

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.488 OF 2009

Mohammed Salim Mohammed Nasir Khan	]	
of Bombay, Adult, Indian Inhabitant,	]	
Original Resident of Marwadi Chawl,	]	
Building No.56, Ground, Floor,	]	
Kholi No.1, 11 Lane, Kamathipura,	]	
Village – Loyaman, Post – Gomo,	]	
Thana – Komayami, Dist. Dhanbad,	]	
State – Jharkhand.	]	 Appellant

Versus

The State of Maharashtra,	]	
Thru' Nagpada Police Station, Mumbai	]	 Respondent

Smt. Nasreen Ayubi, Appointed Advocate,
for the Appellant.

Mr. H.J. Dedhia, A.P.P., for the Respondent-State.

CORAM : P.V.HARDAS &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

DATE : 25TH FEBRUARY, 2015.

ORAL JUDGMENT [Per Dr. Shalini Phansalkar-Joshi, J.] :

1. The Appellant, who stands convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.2,000/-, in default to undergo

S.I. for three months, and further convicted for the offence punishable under Section 201 of the Indian Penal Code and sentenced to suffer R.I. for three years and to pay fine of Rs.1,000/-, in default to undergo S.I. for one month, with direction that both the substantive sentences of imprisonment to run concurrently, by the Judgment dated 23rd March, 2009 in Sessions Case No.799 of 2007, by 2nd Ad-Hoc Additional Sessions Judge, Greater Bombay, by this Appeal, challenges his conviction and sentence.

2. Facts, as are necessary, for deciding this Appeal can briefly be stated thus :-

On 21st June, 2007, when PW-1 PSI Sudesh Ajgaonkar was on duty at Nagpada Police Station, Mumbai, along with PW-10 PI Deepak Kundal, at about 2 pm one person by name Mohd. Harun Shaikh came to the Police Station and informed that the foul smell was emitting from Cabin No.5 at ground floor in Marwadi Chawl at Kamathipura. He further informed that the flow of blood was also coming from the door of the said cabin, which was closed and locked from outside. Hence, both, PW-1 PSI Ajgaonkar and PW-10 PI Kundal, along with staff, reached to the spot. There

they found the flow of blood mixed with water was coming from the cabin with foul smell. The two Panchas were called at the spot and in their presence, the two locks of the cabin were broken open. In the presence of PW-3 Baburao Pande, the neighbour, they entered into the cabin and carefully inspected the cabin. At that time, they noticed the dead body of one lady with her mouth gagged, dupatta tied around her neck and her hands also tied behind, wrapped in rexine cloth and kept below the cot. Her dead body was taken out from the said place and the Inquest Panchanama (Exhibit-20) was made on the spot itself. The Scene of Offence Panchanama (Exhibit-8) was also drawn at the spot. The utensil (Kadhai) with the name of the Appellant embossed thereon was seized, along with the photograph of Appellant and the said lady. The dead body of that lady was identified by PW-3 Baburao Pande and other neighbours as that of Jyoti, who was residing in that cabin along with the Appellant.

3. After the Inquest Panchanama (Exhibit-20) and the Spot Panchanama (Exhibit-16), PW-1 PSI Ajgaonkar sent the dead body for postmortem examination. Primary opinion about her

death was given as *“death due to throttling by pressing odhani around her neck, the death having taken place between 24 hrs. to 36 hrs.”*. On interrogation of witnesses by PW-1 PSI Ajgaonkar, it was transpired that deceased Jyoti was residing, along with the Appellant and their son of 5 years old, in the said cabin and there used to be frequent quarrels between them. In view of this information in hand, PW-1 PSI Ajgaonkar lodged complaint (Exhibit-17) on behalf of the State against the Appellant.

4. On his complaint, C.R. No.213 of 2007 came to be registered against the Appellant for the offences punishable under Sections 302 and 201 of the IPC. Further investigation was taken over by PW-10 PI Kundal.

5. During the course of investigation, he recorded the statements of the persons residing nearby and then arrested the Appellant under Panchanama (Exhibit-25). He seized the clothes on his person along with the money purse, cell phone and the bunch of three keys. PW-10 PI Kundal then called two Panchas to find out if there was any nexus between the keys found in possession of the Appellant and the two locks of the Cabin No.5

seized from the spot. It was found in the presence of Panchas that with the said keys, the locks of the cabin's door could be opened. Panchanama (Exhibit-20) was prepared accordingly.

6. On 27th June, 2007, other muddemal articles seized from the spot were sent to Chemical Analyzer vide requisition letters (Exhibits 33 and 34). The C.A. Reports are produced at Exhibit 35(1 to 6). The Postmortem Report came to be collected vide Exhibit-29, which confirmed the cause of the death as “strangulation”. Hence, further to investigation, the Charge-Sheet came to be filed against the Appellant in the Court of Metropolitan Magistrate, Mumbai.

7. On case being committed to the Sessions Court, the Trial Court framed charge against the Appellant vide Exhibit-2. The Appellant pleaded not guilty and claimed trial.

8. In support of its case, therefore, Prosecution examined in all ten witnesses, who were cross-examined on behalf of the Appellant. Appellant raised the defence of denial. On appreciation of evidence of the Prosecution Witnesses, the Trial

Court held the guilt of the Appellant to be proved beyond reasonable doubt for both the offences punishable under Sections 302 and 201 of the IPC and convicted and sentenced him, as aforesaid.

9. This Judgment of the Trial Court is challenged in this Appeal by learned Counsel for Appellant Smt. Ayubi, whereas, supported by learned A.P.P. Mr. Dedhia. In our considered opinion, in order to effectively deal with their rival submissions, it would be useful to refer to the evidence as to the incriminating circumstances brought on record by Prosecution against the Appellant.

10. The first and foremost circumstance relied upon by the Prosecution in this case is the fact that, both, Appellant and deceased Jyoti were residing together, jointly, in Cabin No.5 at Marwadi Chawl in Kamathipura. As a corollary thereto, another circumstance relied upon by the Prosecution is that deceased Jyoti was last seen alive together with the Appellant the day before the incident. To prove this fact, the Prosecution has relied upon the evidence of PW-3 Baburao Pande and PW-7 Kamla Rathod. As per evidence of PW-3 Baburao, he is residing in the

said building since last 10 to 12 years. There are about 12 cabins on the ground floor. In Cabin No.5, Appellant was residing along with deceased and their son, who was of the age of about five years. In cross-examination, he has stated that all the cabins are made of wood and commercial sex workers were residing therein. It is his evidence that on 20th June, 2007, his wife informed him that foul smell was emitting from the said cabin. He also verified the same. On the next day, he found some blood coming out of the door of that cabin. As the cabin was locked from outside, he informed about the said fact to PW-6 Champalal Haran and then the Police came there, broke open the door and removed the dead body of Jyoti. Her mouth was found gagged with cotton ball and her hands tied behind her.

11. The Prosecution has also led the evidence of PW-7 Kamla Rathod, who is also residing in the said building since last eight years. According to her evidence, PW-6 Champalal is the owner of the building. In Cabin No.5, on the ground floor, the Appellant was residing along with his wife Jyoti and one son. She was the Rent Collector and she has given these cabins on rent. According to her evidence, on 18th, 19th and 20th June, 2007, she demanded

rent from the Appellant, but Appellant did not pay the rent. Thereafter, she left for Pune. When she returned on 21st June, 2007, at 2 pm, she came to know about the incident. The Prosecution has further led the evidence of PW-6 Champalal Haran. His father was the owner of the said building, who has died in the year 1998. Since then, he used to collect the rent through PW-7 Kamla. The evidence of these three witnesses, therefore, establishes the fact that Appellant was residing in the said cabin along with the deceased lady Jyoti and their son. It further establishes the fact that Appellant was last seen in the said room on 20th June, 2007, when PW-7 Kamla had gone there to collect the rent.

12. The fact that Appellant was residing in the said cabin is also proved by the Prosecution through Spot Panchanama (Exhibit-16), proved through the evidence of PW-1 PSI Ajgaonkar and Panch PW-4 Bhagwansingh Thakur. As per their evidence, when they broken open the cabin, they inspected the same. In addition to the dead body of Jyoti, they also found one utensil, namely, Kadhai, on which the name of the Appellant was embossed (Article-6) and further one photo-frame with four photos therein

(Article-7 colly.). The said photos were of Appellant and Jyoti together. Thus, the fact that the Appellant was very much residing in the said cabin along with Jyoti stands proved from these articles, which were seized from the spot and which bear the name and photograph of the Appellant with Jyoti.

13. Further material piece of evidence brought on record by the Prosecution is that, with the keys, which were found in possession of the Appellant on his arrest, the locks were collected from the spot, after breaking open the cabin, could be opened. There is evidence on this point of PW-10 PI Kundal and PW-5 Rajaram Gadhave, the Panch Witness. They have deposed that on 21st June, 2007, when Appellant was arrested, his personal search was taken and during that search, along with some other articles and his clothes, bunch of three keys was found in his shirt's pocket. Those keys were seized under Panchanama (Exhibit-25).

14. The evidence of PW-1 PSI Ajgaonkar and the Spot Panchanama (Exhibit-16) goes to prove that at the time of Spot Panchanama, the two locks, which were put up on the door of

the cabin, were seized and sealed. On 25th June, 2007, as deposed by PW-2 Taslimkhan Pathan and PW-10 PI Kundal, those locks could be opened with the two keys found in possession of the Appellant and seized from him at the time of his arrest. The Panchanama (Exhibit-20) was prepared accordingly. This fact, thus, further proves the possession of the Appellant in the said cabin and also the fact that he has locked it from outside, when he left the said cabin. The evidence on record further proves that when the said cabin was opened by the Police, the dead body of the deceased was found therein, that too concealed below the cot, wrapped in rexine cloth.

15. The most crucial circumstance on which the Prosecution is placing reliance is that of the homicidal death of the deceased. The very fact that her dead body was found wrapped in the rexine cloth and kept concealed below the cot in the cabin, coupled with the fact that the door of the cabin was locked from outside, is more than sufficient to prove that it has to be a case of homicidal death. This inference can also be further fortified from the fact that her dead body was found with her mouth gagged by the cloth, odhani tied around her neck and further

both her hands tied behind, leaving no manner of doubt that it has to be a case of homicidal death, as this condition of the dead body otherwise cannot be found in case of a natural, accidental or suicidal death.

16. The Prosecution has also examined PW-8 Dr. Abhijit Gawade, who has conducted the postmortem on the dead body and he has also certified that, in view of the fracture of hyoid bone and the heamatoma under the scalp, he had formed the opinion that *"the death was as a result of asphyxia due to strangulation"*. Accordingly, he has issued the Postmortem Report (Exhibit-29). The approximate time of the death, according to him, was between 48 hrs. to 72 hrs. He has conducted the postmortem on 22nd June, 2007 and the evidence of PW-7 Kamla goes to prove that she has seen the Appellant in the cabin on 20th June, 2007, thus, clearly establishing the presence of the Appellant at the time of her death.

17. Needless to say, that when the Appellant was proved to be in possession of the cabin, from which dead body of the deceased came to be recovered and that too when her death is

proved to be homicidal one, the burden was shifted on the Appellant, in view of Section 106 of the Evidence Act, to explain the circumstances in which her death has occurred. However, no explanation is offered by the Appellant as to the cause of her death. The burden to offer explanation was doubled in this case, because the keys of the lock of that cabin, where dead body was found, were recovered from the possession of the Appellant. Hence, this circumstance of Appellant keeping quiet without bringing on record the facts which were exclusively and especially within his knowledge, forms an additional link in the chain of circumstances established by the Prosecution, leaving no other scope but to hold that it is Appellant and none else, who has committed the murder of Jyoti and in order to screen himself from punishment of the said offence, he has tried to dispose of her body. The Prosecution has, thus, succeeded in proving the guilt of the Appellant for both the offences beyond reasonable doubt.

18. In our considered opinion, therefore, Appeal holds no merit and, hence, stands dismissed, confirming the conviction and sentence of the Appellant for the offences punishable under Sections 302 and 201 of the IPC.

19. The fees of the Advocate appointed for the Appellant from the Legal Aid Panel are quantified at Rs.5,000/-.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]