

of the offence. After that, leave was granted, and the appeal was heard on merits.

3. The incident occurred on 6th September 2004. The accused was staying in room no. 3 rented to him by PW-3 - Alimuddin Amiruddin Shaikh. According to the prosecution, the deceased – Mohmed Akhtar Gafur Ansari, was also staying in the room no. 3, along with the appellant. There was a dispute between them about playing music. The dispute led to an altercation in which the appellant attacked the deceased. The injuries sustained by the deceased caused his death. The prosecution case is based on the evidence of eyewitnesses PW-3 to PW-9, extra-judicial confession by the appellant made to PW-19 - Mohammad Afroz and dying declaration made by the deceased to PW-24 - Mohd. Rafiq. Though PW-3 to PW-9 were declared hostile, the Trial Court and High Court have relied on certain parts of their testimony. The High Court has believed the testimony of PW-19 and PW-24.

SUBMISSIONS

4. The learned counsel appearing for the appellant has taken us through the testimony of hostile eyewitnesses. By pointing out the findings of the High Court, he submitted that, firstly, certain statements made by the eyewitnesses out of context could not be relied upon by the prosecution. Secondly, the testimony of the said witnesses does not support the prosecution. Pointing out the evidence of PW-19, he submitted that according to the witness, he was the

appellant's employer. According to him, the appellant made a phone call to him at 3.30 p.m. on the date of the incident and informed him that he had murdered his roommate. He pointed out that no investigation has been made about the phone from which this call was made. Moreover, he pointed out that though PW-19 claims that he informed PSI Mishra of Limbayat Police Station about the confession and called him to Central Bus Station, PSI Mishra has not been examined as a witness. He pointed out that according to the prosecution's case, even at Central Bus Station, the appellant allegedly made the second extra-judicial confession in the presence of PSI Mishra. Therefore, the omission to examine PSI Mishra becomes fatal to the prosecution case. He pointed out that the prosecution case was that it was PSI Mishra who took the appellant into custody and produced before PW-25. The version of PW-25, the Investigating Officer, appears to be doubtful. He submitted that the entire prosecution case cannot be believed.

5. The learned counsel appearing for the State submitted that though the eyewitnesses were declared hostile, their testimony cannot be entirely discarded. She submitted that the evidence of the said witnesses brings on record the fact that at the time of the murder of the deceased, he, along with the appellant, were staying together in room no. 3 of the building owned by PW-3. Learned counsel pointed out the evidence of PW-4 (Salehabanu). In the cross-examination made by the learned public prosecutor, the witness stated that she first saw the appellant running towards the stairs

from the lobby, and immediately after that, the deceased was found in a heavily bleeding condition. She pointed out that the witness's evidence proved that the appellant and the deceased were quarrelling. The witness heard shouts of “save, save” from the appellant's room. She also pointed out that even the evidence of PW-7 - Najma brings on record that she had seen the deceased bleeding in the gallery of the building and was shouting “save, save” at that time. The witness saw the appellant coming down from the building and was seen cleaning blood stains from his shirt. She pointed out that even the evidence of PW-14 – Sagufta Parvin shows that the deceased was murdered in room no. 3 where the deceased, along with the appellant, were staying together. She further submitted that PW-19 was the appellant's employer; therefore, it was natural that the appellant would confide with his employer about his guilt. She submitted that there is no reason to discard the testimony of PW-19, which proves extra-judicial confession. Similarly, there is no reason to discard the testimony of PW-24 before whom a dying declaration was made by the deceased that the appellant murdered him. The learned counsel submitted that there is no reason to interfere with the impugned judgments, which contain elaborate findings recorded after making a detailed analysis of the evidence of the prosecution witnesses.

CONSIDERATION OF SUBMISSIONS

6. We have minutely scanned the testimony of the prosecution witnesses. Firstly, we will deal with evidence of

PW-19, who claims that the deceased made an extra-judicial confession before him. Even though this witness was declared hostile, the prosecution relied upon a part of his testimony. We are summarising the statements made by PW-19 in his examination-in-chief, in his cross-examination made by the learned public prosecutor after he was declared hostile and in the cross-examination made by the learned counsel appearing for the appellant. The summary of his version is as follows:

- a)** The appellant worked in his textile store for five months in 2004 till the first week of September 2004;
- b)** In September 2004, he received a call from the appellant around 3.30 p.m. and on the phone, the appellant informed him that he had killed his room partner;
- c)** The appellant called PW-19 to the Central Bus Station near Surat Railway Station;
- d)** Thereafter, PW-19 made a phone call to PSI Mishra of Limbayat Police Station and called him to the Central Bus Station;
- e)** PSI Mishra came to the Central Bus Station, where they met the appellant. The appellant again reiterated that there was a quarrel between him and his room partner over playing a tape recorder, and that he had murdered his room partner;

- f)** PW-19 stated that though the appellant had told him the name of the person who was murdered, he was unable to recollect the name;
- g)** In the cross-examination by the learned public prosecutor, he was confronted with the relevant part of his statement recorded under Section 161 of the Code of Criminal Procedure, 1973 (for short, 'CrPC'). He accepted of having made the statement. He stated that the appellant had told him that he had murdered Mohmed Akhtar Gafur Ansari;
- h)** In the cross-examination made by learned counsel appearing for the appellant, he stated that PSI Mishra took the appellant with him, and there were two or three policemen with him;
- i)** He did not remember whether he stated to the police the phone number from which he made a phone call to PSI Mishra; and
- j)** He admitted that he did not disclose the phone number from which the appellant called him.

7. The normal rule of human conduct is that a person would confess the commission of a serious crime to a person in whom he has implicit faith. The appellant had worked in PW-19's shop only for five months in 2004. The appellant was otherwise not known to PW-19. Therefore, it is unnatural that the appellant would call the deceased on the phone and confess. Moreover, PW-19 stated that the appellant called him

to the Central Bus Station after confessing on the phone. Even this conduct is very unnatural. Furthermore, PW-19 admittedly did not disclose to the police the telephone number from which he allegedly received a call from the appellant. As can be seen from the testimony of PW-25, Investigating Officer, no investigation was made to ascertain the phone number on which PW-19 received a call from the appellant and the phone number from which PW-19 called PSI Mishra. It was necessary for the prosecution to collect evidence on these aspects and place it before the Court. Though PW-19 stated that the appellant again made extra-judicial confession at the Central Bus Station in the presence of PSI Mishra, the prosecution has not examined PSI Mishra as a witness. According to the testimony of PW-25, statement of PSI Mishra was not recorded during the investigation. In any event, the alleged confession made by the appellant before PSI Mishra cannot be proved against the appellant in view of Section 25 of the Indian Evidence Act, 1872. Hence, the prosecution's evidence regarding extra-judicial confession cannot be believed.

8. PW-19 stated that PSI Mishra and two to three other constables took the appellant away. Thus, it was PSI Mishra who took the appellant into custody. Hence, PSI Mishra was a crucial witness. A vital prosecution witness has been withheld from the Court. Nothing is placed on record to show that PSI Mishra made any official record to show that he had taken the appellant into custody. PW-25, the Investigating Officer, stated that PSI Mishra and other police personnel were

tracing the appellant in the market as he was working there. He further noted that PSI Mishra produced the appellant at the police station and was shown as arrested at 9.30 p.m. on that day. Thus, PW-25 did not state that PSI Mishra went to the Central Bus Station upon receiving a phone call from PW-19, and that he nabbed the appellant at the Bus Station. The version of PW-25 is entirely different. In the cross-examination, PW-25 specifically admitted that he did not record the statement of PSI Mishra. He stated that he arrested the appellant when PSI Mishra produced him. Further, in the cross-examination, PW-25 stated that in the panchnama of arrest, it is not mentioned that PSI Mishra produced the appellant before him. He stated that he had no information about the time, in whose presence and from which place PSI Mishra arrested the appellant. In further cross-examination, he stated that he was not aware that PSI Mishra met the appellant at Central Bus Station in the presence of the appellant's employer. He denied that PSI Mishra kept the appellant in custody and produced the appellant before him. Thus, it is impossible to believe the testimony of PW-19 that he conveyed the appellant's extra-judicial confession to PSI Mishra. Moreover, the manner in which the appellant was taken into custody becomes highly suspicious as it is not even recorded in the arrest panchnama that PSI Mishra arrested the appellant. Apart from the fact that it is very difficult to believe that the appellant confessed before PW-19, the further part of the testimony of PW-19 makes his testimony extremely doubtful as the prosecution has withheld PSI Mishra from the

Court. Therefore, it is not possible to rely upon the evidence of PW-19.

9. Now, we come to the theory of dying declaration made by the deceased before PW-24. In the examination-in-chief, PW-24 stated that after he heard that his friend (deceased) was injured, he rushed to the site and found that the deceased was fully covered in blood, and he disclosed that the appellant was the author of the injuries. In the cross-examination by the learned public prosecutor, he denied having made such a statement before the police. In the cross-examination by the learned public prosecutor, the witness was confronted with his prior statement recorded by the police. The relevant part of the cross-examination reads thus:

“Such has not happened and been dictated by me in my statement before police that, ‘Therefore, when I was coming downstairs, I saw Lal Mohammad, staying with Mohammad Akhtar, running on the road towards Limbayat Police Station.

...Therefore, I called rickshaw and landlord Alimuddin Shaikh and I took Mohammad Akhtar for treatment in the rickshaw and at that time, I saw Mohammad Akhtar had sustained injuries on throat and head and it was bleeding continuously. At that time, I asked Mohammad Akhtar and he told me, I had an altercation and quarrel with Lal Mohammad, staying with me, regarding playing a tape recorder and therefore, Lal Mohammad caused injuries to me using a knife and ran away.”

.....”

Thus, the witness stated that he did not dictate to the police the statement with which he was confronted. In the cross-examination by the advocate for the appellant, he admitted that when he informed Limbayat Police Station, a policeman came in an auto-rickshaw. The policeman, along with two or three other persons, brought the deceased down and put him in the auto-rickshaw. The police personnel and the other two to three persons were not examined as witnesses. He stated that the deceased was unconscious at that time. So, when the deceased was put in the auto-rickshaw, he was not in a position to speak.

10. At this stage, we may also refer to the testimony of PW-3, who was the complainant and landlord of the appellant. He stated that when he went to the place where the deceased was lying in a heavily bleeding condition, the deceased did not disclose anything to him, and there was no conversation when the deceased was taken by him by an auto-rickshaw to the hospital. Therefore, the prosecution story regarding the dying declaration made to PW-24 does not inspire confidence at all.

11. Now, we turn to the evidence of the eyewitnesses who were declared hostile. PW-3, according to the prosecution, was the witness before whom the deceased made a dying declaration while he was being carried in an auto-rickshaw. PW-3 did not support the prosecution on this aspect, and PW-24 claimed that when the deceased was put in an auto-

rickshaw, he was not conscious. PW-3 stated that he heard a quarrel between the appellant and the deceased. When the witness was confronted with his police statement in the cross-examination, he denied having made such a statement. PW-4 was declared as hostile. When he was confronted with relevant part of his police statement, he denied to have made the statement.

12. The High Court has relied upon the testimony of PW-7, who was again declared hostile. In the cross-examination made by the public prosecutor, PW-7 accepted that she informed the police that she saw the appellant going down, and while going down, he was cleaning the blood off his clothes. However, in the cross-examination made by the advocate for the accused, she stated that except for seeing the deceased in injured condition, she had not seen anything else and that she was not aware of the persons who were involved in the incident.

13. The High Court held that the evidence of PW-9 Kalu Shaikh, another hostile witness, proves the appellant's presence at the time of the incident. In cross-examination by the advocate for the accused, PW-9 stated that he did not know the appellant and the deceased before the incident. He stated that he was unable to identify the appellant. He stated that except for hearing the shouts "save, save," he knew nothing.

14. Therefore, after having carefully perused the evidence of the hostile prosecution witnesses (PW-3 to PW-9), we find that there is nothing in the evidence which could be relied upon by the prosecution for connecting the appellant with the murder of the deceased.

15. Thus, the appellant's conviction cannot be sustained for the above reasons. Accordingly, the appeal is allowed. The conviction and sentence of the appellant are set aside, and the appellant is acquitted of the offence alleged against him in Sessions Case No. 80 of 2005, decided by the 3rd Fast Track Court, Surat arising out of CR No. I/142/2004 of Limbayat Police Station. The appellant shall be set at liberty unless he is required to be detained in connection with any other case.

.....J.
(Abhay S. Oka)

.....J.
(Ujjal Bhuyan)

**New Delhi;
July 08, 2024**