

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.248 OF 2012

Shaikh Jabbar s/o. Shaikh Sattar,
Age: 30 Years, Occu.
R/o. Mohammadiya Colony, Beed,
Tq. and Dist. Beed

APPELLANT
[Accused]

VERSUS

The State of Maharashtra,
Through P.S.O.
Police Station Peth, Beed,
Taluka & District Beed.
[Copy to be served on
Public Prosecutor / Government
Pleader High Court at Aurangabad].

RESPONDENT

...
Mr. R.G.Hange, Advocate for the Appellant
Mr. M.M.Nerlikar, APP for the Respondent – State
...

**CORAM : S.S. SHINDE &
A.I.S.CHEEMA, JJ.**

**RESERVED ON : 10.06.2015
PRONOUNCED ON: 22.06.2015**

JUDGMENT [Per S.S.Shinde, J.]:

1] This Criminal Appeal is filed by the appellant [original accused], challenging the judgment and order dated 07.05.2011 passed by the Additional Sessions Judge, Beed in Sessions Case No. 1/2011, thereby convicting the appellant for the offence punishable under Section 302 of

I.P.Code and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.1,000/- in default to suffer one month rigorous imprisonment.

The prosecution case, in brief, is as under:

2] Mr. Pathan Rahimkhan Sherkhan, resident of Mominpura, Beed, lodged a report to the P.S.O. of Peth Beed Police Station orally that, he is having business of brick kiln. There is one small well near brick kiln. He has gone near well and saw dead body of Sk. Raju son of his labourer Sk. Jabbar Sk. Sattar, floating in well water. Accordingly, his report was reduced into writing and thereupon case of accidental death bearing No. 23/2010, under Section 174 of Criminal Procedure Code was registered by P.S.O. of Peth Beed Police Station.

3] Thereupon PSI Gir along with his staff and informant Pathan Rahimkhan went on spot. Police with the help of other persons, who were gathered there, withdrawn dead body out of well. It was seen that, both hand and leg of deceased were tied by *Sutali* [thin jut rope]. PSI Gir in presence of two panchas drew inquest panchanama on

16.09.2010, in between 8.15 to 9.00 p.m. Thereupon he has also drawn panchanama of place of incident during the period from 9.00 a.m. to 9.45 a.m. On next day, the dead body was sent for post mortem examination to Civil Hospital, Beed. Medical Officer Dr. Pravin Deshmukh conducted post mortem examination from 11.30 a.m. to 12.30 p.m. and issued provisional death certificate expressing his opinion as probable cause of death was 'due to drowning'. White shirt, green pant and pieces of thin thread rope i.e. *Sutali*, by which hand and legs of deceased were tied, came to be seized under panchanama drawn at about 12.00 to 12.45 p.m. Thereafter dead body was handed over to relatives of deceased.

4] Thereafter, the appellant i.e. original accused himself lodged First Information Report on 16.09.2010 at about 5.30 p.m. According to contents of said FIR, appellant is resident of Mahammadiya Colony, Beed, where he along with his wife Shahedabee and two sons Raju and Sk. Altaf are residing together. His parents are residing separately at Mohammadiya Colony, Beed. He is having three sister-in-law [his wife's sister] namely Sk. Banu, Sk.

Shama and Sk. Samina, and they all are married. His father in law and mother in law died leaving one house consist of three rooms totally admeasuring 30 x 30 at Mohammadiya Colony. They have no son, therefore, their four daughters are the legal heirs and owners of said house. He himself, along with his wife and family are residing in one room whereas his brother in law Sk. Badal has acquired two share of Sk. Samina and Sk. Banu by paying Rs.5000/- to each. Accordingly, Sk. Badal along with his wife and family are in occupation of two rooms and are staying in said two rooms.

5] It was further alleged that, Sk. Badal was persistently asking him to give share of his wife to him. However, he has declined to give share of his wife to Sk. Badal. Said Sk. Badal was raising quarrel with him by making false allegations that, he is having illicit sexual relation with Shama w/o. Shaikh Badal.

6] According to his further report, on 16.09.2010 on Tuesday at about 5.00 to 5.30 p.m., his son Shaikh Raju asked him that, he want to eat Jamun [Gulab Jamun]. Therefore, he and Raju went to Hotel of Khalibhai at

Mominpura where he has taken Gulab Jamun and after eating Gulab Jamun Raju parted from him so as to go at home. According to his further report later on at about 9.00 to 9.30 p.m., he had been to his home. Raju was not at home. He made an enquiry with his wife. His wife replied that, Raju never came to home. They were under impression that as usual Raju might have gone to sleep at the house of parents of the appellant.

7] On 15.09.2010, at morning at about 7.00 to 7.30 a.m., he woke up from sleep and asked about Raju to his wife. His wife told that, Raju has not yet come to home. Therefore, he went to Mominpura, Beed, consumed tea in the Hotel of Khalilbhai, and while returning back, made an enquiry of Raju with his parent. His mother replied that, Raju did not come to them at that night. Thereafter, while he was making search, one boy namely Shaikh Mustak s/o. Sh. Asef told him that, on that night, Raju slept at his house at Mohammadiya Colony, and on the next day morning he had tea, and left their house. Thereafter, appellant went to Police Station and lodged missing complaint at about 11.30 a.m.

8] According to his further report on 16.09.2010 at about 9.00 to 9.30 p.m., while he was at his house Sk. Majar Sk. Shigu son of maternal aunt informed on telephone that, dead body of his son Raju found floating in a well by west side of brick kiln of Rahim Pathan at Bindusara river bed towards west of Mominpura. Thereafter, he immediately rushed to that place. The police personnel were already present there and saw dead body of his son Raju. His both legs and hands were tied by *Sutali*, lips and lobes were found abrasion due to eaten by fish. Dead body was given by police in his custody and after cremation, he had been to Police Station for lodging complaint.

9] It is further stated that, since appellant refused to give share of his wife from the house to Shri Shaikh Badal, he is having suspicion about Sk. Badal Sk. Maheboob in committing murder of his son Sk. Raju by tying his hands and legs by *Sutali* and throwing him in a well. On the basis of his report, crime was registered bearing No.111/2010 under Section 302 r.w. 201 of IP Code against Shaikh Badal Shaikh Maheboob.

10] Shaikh Badal Shaikh Maheboob was arrested on very day. Later on, Police recorded statement of witnesses and during investigation, it was transpired that, on 17.09.2010, the complainant Sk. Jabbar Sk. Sattar i.e. present appellant has committed murder of his son, and therefore, he was arrested on 17.09.2010 at about 9.00 p.m.

11] The concerned Investigation Officer carried out the investigation. The disclosure statement of the accused was recorded. The seized articles were sent to C.A. office at Aurangabad and after due investigation, charge sheet was submitted by the Investigation Officer. The learned Judicial Magistrate First Class committed the case to the Sessions Court, since it was exclusively triable by the Sessions Court. The trial Court framed the charge. In order to prove its case, prosecution examined as many as 18 witnesses. PW-1 Imtiyazkhan Pathan [Exhibit-16] is a panch witness of inquest panchanama as well as panchanama of place of incident. He has proved inquest panchanama Exh. 17 and panchanama Exh.18 of place of incident. PW-2 Md. Rais s/o. Md. Hanif at Exh. 19 is also panch of seizure of one

mobile hand set of Nokia company having sim card therein [9922997202] and one another mobile of china made having two sim card no. 9822556014, 9822851514 from accused. He has proved seizure panchanama at Exh.20. PW-3 Sk. Miya Sk. Gaibu at Exh. 21 is also a panch witness of seizure of cloth of dead body and pieces of *Sutali* by which leg and hands were tied. He has proved said seizure panchnama at Exh.22. Evidence of PW-4 Jammeer Khan Maheboobkhan Pathan is at Exh.23, who has alleged to have seen the accused near well at the relevant time on 14.09.2010 at about 7.30 to 7.45 p.m. where dead body of Shaikh Raju was found. PW-5 Momin Khaliloddin Shamshoddin at Exh.24 is owner of Hotel Shalimar where the accused and his son Raju went to eat Gulab Jamun. PW-6 Siraj Sk. Fufran at Exh.25 is also a panch witness of panchnama at Exh. 22 of seizure of clothes of dead body and threads of *Sutali*, who has also proved said panchanama at Exh.22. PW-7 Sk. Hakim Qureshi at Exh.26 is a witness on the point of, accused and his son Raju were last seen together at the brick kiln near said well on 14.09.2010. PW-8 Dr.Pravin Deshmukh at Exh.27 is a Medical Officer, who has conducted post mortem examination, and has also proved post mortem

examination report at Exh.28. PW-9 Sk. Rafik Sk. Mohammad at Exh. 30 is a witness in whose presence two Video Audio Cassettes were taken by Police from the person, who had recorded video audio shooting. He proved said seizure panchanama at Exh.31. PW-10 Maharudra Gheware at Exh.32 is a witness having his own Amol Photo Studio and who has taken video and Audio shooting of the disclosure statement of the accused and the place which was shown by accused. PW-11 Md. Aspiyan Anisoddin at Exh.23 is the owner of 'Rehana Kirana' grocery shop from whom the accused purchased and procured *Sutali's* which was alleged used to tie both legs and hands of deceased Raju. Evidence of PW-12 Sk. Bilal s/o. Sk. Sardar is at Exh. 34. The accused is his maternal uncle. His evidence is on the point of missing of Raju since from 14.09.2010, and he himself and Osman went in well and withdrawn the dead body out of well. Evidence of PW-13 Naseer Sher Khan Pathan is at Exh.36 is also on the point of accused and Raju were lastly seen together, and accused had played the playing card along with this witness and others. Deposition of PW-14 Rahim Khan Sher Khan Pathan is at Exh.39, who has firstly seen the dead body of Raju in his well and gave information at Exh. 40 to the Police. Evidence of PW-15 Sk.

Samina w/o. Sk. Mansoor is at Exh. 41, who is sister of the wife of accused, on the point that, there were illicit relations between accused and Sk. Shama w/o. Sk. Badal, and how the deceased boy Raju was obstacle to them. Her evidence is on the point of motive. Deposition of PW-16 Sk. Shama Sk. Badal is at Exh. 42 , who is also sister of wife of accused with whom the accused was having sexual illicit relation. Deposition of PW-17 Walmik Avahale Police Inspector, Peth Beed Police Station is at Exh. 43, who arrested accused, and conducted investigation. As per prosecution case, he has proved the memorandum statement of accused at Exh. 44 and alleged to have discovery shop, where *Sutali* was purchased by accused, at the instance of accused. Exh. 46 is copy of forwarding letter under which the samples of *Sutali* and thread of *Sutali* by which hands and legs were tied of dead body sent to C.A. office for examination and report. Investigation Officer has produced on record the report of C.A. office at Exh. 46/A and lastly PW-18 PSI Avinash Gir at Exh.47 is the Officer, who has drawn panchanama of place of incident, inquest panchanama and also who has recorded FIR of accused. According to prosecution case, he has proved said FIR at Exh. 48.

12] After full fledged trial, the appellant – accused Shaikh Jabbar Shaikh Sattar was convicted for the offence punishable under Section 302 of IPC and sentenced to suffer life imprisonment and to pay a fine of Rs.1,000/- in default of payment of fine to suffer 1 month rigorous imprisonment. However, he was acquitted of the offence punishable under Section 201 of I.P. Code. Since the accused was in jail from 17.09.2010 till the pronouncement of the judgment, the set-off is ordered by the trial Court.

13] The learned counsel appearing for the appellant invited our attention to the notes of evidence and submits that, the entire prosecution case rests upon the circumstantial evidence. The prosecution has not established the chain of circumstances, and therefore, the benefit of doubt ought to have been given to the appellant. It is submitted that, the alleged recovery of *Sutali* at the instance of the appellant is not in accordance with the relevant provision, and therefore, it cannot be believed.

14] On the other hand, the learned APP appearing for the respondent – State submitted that, the trial Court,

after proper appreciation of the evidence, has reached to the conclusion to convict the appellant, therefore, this Court may not interfere in the impugned judgment and order.

15] We have given careful consideration to the rival submissions, with the able assistance of the learned counsel appearing for the appellant and the learned APP appearing for the respondent – State, we have carefully perused the entire evidence so as to re-appreciate the same. It appears that, there is no direct evidence. The prosecution case rests upon circumstantial evidence. So far spot panchanama and inquest panchanama are concerned, the accused has not contested the same. As per the prosecution case and as per the post mortem examination, the death was due to drowning. The concerned Medical Officer has proved the contents of the post mortem at Exh. 28. The accused has also not seriously disputed that, the death was caused of his son Raju due to drowning. It further appears that, both the legs and hand of the deceased were tied by rope before he was thrown in a well. So far motive is concerned, it is alleged that, the

appellant had illicit relation with PW-16 Sk. Shama Sk. Badal since last 2/3 years of the alleged incident. The deceased Raju used to tell about the said illicit relationship of the appellant with Shaikh Shama. The appellant got annoyed due to disclosing such illicit relationship with his wife by the son Shaikh Raju [deceased], and therefore, as per the prosecution case, it was the appellant, who wanted to remove an obstacle of Raju, and therefore, he killed said Raju.

16] As already observed, the entire case rests upon circumstantial evidence, and therefore, each of the circumstance in the chain of circumstances has to be established by the prosecution, and there should be a complete chain of circumstance, which would lead to only hypothesis that, the Raju was killed by the appellant accused alone and none else. So far alleged motive is concerned, the prosecution had placed reliance on the evidence of PW-15 and PW-16. Admittedly, except oral evidence of the prosecution witnesses i.e. PW-15 and PW-16, the prosecution has not placed any other evidence on record, which would suggest illicit relation between the

appellant and Shaikh Shama. The another important circumstance relied upon by the prosecution is, the deceased was last seen in the company of the appellant – accused on 14th September, 2010 in between 6 p.m. to 7.45 p.m. by various prosecution witnesses. In order to prove said circumstances of last seen together, the prosecution relied upon the evidence of PW-16 Shaikh Shama Shaikh Badal, PW-7 Shaikh Hakim Qureshi, PW-13 Naseer Sherkhan Pathan and PW-4 Jammeer. In order to appreciate the aforementioned two main circumstances i.e. motive and the last seen together, the evidence of aforementioned witnesses is required to be discussed.

PW-15, Shaikh Samina w/o. Shaikh Mansoor in her examination in chief before the Court stated that, she is having three sister namely Shaikh Shama, Sk. Shaheda Bee and Sk. Banu. They all are married. They have no brother. Her father's house was at Mohemadiya Colony and presently they are residing in the said house. The father is not alive. Shama is residing with the mother in the said house. The other sister Shaheda Bee i.e. wife of accused, is also residing neighbouring room in her father's house. Prior

to 14th September, 2010, the accused and his son Shaikh Raju came to her house. Later on her sister Shama also came to her house. They sat for sometime, took tea and returned back. Meanwhile, when they were taking tea, Raju had been to her house, he saw all of them and returned back to his house. When he called his mother, and both of them came to her house. Thereafter, quarrel started between the accused and his wife Shahida. This witness has further stated that, they have heard about extra marital relation between accused and Shama and that was the reason for quarrel between them. About such illicit relationship, they heard from last 2/3 years. The accused and his wife and Raju then returned to their house. This witness further stated that, on next day, they came to know Raju was missing and thereafter his dead body was found in a well.

If the statement of PW-15 in examination in chief is perused carefully, according to this witness, prior to 2 days of 14th September, 2010, the accused, his wife and Raju [deceased] came to the house and on next day, they came to know Raju was missing and thereafter his dead

body was found in a well. In fact, as per the prosecution case, Raju was seen in the company of the appellant – accused by PW-16 Shaikh Shama Shaikh Badal, PW-7 Shaikh Hakim Qureshi, PW-13 Naseer Sherkhan Pathan and PW-4 Jammeer on 14.09.2010, in between 6.00 to 7.45 p.m. Therefore, the evidence of PW-15 suffers from the credibility inasmuch as even according to the prosecution case, Raju was alive and was seen in the company of the accused on 14th September, 2010, in between 6 p.m. to 7.45 p.m. If Raju and wife of the accused visited the house of PW-15, two days prior to 14th September, 2010 and if according to this witness, Raju was missing on next day, then, it would be either on 12th or 13th of September, 2010, and said version of this witness runs contrary to the prosecution case, since Raju was seen alive in the company of the accused till 7.45 p.m. on 14th September, 2010, by the prosecution witnesses. So far illicit relationship between accused and Shaikh Shama is concerned, evidence of the PW-15 is hearsay and it is not safe to believe on her version.

17] In her cross examination, PW-15 admitted that,

there are three rooms in the house of her father. Out of those three rooms, two are occupied by Shahaida and Shama and third room is sold by her elder sister Banu and Badal. She has also admitted in her evidence that, parents of the accused are residing separately. They are residing beyond their house. Deceased Raju was a school going boy. Raju was staying with his parent on that day. Raju used to go to sleep at his grand father's house at night. She further stated, she has stated before the Police that, accused and Shama were taking tea so also Rajiv went back and called his mother and quarrel took place at her house. Thereafter, they returned to their house. There was extra marital relations between them since last 2/3 years. However, she cannot assign any reason why it does not appear in her statement. She further stated that, accused, her sister Shama and she herself never resided together in the said house. She has not personally seen the extra marital relations between accused and Shama. At this juncture, it would be necessary to refer the statement of Walmik Manikrao Avhale in his examination in cross. He was working as P.I. at the relevant time with the Peth Beed Police Station. In his cross examination, he stated that, PW-15 Shaikh Samina has not stated before him that, her

sister Shama came after Jabbar and at 9.00 p.m., they were taking tea, that time Raju went back, called his mother and quarrel took place at their house.

18] Therefore, if the evidence of PW-15 is considered in its entirety, there are material improvements. She had categorically admitted in her cross examination that, her evidence about illicit relation between Shama and accused is hearsay and she has not personally seen the extra marital relations.

19] PW-16 Shaikh Shama w/o. Shaikh Badal, in her evidence stated that, she is having six sons. She is having three sisters, Sk.Banu, Sk. Samina and Shaheda. All sisters are married. Her parents are no more. Her father was having house of three rooms at Mahamodiya Colony, Beed and she is residing in two rooms along with her family, and Shahida along with her family is residing in third room. She further stated that, she had extra marital relations with accused since last four years and on that count, there were quarrels in between wife of the accused and accused. Accused used to beat and abuse his son Sk.

Raju, since Sk. Raju had seen relations of the accused and herself. She further stated in her examination in chief that, on that day i.e. on 14th September, 2010, Raju had gone to play, and returned back at about 6.00 to 6.30 p.m. at his house. At that time, he had taken dinner plate and his mother went to bring ration. Thereafter, accused took Raju on his motor cycle and went. On next day morning when this witness was working, accused asked his wife as to where is Rajeev. She told that Rajeev might have gone at her mother's house. In her cross examination, she admitted that, parents of accused are residing separately. She further stated that, Rajeev used to stay at night at the house of the parent of accused. She further admitted in her evidence that, Raju was learning in 2nd Standard and his school time was 8.30 a.m. to 11.00 to 12.00 noon. She further stated in her cross examination that, police recorded her statement on next day after death of Rajeev. She further stated that, she stated to the police that, accused used to beat Rajeev as he was telling our relations to his mother. She also stated to the police that, along with them daughter of Sameena was there. She stated to the police that, Rajeev came to house after playing, taken dinner plate, and his mother went to bring ration, and

accused took Rajeev on his motor cycle and went away. She has not stated to the police that, she is working as a Labourer. She cannot assign reason why above referred earlier portion does not appear in her statement and why police written his work as labourer. She further admitted that, previously there was quarrel on account of house property in between her family and family of accused. PW-17 Investigation Officer, in his evidence stated that, PW-16 Shaikh Shama had not stated before him that, accused used to beat Raju as he was telling their relation to his mother.

PW-16 had admitted during her cross examination that, previously there was quarrel on account of house property in between her family and family of the accused. Therefore, in absence of corroboration to her version that, she has extra marital relations with the accused, it is not safe to believe on her evidence as it is apparent that, there are certain improvement in her deposition before the Court. She had stated in her evidence that, she saw Raju came back after playing in between 6.00 to 6.30 p.m. at his house, and took dinner

and left with the accused. If the evidence of PW-11 is considered, he has also stated in his evidence that, during that period accused came to his shop for purchasing '*Sutali*'. Therefore, there is no consistency about timing showing exact whereabouts of the deceased at the relevant time.

20] The prosecution did examine PW-4 Jameer Khan Maheboobkhan Pathan to prove that, the deceased was lastly seen alive in the company of the accused till 7.45 p.m. on 14th September, 2010. PW-4 in his examination in chief stated that, he know accused. On 14.09.2010 at about 7.30 to 7.45 p.m., he had seen the accused near brick kiln of Rahim Pathan. The brick kiln of Rahim Pathan is near about 20 to 25 feet away from their brick kiln. He heard sound of something lying in water of well, which is near about 20 feet away from brick kiln. On hearing sound, he went towards well. Accused was standing near by well. He asked accused as to what type of sound it was, he replied that, one stone fell in the well due to a push of his leg. Then, accused and PW-4 returned talking with each other towards their brick kiln. He further stated that, on

next day, number of persons gathered near well. Then, he also went near well. Meanwhile Police also came. The dead body of one boy was taken out of well by Police. His both legs and hands were tied by thin rope i.e. *Sutali*. Then he came to know that, dead body is of Raju, son of accused.

If the evidence of this witness is considered in its entirety, he had seen deceased in the company of the accused in between 7.30 to 7.45 p.m. The prosecution has not brought on record that, there was enough light so as to rule out the possibility of mistaken identify. According to this witness, he saw the accused near the brick kiln of Rahim Pathan, which is near about 20-25 feet away from their brick kiln. However, nowhere he stated that, he saw deceased Raju with the accused. As per the prosecution case, the deceased was seen lastly in the company of the accused on 14th September, 2010, and thereafter, dead body was recovered on 16th September, 2010. However, according to PW-4, he had seen the accused on 14th September, 2010, at about 7.30 to 7.45 p.m. and on next day, number of persons gathered near well and dead body of one boy was taken out from the well on 15th September,

2010. Said version of the PW-4 is not consistent with the prosecution case that, the dead body was found and taken out from the well on 16th September, 2010.

During the cross examination of PW-4, he admitted that, he does not remember exact day of withdrawing the dead body from well but it was next day of his meeting with accused. Though this witness has stated in his cross examination that, he stated to the police that, accused was seen by him at 7.30 to 7.45 p.m., and he had seen the accused near brick kiln of Rahim Pathan, and said brick kiln is 20 feet away from their brick kiln, and after hearing sound, he went towards well and accused stated that, a stone fell in the well. He could not assign any reason as to why all these details were not written in his statement. Again in this respect, it would be relevant to see the evidence of PW-17. PW-17 in his cross examination stated that, PW-4 Jameer has not specifically stated before him that, business of selling bricks is looked after by him as well as his father-in-law. He had seen accused at 7.30 to 7.45 p.m. near brick kiln of Rahim Pathan, which is 20 feet away from their brick kiln. After hearing sound, he went

towards well. On his query, accused replied that, a stone fell in the well due to a push of his leg.

Therefore, if the evidence of PW-4 is considered in its entirety, no reliance can be placed on his evidence to accept the prosecution case that, the deceased Raju was seen in the company of the accused on 14th September, 2010 in between 7.30 to 7.45 p.m.

21] The prosecution further examined PW-7 so as to prove the circumstance that, deceased Raju was last seen in the company of the accused on 14th September, 2010, in between 6.30 to 6.45 p.m. PW-7 in his evidence stated that, he know accused. On 14.09.2010, he was on his brick kiln at about 6.30 to 6.45 p.m. At that time, he saw accused along with his son Raju, were going towards brick kiln of one wahab. There is a well near brick kiln of Rahim Pathan. At the relevant time, he saw 5-6 persons were playing cards near brick kiln. They were playing cards on open space in between two brick kilns. On next day, he came to know that, Raju died by drowning in a well. If the evidence of this witness is carefully perused, he saw

deceased Raju in the company of accused on 14th September, 2010, in between 6.30 to 6.45 p.m. However, he further stated that, on next day i.e. on 15th September 2010, he came to know that, Raju died by drowning in a well. The version of PW-7 that, on next day i.e. on 15th September, 2010, he came to know that, Raju died due to drowning, is inconsistent with the prosecution story inasmuch as, as per prosecution case, the dead body of Raju was found in a well on 16th September, 2010. In his cross examination, he stated that, he stated before the police that, 5-6 persons were playing cards near the brick kiln of Rahim Khan. However, he cannot assign reasons why said fact has not written specifically by police in his statement. If the evidence of PW-17 Investigation Officer is perused, PW-17 stated that, PW-7 Hakeem Qureshi never stated specifically before him that, adjoining brick kiln was of Wahab, that he was at his brick kiln on 14.09.2010 at about 6.30 to 6.45 p.m., and saw the accused from that place, and 5-6 persons were playing cards near the brick kiln of Raheem Khan. Therefore, it appears that, PW-7 has improved his version before the Court and the said improvement is material. Therefore, the evidence of PW-7 cannot be believed.

22] The prosecution further examined PW-13 Naser Sherkhan Pathan so as to prove that, deceased Raju was seen in the company of the accused on 14th September, 2010 in between 6.00 to 6.30 p.m. In his examination in chief, he stated that, on 14th September, 2010, near about 4-5 months back, on Monday at about 6.00 to 6.30 p.m., he himself and 3-4 persons were playing cards. At that time accused along with his son had been to them. At that time, they were playing cards near brick kiln of his brother. Accused was in drunken condition. When he asked why he has brought his son, he replied that, his son insisted to take with him and he was crying, therefore, he brought him. He has also participated and played cards with them. He lost Rs.50/- to Rs.60/- Hakimbai came at the said place at 6.45 p.m. Then they stopped playing. They all went away and accused with his son stayed there. However, in his cross examination, he stated that, Hakimbai had come at about 6.45 p.m. Accused stayed there along with his son. However, he cannot assign any reason why said version is not appearing in his statement. He further stated in his cross examination that, it is not true to say that, on 14th day of 2010 accused along with his son had been to them, he played the cards and lost Rs.50/- to Rs.60/-. Therefore, so

far playing cards by the accused with this witness and other 3-4 persons is concerned, his evidence in examination in chief that, the accused has played the cards and lost Rs. 50/- to Rs.60/- is denied by him in examination in cross.

PW-17 in his cross examination stated that, PW-13 Naseer Pathan has not stated specifically before him that, they were playing cards near the side of brick kiln of Rahim, accused was under drunken condition and Hakimbhai came about 6.45 p.m., and accused stayed back there along with his son. Therefore, improvement by PW-13 before the Court in his statement that, they were playing cards near the side of brick kiln of Rahim and the accused was under drunken condition and then Hakimbhai came at about 6.45 p.m. and accused stayed back there along with his son, are material improvements, and therefore, his evidence cannot be believed so as to accept the prosecution case that, deceased Raju was last seen in the company of the accused on 14th September, 2010 in between 6.00 to 6.30 p.m. If the evidence of PW-16 and PW-13 is considered and compared, so far presence of the accused and deceased is concerned, PW-16 in her evidence

stated that, deceased Raju after playing, came to his house in between 6.00 to 6.30 p.m. and then he had dinner. However, if the evidence of PW-13 is perused carefully, he stated that, he had seen deceased Raju in the company of the accused in between 6.00 to 6.30 p.m. near brick kiln of his brother. Therefore, there are two different version stated by the PW-16 and PW-13 so far place of the presence of the accused and Raju in between 6.00 to 6.30 p.m. on 14.09.2010. Said two different versions go to the root of the case and makes it unbelievable that, PW-13 really saw deceased with accused on 14th September 2010, in between 6.00 to 6.30 p.m.

23] PW-11 was examined by the prosecution to prove that, on 14.09.2010 at about 6.00 to 6.15 p.m. accused had been to his shop for purchasing *Sutali* i.e. thin rope. In his evidence, he stated that, accused came in his shop on 14th September, 2010 at about 6.00 to 6.15 p.m. for purchasing *Sutali*, and accordingly, he purchased the *Sutali* on that day. In his cross examination, he stated that, he narrated before the Police that, the accused had been to his shop at about 6.00 to 6.15 p.m. on 14th September,

2010, and purchased four thread, however, said portion is not written in his police statement.

PW-17 in his evidence stated that, PW-11 Mohammad Anisoddin never stated before him that, accused had been to his shop at about 6 to 6.15 p.m. and purchased four threads. However, PW-11 has stated in his statement that, accused has come to his shop at 7.00 p.m. It appears that, the Investigation Officer recorded the memorandum of statement of accused, and also done video recording of his disclosure of shop from which Sutali was purchased. However, upon considering evidence of PW-11 and also alleged memorandum statement given by the accused, in the light of relevant provisions of the Evidence Act, we are not prepared to believe alleged recovery – discovery by the police at the instance of the accused.

24] In the light of the discussion in the foregoing paragraphs, if the evidence of PW-4, PW-7, PW-11, PW-13 and PW-16 is considered in its entirety, and if said version of the said witnesses compared with each other, in the light of the evidence of PW-17 in his cross examination, it leads

to conclusion that, the prosecution has utterly failed to establish vital circumstance that, the deceased Raju was last seen in the company of the accused in between 6.00 p.m. to 7.45 p.m. and thereafter he was never seen. Sk. Mustak s/o. Sk. Ashef, who told the accused that, on the night of 14th September, 2010, Raju [deceased] slept at his house in Mohemmadiya Colony, and next day morning after having cup of tea left their house, ought to have been examined by the prosecution, who could have thrown light on entire prosecution case.

Where the prosecution case entirely rests upon the circumstantial evidence, each circumstance in the chain of circumstance is required to be firmly established by the prosecution. However, the prosecution has not convincingly and by leading cogent evidence has established the vital circumstance that, the deceased Raju was last seen in the company of the accused before his death. If the evidence of the Medical Officer i.e. PW-8 Dr. Pravin Shankarrao Deshmukh, who was examined as Medical Officer, Civil Hospital, Beed, at the relevant time is carefully perused, in his cross examination, he stated that,

in column no. 21 against contents in stomach initially empty was struck out. The stomach was not empty but was having small amount of food. He further stated that, exact time of death can be gathered on the basis of food found in stomach. He deposed that, he has not noted in P.M. notes the exact time of death.

25] Therefore, the cross examination of PW-8 would make it abundantly clear that, it was possible for him to gather and mention exact time of death on the basis of food found in stomach. However, he has not noted time of death in P.M. notes. Since the prosecution case rests upon the circumstantial evidence, and in particular the deceased was last seen in the company of the accused on 14th September, 2010, in between 6.00 to 7.45 p.m., it was incumbent upon the Medical Officer to try to estimate time of death so as to find out correctness of the version of the prosecution witness on the point of the last seen together.

26] In the light of the discussion in the foregoing paragraphs, we are of the opinion that, the appellant is entitled for benefit of doubt, the findings recorded by the

trial Court, and conviction ordered cannot sustain. Accordingly, the impugned Judgment and Order is set aside. The Appeal is allowed. The appellant be released forthwith unless required in any other case. Fine amount, if any, be refunded to the accused. Appeal stands disposed of accordingly.

Sd/-

[A.I.S.CHEEMA, J.]

Sd/-

[S.S. SHINDE, J.]

...
DDC