

STATE THROUGH CENTRAL BUREAU OF INVESTIGATION, A
SPECIAL CRIME BRANCH, MUMBAI, MAHARASHTRA.

v.

SANVLO NAIK & ANR.

(Criminal Appeal Nos. 1610-1611 of 2007) B

SEPTEMBER 07, 2017

[RANJAN GOGOI AND NAVIN SINHA, JJ.]

Appeal – State’s appeal against acquittal – Accused-respondents were serving as Inspector In-charge and Police constable – Case of custodial death – Charge sheet of all accused under s.302 – Trial court acquitted all of offence under s.302, however convicted accused-respondents under s.304 Part II r/w s.34 – Acquittal of accused-respondents by High Court accepting their plea of alibi – Appeal by State against acquittal – Held: There were serious inconsistencies in the entries made in the General Diary Register of the concerned Police Station – There was overwriting in the entries with regard to the departure of the accused-respondents from the Police Station for home around the time when the death of the victim took place and several pages of the register in continuity were missing which rendered the said register wholly unacceptable document – Thus, the plea of alibi was not substantiated – It cannot be said that these facts were trivial, as found by the High Court – Having regard to the circumstances and the absence of any cogent explanation on the part of the accused-respondents and taking into account the fact that the deceased was in police custody and death had occurred in such custody, it was the accused-respondents (accused Nos.2 and 5) who, to the exclusion of any other persons, were responsible for the injuries that caused the death of the deceased – Acquittal of accused-respondents under s.304 Part II r/w s.34 IPC is not legally sustainable – As regards the sentence, the maximum punishment that is awardable in case of offence under s.304 Part II IPC is ten years – The accused respondents are Police Personnel whose duty was to act in accordance with law – They, however, had fudged the General Diary Register of the Police Station to put up their defence and had put up a false plea of alibi – In view of the evidence of P.W.5 that the memo sending the deceased

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- A *to the hospital was recorded by him after the deceased was already declared to be dead indicate that accused no.2 had prepared a false memo sending the deceased to the hospital when he was already dead – The accused respondents having been found guilty of commission of the offence under s.304 Part II r/w s.34 IPC, awarded maximum sentence awardable under the said Section –*
- B *Penal Code, 1860 – s.304 Part II r/w s.34.*

Allowing the appeals, the Court

- C **HELD: 1. The General Diary register of the concerned Police Station contained the entry with regard to the departure of the accused Nos.2 and 5 from the Police Station for home at about 1.25 a.m. A plain scrutiny of the register showed that the same was a wholly unacceptable document. Specifically, several pages were missing in continuity in which the Register ought to have been maintained. That apart, several over-writings in the serial numbers of the relevant entries in the said register, particularly,**
- D **with reference to the entry relating to the departure of the accused No.2 from the Police Station at 1.25 a.m. Also there was an entry No.7 in the General Diary of the Police Station recorded at 2.00 a.m. which recorded the memo claimed to have been prepared by accused No.2 sending the deceased to the hospital. The apparent inconsistency between the two entries in the General Diary Register i.e. entry No.6 (interpolated) and entry No.7 has been sought to be answered by accused No.2 by contending that the said memo sending the deceased to the hospital was prepared by the accused No.2 earlier i.e. before leaving the police station at 1.25 A.M. which fact is stated in his statement recorded under**
- E **Section 313 Cr.P.C. Not only Entry No. 6 of the General Diary Register contains an overwriting, Exhibit 68 does not mention the time when it was written. Neither there is any reference to the said memo in the General Diary which would have been but a natural part of the conduct of the accused No.2 who had specifically mentioned against Entry No.6 that he had left the**
- F **Police Station at 1.25 a.m. The plea of alibi for the reasons mentioned is wholly unacceptable. It cannot be said that these facts were trivial, as found by the High Court. The oral evidence of P.W.11 and P.W. 16 who had deposed that they had seen both**
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the accused respondents in a scooter going towards their respective homes has to be, naturally, understood in the context of the fact that both P.W. 11 and P.W.16 were serving Police personnel. Their versions are apparently belied by the contents of the documents. If the plea of alibi put forward by accused No.2 is not accepted, the similar plea put forward by the accused No.5 inasmuch as in his statement under Section 313 Cr.P.C. accused No.5 has himself stated that he had gone from the Police Station in a scooter along with accused No.2 and had dropped accused No.2 in his house at the first instance is also not acceptable. The plea of alibi put up by the accused No.5, therefore, necessarily has to fail. If accused No.2 and accused No.5 were present in the Police Station at the relevant point of time, incriminating circumstances stated below have to be reasonably explained by the said accused respondents. The deceased was hale and hearty at the time he was brought to the Police Station except for some minor bruises which he may have sustained in the course of the arrest; The deceased was found in the chamber/cabin of the accused No.2 in which cabin accused No.5 was also present; The deceased was apprehended by accused No.2 and accused No.5 and at all times was in custody in the Police Station of which the accused No.2 was the Officer-in-Charge. The only explanation offered was the plea of alibi which is already rejected. [Para 11] [921-F-H; 922-A-H; 923-A-B]

2. In the present case there is no eye-witness. The test, therefore, would be whether the circumstances culled out above would be sufficient to enable the Court to come to the conclusion that it is the accused respondents and nobody else who are responsible for the injuries on the deceased. Having regard to the circumstances and the absence of any cogent explanation on the part of the accused respondents and taking into account the fact that the deceased was in Police custody and death had occurred in such custody, it is the accused respondents (accused Nos.2 and 5) who, to the exclusion of any other persons, were responsible for the injuries that caused the death of the deceased. The acquittal of the accused respondents of the offence under Section 304 Part II read with Section 34 IPC cannot be legally sustained. [Para 12] [923-C-E]

A 3. As regard the adequacy of the sentence imposed on the
 accused respondents, the maximum punishment that is awardable
 in case of offence under Section 304 Part II IPC is ten years. The
 accused respondents are Police Personnel whose duty was to act
 in accordance with law. Death had occurred when the deceased
 was in police custody. The accused had fudged the General Diary
 B Register of the Police Station to put up their defence and had put
 up a false plea of alibi. In view of the evidence of P.W.5 that the
 memo sending the deceased to the hospital was recorded by him
 after the deceased was already declared to be dead would indicate
 that Accused No.2 had prepared a false memo sending the
 C deceased to the hospital when he was already dead. The accused
 respondents are convicted of the offence under Section 304 Part
 II read with Section 34 IPC and sentenced to suffer rigorous
 imprisonment for a period of ten years. [Para 13] [923-F-H; 924-
 A-B]

D *Arunachalam v. P. S. R. Sadhanantham and Anr. (1979)*
 2 SCC 297 : [1979] 3 SCR 482; *P.S.R. Sadhanantham*
v. Arunachalam and Anr. (1980) 3 SCC 141 – referred
 to.

Case Law Reference

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| E | [1979] 3 SCR 482 | referred to | Para 3 |
| | (1980) 3 SCC 141 | referred to | Para 3 |

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
 Nos. 1610-1611 of 2007.

From the Judgment and Order dated 01.08.2003 of the High Court
 of Bombay at Panaji in Crl. A. No. 3 of 2002 and Crl. A. No. 4 of 2002.

G Ranjit Kumar, S.G., Ms. Pinky Anand, A.S.G., P. K. Dey, Ms.
 Arunima Dwivedi, Ms. Saudamini Sharma, Ms. Kriti Dua, Mukesh Kumar
 Maroria, Advs. for the Appellant.

V.V.S. Rao, Sr. Adv., Aniruddha P. Mayee, Charudatta
 Mahindrakar, Avnish Oza, Chirag Jain, K. Subba Rao and Sanjay Kumar
 Visen, Advs. for the Respondents.

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The following Judgment of the Court was delivered:

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1. Seven accused were charged for the offence under Section 302 read with Section 34 of the Indian Penal Code, 1860 ("IPC" for short). All of them have been acquitted of the said charge. Accused No. 2 (S.V. Caeiro) and Accused No.5 (Sanvlo Naik), who are respondents in the present appeals, were, however, convicted for the offence punishable under Section 304 Part II read with Section 34 IPC and sentenced to suffer simple imprisonment of three years and two years respectively along with fine. Aggrieved, the convicted accused respondents filed separate appeals before the High Court of Bombay. The High Court by the impugned judgment has allowed the said appeals; set aside the conviction and sentence imposed and acquitted the accused respondents (Accused No.2 and Accused No.5). Aggrieved, the State through Central Bureau of Investigation ("CBI" for short) is in appeal before this Court.

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2. At the very outset, we would like to deal with the issues enumerated in our previous order dated 5th September, 2017 passed in the present matters. The said order reads as follows:

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" Heard in part.

At the end of the hearing today we are of the tentative view that if the respondent Accused No.2 is to be held responsible for the injuries found on the person of the deceased which, according to the report of the postmortem, was responsible for his death what should be the extent of liability of the said accused.

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The further question to be dealt with is whether the offence committed would amount to one punishable under Section 302 IPC and, if so, whether this Court would be empowered in law to pass such an order in the present appeals. Alternatively, if the conviction under Section 304 Part II IPC is to be maintained whether the sentence should be enhanced to a period of ten (10) years.

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Learned counsel for the respondent – Accused No.2 prays for time until Thursday next (i.e. 7th September, 2017). Time as prayed is granted.

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List the matter on Thursday i.e. 7th September, 2017 as part-heard."

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A 3. Shri Ranjit Kumar, learned Solicitor General of India, who
 appeared at the request of the Court, on the strength of several decided
 cases of this Court has submitted that the power of this Court under
 Article 136 of the Constitution of India under which the present appeals
 have been entertained is plenary and of wide amplitude and discretionary
 in nature. Learned Solicitor General, in particular, has referred to the
 B two decisions of this Court in the cases of Arunachalam vs P. S. R.
Sadhanantham and another¹ and P.S.R. Sadhanantham vs.
Arunachalam and another² to suggest that in an appropriate case and
 to meet the ends of justice, this Court is empowered and would be justified
 to go into the merits of an order of acquittal though the same may not be
 C under challenge so long the same raises an issue in the appeal before the
 Court. In this regard, the learned Solicitor General has pointed out that
 this Court's appellate power under Article 136 of the Constitution of
 India is far wider than an appellate Court's power under Section 386 of
 the Code of Criminal Procedure, 1973.

D 4. We have considered the matter. We have taken note of the
 fact that against the acquittal of the present accused respondents insofar
 as the offence under Section 302 IPC is concerned no appeal has been
 filed/preferred by the State before the High Court. The present are
 appeals against the acquittal of the accused respondents under Section
 304 Part II read with Section 34 IPC. The order of acquittal of the
 E accused respondent under Section 302 IPC is of the year 2002. We
 have also perused the record in-original produced before us by the learned
 Solicitor General to show the reasons that had led the present appellant
 – State (Through CBI) not to prefer any appeal against the acquittal of
 the accused respondents under Section 302 IPC. The said decision is
 F based on legal opinion tendered. Taking into account the totality of the
 facts stated above we are of the view that we should not address, in the
 present proceedings, the power of this Court to look into the correctness
 of the acquittal of the accused respondents insofar as the offence under
 Section 302 IPC is concerned.

G 5. We will, therefore, stay confined to the question of the
 correctness of the conviction of the accused respondents under Section
 304 Part II read with Section 34 IPC and adequacy of the sentence
 imposed, if the said conviction is to be upheld by the Court. These are
 the contours of the present appeals.

¹(1979) 2 SCC 297

²(1980) 3 SCC 141

6. The facts which are not in dispute may be noticed at the outset. A

It appears that on a telephonic information received in the midnight of 16th May, 1994, accused No.2 and accused No.5 (respondents herein) who were serving as Inspector In-charge and Police Constable of the Margao Town Police Station respectively had gone to apprehend the deceased who was an accused in another case, namely, Crime No.141/1994 registered by the Margao Town Police Station. P.W. 11 (Keshav Komarpant, Police Constable) along with Michael Fernandes, Home Guard who were already on patrol duty in the vicinity of the place where the deceased was informed to be present, assisted accused No.2 and Accused 5 in apprehending the deceased. There appears to have been a small scuffle in the course of the arrest of the deceased in which the deceased had suffered some superficial injuries. Thereafter, he was brought to the Police Station and an entry in the General Diary of the Police Station to the said effect i.e. of the factum of the arrest of the deceased was made/recorded at 00.20 hours on 17th May, 1994. The deceased was in a good physical condition when he was brought to the Police Station. This has been testified by P.W. 11 (Keshav Komarpant, Police Constable). P.W. 11 (Keshav Komarpant, Police Constable) and P.W. 16 (Ulhas Saluke, Head Constable) in their depositions have categorically stated that after the arrest of the deceased he was brought to the cabin of Accused No.2 where Accused No.5 was also present. P.W.17 (Abdul H.K. Khan, Head Constable) has also deposed similarly. P.W. 16 has further deposed that at about 1.30 a.m. the deceased, brought by accused Nos.2 and 5, was put in the female lockup. The evidence of P.W. 20 (Balkrishna Mogha, Head Constable), who was on SHO duty on that day is to the same effect. In his deposition, P.W. 20 has specifically stated that he saw the deceased in the cabin of the accused No.2 and at that time accused No.5 was also present. He has further deposed that both accused No.2 and accused No.5 had brought the deceased to the lockup. Thereafter it appears that there is a General Diary entry recorded at 02.00 a.m. to the effect that the deceased was required to be moved to the hospital. Apparently, the deceased, as per the doctor's certificate, was brought dead to the hospital. This was around 2.40 a.m. on 17th May, 1994. B
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7. Both Accused No.2 and Accused No.5 (respondents herein) took up the plea of alibi. According to the accused No.2 he had left the Police Station for his home/residence at about 1.25 a.m. and this fact is

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A recorded in the General Diary of the Police Station as Entry No.6. Insofar as accused No.5 is concerned, it is claimed that he had also left the Police Station at around the same time. Both accused No.2 and accused No.5 claimed that they left the Police Station in a scooter and accused No.5 after dropping accused No.2 at his home had gone to his own home.

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8. Though the prosecution examined as many as 25 witnesses, the material witnesses in the case are P.W.11 (Keshav Komarpant, Head Constable), P.W.16 (Ulhas Saluke, Head Constable), P.W.17 (Abdul H.K. Khan, Head Constable), P.W.18 (Anil Kerkar, Police Constable), P.W.19 (Nynashwar Kalangutkar (Head Constable), and P.W.20 (Balkrishna Mogha, Head Constable). The evidence of Dr. Silvano Dias Sapeco (P.W.10) who had performed the post-mortem of the deceased would also be worth mentioning, particularly, the fact that he had found as many as 14 injuries on the body of the deceased. It is the opinion of the doctor (P.W.10) that the said injuries cannot be self-inflicted and are otherwise sufficient in the ordinary course to cause death.

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9. On the basis of the proved facts, the gist of which has been stated above, the following circumstances can be culled out and taken to have been proved and established by the prosecution against the accused:

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(i) At the time of the arrest, the deceased was hale and hearty and he was brought to the Police Station in a fit condition (P.W.11);

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(ii) The deceased was brought to the Police Station by the respondents and others. He was interrogated in the room of respondent No.2 (accused No.2) and thereafter put in female lockup at about 1.30 a.m. by Accused No. 2 and 5 (P.W.11, P.W.16). There is no General Diary entry as to why he was put in female lockup.

(iii) The condition of the deceased was serious, he was sinking and taken to the hospital;

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(iv) As per doctor (P.W. 5 – Dr. Anand Sawant), the deceased was brought dead at 2.40 a.m. and the memo prepared by the Police was received by him after he had examined the deceased and found him brought dead;

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(v) The medical board conducted autopsy and found more than 14 injuries on the person of the deceased which were ante-mortem and fresh in nature;

(vi) As per the opinion of Medical Board, injuries were fatal in the ordinary course of nature, could not be self-inflicted and could be caused by baton/danda or a patta; A

(vii) The respondents took the plea of alibi and stated in their statements under Section 313 Cr. P.C. that they were not at the Police Station; B

(viii) The station diary, lockup register and arrest register were fudged to cover up the death in the police custody. The learned trial Court extensively dealt these records and concluded that they were fudged;

(ix) It is a custodial death and the respondents failed to discharge the burden of how the deceased died in their custody. C

10. The first question that has to be addressed is whether the plea of alibi set up by the accused respondents are tenable in law. The learned trial Court did not accept the same. The High Court, however, reversed the said finding and in this regard took the view that though the entries in the General Diary showing that the accused No.2 had left the Police Station at about 1.25 a.m. has been overwritten and manipulated, the same are trivial in nature and has to be considered in the light of the oral evidence tendered by P.W.11 and P.W.16 who had testified that they had seen the accused No.2 and accused No.5 going home in a scooter. D E

11. We have considered the plea of alibi raised by the accused respondents (accused Nos.2 and 5). We have perused the General Diary register of the concerned Police Station containing the entry with regard to the departure of the accused Nos.2 and 5 from the Police Station for home at about 1.25 a.m. On a plain scrutiny of the aforesaid register we find that the same is a wholly unacceptable document. Specifically, what has been found is the absence of several pages in continuity in which the Register ought to have been maintained. That apart, we find several over-writings in the serial numbers of the relevant entries in the said register, particularly, with reference to the entry relating to the departure of the accused No.2 from the Police Station at 1.25 a.m. We have also noticed that there is an entry No.7 in the General Diary of the Police Station recorded at 2.00 a.m. which records the memo claimed to have been prepared by accused No.2 sending the deceased to the hospital. The apparent inconsistency between the two F G

A entries in the General Diary Register i.e. entry No.6 (interpolated) and entry No.7 has been sought to be answered by the learned counsel for the accused No.2 by contending that the said memo sending the deceased to the hospital was prepared by the accused No.2 earlier i.e. before leaving the police station at 1.25 A.M. which fact is stated in his statement recorded under Section 313 Cr.P.C. To appreciate the said argument, B we have specifically looked into the original of the entry No.6 of the General Diary as well as the memo prepared by the accused No.2 sending the deceased to the hospital which was marked as Exhibit 68. Not only Entry No. 6 of the General Diary Register contains an overwriting, Exhibit 68 does not mention the time when it was written. Neither do we find C any reference to the said memo in the General Diary which would have been but a natural part of the conduct of the accused No.2 who had specifically mentioned against Entry No.6 that he had left the Police Station at 1.25 a.m. The plea of alibi for the reasons mentioned is wholly unacceptable. It cannot be said that the aforementioned facts are trivial, as found by the High Court. The oral evidence of P.W.11 and P.W. 16 D who had deposed that they had seen both the accused respondents in a scooter going towards their respective homes has to be, naturally, understood in the context of the fact that both P.W. 11 and P.W.16 were serving Police personnel. Their versions are apparently belied by the contents of the documents referred to above. If we are unable to accept E the plea of alibi put forward by the accused No.2, we do not see how we can sustain the similar plea put forward by the accused No.5 inasmuch as in his statement under Section 313 Cr.P.C. accused No.5 has himself stated that he had gone from the Police Station in a scooter along with accused No.2 and had dropped accused No.2 in his house at the first instance. The plea of alibi put up by the accused No.5, therefore, F necessarily has to fail. If accused No.2 and accused No.5 were present in the Police Station at the relevant point of time, incriminating circumstances stated below have to be reasonably explained by the said accused respondents:

G (i) The deceased was hale and hearty at the time he was brought to the Police Station except for some minor bruises which he may have sustained in the course of the arrest;

(ii) The deceased was found in the chamber/cabin of the accused No.2 in which cabin accused No.5 was also present;

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(iii) Accused No.2 and accused No.5 took the deceased to the female lockup. Why the deceased was taken to the female lockup when there was only four persons in the male lockup?

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(iv) The deceased was apprehended by accused No.2 and accused No.5 and at all times was in custody in the Police Station of which the accused No.2 was the Officer-in-Charge.

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The only explanation offered was the plea of alibi which we have already rejected.

12. True it is that in the present case there is no eye-witness. The test, therefore, would be whether the circumstances culled out above would be sufficient to enable the Court to come to the conclusion that it is the accused respondents and nobody else who are responsible for the injuries on the deceased. Having regard to the circumstances and the absence of any cogent explanation on the part of the accused respondents and taking into account the fact that the deceased was in Police custody and death had occurred in such custody, we are of the view that it is the accused respondents (accused Nos.2 and 5) who, to the exclusion of any other persons, were responsible for the injuries that caused the death of the deceased Abdul Gaffar Khan. We, therefore, take the view that the acquittal of the accused respondents of the offence under Section 304 Part II read with Section 34 IPC cannot be legally sustained.

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13. This will bring the Court to a consideration of the adequacy of the sentence imposed on the accused respondents. The maximum punishment that is awardable in case of offence under Section 304 Part II IPC is ten years. The accused respondents are Police Personnel whose duty was to act in accordance with law. Death had occurred when the deceased was in police custody. The accused had fudged the General Diary Register of the Police Station to put up their defence and had put up a false plea of alibi. In view of the evidence of P.W.5 that the memo sending the deceased to the hospital was recorded by him after the deceased was already declared to be dead would indicate that Accused No.2 had prepared a false memo sending the deceased to the hospital when he was already dead. Taking into account all the above, it is our considered view that the accused respondents having been found guilty of commission of the offence under Section 304 Part II read with Section 34 IPC should suffer the maximum sentence awardable under the said Section. We, therefore, set aside the order of the High Court; convict

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- A the accused respondents of the offence under Section 304 Part II read with Section 34 IPC and sentence them to suffer rigorous imprisonment for a period of ten years. The accused respondents shall forthwith surrender and serve out the sentence failing which they will be taken into custody for being dealt with in accordance with law.
- B 14. The appeals consequently are allowed in the above terms.

Devika Gujral

Appeals allowed.