

IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 14 OF 2002.

1. Shri John Vaz,  
r/o H. No. 481,  
Amona, Quepem.
  2. Smt. Lourencinha Vaz,  
r/o H. No. 481,  
Amona, Quepem.
- ... Appellants.

Versus

State through Public  
Prosecutor, Panaji. ... Respondent.

Mr. G.M. Kanekar with Miss Rasika Harji, Advocates for  
the Appellants.

Mr. S.N. Sardessai, Public Prosecutor for the  
Respondent/State.

Coram : R.J. KOCHAR AND  
P.V. HARDAS, JJ.

Date : 29th September 2003.

ORAL JUDGMENT (PER HARDAS, J.)

The appellants, who are convicted for offences punishable under Sections 302 and 392 read with Section 34 of the Indian Penal Code and sentenced to undergo imprisonment for life and to pay fine of Rs. 5,000/-, in default to undergo simple imprisonment for 3 months and rigorous imprisonment for 7 years and to pay fine of Rs. 3,000/-, in default to undergo simple imprisonment for 2 months respectively, by the Additional Sessions Judge, South Goa, Margao, by his Judgment, dated 11th October 2001, in Sessions Case No. 41 of 1999, have filed the present appeal challenging the aforesaid conviction and sentence. When the appeal was called out for hearing Mr. G.M. Kanekar, appeared on behalf of

appellant no. 1. However, the counsel appointed under Legal Aid Scheme on behalf of the appellant no. 2 was absent and, therefore, we have appointed Mr. Kanekar under the Legal Aid Scheme to represent the appellant no. 2 also.

2. The facts, in brief, as are necessary for the decision of this appeal are set out hereunder:-

On 25th July 1999 at 1.35 p.m. one Umakant Dessai gave information to P.W.15 P.S.I. Sandesh Chodankar that a body of a female was floating in the rivulet. An unnatural death was registered under No. 26/99. P.W.15 P.S.I. Chodankar rushed to the scene of offence and conducted an inquest panchanama, at Exhibit P.W.1/A, in the presence of P.W.1 Deepak Fal Dessai. From the trouser pocket of the dead body an electricity bill in the name of Filomena Rocha of Padribhat, Quepem, and other articles including wristwatch, etc., came to be attached. The dead body was identified by P.W.4 Minguel Galdinho, who was the brother-in-law of the deceased. Meanwhile P.W.4 Minguel had filed a missing report, which was recorded by P.W.10 Baswant Sonaji, at Exhibit P.W.10/A. The postmortem examination on the dead body of Laurencinha wife of Santana Fernandes was conducted by P.W.3 Dr. Avinash Pujari, who in his postmortem report, at Exhibit P.W.3/A, had opined that

death of the deceased was as a result of Asphyxia due to drowning in water with evidence of head injury. On the basis of the investigation, P.W.15 P.S.I. Chodankar filed his complaint, at Exhibit P.W.15/B and an offence against the appellants came to be registered. Both the appellants came to be arrested on 26th July 1999. During investigation, the appellant no. 1 agreed to point out a branch of the tree near the scene of offence. The disclosure was made in the presence of P.W.14 Rayson Almeida and the memorandum and the panchanama is at Exhibit P.W.14/A. Accused no. 1 is alleged to have made a statement that he would point out the two gold bangles of the deceased. The disclosure statement was made in the presence of P.W.14 Rayson and the memorandum and panchanama is at Exhibit P.W.14/B. The clothes of the deceased, which were attached vide Exhibit P.W.2/A, in the presence of P.W.2 Surendra Naik were forwarded to the Central Forensic Science Laboratory, Hyderabad, for examination and the report is at Exhibit P.W.15/D Colly. The viscera did not reveal the presence of any poison. The scalp hair and the stained gauze piece and the stained nail clippings of the deceased were found to be stained with blood. However, the nail clippings of both the accused did not show the presence of blood. Vide Exhibit P.W.1/A, the Executive Engineer of Public Works

Department was requested to draw the sketch of the scene of offence. P.W.7 Menino Fernandes has drawn the sketch. A request, vide Exhibit P.W.13/A, was made to P.W.13 S.B. Faria, Special Judicial Magistrate for holding the identification parade. P.W.13 Faria, issued notice, at Exhibit P.W.13/B, intimating the police to produce the accused for identification parade on 7th August 1999, at 2.30 p.m.. Accordingly, P.W.13 Faria conducted the identification parade, on 7th August 1999, at 2.30 p.m.. The memoranda of the test identification parade are at Exhibits P.W.13/C and P.W.13/D. After completion of the investigation, a charge-sheet against the appellants came to be filed.

3. On committal of the case to the Court of Sessions, the learned Additional Sessions Judge, South Goa, Margao, vide Exhibit 7, framed a charge against the appellants for offences punishable under Sections 392 and 302 read with Section 34 of the Indian Penal Code. Both the appellants denied their guilt and claimed to be tried. The prosecution, in support of its case, examined 15 witnesses. On consideration of the evidence of the prosecution, the learned trial Judge convicted and sentenced the appellants as aforestated. Hence, the present appeal assailing the said conviction and sentence.

4. From the evidence adduced by the prosecution, the prosecution mainly relies on the following three circumstances:-

(1) Deceased Laurencinha had gone with accused no. 2 to see a doctor on 24th July 1999.

(2) Deceased Laurencinha last seen in the company of the accused at 1.00 p.m.

(3) Recovery of the gold bangles at the instance of accused no. 2.

5. On the basis of these three circumstances, the prosecution has sought to establish the offences against the present appellants. We will, therefore, examine these three circumstances and advert to the evidence of the witnesses examined by the prosecution to prove these circumstances.

6. It is not in dispute before us that deceased Laurencinha met with a homicidal death. P.W.4 Minguel is the brother-in-law of deceased Laurencinha. P.W.4 Minguel states that accused no. 2 was the Godmother of deceased Laurencinha. Deceased Laurencinha was the sister of his wife. Deceased Laurencinha was married about a year back to one Santana Fernandes, who went

abroad within 15 days of the marriage and, therefore, deceased Laurencinha started residing with her mother P.W.6 Philipinha Costa at Padribhat. He further states that on 24th July 1999, he had gone to the house of deceased Laurencinha at about 8.30 a.m. and deceased Laurencinha had told him that accused no. 2 had wanted her to accompany accused no. 2 to a doctor as accused no. 2 was not feeling well. He further states that when he had gone to the house of Laurencinha, her mother P.W.6 Philipinha was also present. Prior to visiting the house of deceased Laurencinha, he had also gone to the house of accused no. 2. P.W.4 Minguel had inquired with deceased Laurencinha about the doctor, but, she had only replied "he is a good doctor". P.W.4 Minguel, therefore, returned home and at about 6.00 p.m. he telephoned at the house of deceased Laurencinha and P.W.6 Philipinha had informed him that deceased Laurencinha had not returned. He again telephoned at 8.00 p.m. and was answered by P.W.6 Philipinha in the same manner. On the next day, that is, on 25th July 1999, he went to the house of deceased Laurencinha at about 7.00 a.m. and learnt that the deceased had not returned. Therefore, he went to the house of accused no. 2 and questioned accused no. 2 as to where the deceased had gone. He had also informed accused no. 2 that the deceased had disclosed to him that deceased was going with accused no. 2 to see a doctor. Accused no.

2 is alleged to have replied that she had not gone anywhere with deceased Laurencinha. He, therefore, came back home and went to the Quepem Police Station and lodged the missing report at Exhibit P.W.10/A. At about 4.00 p.m. a neighbour, by name, Anaclet informed him that the police had found a dead body of an unknown female and the dead body was kept in the morgue at the Hospicio Hospital, Margao. P.W.4 Minguel alongwith his wife Monica went to the hospital and identified the dead body of deceased Laurencinha. In the cross-examination he has admitted not to have stated that, on 24th July 1999, before going to the house of deceased Laurencinha, he had first gone to the house of accused no. 2. An omission was also brought on record in respect of deceased Laurencinha telling him that accused no. 2 wanted the deceased to accompany her to the doctor as accused no. 2 was not feeling well. An omission was also brought on record in respect of deceased Laurencinha telling him that "he is a good doctor". He has further admitted that, on 24th July 1999, when he had gone to the house of deceased Laurencinha, at 8.30 a.m., the deceased was getting ready for going out. He had come home and, therefore, does not know when the deceased left the house and with whom. He has also admitted that the relations between deceased Laurencinha and accused no. 2 were good. He was confronted with the omission in his report, at Exhibit P.W.10/A,

regarding his visit to the house of accused no. 2 on 25th July 1999. Omission was also brought out in respect of his questioning accused no. 2 as to where the deceased had gone and of his informing accused no. 2 that deceased had told him that she was accompanying accused no. 2 to a doctor and accused no. 2 stating that the deceased had not accompanied her anywhere. He has also admitted that the house of accused no. 2 is at a distance of about 3 kilometres from the house of deceased Laurencinha. He has admitted that he did not go to the house of accused no. 2 for inquiring, on 24th July 1999, in the afternoon or in the evening.

7. P.W.5 Philipinha, the mother of deceased Laurencinha, states that accused no. 2 is the Godmother of her daughter deceased Laurencinha. She states that on one day accused no. 2 had come to her house and had asked deceased Laurencinha to accompany her to visit a doctor. On the next day her daughter deceased Laurencinha went out of the house. She asked deceased Laurencinha as to which doctor she was going to visit alongwith accused no. 2 but, deceased Laurencinha did not tell the name because accused no. 2 had not told her the name of the doctor. While going out she had worn a blue shirt and jeans. She was also wearing two gold bangles, one chain and three pairs of earrings. All the ornaments were of gold. She was also wearing a



wristwatch and had cash of Rs. 1,000/- in her bag. She further states that at night accused no. 1 came to her house and was under the influence of liquor. She, however, did not open the door. She has further stated that though deceased Laurencinha did not know how to drive the motorcycle, she possessed one. Some times the son of accused used to take the deceased Laurencinha on the motorcycle whenever Laurencinha wanted to go to Church, etc.. She has also admitted that the relations with the accused were very good and they occasionally used to dine together. She further states that she had told Erick, son of the accused, that deceased Laurencinha had gone with accused no. 2 and she further asked Erick to go home and check whether his mother (accused no. 2) had returned. She states that Erick came back and informed her that his mother accused no. 2 had told him that Laurencinha had not gone out with her. She states that she had given a photograph of her daughter to the police and had identified the dead body in the morgue. She has identified the gold earrings, the clothes and the wristwatch as belonging to her daughter. She has also identified the two gold bangles M.O.8 as belonging to her daughter deceased Laurencinha. In the cross-examination, she has admitted that deceased Laurencinha went out of the house at 8.30 a.m. and on that day P.W.4 Minguel had gone to the house of accused no. 2 and then had come to her house. At that time her

daughter was getting ready for going out. She has admitted that she had not gone to the house of the accused on any day after her daughter had left. She states that, on that day, her daughter had gone to the house of the accused at about 8.00 a.m. and Laurencinha was told by the daughter of the accused that accused no. 2 had already gone out with somebody on a motorcycle and that Laurencinha should come walking. P.W.5 Philipinha, admittedly, had not gone to the house of accused no. 2 alongwith deceased Laurencinha and she does not state as to who had informed her about this fact. An omission is brought out in respect of accused no. 2 coming to her house and requesting deceased Laurencinha to accompany her to a doctor. She has also admitted that, on Sunday, both the accused had come to her house and had told her that they had not met her daughter Laurencinha and that "whatever was wanted by God had happened".

8. On perusal of Exhibit P.W.10/A, the missing report lodged by P.W.4 Minguel, it is clear that there is no reference to deceased Laurencinha accompanying accused no. 2 to the hospital. All that the report states is that on 24th July 1999 at about 10.00 a.m. deceased Laurencinha had left the house saying that she was going to the hospital. There is no reference that she was accompanying accused no. 2 to the hospital or that accused no. 2 had asked her to accompany her to

the hospital. The evidence of P.W.4 Minguel and P.W.5 Philipinha is replete with omissions on material aspects of accused no. 2 coming to their house and requesting deceased Laurencinha to accompany accused no. 2 to the hospital. P.W.4 Minguel and P.W.5 Philipinha do not know with whom the deceased had gone. In such circumstances, therefore, according to us, there is absolutely no evidence that accused no. 2 had gone to the house of deceased Laurencinha on the earlier day to request deceased Laurencinha to accompany accused no. 2 to see a doctor. There is also no evidence on record that the deceased Laurencinha from her house had gone to the house of accused no. 2.

9. The next circumstance is that the deceased was last seen in the company of the accused by P.W.6 Sunderraj Nair and P.W.9 Jayesh Dessai. P.W.6 Sunderraj states that he has a shop at Balli on the four road junction where he sells vegetables. He also drives an autorickshaw. According to him, on 24th July 1999, at 1.00 p.m., two ladies accompanied by a man had come to his shop stating that they wanted to go to Quitla. He has identified accused no. 1 as the said man and accused no. 2 as one of the two ladies. According to him, the other lady was wearing jeans and green colour blouse. They all sat in his autorickshaw and he took them to Quitla. Accused no. 1 had asked him to go a

little further and stop. Accordingly, he proceeded a little further and stopped on the slope. All the three then got down. At that time, one of his friends P.W.9 Jayesh came there. P.W.9 Jayesh questioned accused no. 1 as to where they wanted to go. However, they did not tell anything but walked towards the cashew plantation. On the next day he learnt about the death of the other lady. In the cross-examination, he states that he had gone to the police station on 26th July. He had not gone to the police station on 25th because there was no one to look after his shop. He has admitted that he had seen both the accused on 26th July 1999 at the police station and was asked to identify the accused at the police station. He has also admitted that Jayesh was present at the police station at that time. According to him, P.W.9 Jayesh was also shown the accused on 26th July 1999 at the police station. He has admitted that he has not been asked to identify the dead body of the lady. He has admitted not to have stated in his statement that Jayesh had asked where they were going.

10. P.W.9 Jayesh states that on 24th July 1999 he had gone to Betul for bringing fish and was returning at 1.00 p.m.. He saw P.W.6 Sunderraj at Quitla and had stopped. He saw three persons alighting from the autorickshaw. He has identified both the accused. He states that he asked P.W.6 Sunderraj as to where they

were going and he answered that he does not know. In the cross-examination he has admitted that P.W.15 P.S.I. Chodankar was present by the side of the dead body on 25th July 1999 but he did not tell him as to what he had seen on the previous day. He has volunteered that he was afraid at that time. He has admitted that his statement was recorded by P.W.15 P.S.I. Chodankar on 25th July 1999 and till then he did not inform the police nor did he go to the police station to inform about what he had seen. His statements that thereafter at about 2.00 p.m. he had seen the accused walking past Fatorpa and seeing the trouser of accused no. 1 as well as the skirt of accused no. 2 wet were proved as omissions. He states that when he had seen the accused on the second occasion P.W.6 Sunderraj was also with him and, thereafter, they had proceed in their respective vehicles. He has admitted that he did not know the accused as well as the deceased prior to 24th July 1999. Both the witnesses have identified the accused in the test identification parade conducted by P.W.13 Faria. The learned trial Court in paragraph 32 of its Judgment has stated that since P.W.6 Sunderraj and P.W.9 Jayesh had earlier seen the accused in the police station, the identification parade held by P.W.13 Shri Faria "has lost its sanctity".

10A. The substantive evidence is the identification of the accused by the witness in the

Court. The test identification parade provides corroboration to the identification of the accused by the witness in the Court. If the witness identifies the accused for the first time in the Court without identifying him in the test identification parade, the evidence of identification is weakened. In the present case, because of the infirmities, the evidence of the test identification parade has lost its value. We have to examine as to what weight can be attached to the identification of the accused by P.W.6 Sunderraj and P.W.9 Jayesh in the Court. In the present case neither P.W.6 Sunderraj nor P.W.9 Jayesh claim that the incident of three persons travelling in the autorickshaw was either strange or bizarre. There was nothing special in that incident which could have impressed the features of the two accused on the memory of P.W.6 Sunderraj and P.W.9 Jayesh. The persons travelling in the autorickshaw on that day were like ordinary persons who had engaged the autorickshaw on hire. The conduct of P.W.9 Jayesh in not disclosing this incident to P.W.15 P.S.I. Chodankar on 25th July 1999 and not disclosing about this incident to anyone till his statement was recorded is extremely suspicious. P.W.6 Sunderraj states that P.W.9 Jayesh had questioned accused no. 1 as to where they were going. However, according to P.W.9 Jayesh, he had asked P.W.6 Sunderraj as to where the accused were going. From the evidence of P.W.9 Jayesh and, particularly, his conduct in not disclosing

this incident to P.W.15 P.S.I. Chodankar, we are firmly of the opinion that P.W.9 Jayesh was not present and had not seen the deceased in the company of the accused. The evidence of P.W.6 Sunderraj, according to us, particularly his identification of the accused, in the face of rejection of the test identification parade, does not inspire any confidence. P.W.6 Sunderraj had no particular reason to carefully observe the accused. He does not state that there was anything unusual either in the demeanour of the accused or the place where they had asked him to stop. The identification of the accused by P.W.6 Sunderraj unless corroborated by other circumstantial evidence, according to us, is not safe to be accepted for sustaining the conviction.

11. The next circumstance is regarding the recovery of gold bangles M.O.8, at the instance of accused no. 1. In this regard, the prosecution has examined P.W.14 Rayson. P.W.14 Rayson in his evidence states that on 27th July 1999 at 2.00 p.m. the accused no. 1 made a statement that he would show the place of incident. According to P.W.14 Rayson, the police and the pancha accompanied by accused no. 1 went to the scene of offence. A stick (danda) was lying at that place. Accused no. 1 handed over the stick to the police. He has identified the said stick as the one produced by accused no. 1. He further states that

thereafter the police told him that they wanted to attach gold bangles from the house of the accused. He was also told that accused no. 1 had told the police that the gold bangles were at his house. According to him, the police and the pancha went to the house of the accused no. 1 and, thereafter, accused no. 1 removed the gold bangles from the almirah and handed over to the police. In the cross-examination, he has admitted that the accused no. 1 had merely stated that he would show the place of incident and had not stated anything else. The accused no. 1 had not stated that he would show the stick. He has further stated that everybody was searching for the stick and he cannot say who found the stick. He has further stated that accused no. 1 had not stated that he would show the place where he had kept the gold articles. According to him, the police were searching for the gold articles inside the house as well as in the almirah. P.W.15 P.S.I. Chodankar has merely stated that at the instance of accused no. 1 a branch of a tree was attached from the scene of offence and two gold bangles were attached at the instance of accused no. 1. He has not stated anything about any statement being made. It is difficult to accept the prosecution evidence that at the instance of accused no. 1 a stick and two gold bangles M.O.8 came to be attached. Neither P.W.14 Rayson nor P.W.15 P.S.I. Chodankar has deposed about any statement being made by



accused no. 1 in respect of either the stick or the gold bangles. Therefore, according to us, the learned trial Court was in error in relying and accepting the evidence in respect of recovery of stick and the gold bangles, which is not only very cryptic and unreliable, but miserably falls short of proving the said circumstance. Therefore, according to us, the prosecution has not been able to prove any of the three circumstances alleged against the accused. The case of the prosecution rests on circumstantial evidence. The prosecution is enjoined with the responsibility of proving each and every circumstance on which it chooses to rely. The circumstance so proved should form a chain of circumstances, which should exclude every hypothesis of the innocence of the accused and should unerringly point to the guilt of the accused. According to us, the prosecution has miserably failed to prove any of the circumstances alleged against the accused. Thus, there is absolutely no evidence on the basis of which the conviction of the appellants/accused can be sustained.

12. In the result, therefore, the Criminal Appeal is allowed. The conviction and sentence of the appellants, as passed by the Additional Sessions Judge, South Goa, Margao, for the offences punishable under Sections 302 and 392 read with 34 of the Indian Penal Code, in Sessions Case No. 41 of 1999 is, hereby,

quashed and set aside and the appellants are acquitted of the offences for which they are charged and convicted. The appellants be set at liberty, forthwith, if not wanted in any other case.

(R.J. KOCHAR)  
JUDGE.

(P.V. HARDAS)  
JUDGE.

ed's.