought to have been a separate/joint trial only based on*

*whether the trial had prejudiced the rights of the accused or the victim.* Since the provisions which engraft an exception use the phrase “may” with reference to conducting a joint trial, a separate trial is usually not contrary to law even if a joint trial could be conducted unless proven to cause a miscarriage of justice. *Therefore, conviction or acquittal of the accused cannot be set aside on the mere ground that there was a possibility of a joint or a separate trial.* To set aside the order of conviction or acquittal, it must be proved that the rights of the parties were prejudiced because of the joint or separate trial, as the case may be.

**66.** In the present case, neither was the objection raised at the earliest opportunity nor has any prejudice or failure of justice been established by the appellants. The separate trials were never objected to at the beginning of each of the trials. This is an additional reason to reject the arguments based on the filing of the second FIR or the failure to hold a joint trial. As noted earlier, the doctrine of double jeopardy is not attracted to the facts and circumstances of the present case.

**Testimony of a ‘Child Witness’ - PW9 (Eye-Witness):**

**67.** Mr Desai and Mr Gaokar submitted that PW9’s testimony was unreliable because she was an interested witness. Besides, they submitted that PW9, being a child, was prone to tutoring. They submitted that PW9’s testimony should have been excluded from consideration. This contention cannot be accepted for reasons discussed hereafter.

**68.** PW9 was about 7 and a half years old at the time of the incident and about nine years old at the time she deposed in the Court. The Sessions Judge, after questioning PW9 and noticing her demeanour, made a note that she was found to be competent enough to answer the questions considering her age. Accordingly, an order was made to record her testimony without administering any oath.

**69.** PW9 has deposed that her father Shivaji and her mother Sujata were working for AW1, whom she referred to as “Patrao”. She deposed that she, along with her parents and her younger brother Vishal, were staying in Patrao’s house. She deposed that there were six rooms in Patrao’s house, out of which they occupied one room. She deposed about this Patrao having one black coloured vehicle and two motorcycles.

**70.** PW9 deposed that Patrao (AW1) and one Marathe (AW2) tied her father to one pole and beat him. To the question as to who tied her father to the pole, she answered that it was Patrao. She also deposed that her father was beaten up with bamboo. To the question as to whether she had seen Patrao beating her father, she replied in the affirmative and added that she was present near one vehicle and saw the beating. She deposed that her father was beaten with bamboo on the face, neck, hands and legs. She disclosed that her father collapsed due to the beating and was taken to their room by her mother, who applied turmeric powder. She deposed that during the night, her father was sleeping while her mother was awake.

**71.** PW9 deposed that on the next day (i.e. on 10.05.2013), since her father was not getting up, her mother called their next-door neighbour Lamani for help. She deposed that Lamani tried to wake her father but there was no response. PW9 then deposed that her mother then called Patrao (AW1), who came to their room. She then deposed that she, along with her brother Vishal and mother, were asked to sit in Patrao's room and watch TV, which Patrao had switched on for them. She also deposed that Patrao kept the sound of the TV on loud volume.

**72.** PW9 deposed that after watching TV in Patrao's room, she never saw her father. She deposed that she was told by her mother that her father had been shifted to the hospital. She deposed that Patrao told them to leave the place since the police were inquiring. After that, PW9 deposed that her mother started packing their belongings. PW9 deposed that Patrao asked her mother to sit on the front seat of the black coloured car, and she, along with her brother and Marathe, sat on the rear seat.

**73.** PW9 then deposed that Patrao took all of them to Anmod Ghat, where Patrao told Marathe to kill her mother. Marathe tied a rope around the neck of her mother to strangulate her, tore her clothes with the help of a knife and then threw her into the jungle area. PW9 deposed that Marathe then strangulated her brother Vishal at his neck with the same rope in order to kill him, tore his clothes with the help of a knife and then threw him in the jungle/trees. She deposed that the rope broke when it was tied around Vishal's neck.

**74.** PW9 further deposed that Marathe tried to strangulate her by pressing her neck with his hands, tore off her clothes with the help of a knife and threw her in the jungle/trees. PW9 then deposed that she got up during the morning time, climbed up and

approached the main road. She deposed about seeing a vehicle passing along the road after which one of the vehicles stopped. She deposed that she told the driver of the stopped vehicle that her mother and brother were killed and thrown at the said place. She deposed how she travelled with the car and a little ahead found her brother Vishal who was found standing by the side of the road. She deposed that she, along with her brother, was taken to the police station, where she disclosed the police incident. She deposed about how she showed the place to the police and also Patrao's vehicle. PW9 was asked whether Marathe did anything else to her apart from tearing her clothes. The Sessions Court noted that the witness seemed to be depressed and frightened about the incident. She deposed that she had identified Patrao and Marathe at Ponda.

**75.** PW9 was taken to the site, and she showed the place where her father was tied. PW9 stated in her deposition that she would be able to identify Patrao and Marathe. However, Sessions Judge had noted that when the witness was called in the open Court and asked to identify the accused person, she was found to be scared because of the crowd in the Court and the Sessions Judge therefore, decided that the matter be taken after all other Court matters conclude in the chamber itself.

76. After the deposition resumed, PW9 again stated that she would be in a position to identify Patrao and Marathe if shown to her. The Sessions Judge has made a note that PW9 was only nine years old, and her testimony was recorded in the chamber in the presence of the Advocates for the accused persons while the accused persons were sitting in the open Court only to ensure that the child witness was comfortable and deposes without fear. The objection raised on behalf of one of the accused persons was rejected by the Court by recording that it was the duty of the Court to consider the welfare of the child. The Sessions Judge also makes a note of the demeanour of PW9 and about how she was nervous and about to cry due to fear. The Sessions Judge noted that this was the reason why PW9 was not taken to the open Court where the accused persons were sitting for the purpose of identification.

77. PW9 categorically denied that Patrao and Marathe were shown to her at the police station at any time. She also denied that any photographs of Patrao and Marathe were shown to her before the identification parade. PW9 deposed about the identification parade and stated that both the accused persons were standing together in the parade. She disclosed that her father was not talking when he was taken into the room after he was beaten up. She deposed that her father was screaming for help when he was

assaulted. She deposed that it was Patrao who started assaulting her father.

**78.** As noted earlier, the conviction of A1 and A2 was upheld by this Court by judgment and order dated 07.08.2020 in Criminal Appeal No.52/2019 and 55/2019. This judgment was produced before the Sessions Court in the present matter. This conviction was for the murder of Shivaji's wife, Sujata, in Anmod Ghat. PW9 had deposed in that matter before the Children's Court. An attempt was made in the present Sessions case to contradict PW9 by the statements made by her in her deposition in the trial for the murder of Shivaji's wife, Sujata or vice versa. This Court, otherwise, found that PW9's deposition was worthy of acceptance and inspired confidence.

**79.** In the judgment and order convicting A1 and A2 for the murder of Shivaji's wife, Sujata, this Court had noted how PW9 had not only described Patrao and Marathe but also identified them in the Court from behind the curtain. The Court also noted how PW9 knew Patrao and Marathe, and this was not a case where PW9 was called upon to identify accused persons of whom she may have had only some fleeting or momentary glance.

**80.** Even in the present matter, PW9 has deposed to knowing Patrao and Marathe and had witnessed them beat her father. She has deposed to sitting in the room provided to them by Patrao. Marathe actually strangulated PW9, her mother and her brother. Therefore, PW9 had ample opportunity to know Patrao and Marathe. In the judgment and order dated 07.08.2020, this Court has taken judicial notice of the fact that in Goa, the employer is referred to as “Patrao”. In the chargesheet filed, A2’s alias name was shown as “Maratho” without any protest from A2.

**81.** Mr Desai and Mr Gaoker relied on *State of Haryana V/s. Ram Singh* (supra) to contend that since PW9, Shivaji and Sujata’s daughter, she should be regarded as an interested witness and her testimony discarded. The decision cited, only provides that the evidence of an interested witness requires direct scrutiny. However, this decision does not say that the testimony of such a witness must not be accepted or that such evidence is not legitimate. In this case, PW9 was an eyewitness to Shivaji’s murder. Besides, she was herself a victim in A1 and A2’s prosecution for murder of PW9’s mother Sujata. In any case, the Sessions Court and this Court has strictly scrutinized PW9’s evidence and found her evidence to be clear, cogent and inspiring confidence.

**82.** In *Digamber Vaishnav and Anr.* (supra), the Hon'ble Supreme Court held that in a case where the prosecution mainly relies upon the testimony of a child witness, the acceptability of such evidence would depend on the facts and circumstances of each case. The Court held that there is no rule of practice that in every case, the evidence of a child witness has to be corroborated by other evidence before a conviction can be allowed to stand. Still, as prudence, the Court always finds it desirable to seek corroboration to such evidence from other reliable evidence placed on record. The only precaution that the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one.

**83.** In the present case, it is not as if the conviction is being sustained based only on PW9's testimony. There is other corroborating evidence available on record. Besides, PW9's evidence was found to be clear, cogent and reliable. No dent was made to her testimony in her cross-examination.

**84.** *Golla Yelugu Govinda* (supra) and *Bhagwan Singh* (supra) are concerned with the evaluation of the testimony of a child witness. Both these decisions held that the question of whether the child witness has sufficient intelligence primarily rests with the trial

Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if, from what is preserved in the records, it is clear his conclusion was erroneous.

**85.** In the present case, the learned Sessions Judge was alive to this position and has not only satisfied himself but also recorded his observations on the competence of PW9 to depose in this matter. Further, in *Golla* (*supra*), it was explained that it is also an accepted norm that if, after careful scrutiny of their evidence, the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.

**86.** Besides, *Bhagwan Singh* (*supra*) was a matter where the child witness was alleged to have seen the murder of her mother and grandfather at night but had soon after gone to sleep. Even the statement of this child was not recorded by the police immediately after the occurrence but after a few days. No such facts arise in the present case.

**87.** From the critical evaluation of PW9's testimony applying the above principles, we cannot agree with the contention of Mr Desai and Mr Gaoker that PW9's testimony inspires no confidence. PW9 was an eyewitness, and there is no good reason to discard her testimony. In that sense, this is not a case based on circumstantial evidence, though there are several circumstances that corroborate PW9's eyewitness testimony. The conviction does not rest solely on PW9's testimony. There is ample corroboration from other reliable evidence on record. The Sessions Court satisfied herself about the competence of this witness to depose in this matter. No case is made out to take a different view.

**88.** Accordingly, for all the above reasons, we do not agree with the contention that PW-9's testimony should have been excluded from consideration by the Sessions Court or that even we should not look into this testimony.

#### **Identification of A1/A2 and TIP:**

**89.** The next contention raised concerns the alleged non-identification of A1 and A2 by PW9 (minor daughter) or other prosecution witnesses. The argument was that there were serious flaws in the Test Identification Parade (TIP), and PW9 had refused to come out in the open Court and identify A1 and A2 who were

in the docks. Based upon these contentions, Mr Desai and Mr Gaoker contended that even though the offence alleged was extremely serious and may have been committed inhumanly, there was no legal evidence to connect A1 and A2 with this heinous crime. Even this contention deserves no acceptance for reasons discussed hereafter.

**90.** Satish Prabhu (PW5), the Mamlatdar of Ponda, conducted the Test Identification Parade (TIP). He deposed about following the prescribed procedures and adopting the prescribed safeguards for the conduct of the TIP. In particular, he deposed that the two accused persons were brought by police escort with their faces covered and made to sit in his chamber. He deposed how police were asked to withdraw themselves from his chamber and independent witnesses were called. He also deposed to the selection of dummies having the same physical appearance as that of accused persons to stand in the TI parade.

**91.** PW5 has deposed as to how he took care to ensure that the identifying witnesses were not able to see the accused persons before the start of the TI parade. PW5, in terms, deposed that during the parade, except for himself and the two responsible persons, no other persons were present in the Courtroom. He has

deposed about ensuring that even the windows and doors of the Courtroom were properly closed to prevent anyone from seeing from outside. PW5 deposed about the option given by him to A2 to stand in the parade as per his choice amongst the dummies. He also deposed to having informed A2 about his right to change his clothes and appearance if required and that A2 declined this offer.

**92.** PW5 then deposed that PW9 (minor daughter) was brought into the Courtroom accompanied by NGO member Ashwini Verenkar (PW21). He then deposed how PW9, after having a glance at the parade, started crying as she was afraid. PW5 then deposed to console PW9, after which she pointed her finger towards A2 as one of the accused persons. PW5 deposed, having asked PW9 whether she knew the name of A2, to which PW9 replied that this person whom she had pointed out was Maratho.

**93.** PW5 was deposed about the safeguards adopted for the identification of A1 and how he was given a choice to stand amongst the dummies. PW5 deposed how he told A1 about his right to change clothes, but A1 declined the offer. PW5 then deposed about PW9 entering the Courtroom with Ashwini Verenkar (PW-21). He deposed how, while PW9 was entering the Courtroom itself, she started crying as she was scared. However,

PW9 pointed out to A1 from the door itself. PW5 deposed, inquiring from PW9 whether she knew the name of the accused she had pointed out to A1. He deposed that PW9 disclosed that this accused's name was "Patrao".

**94.** PW5, in his cross-examination, at the behest of A1, denied that the accused person was not wearing any mask when they were brought from the police van up to his chamber. He denied the suggestion that all the identifying witnesses had seen the accused person prior to conducting the ID parade. He denied the suggestion that he did not conduct the ID parade in the manner prescribed in the manual and that all the identifying witnesses were briefed and told to identify the accused persons, and they had the opportunity to see the accused prior to attending the parade. He denied the suggestion that the Memorandum of ID parade was prepared by him as requested by police authorities. He denied the suggestion that the identifying witnesses had not identified the accused persons during the ID parade. He denied the suggestion that the memorandum produced by him of the ID parade was a fabricated document.

**95.** In his Cross-examination, at the behest of A2, PW5 deposed that he asked PW9 to identify the person from the parade who was

present at the time when her father was beaten up. He also deposed to asking PW9 to identify the person who had taken her in the car. He denied the suggestion that PW9 had not identified A2. He denied the suggestion made on behalf of A2 that the TIP was not in accordance with the guidelines issued by the High Court and stated in the criminal manual.

**96.** Significantly, no question was posed to PW5 about the presence of any police during the TIP. This is crucial because Mr Desai and Mr Gaoker contend that the TIP was vitiated because PW9, in the course of her deposition, stated that police were present at the TIP and it was the police who consoled her when she started crying.

**97.** PW9 was hardly nine years old when she deposed in this case. She could not be expected to know the difference between police officials and the Mamlatdar. PW5 (Mamlatdar) had deposed that it was he who consoled PW9 when she started crying during the TIP. Therefore, reading the two depositions together and the crucial circumstance that not even any question was put to PW5 about the presence of any police during TIP is sufficient to hold that there were no police present during the TIP.

**98.** Significantly, PW5, in his examination in chief, had made a positive statement about requiring the police to withdraw. He also categorically stated that besides himself and the two respectable persons who witnessed the TIP, there were no other persons present. There was no challenge to this statement in the cross. Besides, as noted earlier, this is a case where PW9 knew A1 and A2 much before the incident. She had witnessed them beating her father, murdering her mother and strangulating her brother. She was herself strangulated by A2. On cumulative consideration of all these circumstances, the argument about TIP being vitiated cannot be accepted.

**99.** Besides, the prosecution examined Ashwini Naik Verenkar (PW21), a member of the NGO who had accompanied PW9 for TIP. PW21 deposed to the presence of the Executive Magistrate, one typist, two other persons and seven persons standing in a row. She did not depose to the presence of any police officials during the TIP. In the cross-examination on behalf of A1 and A2, not even a question was put to PW21 about the presence of police during the TIP. Again, this is also significant and establishes that no police were present during the TIP. PW21 also deposed that PW9 pointed to A1 and A2. She deposed how PW9 identified A2 and stated that his name was "Maratho". She deposed how PW9 identified

A1 and stated that his name was “Patrao”. PW21’s testimony completely corroborates PW5’s testimony on the aspect of TIP.

**100.** *Ramkishan Mithanlal Sharma* (supra), relied upon by Mr Desai and Mr Gaoker, was a case where the evidence shows that the police had pervasively interfered at each stage of the TIP. There was evidence of the police managing the panchas called to witness the TIP with the intention of bypassing the bar under Section 162 of CrPC. No such circumstances exist in the present case. Therefore, *Ramkishan Mithanlal Sharma* (supra) is clearly distinguishable.

**101.** Although there is merit in the submissions of Mr Desai and Mr Gaoker, that evidence of TIP may not itself be substantive evidence. Still, the evidence of the Mamlatdar (PW5), who conducted TIP and PW21, the NGO member who accompanied PW9, cannot be excluded. These two witnesses clearly and categorically deposed to PW9, identifying A1 and A2 and also disclosing their names as “Patrao” and “Maratho”, respectively. Even PW9 deposed about identifying A1 and A2 during the TIP held at Ponda.

**102.** In *Ram Nath Mahto V/s State of Bihar*<sup>34</sup>, it was held that evidence of the TI parade may not itself be substantive evidence. Still, the evidence of the Magistrate, who conducted the TI parade, that the witness correctly identified the accused in the TI parade, supported by the remark of the trial Judge recording the demeanour of the witness that she was frightened at the trial, was sufficient to sustain a conviction. In the present case, PW9 also identified the accused person during the TI parade.

**103.** Merely because PW9 was too traumatised to enter the Courtroom where A1 and A2 were sitting, as was noted by the Sessions Judge, we cannot say that this was a case where the prosecution witnesses had failed to identify A1 and A2. A2 strangulated PW9 in the presence of A1. PW9 witnessed A1 and A2 beating her father to death. PW9 witnessed A2 strangulating her mother and younger brother. In such circumstances, there was nothing unnatural in PW9 being traumatised to enter the Courtroom to identify A1 and A2. Perhaps not being traumatised would have appeared unnatural.

**104.** Applying the law laid down in *Ram Nath Mahto* (supra) and considering the evidence of PW5 (Mamlatdar), who conducted the

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<sup>34</sup> AIR 1996 SC 2511

TIP, PW21, the NGO member who accompanied PW9 and witnessed her identify A1 and A2 and PW9 who deposed to her identifying A1 and A2 during the TIP at Ponda, the conviction of A1 and A2 deserves to be sustained. Learned Sessions Judge, in this case, has noted the demeanour of PW9 and recorded how scared she was at the very prospect of having to see A1 and A2 once again in the Court.

**105.** PW17 also identified A1 when he visited the site on 11.05.2013. From the tenor of cross-examination, PW17's visit to the site in the presence of A1 was not even denied. From the questions posed on behalf of A1, PW17's presence at the site was also admitted. All this is more sufficient for the identification of A1 and A2 coupled with other evidence on record. It cannot be said that the prosecution has failed to prove that A1 and A2 were the authors of the heinous crime beyond reasonable doubt.

**106.** The prosecution has proved the existence of JCB machines on the spot and the fact that A1 owned the same. The prosecution case was that this was the JCB machine used to bury Shivaji almost 2.5 metres below the ground. Ramesh Shirodkar (PW17) not only identified A1 as Patrao but he deposed having visited the site on 11.05.2013 as instructed by his superior officer on account of some

information about the foul play at the site. PW17 was cross-examined, and this cross-examination indicates that the fact about his visiting the side in the presence of A1 was not even denied. From the cross-examination, the fact that A1 owns the property which PW17 visited on 11.05.2013 was also not denied.

**107.** The prosecution examined Prakash Azavedo (PW8), Deputy Director of Transport, South Goa, Margao. He produced on record documentary evidence showing that the JCB vehicle bearing registration no. A1 owned GA-07-E-4951 as per the records maintained in his office. This witness was not even cross-examined on behalf of either A1 or A2.

**108.** In *Balu Sudam Khalde* (supra), the Hon'ble Supreme Court has held that the suggestions made by the defence Counsel to the witness in the cross-examination, if found to be incriminating in nature in any manner, would definitely bind the accused. The accused cannot get away on the plea that his Counsel had no implied authority to make suggestions in the nature of admissions against his client. The Court disagreed with the legal proposition that was put forth that an answer by a witness to a suggestion made by the defence Counsel in the cross-examination does not deserve any value or utility if it incriminates the accused in any manner.

Similarly, in *Ramanand @ Nandlal Bharti* (supra), the Hon'ble Supreme Court observed that the position of law is that suggestions made to the witnesses by the defence and the answers to those are binding to the accused.

**109.** For all the above reasons, the appellant's argument about the failure of the prosecution witness to identify A1 and A2 fails and is hereby rejected.

#### **Section 27 Recovery and Inference therefrom:**

**110.** Mr Desai and Mr Gaoker objected to the admissibility of statements under Section 27 of the Evidence Act by contending that A1 and A2 were not formally accused of the offence of Shivaji's murder at the time they allegedly made the statements leading to the discovery of Shivaji's mortal remains. They further submitted that A1 and A2 were not in the custody of the police for the offence of Shivaji's murder. In any case, they submitted that even if A1 and A2 were in police custody pursuant to the registration of FIR No.29/2013 by Collem Police Station, their statement in connection with the offence under FIR No.70/2013 registered at Old Goa Police Station would not be admissible under Section 27 of the Goa Act. Again, for reasons discussed hereafter, we cannot agree with these contentions.

**111.** Now, the record clearly bears out that A1 and A2 were formally arrested and consequently in custody pursuant to registration of FIR No.29/2013 at Collem Police Station concerning the murder of Shivaji's wife, Sujata and the attempt to murder their two minor children. Whilst in such police custody, A1 and A2 made statements which led to the discovery of Shivaji's mortal remains from an enclosed property, which was ultimately established as being the property of A1. Mortal remains were buried almost 2.5 metres below the ground in the centre of such property for which the access was sufficiently restricted. Therefore, the contentions on behalf of A1 and A2 would have to be evaluated in the backdrop of such facts and circumstances as stand proved beyond reasonable doubt by the prosecution.

**112.** Mr Desai and Mr Gaoker relied upon *Manoj Kumar Soni* (supra) and *Mustkeem* (supra); these authorities only explained the law on the evidentiary value of Section 27 of the Evidence Act by referring to *Pulukuri Kotayya V/s. King emperor*<sup>35</sup>. The Sessions Court, in this case, has followed these principles, and therefore, these two decisions do not take the appellants' case any further.

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<sup>35</sup> AIR 1947 PC 67

**113.** The Constitution Bench in *State of Uttar Pradesh V/s. Deoman Upadhyaya*<sup>36</sup> has explained that Section 27 of the Evidence Act is one of a group of Sections from Sections 24 to 30 relating to the relevancy of certain forms made by persons accused of offences. By Section 24, in a criminal proceeding against a person, a confession made by him is inadmissible if it appears to the Court to have been caused by inducement, threat or promise having reference to the charge and proceeding from a person in authority. By Section 25, there is an absolute ban against proof at the trial of a person accused of an offence of a confession made to a police officer. The ban, which is partial under Section 24 and complete under Section 25, applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was at the time of making the confession in custody. For the ban to be effective, the person need not have been accused of an offence when he made the confession.

**114.** The Constitution Bench further explains that the expression “accused person” in Section 24 and the expression “a person accused of any offence” have the same connotation and describe the person against whom evidence is sought to be led in a criminal

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<sup>36</sup> AIR 1960 SC 1125

proceeding. This position was also made clear by the Privy Council in *Pakala Narayan Swami V/s. Emperor*<sup>37</sup>. The Constitution Bench referred to Section 26, which prohibits proof of a confession made by a person in custody made to any person whilst he is in the custody of a police officer unless it is made in the immediate presence of a Magistrate. Section 27, which is in the form of a proviso, states: “provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

**115.** The Constitution Bench explains that the expression “accused of any offence” in Section 27, as in Section 25, is also descriptive of the person concerned, that is, against a person who is accused of an offence. Section 27 renders provable certain statements made by him while he was in the custody of a police officer. Section 27 is founded on the principle that even though the evidence relating to confessional or other statements made by a person whilst he is in the custody of a police officer is tainted and therefore inadmissible, if the discovery assures the truth of the

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<sup>37</sup> AIR 1939 PC 47

information given by him of a fact, it may be presumed to be untainted and is therefore declared provable insofar as it distinctly relates to the fact thereby discovered. Even though Section 27 is in the form of a proviso to Section 26, the two sections do not necessarily deal with evidence of the same character. The ban imposed by Section 26 is against the proof of confessional statements. Section 27 is concerned with the proof of information, whether it amounts to a confession or not, which leads to the discovery of facts. By Section 27, even if a fact is deposited to as discovered in consequence of information received, only that much of the information is admissible as distinctly relates to the fact discovered.

**116.** From the above, it is apparent that a formal arrest in connection with the offence for which the accused is charged is not a prerequisite for admitting the offence under Section 27. Even if the accused person is in the custody of the police for one offence, his statements leading to discovery would be admissible in a trial relating to some other offence. Very recently, this position was explained in some detail by the Hon'ble Supreme Court in the case

of *Perumal Raja @ Perumal V/s State, Rep. By Inspector of Police*<sup>38</sup>.

**117.** Mr Desai and Mr Gaoker had relied on *Rajesh and Anr. V/s. State of Madhya Pradesh*<sup>39</sup> to urge that formal accusation and formal custody are essential prerequisites under Section 27 of the Evidence Act. In this context, the Hon'ble Supreme Court, in *Perumal Raja* (supra), by relying upon the Constitution Bench in *Deoman Upadhyaya* (supra), holds thus:

*"26. Reference is made to a recent decision of this Court in Rajesh & Anr. V/s State of Madhya Pradesh (supra), which held that formal accusation and formal police custody are essential pre-requisites under Section 27 of the Evidence Act. In our opinion, we need not dilate on the legal proposition as we are bound by the law and ratio as laid down by the decision of a Constitution Bench of this Court in State of U.P. V/s. Deoman Upadhyaya (supra). The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength. This Court in Deoman Upadhyay (supra) observed that the bar under Section 25 of the Evidence Act applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was in custody at the time of making the confession. Further, for the ban to be effective the person need not*

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<sup>38</sup> 2024 INSC 13

<sup>39</sup> 2023 SCC OnLine SC 1202

have been accused of an offence when he made the confession. The reason is that the expression “accused person” in Section 24 and the expression “a person accused of any offence” in Sections 26 and 27 have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. The adjectival clause “accused of any offence” is, therefore, descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate a condition of that person at the time of making the statement.”

**118.** *Perumal Raja* (supra) at para 28 also explains that the expression “person accused of an offence” and the words “in the custody of a police officer” in Section 27 of the Evidence Act are separated by a comma. Thus, they have to be read distinctively. The wide and pragmatic interpretation of the term “police custody” is supported by the fact that if a narrow or technical view is taken, it will be very easy for the police to delay the time of filing the FIR and arrest and thereby evade the contours of Sections 25 to 27 of the Evidence Act. The Court further held that the correct interpretation would be that as soon as an accused or suspected person comes into the hands of a police officer, he is no longer at liberty and is under a check, and is, therefore, in “custody” within the meaning of Sections 25 to 27 of the Evidence Act. It is for this reason that the expression “custody” has been held, as earlier

observed, to include surveillance, restriction or restraint by the police.

**119.** In *Perumal Raja* (supra), the Hon'ble Supreme Court, by reference to *Vikram Singh and Ors. V/s State of Punjab*<sup>40</sup> and *Dharam Deo Yadav V/s State of Uttar Pradesh*<sup>41</sup> has held that a formal arrest is not a necessity for the operation of Section 27 of the Evidence Act. The Court explained that the expression “*custody*” in Section 27 of the Evidence Act does not mean formal custody but includes any kind of surveillance, restriction or restraint by the police. Therefore, even if the accused was not formally arrested at the time of giving information, the accused is, for all practical purposes, in the custody of the police, and the bar vide Sections 25 and 26 of the Evidence Act apply.

**120.** Therefore, by applying the law laid down in the above decisions to the facts of the present case, Mr Desai's and Mr Gaoker's arguments that the statements made leading to the discovery of the mortal remains of Shivaji be excluded cannot be accepted.

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<sup>40</sup> (2010) 3 SCC 56

<sup>41</sup> (2014) 5 SCC 509

**121.** Incidentally, the precise issue involved in *Mohan Lal V/s State of Rajasthan*<sup>42</sup> was whether the statement of the accused in custody in connection with FIR No.95 of 1985 was admissible under Section 27 of the Evidence Act in the trial in connection with FIR No.96 of 1985. The Court noted that the accused was arrested in connection with FIR No.95 of 1985. While he was interrogated, he led to the discovery in connection with the stolen contraband articles from the Malkhana, which was the matter of investigation in FIR No.96 of 1985.

**122.** The Court held that there was no shadow of a doubt that the appellant accused was in police custody. Section 27 of the Evidence Act provides that when any fact is deposed to as discovered in consequence of the information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to confession or no, as relates distinctly to the fact thereby discovered, may be proved. It is well settled in law that the components or portion which was the immediate cause of the discovery could be acceptable legal evidence.

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<sup>42</sup> (2015) 6 SCC 222

**123.** The Court held that the words employed in Section 27 do not restrict that the accused must be arrested in connection with the same offence. In fact, the emphasis is on receipt of information from a person accused of any offence. Therefore, when the appellant-accused was already in custody in connection with FIR No.95 of 1985, and he led to the discovery of the contraband articles, the plea that it was not done in connection with FIR No.96 of 1985 is absolutely unsustainable.

**124.** Mr Desai and Mr Gaoker relied on *State of Haryana V/s Ram Singh* (supra) to challenge the admissibility of the recovery statement under Section 27 of the Evidence Act. However, the facts in *Ram Singh* (supra) are not at all comparable to the facts in the present case. In *Ram Singh* (supra), the three recovery panchas were related to the deceased, and there was no explanation that no independent witnesses could be found.

**125.** Mr Desai and Mr Gaoker also argued that the recovery of the dead body was suspect because there was no videography of the exhumation process, though the Sub Divisional Magistrate had directed such videography. It is true that there was no videography. However, the prosecution produced on record photographs of the exhumation process, which were admitted in evidence and also

examined PW15. This was in addition to IO's (PW26) deposition on this aspect.

**126.** Vishwanath Gaonkar (PW15), the panch witness, deposed to going to the site as per the directions of A2. He deposed to the huts at the site and A2's disclosure that Shivaji's body had been buried at the rear side of one of the huts. He deposed to noticing a small pond/pit behind the hut, which A2 pointed out as the place where the body was buried. PW15 deposed to the presence of the SDM/Deputy Collector Shri Corjuenkar (PW6), Deputy S.P. Umesh Gaonkar, Ponda, Deputy S.P. Dhinraj Govekar, PI Ghad of Old Goa Police Station, doctors and other persons. PW15 then deposed to the start of the digging process at the place pointed out by A2. He deposed that initially, labourers dug manually. However, after it was realised that manual digging was not possible, a JCB machine was brought, and with its help, the digging recommenced. He deposed how, at a depth of 2.5 metres, he noticed the body of a person. He deposed that since the place was muddy/clay and the body was stuck in the mud, it was not possible to remove it. He deposed how a fire brigade was then called.

**127.** In the cross-examination on behalf of A2, PW15 stated that the spot pointed out by A2 where Shivaji's body was found buried

had a rough surface, showing that digging and filling was carried out at this spot earlier. Apart from this, on behalf of A2 only some suggestions were put about A2 not making any voluntary disclosure or that A2 was forced to point out the places at the respective sites in Anmod Ghat and Ribandar Patto.

**128.** The Investigating Officer (PW26) has also deposed to the exhumation. In his cross-examination as well, no dent was made to the IO's testimony. The IO produced on-record photographs taken during the recovery, including exhumation. These were admitted in evidence without any challenge. Significantly, not even a question was posed to the IO about videography during the exhumation process.

**129.** Therefore, we cannot hold that the recovery of Shivaji's mortal remains based on A2's statement stands vitiated for failure to videograph the process. There is oral as well as documentary evidence sufficient to prove this recovery from the property owned by A1. Accordingly, the contention based upon the absence of videography of the exhumation process is hereby rejected.

**130.** In this case, based on the statement of A2, the mortal remains of Shivaji were discovered on A1's property, where they

were buried 2.5 metres below the ground. This is a significant circumstance though this cannot be the sole circumstance to sustain a conviction. The Sessions Court has certainly not based the conviction on this sole circumstance. This is only one of the significant circumstances.

**131.** Mr Desai and Mr Gaoker relied upon *Kanbi Jadav* (supra), which holds that mere discovery of the dead body as pointed out by the accused or discovered pursuant to the statement of the accused would not necessarily lead to the conclusion that the accused was the author of the murder. As noted earlier, the discovery of the mortal remains of Shivaji, pursuant to A2's statement, is not the sole circumstance for sustaining the conviction. This is only one of the circumstances.

**132.** In *Kanbi Jadav* (supra), the conviction was sustained because, in addition to the discovery of the dead body, blood and blood-stained buttons were also discovered at the instance of the accused. The Court held that these circumstances, taken together, would raise the presumption of the accused participation in the murder.

**133.** In *Kanbi Jadav* (supra), the Hon'ble Supreme Court relied on ***Wasim Khan v. State of Uttar Pradesh***<sup>43</sup>, where it is held that the recent and unexplained possession of stolen property would be presumptive evidence against a prisoner on a charge of robbery as also of a charge of murder. Thus, *Kanbi Jadav* (supra), far from assisting the appellants, supports the prosecution case.

**134.** In the ***State of Maharashtra, V/s. Suresh***<sup>44</sup>, the Hon'ble Supreme Court has held that recovery of a dead body, which was from the place pointed out by the accused, was a formidable incriminating circumstance. This would, the Court held, reveal that the dead body was concealed by the accused unless there is material and evidence to show that somebody else had concealed it, and this fact came to the knowledge of the accused either because he had seen that person concealing the dead body or was told by someone else that the dead body was concealed at the said location. Here, suppose the accused declines and does not tell the Court that his knowledge of the concealment was on the basis of the possibilities that absolve him. In that case, the Court can presume that the dead body (or physical object, as the case may be) was concealed by the accused himself. This is because the person who

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<sup>43</sup> (1956) SCR 191

<sup>44</sup> (2000) 1 SCC 471

can offer the explanation as to how he came to know of such concealment is the accused. If the accused chooses to refrain from telling the court as to how else he came to know of it, the presumption is that the concealment was by the accused himself.

**135.** The above view was followed subsequently and reiterated in *Harivadan Babubhai Patel Vs. State of Gujarat*<sup>45</sup>, *Vasanta Sampat Dupare Vs. State of Maharashtra*<sup>46</sup>, *State of Maharashtra Vs. Damu S/o Gopinath Shinde and Ors.*<sup>47</sup>, *Rumi Bora Dutta Vs. State of Assam*<sup>48</sup> and *Perumal Raja* (supra).

**136.** As noted earlier, conviction in this case was not on the sole basis of the discovery of Shivaji's mortal remains based upon the statement of A2. There is other evidence linking both A1 and A2 to the offence of Shivaji's murder. The recovery of Shivaji's mortal remains from A1's property, where it was found buried almost 2.5 metres below the ground, shifts the onus on A1, given the provisions of Section 106 of the Evidence Act. There is evidence about A1's property being enclosed. Therefore, if a dead body is

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<sup>45</sup> (2013) 7 SCC 45

<sup>46</sup> (2015) 1 SCC 253

<sup>47</sup> (2000) 6 SCC 269

<sup>48</sup> (2013) 7 SCC 417

found on this property buried 2.5 metres below the ground, surely A1 owed an explanation, which A1 did not bother to provide in his statement under Section 313 of CrPC or even by making suggestions to the prosecution witnesses to lay some foundation for a plea inconsistent with their guilt.

**137.** A1, through the suggestions made on his behalf, tried to deny that the property where Shivaji's body was found buried belonged to him. A1, in his Section 313 CrPC statement, denied that he owned this property. However, these denials are belied by PW17's testimony. PW17 clearly deposed going to the site on 11.05.2023, and A1 declared to him that this was his property. In PW17's cross-examination, from the suggestions, there was virtually an admission about A1's presence and interaction with PW17 at the site.

**138.** Besides, the prosecution has produced a tenant verification form at Exhibits 226 and 227, which lists A1 as the owner of the property from where Shivaji's dead body was recovered. The JCB machine was also attached from this very property. The prosecution has produced documentary evidence to show that this JCB machine was registered in A1's name. Therefore, some explanation was necessary from A1 about the presence of this JCB

machine on this property if A1 was serious about his contention that he was not the owner of the property or had nothing to do with this property.

**139.** It would be conspicuous enough if a JCB machine were employed to excavate such soil on one's property. Still, even assuming such excavation was carried out by manual labour, it would cause noticeable commotion. In his Section 313 statement, A1 has denied that he owns the said land. PW17's testimony belies this that A1 declared to him on his visit to the said property on 11.05.2013 that A1 was the owner of the said property; this visit nor this disclosure has been challenged in PW17's cross-examination. Further, the tenant verification forms at Exhibits 226 and 227 also list A1 as the property's landlord.

**140.** The recovery that has gone unexplained by the accused has to also be considered along with PW9's eye-witness testimony that she saw A1 and A2 tie and beat Shivaji. Considered together, it cannot be said that a presumption against A1 and A2 as being the authors of the murder should not be drawn. The burden under Section 106 of the Evidence Act would lie on them to explain the incriminating circumstance, which they have failed to discharge.

**141.** All the above circumstances are more than sufficient to hold that A1 and A2 were identified as the perpetrators of the offence of murdering Shivaji. The prosecution has proved the guilt of A1 and A2 beyond reasonable doubt.

***Medical Evidence and the argument that this was a culpable homicide not amounting to murder :***

**142.** Mr Gaoker's alternate contention about the offence, assuming that the same was proved does not constitute culpable homicide amounting to murder, also cannot be accepted given the evidence on record. The medical evidence notes several ante mortem injuries caused to Shivaji by blunt force impact, including multiple bruises on the skull, fracture-dislocation of the first and second premolars of the jaw on the left side, and most importantly, the fractures of both sides' ribs (fourth to seventh ribs), which were the cause of Shivaji's death. This was very well deposed to by Dr Madhu S.G. Ghodkirekar (PW11).

**143.** Besides, the post-mortem report very clearly supports this position. The internal examination of the deceased showed that the pleural cavity contained 1010cc of blackish fluid. PW11 deposed that injuries numbers 1 to 4 and 8 could have been caused by a

danda, and further injuries numbers 5 to 7 were possible if a person is tied with rope, and both could have caused injury number 3. The cross-examination did not demolish these depositions. PW11 deposed that injuries numbers 1,2,3, and 5 were caused about 24 hours before the death of Shivaji.

**144.** The prosecution in this case has established quite objectively the bodily injuries on Shivaji. Secondly, the prosecution has also brought on record the nature of the injuries. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Fourthly and most importantly, the prosecution has established that PW11 has deposed that the injuries were of such nature as were known to cause death in the ordinary course of nature.

**145.** In *Virsa Singh V/s. State of Punjab*<sup>49</sup>, the Hon'ble Supreme Court has held that it does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no

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<sup>49</sup> AIR 1958 SC 465

knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective, and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death.

**146.** The Court held that no one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences, and they can only escape if it can be shown or reasonably deduced that the injury was accidental or otherwise unintentional.

**147.** In *Anbazhagan V/s. State represented by the Inspector of Police*<sup>50</sup>, the Hon'ble Supreme Court has held that Courts must necessarily have regard to the nature of the weapon used, part of the body injured, extent of the injury, degree of force used in causing the injury, the manner of attack, the circumstances preceding and attendant on the attack. The intention to kill is not the only intention that makes a culpable homicide a murder. The

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<sup>50</sup> 2023 SCC OnLine SC 857

intention to cause injury or injuries sufficient in the ordinary cause of nature to cause death also makes a culpable homicide a murder if death has actually been caused and the intention to cause such injury or injuries is to be inferred from the act or acts resulting in the injury or injuries.

**148.** In *Anbazhagan* (supra), the court also held that even when the intention or knowledge of the accused may fall within Clauses (1) to (4) of Section 300 of the IPC, the act of the accused which would otherwise be murder, will be taken out of the purview of murder, if the accused's case attracts any one of the five exceptions enumerated in that section. Here, no case has been made to show that any exception enumerated under the section shall be attracted. Therefore, there is no cause to interfere with the conviction A1 and A2 under Section 302 of the IPC.

**149.** The evidence on record shows that Shivaji was bound with rope, rendering him helpless and unable to escape, following which A1 and A2 rained several blows with the help of danda/bamboo across Shivaji's entire body, including vital spots such as the head, face, chest and the ribcage. The fractures of the ribs, the testimony of PW11 establishes, are injuries known to cause death. It is apparent that the accused viciously beat Shivaji to death; it cannot

be said to be a case where a singular stray or accidental blow was landed; the force employed was also sufficient to cause multiple fractures. Therefore, the intention to cause injury or injuries sufficient in the ordinary cause of nature to cause death can be safely inferred.

**150.** Accordingly, the alternate contention about this being only a case of causing grievous hurt or a culpable homicide not amounting to murder also cannot be accepted.

***Miscellaneous Contentions :***

**151.** Mr Desai and Gaoker, relying upon *P.K. Basheer* (supra), contended that in the absence of a certificate under Section 65-B of the Evidence Act, the CCTV footage recovered from the property of A1 was not admissible and, therefore, could not have been considered much less relied upon.

**152.** In *P.K. Basheer* (supra) it was categorically stated that the Section 65-B certificate is *sine qua non* for such electronic evidence to be admitted as evidence. On perusal, the record reflects that the mandatory Section 65-B certificate has not accompanied the CCTV footage recovered from A1's property. As such, the CCTV footage could not have been considered by the learned Sessions

Judge. However, this footage does not form the basis of the conviction; it was only one of the minor circumstances, and its exclusion does not cause the implosion of the prosecution's case.

**153.** The Sessions Judge has considered the CCTV footage from the site. However, Mr Desai and Mr Gaoker are justified in contending that this evidence should not have been looked into for want to Section 65-B certificate. Accordingly, we have excluded this evidence altogether. Even after excluding this evidence, there is ample evidence to sustain the conviction of A1 and A2.

**154.** The Sessions Judge has also considered the A2's confession. Mr Desai and Mr Gaoker made several submissions regarding A2's confession. In the judgment and order convicting A1 and A2 for the offence of Shivaji's murder or the attempt to murder Shivaji and Shivaji's children, this Court had held that there was no necessity to go into the aspect of admissibility of A2's confession because even if his confession was excluded from consideration, there was ample evidence on record to sustain the conviction of A1 and A2. This Court had observed that the minor daughter's testimony was clear, cogent and inspired confidence. This Court had observed that the minor daughter was an injured witness.

Besides, her evidence was well corroborated by other reliable evidence.

**155.** Even in the present case, there is no necessity to go into the rival contentions on the aspect of the admissibility of A2's confession. This is because even after excluding A2's confession, there is ample evidence on record to sustain A1 and A2's conviction. Even in this case, the minor daughter (PW9) has deposed clearly and cogently. Her evidence inspired confidence. There is other reliable evidence which completely corroborates PW9's eyewitness account. There is evidence admissible under Section 27 concerning the recovery of Shivaji's mortal remains from the property owned by A1. Shivaji's mortal remains were found buried almost 2.5 metres below the ground on A1's property, and A1 offered no explanation for this. There is evidence of the JCB and the black car. There is evidence about the identification of A1 and A2. There is medical evidence that corroborates the prosecution's version. There is evidence about witnesses identifying A1 and A2, including evidence of PW10, 12 and 17. All this evidence is more than sufficient to sustain A1 and A2's conviction, even without referring to A2's confession.

**Conclusion:**

**156.** For all the above reasons, we dismiss both these appeals without any order for costs. We thank the Learned Counsel for the Appellants and the Learned PPs for the assistance rendered by them.

**VALMIKI SA MENEZES, J.**

**M. S. SONAK, J.**

NITI K  
HALDANKAR

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NITI K HALDANKAR  
Date: 2024.01.19  
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