

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

Criminal Application No. 6265 of 2014

The State of Maharashtra,
Through P.I., Tofkhana Police Station,
Taluka & District : Ahmednagar.

.. Applicant
(Original complainant)

versus

Devendra @ Guddu Chandrakant Mahamuni,
Age : 30 years,
Occupation : Private Service,
R/o. Pipeline Road, Samarthnagar,
Behind Sagar Hotel, Shriram Chowk,
Ahmednagar.

.. Respondent
(Original accused)

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*Mr. S.G. Nandedkar, Additional Public Prosecutor,
for the applicant - State.*

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**CORAM : S.S. SHINDE &
A.M. BADAR, JJ.**

DATE : 24TH FEBRUARY 2015

COURT'S ORDER (Per A.M. Badar, J.) :

1. By this application, the State is seeking leave to challenge the judgment and order dated 20-8-2014, passed by the learned Additional Sessions Judge, Ahmednagar, in Sessions Case No. 236/2013, thereby acquitting respondent / accused of the offence punishable under Section 302 of Indian Penal Code.

2. Heard the learned Additional Public Prosecutor appearing for the State. He vehemently argued that the prosecution has proved motive for commission of crime by respondent / accused through evidence of PW 1 Abhijit Suresh Wagh, PW 5 Uma Suresh Wagh and PW 9 Smt. Meena Nikhil Wagh. The deceased had extended hand loan of Rs. 2.5 Lacs to the accused and the accused was refusing to repay the same. In order to avoid liability of payment of hand loan, the accused had committed crime in question. The learned Additional Public Prosecutor further argued that through evidence of PW 9 Meena and PW 1 Abhijit, coupled with the evidence regarding call detail records coming on record through the evidence of PW 16 Dattaram Shantaram Angre, the prosecution has proved that the deceased and the accused were lastly seen together and thereafter the deceased was found dead. As such, according to the prosecution, in this case, based on circumstantial evidence, guilt of the accused was proved by the prosecution and, therefore, the State is entitled to leave as prayed.

3. With the assistance of the learned Additional Public Prosecutor, we have gone through the entire record and proceedings, including deposition of witnesses as well as documentary evidence led by the prosecution.

4. We may note the facts leading to the prosecution of the respondent / accused.

Nikhil @ Banti Suresh Wagh (since deceased) was resident of

Ahmednagar and respondent / accused Devendra @ Guddu Chandrakant Mahamuni was his friend. Deceased Nikhil @ Banti was residing with his second wife PW 9 Meena. Deceased Nikhil @ Banti had given an amount of Rs. 2.5 Lacs to accused Devendra @ Guddu as a hand loan and he was insisting accused Devendra @ Guddu to refund that amount. On 25-4-2013, deceased Nikhil @ Banti contacted accused telephonically for payment of this amount and the accused called him for taking payment thereof. For getting refund of the hand loan, according to the prosecution, Nikhil @ Banti left his home at about 12.00 Noon and went to meet the accused. He was throughout in the company of respondent / accused. PW 9 Meena was contacting him telephonically for getting updates. Lastly, deceased Nikhil @ Banti telephonically informed PW 9 Meena that he is reaching the house and she should wait for him at the gate of the apartment. However, Nikhil @ Banti did not return and therefore, perturbed PW 9 Meena informed this fact to PW 1 Abhijit - brother of deceased Nikhil @ Banti. Abhijit, along with his friend PW 10 Vishal Bhagatsing Pardeshi, left for searching Nikhil @ Banti and they found his dead body at Civil Hospital, Ahmednagar. Pointing out finger of suspicion at respondent - accused, immediately PW 1 Abhijit lodged report against the accused. This report resulted in registration of Crime No. I-202/2013 under Section 302 of Indian Penal Code. The respondent / accused came to be arrested. The spot was inspected. The Investigating Officer recorded statements of witnesses, collected call detail records from the Cellular Company. According to the prosecution, two wheeler of deceased Nikhil @ Banti also came to be recovered at the instance of the accused.

5. It needs to mention here, that the entire prosecution case is

based on circumstantial evidence. When the evidence is circumstantial in nature, then prosecution is obliged to prove the circumstances from which conclusion of guilt of the accused is drawn, firmly and cogently. The chain of circumstances needs to be firmly established so that it must point out that in all probability, it was the accused and nobody else who had committed the crime in question. The prosecution, in the instant case, has propounded last seen theory and according to the prosecution, the deceased was lastly in the company of respondent / accused Devendra @ Guddu. This last seen theory comes into play when the time gap between the accused and the deceased were last seen together and when the deceased was found dead, is so short that the possibility that anybody else than the accused committing the crime in question becomes virtually impossible.

6. In the case in hand, PW 9 Meena, who is stated to be second wife of the deceased, has deposed about the fact that the deceased was lastly in the company of respondent / accused Devendra @ Guddu. In chief examination, PW 9 Meena has stated that at about 12.00 Noon, for getting refund amount of hand loan, deceased Nikhil @ Banti went to meet the accused. Her evidence shows that accused was serving at Renuka Mata Multi-State Private Ltd. Bank at Ahmednagar. PW 9 Meena deposed that at about 2.00 p.m., she telephonically contacted Nikhil @ Banti and Nikhil @ Banti told her that he is with the accused and they had breakfast at S.T. Stand area of Ahmednagar. Deceased Nikhil @ Banti allegedly assured her that he will return back soon. PW 9 Meena further deposed that about about 7.00 p.m., she again telephonically contacted Nikhil @ Banti and Nikhil @ Banti informed her that he is sitting with the

accused at Gawade-Mala area of Ahmednagar. Then according to the version of PW 9 Meena, at about 9.00 to 9.30 p.m., she again telephonically contacted Nikhil @ Banti and Nikhil @ Banti informed her that one person is coming with money. PW 9 Meena testified that at that time, she had also talked with the accused on telephone. PW 9 Meena further deposed that about 10.45 p.m., she again contacted telephonically and at that time, Nikhil @ Banti told her that he is coming and work is about to finish. Half an hour thereafter, as per version of PW 9 Meena, deceased Nikhil @ Banti called her and told her that he is coming back within 15 minutes and she should wait at the gate of the apartment. PW 9 Meena then deposed that Nikhil @ Banti did not return and cellphone was found switched off. Therefore, at about 11 to 11.15 p.m., she telephonically contacted the accused and the accused told her that he had left Nikhil @ Banti in front of gate of their apartment and he will inform further progress to her but telephonically contacting Nikhil @ Banti. Then according to PW 9 Meena, she telephonically contacted accused. At that time, accused informed her that cellphone of deceased Nikhil @ Banti is switched off. With the aid of this evidence regarding repeated telephonic contact of PW 9 Meena with accused Nikhil @ Banti, the prosecution is attempting to show that he was in the company of the accused soon before his death.

7. At this juncture, it is apposite to mention that thereafter, PW 9 Meena contacted PW 1 Abhijit, who went for search of deceased Nikhil @ Banti along with PW 10 Vishal Pardeshi and they came to know that Nikhil @ Banti is dead. As such, according to the prosecution, the time gap between the point of time when Nikhil @ Banti and accused Devendra

@ Guddu were lastly seen alive, and the time when deceased Nikhil @ Banti was found dead, is virtually small time gap leading to the inference that it was the accused who killed Nikhil @ Banti. However, one will have to examine whether this evidence of PW 9 Meena regarding last seen theory is believable or not. If one goes to her cross examination and particularly paras 9 and 10 thereof, then it is seen that this entire evidence has come on record by way of improvement. Her statement under Section 161 of Cr.P.C. was recorded by PW 14 Ashok Mahadeorao Dhekane, Police Inspector attached to Tofkhana Police Station. PW 9 Meena had not disclosed anything about this last seen theory deposed by her before the court to this Investigating Officer. If really, PW 9 Meena had contacted deceased Nikhil @ Banti repeatedly on that day and found him to be in the company of respondent / accused, then it is not understood as to why she would not have disclosed such an important facts to the Investigating Officer while recording her statement. As such, this version of PW 9 Meena coming on record for the first time before the court cannot be accepted in order to conclude that the deceased was lastly seen in the company of the accused. Such evidence needs to be ignored.

8. There is another aspect to the matter. Evidence of PW 1 Abhijit and PW 9 Meena shows that many persons from Ahmednagar were knowing deceased Nikhil @ Banti. Evidence of PW 9 Meena shows that deceased Nikhil @ Banti was doing business of selling CD and was having a shop. Evidence on record shows that he had gone to meet respondent / accused who then was serving at Renuka Mata Multi-State Private Ltd. Bank at Ahmednagar. As per version of PW 9 Meena, they both had gone to S.T. Stand area for breakfast and thereafter to Gawade-

Mala area. The prosecution has not brought on record evidence to show that the accused was on leave on 25-4-2013. Similarly, if the accused was on duty on that day, then his colleague must have seen the accused leaving office with deceased Nikhil @ Banti. This link evidence is also not adduced by the prosecution in order to show that the deceased joined company of the accused. As deceased Nikhil @ Banti did not return, PW 9 Meena had informed this fact to her brother PW 1 Abhijit. Evidence of PW 1 Abhijit does not show that PW 9 Meena informed him that Nikhil @ Banti was in the company of the accused throughout the day but he did not return. This is an aspect which casts shadow of doubt on the version of PW 9 Meena regarding last seen theory. In the wake of this evidence, we do not find any fault with the conclusion arrived at by the learned trial court that the prosecution has failed to prove the fact that the deceased was lastly seen in the company of the accused.

9. The prosecution has also relied on call detail records in order to demonstrate that PW 9 Meena was constantly in touch with her deceased husband Nikhil @ Banti on telephone. To prove this fact, the prosecution has examined PW 16 Dattaram Angre, Nodal Officer of Idea Cellular Company. According to PW 9 Meena, deceased Nikhil @ Banti was having cellphone with No. 9011818131. As per her version, she had telephonically contacted Nikhil @ Banti on this cellular number. Evidence of PW 16 Dattaram Angre, Nodal Officer, shows that this cellphone number was issued to one Dipak Namdeo Savant. The prosecution has not examined Dipak Namdeo Savant nor there is any evidence to show how the deceased came in possession of this cellular number which was in the name of Dipak Savant. Be that as it may, so far

as call detail records are concerned, PW 16 Dipak Savant deposed about it with the aid of certificate Exhibit 93, dated 7-7-2014, issued under Section 65B of the Indian Evidence Act. However, call detail records furnished by him came to be issued on 3-5-2013 i.e. one year prior to 7-7-2014. His cross examination shows that call details are stored in the server only for a period of one year and at the time of issuance of certificate Exhibit 93 under Section 65B of the Indian Evidence Act, those call details were not in the server of the Cellular Company. As such, call detail records are not strictly proved in terms of provisions of Section 65B of the Indian Evidence Act and refusal to rely on those call detail records, by the learned trial court, cannot be faulted with.

10. Now, comes the evidence regarding motive. In cases relating to circumstantial evidence, motive assumes importance because absence of proof of motive in cases relating to grave offences may impel the court to translate surmises or conjunctures into proof. In order to establish that the deceased has given hand loan of Rs. 2.5 Lacs to the accused, the prosecution is mainly relying on evidence of PW 9 Meena. Her evidence is to the effect that by withdrawing this much amount from her account, the same was paid in her presence by her husband Nikhil @ Banti to accused Devendra @ Guddu. This part of her version is coming on record by way of omission which is proved by Investigating Officer - PW 14 Ashok Dhekane, P.I. Moreover, the prosecution has not placed on record copy of bank accounts of PW 9 Meena in order to show that there was withdrawal of this amount from her account in order to conclude that the same was paid to the accused as hand loan. On this aspect, evidence of PW 1 Abhijit and PW 5 Uma Wagh is hearsay. With this evidence, it

cannot be said that the prosecution has proved the fact that amount of Rs. 2.5 Lacs was given by the deceased to the accused by way of hand loan and for appropriating the same instead of refunding it, the accused was prompted to commit murder of Nikhil @ Banti.

11. The prosecution has relied on recovery of two wheeler vehicle of deceased Nikhil @ Banti on the basis of voluntary disclosure statement of the accused. Section 27 of the Indian Evidence Act provides that a fact can be discovered by Police on the basis of information elicited by the accused while in Police custody. This recovery is shown to be made on 1-5-2013. PW 4 Mahesh Bharat Pardeshi is shown to be Panch witness to this recovery. His evidence as well as evidence of PW 14 Ashok Dhekane, P.I., shows that while in custody, accused made a statement that two wheeler Honda Activa vehicle of deceased Nikhil @ Banti is kept at his house. A memorandum thereof came to be recorded at Exhibit 36(1) and the Police party accompanied the accused to his house located behind Sagar Hotel at Ahmednagar. Evidence of these two witnesses shows that two wheeler vehicle of Honda Activa make came to be recovered from the house of the accused as per Panchanama Exhibit 36/2. In the wake of evidence of PW 10 Vishal Pardeshi, evidence of this recovery needs to be rejected *in toto*. PW 10 Vishal Pardeshi, accompanied by PW 1 Abhijit, went to Tofkhana Police Station in the night intervening between 25-4-2013 and 26-4-2013 for lodging FIR and while they were still in the Police Station, respondent / accused was brought at the Police Station. Evidence of PW 10 Vishal Pardeshi shows that Police has apprehended the accused and brought him at Police Station with Honda Activa two wheeler vehicle of the deceased. As such, it is seen from this evidence, that Honda Activa

two wheeler vehicle of deceased Nikhil @ Banti was with Police right from 25-4-2013 and, as such, the learned trial court has rightly discarded evidence regarding recovery of this very same two wheeler vehicle at the instance of respondent / accused. This discussion, as such, makes it clear that the prosecution has failed to prove circumstances from which guilt of respondent / accused was sought to be established. Therefore, it cannot be said that the view taken by the learned trial court in acquitting respondent / accused was not a possible view.

12. In the result, the Criminal Application is rejected. Consequently, leave to file appeal is refused.

(A.M. BADAR)
JUDGE

(S.S. SHINDE)
JUDGE

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