

CASE NO.:
Appeal (crl.) 478 of 2005

PETITIONER:
Sadashio Mundaji Bhalerao

RESPONDENT:
State of Maharashtra

DATE OF JUDGMENT: 28/11/2006

BENCH:
G.P.MATHUR & A.K. MATHUR

JUDGMENT:
J U D G M E N T
W I T H :

Criminal Appeal Nos. 479 & 480 of 2005

A.K. MATHUR, J.

These appeals are directed against the order dated 17.1.2005 passed by the Division Bench of the Bombay High Court at Nagpur Bench in Criminal Appeal No.242 of 1996 whereby the Division Bench has reversed the acquittal of all the accused-appellants and convicted them under Sections 302 read with Section 34 of the Indian Penal Code (for short, 'IPC') and sentenced them to suffer life imprisonment. The Division Bench also directed payment of fine of Rs.30,000/- each by original accused Nos.1,2 & 3; Rs.15,000/- by original accused No.6; Rs.10,000/- each by original accused Nos.10, 11, 13, 15, 16 & 17. In default of payment of fine, they were also directed to undergo rigorous imprisonment for five years. So far as the offence under section 201 read with 34, IPC was concerned, the original accused Nos.1,2,3,6,10,11,13,15,16 & 17 were sentenced to undergo rigorous imprisonment for five years. Original accused Nos.1 to 3 were directed to pay a fine of Rs.10,000/- each; accused No.6 to pay fine of Rs.5,000/- and accused Nos.10,11,13,15,16 & 17 were directed to pay a fine of Rs.2,500/- each. In default of payment of fine, they were to suffer further rigorous imprisonment for two years. The substantive sentences under section 302 read with 34, I.P.C. and under section 201 read with section 34, I.P.C. were directed to run concurrently. Hence, the present appeals by the accused-appellants.

This is one of the unfortunate case where the deceased has died in the police custody. We are conscious that such incidents of suspect dying in the police custody has lately increased. This is an unfortunate scenario. But nonetheless we have to examine the matter objectively though keeping in mind the fact that the accused involved in all these appeals are nobody else that the Police officers and the investigation was being undertaken by their colleagues only. Therefore, we have to examine all the aspects objectively keeping in mind the fact that the accused involved in the present appeals are nobody else but the colleagues of another investigating agency.

Brief facts giving rise to filing of the present appeals are that the deceased Dilip along with other suspects were involved in a dacoity case which took place in the village Takarheda within the jurisdiction of Police-station, Arvi. One Namdeo Tulshiram Taywade, filed a complaint to this effect that the alleged dacoity has taken place in his house in which the inmates of the house were injured and certain ornaments had been taken away from his house. On the basis

of this report, a case was registered on 24.10.1987 against unknown persons under sections 395, 397 & 398, IPC vide Crime No.254 of 1987. The investigation of the case was taken over by P.I. Bhadikar- the accused appellant. During the course of investigation, on 5.11.1987 the police arrested seven persons namely (1) Bastam Devidas Pawar, (2) Comrade Bhimrao Pawar, (3) Dilip Khusmya Ghosale, (4) Chaubharat Ramchandra Ghosale, (5) Partya Khusmya Ghosale, (6) Navbharat Ramachandra Ghosale and (7) Gangacharan Sukhadeo Pawar. The police arrested these persons and sought for judicial remand from the Judicial Magistrate for the purpose of investigation. The police was granted custody remand for seven days for the purpose of recovery of weapons of offence as well as stolen property. Till this time there was no complain of any ill-treatment of the accused. After taking remand from the Magistrate, the accused persons brought them to the Police-station.

On the night intervening between 5.11.1987 and 6.11.1987 when all the accused above mentioned were in police custody on remand by the Magistrate, the police was interrogating all the accused at the Police-station, Arvi. Dilip Khusmya Ghosale (hereinafter to be referred to as 'Dilip') who was one of the Suspects in the aforesaid crime was taken up from the police lock up to Detection Branch room for interrogation by some of the accused-appellants and it is alleged that his hands were tied down and he was administered beating by kicks and fist blows and during this interrogation, Dilip died in the Detection Branch centre. It is alleged that though Dilip died on account of beating, but in order to cover up this fact, the police registered a case under section 224, IPC on 6.11.1987 at 2.15 O' clock that the accused- Dilip has escaped from the police custody and thereafter wireless message was sent all over the State describing the general features of the accused-Dilip. It is alleged by the prosecution that a dead body was found lying in Adilabad, Andhra Pradesh and the post-mortem was conducted on the dead body by the P. S. Adilabad. The dead body was in a decomposed condition and it was cremated. During the course of investigation this fact came to the light. It was alleged that this dead body was that of deceased-Dilip and his finger prints were taken and it was sought to be matched with the finger prints on one receipt of purchase of a cow and it was sought to be connected with that of the deceased so as to establish that this was the dead body of deceased Dilip who was taken away by the police jeep and the same was disposed of at Adilabad in A.P. by the accused persons.

It appears that for some time nothing happened but some public spirited persons got a scent of it that some accused has died in police custody. Therefore, one Dr. Shyam Sundr Bhutada approached the concerned Superintendent of Police and informed him that it was a rumour in the town that one Dilip has died in the police custody. Thereafter, he lodged a written complaint in the police-station and this report was taken up by the In-charge of the Police-station. Accused No.2- Bhadikar registered the offence under section 302 read with 34, I.P.C. vide crime No.263/87. Accused \026 appellant No.1 took up the investigation. It appears that after some time the higher-ups in the Department came to know about this fact and therefore, this case was taken up by the C.I.D., Crime and it was entrusted to P.W.,28, Deputy Superintendent of Police- Bhagwangir Goswami on 24.12.1987. Thereafter, the investigation was taken up by Shri Goswami who recorded the statement of all the co-accused who were held up in that dacoity case along with deceased Dilip and after completion of necessary investigation all the 17 accused persons including one D.S.P., incharge of the Police-station were charged under sections 302, 201 read with Section 34, IPC. The case was committed to the court of session. The prosecution examined a large number of witnesses in order to substantiate the allegation that accused- Dilip died in the police custody. Learned

Second Additional Sessions Judge after recording necessary evidence came to the conclusion that the prosecution has failed to substantiate the allegation against the accused police personnel and gave the benefit of doubt to all the accused persons and acquitted all of them. Aggrieved against the order of acquittal passed by learned Second Additional Sessions Judge dated 30.4.1996, the State preferred an appeal before the High Court against all the accused persons. The Division Bench of the High Court, Bombay ; Bench at Nagpur reviewed the whole evidence on record and reversed the order of acquittal of all the accused persons and convicted them as aforesaid by its order dated 17.1.2005. Hence, the present appeals by the accused-appellants.

We have heard learned counsel for the parties and have perused the records. It is an admitted fact that the deceased was arrested in a dacoity case along with other persons and he was in the police custody. The case of the prosecution was that he was taken for interrogation in the interrogation room on the relevant date and he expired and in order to substantiate the allegation, the prosecution produced some of the witnesses who were already in the custody along with accused- Dilip, namely; P.Ws. 2,3,4 & 5. These witnesses alleged that deceased Dilip was detained along with them and Dilip was being taken with his hands tied for interrogation and he was administered beating and he shouted for sometime but after some time no shouting was heard and thereafter the deceased died. The police prepared a defence that the accused escaped from the Police-station and therefore, registered a case being crime No.624/87 under Section 224, IPC on 6.11.1987. The first part of the evidence has to be closely examined whether the testimony of these witnesses is to be accepted and to what extent ? P.W.2 was an accused who was being prosecuted under Sections 302 & 307, IPC. He was also arrested along with the deceased Dilip and another accused detained in the police custody. Other accused were also there with him i.e. Babarao Naware and Sadashiv Uike involved in some other crime. He deposed that there is a police lock up which is separate from the Magistrate lock up. The distance between the two is 30 feet. He stated that one Paradhi boy was brought out of the Police-station and the accused persons were beating him with sticks, fist and kicks. They were assaulting the boy in front of the temple of the Police-station. He deposed that there are three windows in the room and that he heard the shricks, therefore he woke up and noticed the incident through that window and he found that as a result of beating the paradhi boy i.e. the deceased Dilip became unconscious. He further stated that some water was brought and sprinkled on the face of the deceased. Then some of the accused persons told that the deceased was knowingly pretending to be unconscious and therefore, they further subjected him to beating. Then the deceased boy did not regain his consciousness and a police jeep was called and he was taken with handcuffed. This witness has an outstanding criminal records i.e. 35-36 criminal cases are pending against him. He has also stated that he could not say as to how the blows landed on what part of the body as it was dark and he was at some distance. He also denied some suggestions made to him that he has not deposed that accused Kishore was asked to bring water and he has also deposed that the police jeep returned back in the Police-station at about 10 A.M. A suggestion was also given to him that since he has been implicated in number of cases by the Arvi Police therefore, out of vengeance he is deposing against the police. He went to the extent of implicating the DSP, In-charge of the Police-station. He also admitted that he has not deposed before the Police but for the first time he is deposing in the Court. P.W.3- Babarao Naware, another witness who was also there in the police lock up along with the deceased. He deposed that he knew accused Nos.1,2,3, 7,9,11, 13 and 16 and he admitted that he along with deceased Dilip were held up in a dacoity case. He also deposed that the accused No.2 along

with other members of the Staff of police administered beating to the deceased and he went to the extent of implicating Deputy Superintendent of Police. He stated that he saw the whole incident through the window of the lock up and he noticed the incident from 10 to 15 feet. He also deposed that it was about 2.30 A.M., the police jeep took the dead body of the deceased Dilip and returned at about 7 to 8 A.M. This witness has also deposed that he has 31 criminal cases pending against him. He also admitted that one Deputy Superintendent of Police, Mr. Sharma met him but he did not state anything to him about this incident. According to him, the incident of beating continued for about three hours. He did not make a complain about this incident before the lock up guards nor did he tell them about this incident of kicks and blows being administered on the deceased during investigation but for the first time he deposed in the court, he made a lot of improvement in his testimony, during the trial. P.W.4, who was also held up in a dacoity case, has admitted that he was arrested along with other accused persons. He also deposed that he heard the screaming of Dilip in the night at about 12 to 2 A.M. Thereafter, it is alleged that the deceased Dilip was not brought back alive in the Police-station. He also made a lot of improvements in his testimony like that he involved Deputy Superintendent of Police, Wardha who is one of the assailants and according to him, accused Kishore assaulted. P.W.5 was also arrested along with the deceased Dilip. He only deposed that the police took accused Dilip handcuffed from the room and he heard the shout of Dilip of beating. After some time the beating stopped and Dilip was not brought back to the room. P.W.5 did not state who did the beating. Though he was called to identify the dead body of Dilip but he deposed that he failed to identify the dead body of the deceased Dilip. He was the brother of deceased Dilip. He was shown the photograph of the dead body of the deceased Dilip at Adilabad Police-station but he failed to identify the dead body. He also deposed that Dilip had sold his cow to Baraku Wadi (carpenter) and a receipt was executed to that effect. He has deposed that this receipt was given by him to the Police. He has categorically denied that the body which was shown to him was that of Dilip. This receipt is alleged to have been received by him from his mother. This is the total eye witnesses produced by the prosecution to substantiate the allegation against the accused. After appreciating the evidence the trial court disbelieved all these witnesses. Apart from this evidence, circumstantial evidence was also sought to be pressed into service that the dead body which was seized by the Adilabad Police-station was that of the deceased- Dilip. For this the prosecution has led the evidence of some of the witnesses like P.Ws.7, 20 and 21 to substantiate that the dead body of the deceased was seized by the Police at Adilabad (A.P.). P.W.5 produced a sale receipt of cow from another person to whom the deceased Dilip had sold his cow, which bears his thumb impression. The finger prints which were taken by the Police before disposal of the dead body by the Police at Adilabad Police-station was sought to be matched with the thumb impression of the deceased Dilip by producing handwriting expert, P.W.23 that the thumb impression was that of the deceased. But unfortunately, P.Ws.7, 20, 21, 9 & 10 all have been declared hostile. P.Ws.7, 20 & 21 were produced to substantiate that the dead body of the deceased was taken in a jeep and P.Ws.9 & 10 were produced to show that the receipt which was scribed by P.W.10 which bears the thumb impression of the deceased and the same was sought to be connected with the finger prints which were taken from the dead body by spoon method but this circumstantial evidence has also not been accepted by the trial court. This is the total evidence which had been sought to be pressed by the prosecution to substantiate the guilt of the accused.

Learned counsel for the accused- appellants has seriously contested and submitted that all the eye witnesses who have been produced by the prosecution have criminal records and

secondly, they are also inimically disposed against the accused. It was also pointed out that the incident is said to have taken place in the dead of the night and it is very difficult for these witnesses to have seen the incident of beating by the accused persons to the deceased Dilip. It was pointed out that firstly no evidence had been led to show what was the height of the window from where these eye witnesses could see the beating to the deceased. Some witnesses state that some accused persons took the deceased by handcuffing with the rope in the D.B. room where they heard the shouting. But some said beating took place in open place near the temple. It was pointed out that there was no unanimity among the prosecution witnesses that who beat the deceased and how; whether all the 17 accused persons who were charged were all involved in beating to the deceased or some of them were involved in beating. Therefore, learned counsel has submitted that this kind of omissions in evidence cannot be accepted for convicting all the 17 accused of the P.S., Arvi, though the High Court has wrongly accepted their testimony on the face of it.

Learned senior counsel for the State, Shri Shekhar Naphade has fairly submitted that there are shortcomings in the testimony of these witnesses. But he has submitted that the fact remains that the deceased was in the custody of the police and the police has not accounted for him except by registering a case under Section 224, IPC and did not pursue the investigation further. He has also pointed out that the theory of escape is nothing but a fake make believe story by the accused and they abandoned that by closing the case on 29.4.1989 because they were aware of the fact that the deceased has not escaped but he has been the victim of their beating. Learned counsel for the State has emphasized that the investigation has also been done by the Police personnel i.e. by the C.I.D. and all the accused who are the eye witnesses are practically won over because their dacoity case was also closed on 24.10.1988. Therefore, their testimony has also to be closely scrutinized keeping in view the fact that they also stand to gain by siding towards the accused on the closure of the dacoity case. Learned counsel has also emphasized if the accused had pursued the theory of escape the case under section 224, IPC would not have been closed. Secondly they could have cross-examined the witnesses in that light but no such cross-examination has been done by the accused. Therefore, this theory of escape of the deceased Dilip is nothing but a false theory. It is only with a view to create an evidence and to find an escape route for the accused persons.

Learned counsel in support of this has invited our attention to a decision of the Calcutta High Court in A.E.G. Carapiet v. A.Y. Derderian [AIR 1961 Cal. 359] wherein it had been held that the parties should put their case in cross-examination of the witnesses. It was also held that this is the rule of one of the essential justice and not merely technical one. Learned counsel further invited our attention to a decision of this Court in State of M.P. v. Shyamsunder Trivedi & Ors. [(1995) 4 SCC 262] wherein it has been held that in a case of custodial death or police torture, generally ocular or other direct evidence is not available and the police officials alone can explain the circumstances in which a person in their custody died. Exaggerated adherence to and insistence upon establishment of proof beyond every reasonable doubt was improper and the Court must adopt a realistic rather than a narrow technical approach. Learned counsel submitted that the deceased was last seen in the custody of the Police and he is not found alive. Therefore, this circumstance should alone be sufficient to hold the accused guilty. Learned counsel has also invited our attention to a decision of this Court in Sahadevan alias Sagadevan v. State represented by Inspector of Police, Chennai [(2003) 1 SCC 534] and submitted that last seen is a very important circumstance and if a person is last seen

in the company of the accused and was never seen thereafter, it is obligatory on the accused to explain the circumstances in which the missing person and the accused parted company. It was also held that false explanation can be taken as a circumstance against the accused. Learned counsel also invited our attention to a decision of this Court in Mani Kumar Thapa v. State of Sikkim [(2002) 7 SCC 157]. In that case their Lordships held that in case of custodial death, failure of the accused in explaining the inculpatory circumstance could form an additional link in the chain of circumstances. Learned counsel also invited our attention to a decision of this Court in Devender Kumar Singla v. Baldev Krishan Singla [(2005) 9 SCC 15]. This was a case of cheating. In this case it was held that the statement under Section 313 of the Code of Criminal Procedure is not evidence. It is only a stand of the accused or his part of story. It was pointed out that in the absence of evidence, statement cannot be used to make up absence of any suggestion during cross-examination.

Now, a review of the ocular evidence produced by the prosecution keeping in view the submission made by learned counsel for the parties, we are of opinion that the statements of the witnesses cannot be accepted on their face. It is true that the deceased was not found alive but his dead body was found within the jurisdiction of Police-station, Adilabad in Andhra Pradesh. Keeping in view that the investigation has been done by the police personnel against the police personnel and also keeping in view the previous antecedents of the prosecution witnesses and the way they have described the beating, it is very difficult to rope in all the 17 accused persons for commission of the crime. In fact, the Police should have properly scrutinized the evidence and they could have pinpointed the person who was responsible for beating. But unfortunately, the police has not taken enough care to produce material evidence and pinpoint the person who was alleged to have been involved in beating the deceased. It is true that the deceased was last seen in the custody of the Police and thereafter he was not found alive. Though the police has made an attempt to cover up the story by registering a case under section 224, I.P.C. but that was closed shortly thereafter. Therefore, in this background to draw inference from these circumstances, the guilt of the accused is very difficult. We are conscious that there is rise in incidents of custodial deaths but we cannot completely de hors the evidence and its admissibility according to law to convict accused. We cannot act on presumption merely on a strong suspicion or assumption and presumption. We can draw only presumption which is permissible under the law and we cannot rush to the conclusion just because the deceased has died in the police custody without there being any proper link with the commission of the crime.

Learned senior counsel for the State, Mr. Shekhar Naphade very fairly submitted that despite the strong loopholes in the prosecution case the strongest circumstance which stand against the appellants is that the deceased was in the custody of the police and that he was last seen alive in the custody of the Police. Thereafter, he was not seen alive. Therefore, presumption should be drawn of the guilt of the accused. Commission of crime with reference to this type of presumption is perverse. It is true that the accused involved are police personnel but we cannot stand to condemn the whole police-station just on the basis of only circumstantial evidence of the deceased last seen in the custody of the police and thereafter he was not reported alive. Apart from this direct shaky evidence, it is very difficult to accept the evidence to connect the dead body with that of the deceased Dilip which came to the light after two years i.e. 1989. An attempt was made to connect the body of the deceased with that of Dilip, the prosecution led evidence of P.W.22 who took the finger prints of the deceased body. P.W.22 took the finger prints

of the deceased on 10.11.1987 though he admitted that the prints were not visible and these finger prints were sought to be corroborated with the receipt which was produced by P.W.5 which also bears the finger print of the deceased Dilip. For this the prosecution has also led evidence of P.W.10, the scribe of the receipt and P.W.11. Both the witnesses turned hostile. Consequently, it is very doubtful how could the receipt given to the purchaser was with the seller i.e. Dilip which was scribed by P.W.10 and it was said to be in possession of P.W.5, the brother of the deceased and the explanation was that his mother gave it to him. The thumb impression of Dilip in the said receipt was sought to be connected with the finger prints of the deceased taken by P.W.22. P.W.22 obtained the same with spoon method of right hand thumb impression and left hand thumb impression of the deceased which was in highly decomposed condition, dermis and epidermis of fingers were not found. Firstly the thumb impression on the receipt was of Dilip has not been proved as P.W.10 turned hostile. However, the prosecution tried to connect the body of the deceased by leading evidence of handwriting expert, P.W.23. P.W.22 was produced by the prosecution to show that he has taken the finger prints of the deceased through spoon method and that finger prints had been produced by the prosecution and P.W.23, the handwriting expert has been examined. P.W.23 has of course deposed that he has sent his report and as per his finding the thumb impression on the receipt and that of the dead body taken by P.W.22 are of the same person. But the question is whether the finger prints obtained on the receipt on sale of a cow by the deceased Dilip bears the thumb impression of Dilip or not. Since P.W.10 has denied that the thumb impression of Dilip was taken in his presence and since the receipt produced by the prosecution bearing the thumb impression of deceased Dilip is not proved, therefore, the comparison of the finger prints of the deceased with that of the thumb impression is of no consequence. More so, the brother of the deceased, Paratya and his wife- Shobha have also declined to identify the dead body. Therefore, under these circumstances, the prosecution has failed to establish that the dead body was that of the deceased, Dilip. As such, this circumstantial evidence is also not of worth that it can connect the accused persons with the commission of the crime.

As a result of our above discussion we are of opinion that the view taken by the Division Bench of the High Court in reversing the judgment of Second Additional Sessions Judge, does not appear to be well founded. Normally, the appellate court is very slow in interfering with the order of acquittal unless there are compelling circumstances to do so. After going through the judgment of the trial court, we are of opinion that the view taken by the trial court appears to be just and proper in the given facts and circumstances of the case and it was not proper for the Division Bench of the High Court to reverse the finding. We are satisfied that the reasons given by the High Court in reversing the order of acquittal of the accused persons are not cogent and does not appeal to the reason so as to justify the conviction of the appellants. Hence, we allow the appeals filed by the appellants and set aside the impugned judgment of the High Court and affirm the judgment of the trial court and acquit all accused-appellants from the charges. The appellants shall be released forthwith if they are not required in any other case.