

CASE NO.:
Appeal (crl.) 469 of 2001

PETITIONER:
Anthony D'Souza and Ors.

RESPONDENT:
State of Karnataka

DATE OF JUDGMENT: 30/10/2002

BENCH:
R.C. LAHOTI, BRIJESH KUMAR & H.K. SEMA.

JUDGMENT:
J U D G M E N T

SEMA, J.

Four appellants - Anthony D'Souza, Anil Kumar @ Anil D'souza, Seril D'souza and George D'souza @ Babli were tried by the Additional Sessions Judge, Chickmagalur and convicted for the offences under Section 143 IPC, Section 396 read with 149 IPC and Section 201 read with 149 IPC and sentenced to undergo SI for six months for the offence under Section 143 IPC, rigorous imprisonment for life for the offence under Section 396 read with Section 149 IPC and a fine of Rs.5000/- each. In default of payment of fine SI for three months and to undergo two years RI and to pay a fine of Rs.2000/- each for the offence under Section 201 read with Section 149 IPC and in default of payment of fine, SI for three months. All the substantive sentences were ordered to run concurrently. On appeal their conviction and sentence is confirmed by the High Court. Hence the present appeal.

Briefly stated facts are as follows:-

Deceased Vittal Shetty and Paul were employed as driver and cleaner in a lorry bearing Registration No.CNO 8928 belonging to Kiran Transport Company owned by PW-5 Sri Castelino and his son PW-16 Kiran Castelino. On 17-2-1992, PWs 5 and 16 had sent the lorry driven by substituted driver PW-15 Puttumonu along with deceased Paul to Penambur to take delivery of 200 bags of Mangala Urea from its factory to be taken to Mysore Coffee Curing Works at Balehonnur. PW-9 Balakrishna was the clerk of Venkatadri Transport Company which has a office by the side of Mangalore Chemical Fertilizer Factory, got the fertilizer bags loaded between 11.30 a.m. to 3.30 p.m. After handing over necessary documents including the delivery note, the driver and the cleaner left for Mangalore. Sometime at about 5.00 p.m., the regular driver deceased Vittal Shetty reported back to his duty and he was asked by PW-5 to proceed to Balehonnur with the loaded lorry of fertilizer bags. Deceased driver along with his cleaner deceased Paul then proceeded towards Balahonnur at about 7.30 p.m. on 17.2.1992. It is stated that at about 1.30 in the night both the deceased halted the lorry at Kottigehara at Bharath Hotel run by one Ibrahim PW-12 for taking tea. When both the deceased were about to leave along with the lorry, it is stated that all the four appellants along with one juvenile offender boarded the truck after some talk and left Kottigehara. Since then nothing has been heard about the truck or the driver. It is only on 18-2-1992, one Parswanatha Jain PW-1, a resident of Jenugudde village receives information of finding a dead body in a culvert. He booked a trunk call to the police at Balehonnur Police Station. On receipt of phone message, SHO of Balehonnur Police Station proceeded to the Jenugudde along with the staff and observed some injuries on the dead body. He came back to the police station and suo motu registered a case in Crime No.16/92 for the offence under Section 302 IPC against an unknown offender. Thereafter, the investigation is taken over by Mallikarjunappa PW-33, the PSI of Balehonnur Police Station. In course of investigation, the prosecution examined as many as 36 witnesses and finding a

prima facie case, challan was filed against the appellants. Admittedly, there is no direct eye witness and the prosecution case rests entirely on circumstantial evidence. The prosecution relied on the following circumstantial evidence:-

(a) On 18.2.1992 at about 9.15 a.m., the four appellants along with juvenile offender went to Belagodu Primary Health Unit and informed Gangadhariah PW-17 who was a Group "D" employee, that they were injured in a lorry accident and asked for immediate medical treatment. On noticing the serious injuries on one of the accused, PW-17 directed them to go to Sakleshpur General Hospital.

(b) The appellants then went to a Coffee Estate run by Rafiq Ahmed PW-27 at Belagodu and sought his assistance to go to Sakleshpur. PW-27 noticed the condition of the injured and contacted his relative at Sakleshpur to arrange a taxi so as to provide transportation to the injured to Belagodu.

(c) PW-30 Feroze Khan the owner of taxi was engaged and sent to Belagodu being driven by himself. PW-30 took the injured to Government Hospital, Sakleshpur and received his taxi charges of Rs.60/ from the accused.

(d) At Government Hospital Sakleshpur, the injured disclosed their names as J.D.'Souza S/o Joseph, Anil S/o Joseph, Manjunatha (Juvenile Offender) to the Medical Officer Dr.Prakash Inamdar PW-28. They also informed PW-28 that they sustained injuries in a truck accident near Belagodu village on 18.2.1992.

(e) PW-28 made necessary entries in the Medico-legal case registered vide Ex.P.32(a)(b) & (c) at pages 243 and 244 of the register. The doctor also noticed serious injuries on the person called J.D.'Souza. He accordingly advised them to go to a major hospital at Mangalore.

(f) The accused went to the taxi stand and again met PW-30 and engaged his taxi to take them to Mangalore. The taxi of PW-30 went out of order near Uppinangadi and PW-30 asked them to engage another vehicle. Accused did not have enough money for paying the full charges. They paid Rs. 200/- in addition to one wrist watch worn by one of them. They, however, promised PW-30 that they would come back and pay the balance and take back the wrist watch after about three or four days.

(g) The accused on reaching Mangalore after engaging another vehicle, two of them went to Wenlock Hospital at about 4.00 p.m. and Dr.Vasanth Kumar, PW-26 treated them. Doctor noticed one of the injured persons, named as George D'souza, was seriously accompanied by another injured named Sunil (later established as Anil). They also told the doctor that they had received injuries in a road accident. Doctor entered the same in the Medico-Legal Case Register and sent the MLC to the jurisdictional police.

(h) On 18.2.1992 at about 5.40 p.m. PW-35 Vasudeva ASI and SHO of Mangalore South Police Station went to the hospital and noticed that one of the injured was in a serious condition and others with simple injuries were able to talk. He recorded the statement of able injured who disclosed his name as Sunil Fernandis and that of seriously injured as George D'souza. He also told PW-35 that they sustained injuries in the motor accident near Belagodu. He has recorded the statement vide Ex.P.49 and also registered a case in Crime No. 57/92 for the offences under Sections 279 and 337 IPC against the unknown lorry driver. PW-35 having noticed that the accident had taken place within the jurisdiction of Sakleshpur Police Station transferred the case to the jurisdictional police.

(i) The case was then re-registered in crime No.25/92 at Sakleshpur Rural Police Station and PW-32 located the lorry bearing registration No.CNO 8928 and from the lorry he found out that it belongs to PWS 5 and 16 and contacted them over the phone intimating them that the lorry had met with an accident near Belagodu village and three persons named George, Anil and Manjunath had received injuries in the accident and that they were being treated at Wenlock Hospital at Mangalore.

(j) On receipt of the information PWS 5 and 16 went to Wenlock Hospital and on inquiry came to know that the injured got themselves

discharged against the advice of the doctor PW-26 and gone to KMC Hospital, Bijai. In KMC Hospital, they found that one injured person by name George was serious and was admitted in Intensive Care Unit and unable to talk. PW-5 left behind PW-16 to get the particulars.

(k) Sometime in the evening PW-16 noticed that three persons along with a young boy came to the KMC Hospital, Bijai and when the three persons went to ICU leaving behind the boy, PW-16 out of curiosity made enquiry and learnt from the boy that all the three persons and the juvenile were injured in the lorry which met with an accident at Belagodu. The boy further alleged to have revealed that he was working as a coolie and on 17.2.1992 the four accused brought him to hotel at Kottigehara at about midnight. When the lorry stopped at the hotel they requested the driver to take them as passengers. All of them sat in the cabin and after going some distance one of them got the lorry stopped on the pretext of attending calls of nature and then Anil (A-2) tried to strangle the driver with a plastic rope and when the driver and the cleaner tried to run away they were hit with the wooden block called as 'Katte' and killed both of them. The boy further alleged to have revealed that after taking the money from the person of the driver as well as the wrist watch accused (A-1) and other took the vehicle towards the forest in order to dispose of the dead bodies. The boy further alleged to have disclosed that when they kept the body of the driver in a culvert near Jenugudde and before they could dispose of the body of the cleaner in the same way they heard the sound of approaching vehicle and they proceeded ahead in the lorry and thereafter the body of cleaner was also kept under a culvert. The boy further alleged to have disclosed that thereafter the lorry was driven to the estate of one Rajegowda PW-13 and after unloading the fertilizer bags, while they were proceeding towards Belagodu, the lorry met with an accident and all of them got injured. This is how the accused were roped in with the crime by the circumstances as recited above.

After the accused were arrested they were interrogated. Accused Nos. 1 and 3 made the voluntary disclosure statements vide Ex.P. 39 and 40 leading to the discovery and seizure of 193 bags of fertilizer from the estate of PW-13 Rajegowda and the wrist watch MO-19 belonging to the deceased Vittal Shetty from PW-30 the taxi driver. The disclosure statement led to the recovery of wooden 'Katte'. MO-20 alleged to have been used by the accused for the murder of deceased Vittal Shetty and deceased Paul. In course of the trial, accused No.5 Manjunath is stated to be a juvenile offender and his case was split up and only four accused were tried in Sessions Case.

To establish the guilt of the accused the prosecution has examined as many as PWs 1 to 36, Exs. P.1 to P.49 and M.Os. 1 to 24. In their examination under Section 313 I.P.C., the accused totally denied the prosecution story. They, however, declined to lead any DWs.

It is contended by Mr. Vijay Panjwani, learned amicus curiae, that the prosecution case rests entirely on the circumstantial evidence and the prosecution in such a case is required to prove all the links in the chain of circumstances which would lead to unerringly one conclusion and that is the guilt of the accused. According to him, the chain of circumstances linking to the guilt of the accused has not been discharged by the prosecution.

As already noticed, there is a concurrent finding of facts by both the courts and this Court would be slow to interfere with the concurrent finding of facts unless there is some perversity in the finding. It is also established principle of law that in a case resting on circumstantial evidence, the circumstances from which the conclusion of guilt is drawn must unerringly lead to one conclusion consistent only with the hypothesis of the guilt of the accused. Keeping in view this principle we now to proceed to find out whether the finding arrived at by the two courts suffers from any infirmity.

Before we advert further, we may point out that all the prosecution witnesses were independent witnesses and there is no allegation of malice or rancour towards the accused. The witnesses were also subjected to lengthy cross-examination but their testimony remained unimpeached.

It is not disputed that on 17.2.1992, the lorry bearing No CNO 8928 loaded with 200 Mangalore Urea bags, driven by deceased Vittal Shetty

accompanied by cleaner deceased Paul left Mangalore towards Balehonnur. The said lorry belongs to PWs 5 and 16 of Kiran Transport Company. The said lorry met with an accident near Belagodu when the accused were injured in the same accident. This is borne out from the witnesses of PWs 17, 27 and 30 who are the persons who were immediately approached by the accused after the accident and their help was sought to go to hospital. The evidence of PWs 17, 27 and 30 has also been corroborated by the evidence of Medical Officers P.Ws. 28, 26 and 29. It is in the evidence of PW-17 Ganga Shetty, a group 'D' employee of Health Unit at Belagodu that on 18.2.1992 all the accused along with a boy came to Health Unit and informed him that they had sustained injuries in an accident to the lorry in which they were travelling. As there was no medical officer available, he directed the accused to approach the General Hospital at Sakaleshpur. He stated that one of the accused had serious injury on his head. The statement of PW-17 is corroborated by the evidence of PWs 27 and 30. As noticed, PW-17 was a 'D' class employee of PHU, Belagodu and residing near the place of accident, it is quite natural that the accused would go to the nearest place where medical aid is available. Further the evidence of PW-17 is corroborated by the evidence of PW 27 who is a Coffee Estate owner of Belagodu Village. It is in the statement of PW-27 that in the morning at about 9.00 a.m. on 18.2.1992 accused nos. 1 to 4 came to his estate out of whom one was seriously injured and sought his help to go to hospital at Sakaleshpur. It is also stated that after seeing the condition of the injured, he telephoned to a relative who is also Proprietor of Hilal Coffee Works at Sakaleshpur and requested him to arrange for sending a taxi to take the injured to the Sakaleshpur Hospital. At about 10.30 a.m. a taxi came and injured were taken in taxi towards Sakaleshpur. The evidence of PW-27 is further corroborated by the evidence of Ferozkhan PW-30, the taxi driver. PW-30 stated that he is a taxi driver driving a taxi bearing registration No. MEX 2837. On receipt of communication from the proprietor of Hilal Coffee Works that there was a phone call from Belagodu stating that an accident had happened at Belagodu and the injured were required to be shifted to a hospital, he took the taxi, went to Belagodu and reached the outskirts by about 9.30 or 9.45 a.m. and saw some persons standing and one of them was seriously injured. He took them to Government Hospital, Sakaleshpur and received the taxi charges of Rs.60/- from them. The accused were identified by PWs 17, 27 and 30. The evidence of P.W.30 that he took the accused from Belagodu to Sakaleshpur Belagodu to Sakaleshpur Hospital has been corroborated by the evidence of Dr.Prakash Inamdar PW-28. It is stated in the evidence of PW-28 that he was a Medical Officer in the Govt. Hospital at Sakaleshpur and on 18.2.1992 he had examined three injured persons who disclosed their names as D'Souza S/o Joseph D'Souza, Anil S/o Joseph D'Souza and Manjunath S/o R.Shetty. The accused also informed him that they were victims of a motor vehicle accident near Belagodu village. PW-28 not only treated the accused but also noted down the injuries in the Medico Legal Register and the same is marked vide Ex.P-32 and the relevant entries at P-32 A, B & C. It is consistent that the accused were injured in a lorry accident at Belagodu village and later came to Sakaleshpur Government Hospital with the help of PWs 27 and 30. In the light of the facts recited, the following circumstances are clearly established against the accused.

The first circumstantial evidence connecting with the accused is again the evidence of PW-30, the taxi driver. It is noticed in the evidence of PW-27 (Medical Officer) who had advised the accused to take the seriously injured to a major hospital at Mangalore. According to the prosecution case the accused again came back to the taxi stand and met PW-30 and asked him to take the injured to Mangalore in his taxi. PW-30 agreed to the request on the condition that they would pay his taxi charges of Rs.550/-. The charges were stated to be settled at Rs.500/- and then they left towards Mangalore. It is in the evidence of PW-30 that while they were proceeding near Upppinangadi some mechanical defect developed in the taxi and he asked the accused to make alternative arrangement. It is further stated that on being demand of taxi charges the accused expressed their inability to pay the whole amount and paid Rs.200/- and on being insisted by PW-30 for full payment a sum of Rs.200/- along with "Ceiko" wrist watch had been given stating that they would come back and take the wrist watch back after three or four days after paying the balance amount. As already stated PW-30 met with all the accused persons on two occasions. He was well acquainted with the accused and clearly recognised them in the court.

There is no malice or ill-feeling of PW-30 towards the accused. He was subjected to lengthy cross examination but nothing could be elicited to discredit his testimony. The statement of PW-30 has also been corroborated by the seizure of MO-19. This again further strengthened the prosecution story connecting the accused with the crime. PW-5, the employer of the deceased Vittal Shetty and PW-8 Raghunath Shetty the younger brother of the deceased had specifically and positively identified that MO-19 a wrist watch belongs to the deceased Vittal Shetty. PW-8 being the younger brother of the deceased Vittal Shetty is quite natural that he had sufficient time and occasion to see the wrist watch (Ceiko Company) being worn by the deceased Vittal Shetty. PW-5 the employer of Vittal Shetty also clearly stated that he had seen the deceased wearing MO-19 whenever he comes for duty.

From the evidence disclosed above it is apparently clear that the accused received injuries on their bodies in a lorry accident at Belagodu and went from Belagodu to Sakleshpur has been well established by the prosecution.

The second circumstantial evidence against the accused is that they were being treated by the doctors of the injuries sustained by them in an accident involving the lorry in question. Dr. Vasanthkumar, PW-26 has stated that he examined one injured named George D'Souza (A-4) brought by one Sunil (established as Anil) from Sakaleshpur and noticed injuries on his body and recorded the wound certificate Ex.P-30. According to him, it was a case of injury of lorry accident. He has stated that the person accompanying the injured had given his name as Sunil. This doctor in his examination-in-chief produced Ex.P-30 and stated that while attending to the injury he has noted identifiable marks on the body of both the injured George and Sunil. He has found a black mole in front of the neck of George D'Souza and in the court with the help of birth mark. He has identified the accused No.4 as the person who was brought by Sunil in the injured condition. In regard to Sunil, he again noted the injuries on him and issued the wound certificate vide Ex.P-31. He has stated before the Court that he noted the identification mark on said Sunil as having brown mole of 2" below the right nipple in front of chest. This witness identified accused No.2 (established as Anil) as the person who brought A-4 to the hospital and gave his name as Sunil and the identification is done after seeing the Birth Mark in Ex.P-31. Identification marks of accused Nos. 2 and 4 by PW-26 in the court with physical identifiable mark noted in Ex.P-30 and 31 tallying with the actual birth marks in the courts clearly establish beyond any reasonable doubt that it was accused Nos. 2 and 4 who went to the Wenlock Hospital in injured condition on 18.2.1992 with the history of road accident. This apart, as already noticed, A-2 also lodged a complaint of the accident vide Ex.P-45. PW-35 B.Vasudeva PSI of Mangalore South Police Station recorded the statement of A-2 as Ex.P-49 wherein he stated his name as Sunil. In Ex.P-49 statement A-2 stated that on 18.2.1992 he along with his brother-in-law A-4 travelled in a lorry towards Mangalore and when the lorry came near Belagodu due to rash and negligent driving of the driver at about 10.30 am the lorry capsized and the inmates received the injuries and the driver and the cleaner ran away from the place. It is seen, thus, A-2 had admitted that A-2 and A-4 traveled in the truck and met with an accident at Belagodu and both of them received injuries and they were brought to Sakleshpur by car for treatment and from there to Wenlock Hospital, Mangalore. A-2, however, disowned his statement and even denied of receiving any injuries or there was any lorry accident, in his statement under Section 313 Cr.P.C.

The third circumstantial evidence relied upon by the prosecution connecting the accused with the guilt is the various recoveries made at the disclosure of the accused. At the time of interrogation accused Nos. 1 to 3 made disclosure statements leading to the discovery of incriminating materials. A-3 gave a voluntary disclosure statement Ex.P-14 which led to the discovery of wrist watch M-19 of deceased Vittal Shetty from PW-30 the taxi driver. As already noticed Ex.M-19 wrist watch belongs to the deceased Vittal Shetty has been proved by PWs 5 and 8. The other recovery is 193 bags of fertilizer from the estate of PW-13. This recovery has been made on the basis of the voluntary statement vide Ex.P-39 made by A-1. Pursuant to the disclosure statement PW-34 recovered 193 bags of Mangala Urea which were found stored in the godown of PW-13. The said urea bags were carried by the deceased in the lorry from Mangalore to Balehonnur. PW-13 was declared hostile and did not support the prosecution story. PW-13, however, admitted that A-3 Serial

D'Souza was working as a servant in his estate. He has also admitted that around 23rd or 24th February, 1992 the police party came to his estate and seized 193 bags of fertilizer from his estate. He has also admitted that he has put his signature on the seizure panchanama Ex.P-15. Although PW-13 did not support the prosecution story, but two facts were established by the prosecution that A-3 was his servant and 193 bags of fertilizer which did not belong to him were seized from his estate by the police on a voluntary disclosure statement made by A-3. 193 bags which were part of 200 bags of Mangala urea which were carried by the said lorry from Mangalore to Balehonnur. The seizure has been proved by the IO and the panch witness. The fertilizer bags belong to M.C.C.W. of Ballehonnur has been proved by PW-8 as being purchased by the Pennabur factory.

The fourth circumstantial evidence appearing against the accused is the recovery of MOs. 20, 21 and 22 at the instance of A-3. M-20 is the wooden "katte" alleged to have been used for murdering both the deceased. Both the courts below did not place much reliance on MO-21 the side mirror of the lorry and MO-22 sunmica piece fixed at the lorry. However, both the courts relied upon M-20 the assaulting weapon. Further M-20 was stained with blood and it was sent to Forensic Science Lab and it is confirmed to have been stained with human blood.

The last and probably the most formidable circumstantial evidence against the accused is their own conduct. It appears that the accused were entangled in their own cob-web. As already noticed A-2 lodged the complaint Ex.P-45. In the complaint A-2 has stated that they were the occupants of the lorry which met with an accident on 18.2.1992 near Belagodu via Sakaleshpur due to rash and negligent driving of the driver. Their lorry fell down reversly and due to the accident the complainant and his cousin D'Souza suffered severe injuries and they are being treated in Government hospital. On the basis of the complaint, a case was registered under Section 279/337 IPC. In the complaint A-2 gave his name as Sunil Farnandis which later on proved to be false and established as Anil, as noticed earlier. There is also enough evidence on record that accused have been treated at various hospitals which is borne out from the evidence of Dr.Prakash Inamdar P-28 and Dr. Vasanthkumar PW-26 and PW-29 Dr. Chandra Kumar Ballal, as noticed earlier. This would go to show that the accused had admitted the boarding of the lorry and the lorry met with an accident and they sustained injuries on their bodies out of the lorry accident. In their examination under Section 313 Cr.PC the accused denied the prosecution story in toto. They denied that lorry accident had taken place. They also denied to have received any injuries. In short, in their 313 statement they completely denied the established facts and offered false answers. By now it is well established principle of law that in a case of circumstantial evidence where an accused offers false answer in his examination under 313 against the established facts that can be counted as providing a missing link for completing the chain.

In *Swapan Patra vs. State of West Bengal*, (1999) 9 SCC 242, this Court said that in a case of circumstantial evidence when the accused offers an explanation and that explanation is found not to be true then the same offers an additional link in the chain of circumstances to complete the chain. The same principle has been followed and reiterated in *State of Maharashtra v. Suresh* (2000) 1 SCC 471, where it has been said that a false answer offered by the accused when his attention was drawn to a circumstance, renders that circumstance capable of inculpatng him. This Court further pointed out that in such a situation false answer can also be counted as providing a missing link for completing the chain. The aforesaid principle has been again followed and reiterated in *Kuldeep Singh & Ors. Vs. State of Rajasthan*, JT 2000 (5) SC 161.

In our view, therefore, the chain of circumstances as recited above coupled with the law laid down by this Court unerringly lead to one conclusion and that is the guilt of the accused.

However, one error has been committed by the High Court by converting the conviction from Section 302 read with Section 149 I.P.C. to one under Section 302 in aid of Section 34 I.P.C. It is in the evidence of PW-16 Kiran Castolina that the juvenile accused Majnunath had disclosed to him that all the five accused participated in the murder of deceased Vittal Shetty and Paul. As already noticed the trial of juvenile accused Majnunath has been split. The Trial Court, therefore, was right in convicting the appellants under Section 302

IPC read with Section 149 IPC.

In the result, this appeal is dismissed, being devoid of merit.

We record our appreciation of Mr. Panjwani, learned Amicus-Curiae for his able assistance.

JUDIS