

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY****NAGPUR BENCH : NAGPUR****Criminal Appeal No. 503 of 2014****[Shamimbi Jamirkhan Pathan Vs. Shaikh Shafique Shaikh Nasir & three others]**


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**Office Notes, Office Memoranda of  
Coram, appearances, Court's orders  
or directions and Registrar's orders.**
**Court's or Judge's orders**

Mr. P.R. Agrawal, Adv., for the Appellant.  
Ms. T.A. Udeshi, APP for respondent no.4 – State.

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**CORAM : A.B. CHAUDHARI AND  
P.N. DESHMUKH, JJ.**

**DATE : 20th January, 2015.**

**01.** Heard learned counsel for the appellant-complainant.

**02.** By the present Criminal Appeal, there is a challenge by the complainant to the Judgment and Order dated 25<sup>th</sup> March, 2014 passed by Additional Sessions Judge, Yavatmal, in Sessions Trial No. 46 of 2011, by which the accused persons – respondent nos. 1 to 3 were acquitted of the charge of murder under Section 302, Section 201 read with Section 34 of Indian Penal Code.

**03.** In support of the appeal, learned counsel for the complainant-appellant vehemently argued that the

Trial Court could not have ignored the 'last seen' theory, propounded by the prosecution and duly proved by Shamimbai [PW 1] and Sheikh Latif [PW 7], merely because there was no direct evidence available with the prosecution. He further argued that there can be a conviction on the basis of 'last seen' theory, so also other circumstantial evidence and that has been ignored by the Court below. He submitted that the death was homicidal and, therefore, the Court below should not have lightly brushed aside the evidence of two witnesses. He then argued that merely lodgment of FIR late by three days cannot be the reason for throwing out the prosecution case and, therefore, prayed for admission of the appeal.

**04.** Learned APP for the State supported the appellant-complainant.

**05.** We have heard learned counsel for the rival parties. We have seen the evidence of Shamimbai [PW 1] and Sheikh Latif [PW 7], so also that of other witnesses, copies of which have been supplied by the learned counsel for the appellant. Upon looking into entire evidence and the reasons given by the Trial Judge, we find that the Trial Judge has recorded reasons for not accepting the prosecution case for holding the respondents guilty of the offence of murder for which they were charged. It is true that a mere delay in lodgment of FIR is not *sine qua non* for throwing out the

prosecution case. But then, in the instant case, though mother of deceased, namely PW 1, had last seen the accused persons taking away her son from her house, it is impossible that she would not with the assistance of her husband or others make any missing report to the Police Station till 14<sup>th</sup> September, 2010, i.e., a long period of four days in such a serious matter when she had an apprehension of a danger to the life of her son when he left the house, as propounded by her. Viewed in this context, delayed lodgment of FIR by four days is certainly fatal to the prosecution, as has been held by the Trial Judge. That apart, the Trial Judge found the evidence of PW 1 and PW 7 infirm, incredible and untrustworthy for the reasons given by him. We have perused the reasons given by the Trial Judge for not accepting the evidence of PW 1 and PW 7 and other prosecution witnesses. We are in agreement with the reasons given by the Trial Judge for not accepting the evidence of the witnesses on whom the prosecution relied most. We quote paragraphs 33 and 34 from the impugned judgment recorded by the Trial Judge, which read thus:-

"33. In cross-examination PW 5 admitted that he came to the court with Sk. Latif i.e., PW 7 and even earlier he came to court with him for 3 to 4 times. He admitted that police did not read over the contents of three panchanamas to him, though, his signatures are obtained. He admitted that he does not know which seized clothes belongs to which accused. According to prosecution P.W. Nos. 1 & 7 are the star witnesses, who supported the case of prosecution, but there are lot of variance in the version of both

witnesses. P.W.1 the complainant did not state that she told her brother Sk. Latif that she asked accused Munna about Akilkhan on 10.9.2010. Here, PW 7 Sk. Latif who had last seen deceased Akilkhan with accused near 'Mahalaxmi talkies on 9.9.2010 did not take pain to go to the spot, where dead body was lying on 11.9.2010. This fact creates doubt about the veracity of his version. He could not explain in his version how he predicted that dead body lying behind 'Mahalaxmi talkies' was of deceased Akilkhan. The complainant stated that only on the basis of clothes owned by Akilkhan she identified him, but she told to PW 7 her brother that she identified Akilkhan by his face and clothes."

"34. It is quite doubtful that after getting knowledge of dead body, PW 7 Sk. Latif had not gone to that place to verify whether it is the dead body of Akilikhan who is missing since last three days. Evidently PW Nos. 1 and 7 being relatives of deceased are interested witnesses and both have exaggerated case of the prosecution in their respective versions, which is not supported by other prosecution witnesses. Further prosecution did not examine material witnesses, who could have supported the version of PW 1. PW 7 Sk. Latif could not state on what basis he identified the dead body of deceased. It is also doubtful how dead body became highly decomposed within a span of 36 hours as per the case of the prosecution because according to prosecution incident occurred after 9 p.m., on 9.9.2010 and dead body found on 11.9.2010 at 9 p.m. PW 7 Sk. Latif did not speak about earlier quarrel and rivalry between deceased and accused to corroborate the version of complainant. There is no reference in panchanama that there is panthela near the 'Mahalaxmi Talkies.' Therefore, no question arises that PW 7 Sk. Latif on 9.9.2010 went to panthela to eat pan. PW 7 Sk. Latif himself admitted that there was panthela near the 'mahalaxmi talkies, in his cross examination. ...."

**06.** In the light of the above discussion made by learned Trial Judge which we have quoted above, we think the view taken by the Trial Judge in making the order of acquittal is based on correct appreciation of evidence and not liable to be substituted by this Court in the criminal appellate jurisdiction. That being so, we make the following order:-

**ORDER**

Criminal Appeal No. 503 of 2014 is summarily rejected.

**Judge**

**Judge**

**|Hedau|**