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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
***CRIMINAL APPELLATE JURISDICTION***

**CRIMINAL APPEAL NO.160 OF 2009**

|                                  |   |                     |
|----------------------------------|---|---------------------|
| Vijay Vitthal Jadhav             | ] |                     |
| age: 29 years,                   | ] | .. <u>Appellant</u> |
| residing of Ambedkar Nagar No.2  | ] | (Original           |
| Powai, Saivihar Road, Mumbai -72 | ] | Accused)            |

V/s.

|                                         |   |                 |
|-----------------------------------------|---|-----------------|
| The State of Maharashtra                | ] |                 |
| At the instance of Powai Police Station | ] | .... Respondent |
| Mumbai                                  | ] |                 |

Ms. Rebecca Gonsalves, for the Appellant.  
Mrs. A. S. Pai, APP for the Respondent-  
State.

**CORAM : SMT. V. K. TAHILRAMANI, ACTING C.J. &**  
**DR. SHALINI PHANSALKAR-JOSHI, J.**

**DATE : 1<sup>ST</sup> FEBRUARY 2016.**

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

1. Appellant, who stands convicted by the judgment and order dated 30<sup>th</sup> August, 2007 in Sessions Case No.48 of 2006, by Additional

Sessions Judge, Greater Mumbai, for the offences punishable under Sections 302 and 201 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.1,000/- in default to suffer imprisonment for 60 days on the first count and rigorous imprisonment for three years and to pay fine of Rs.1,000/- in default to suffer imprisonment for 60 days on the second count, by this appeal challenges his conviction and sentence.

2. Brief facts of the appeal can be stated as follows :-

Deceased Suman @ Kalpana was the wife of P.W.4 Gautam Gaikwad. Their marriage had taken place in the year 1993 and out of wedlock, they had two children. The appellant was their neighbour. P.W.4 Gautam, had suspicion about illicit relations between appellant and his wife Suman. His children used to inform him that in his absence, the appellant was visiting his wife. P.W.4 Gautam, on several occasions tried to persuade his wife not to have such relations with the appellant, but it was of no use. Once even he caught the appellant and his wife together in the toilet. Then he has also requested the appellant not to have any such relations with his wife.

3. In this backdrop, on 13.10.2005 deceased Suman left the house and did not return. Subsequently, her dead body was found lying in between Marol pipeline and Morarji Nagar, Saki Naka on 15.10.2015 with injuries thereon. On suspicion, P.W.4 Gautam lodged complaint against the appellant. On his complaint C.R.No.416 of 2005 came to be registered against the appellant.

4. During the course of investigation P.W.1 PI Deshmukh recorded the statements of witnesses, sent the muddmeal articles to Chemical Analyzer, collected postmortem report and C.A. Report. Further to completion of investigation, he filed chargesheet in the court against the appellant.

5. In due course, the case was committed to the Sessions Court. On committal of the case, trial Court framed charge against the appellant vide Exh.8. Appellant pleaded not guilty and claimed trial. In support of its case, prosecution examined in all 11 witnesses and on appreciation of their evidence, trial Court was pleased to hold guilt of the appellant to be proved beyond reasonable doubt and convicted and sentenced him, as aforesaid.

6. This judgment of the trial Court is challenged in the appeal by

learned counsel for the appellant; whereas supported by learned APP. In our considered opinion, before adverting to the rival submissions advanced by them it would be useful to refer to the evidence on record.

7. The prosecution case admittedly stands on circumstantial evidence. As per undisputed facts on record, deceased Suman has left the house on 13.10.2005 and her dead body with injuries thereon was found on 15.10.2005 in between Marol Pipeline and Morarji Nagar. P.W.7 Dr. Bramhne, has conducted postmortem on her dead body and found the cause of her death as asphyxia due to strangulation with multiple injuries. Thus, it was an unnatural death.

8. To prove involvement of the appellant, in her homicidal death, the prosecution has relied on following incriminating circumstances :

- i) Appellant and deceased were last seen together on day of incident.
- ii) Recovery of two handkerchiefs at the instance of appellant.
- iii) Recovery of blood stained clothes of appellant.

9. To prove first circumstance of “*last seen together*”,

prosecution has relied upon the evidence of P.W.2 Ganpat Narkar and P.W.3 Milind Pingale. Both of them were working as security guards at the relevant time at Marol Gate No.1 from 8.00 a.m. to 4.00 p.m in the first shift. According to their evidence, on that day at about 1.00 p.m., while they on duty, one rickshaw came there with a male and a female passenger therein. They did not allow rickshaw to proceed ahead as private traffic was prohibited. Hence the male and female passengers alighted from the rickshaw. According to their evidence the male passenger had heated discussion with the rickshaw driver about the payment of fare and hence they remembered the male passenger, whom they have identified as appellant in the case when the photograph of the appellant was shown to them by the police. They have also identified the appellant in test identification parade conducted by P.W.5 Special Executive Magistrate Yadav. Further they have also identified the appellant in the court as the same male passenger who had alighted from the rickshaw alongwith the female passenger.

10. However, both these witnesses have categorically deposed in the Court that as their attention was focused on the male passenger, they

had not seen properly the female passenger and hence they cannot and would not be able to identify the female passenger or even the rickshaw driver. They have further deposed that they did not identify the photograph of the female passenger when it was shown to them by the police. P.W.3 Milind has further deposed that he cannot even give description of the female passenger.

11. This evidence of both these witnesses is unequivocal to the effect that they had not seen properly the female passenger who has alighted from the rickshaw with the appellant and therefore, they were not in position to identify her photograph or even to give her description. In such situation, the first circumstance of, “*appellant and the deceased last seen together*” cannot be said to be proved at all. The very crux of the circumstance of, “*last seen*” is the accused and the deceased being seen together. If in the instant case, witnesses are not able to identify the female passenger who was with the appellant, then question of proving “*last seen*” circumstance does not arise.

12. The second circumstance relied by prosecution is, “*recovery of handkerchief*” which was allegedly used in the commission of offence, at

the instance of appellant. To prove this circumstance, the prosecution has relied upon the evidence of P.W.7 panch Kailas Bansode and P.W.11 PI Deshmukh. According to their evidence, during custodial interrogation, the appellant gave disclosure statement that he was ready to point out the spot where he has committed the offence. His statement was reduced to memorandum panchnama Exh.23. Thereafter appellant took them to the spot near pipeline, on the way proceeding to Vinchore village. Then the appellant, from below the pipeline, produced one dirty handkerchief. He also produced one lady's handkerchief. Both the handkerchiefs were seized under panchnama. As per evidence of P.W.1 API Deshmukh they were sent to the Chemical Analyzer.

13. As per prosecution case, the appellant has throttled the deceased with the help of his handkerchief. However, C.A. report Exh.35 reflect that neither the blood stains nor any semen stains were found on any of these two handkerchiefs. The alleged hair strand found on handkerchief was sent to Chemical Analyzer to prove that it was of the deceased, but the finding of C.A. Report that the said hair strand tallied with the hair stand of the deceased is not put up to appellant in his statement recorded under

Section 313 of Code of Criminal Procedure. Therefore, the recovery of these handkerchiefs at the instance of appellant may not be of any help to the prosecution to connect the appellant with the offence in question.

14. The last circumstance relied upon by prosecution is, “*recovery of blood stained clothes of the appellant*”. To prove this recovery, prosecution has relied on the evidence of P.W.9 panch Kasi Nadar and P.W.11 PI Deshmukh. According to their evidence on 20.10.2015, during police custody accused gave disclosure statement which led to the recovery of his clothes from his house. On the said clothes, one human hair was found and the clothes and human hair found thereon were sent to Chemical Analyzer. As per C.A. Report, some blood stains were found on the shirt of the appellant and as per the case of prosecution, the said blood stains were of “B” group. The blood group of deceased was also “B” and hence according to prosecution, it was a clinching piece of evidence. However, said human hair found on the shirt of the appellant was not sent to Chemical Analyzer, to ascertain whether it belongs to the deceased and as to the recovery of blood stained clothes, it was made from the house which was in possession of appellant's brother, who was present there. Moreover, this

circumstance, which was the only incriminating circumstance against the appellant, is not put up to him in his statement recorded under Section 313 of the Code of Criminal Procedure. Therefore, it cannot be used against him. Even, otherwise also, this sole circumstance cannot be sufficient to prove the guilt of appellant beyond reasonable doubt.

15. The law relating to a case based on circumstantial evidence is crystallized long back and it has been held time and again that in order to base conviction of the accused on circumstantial evidence, those circumstances alleged against accused are in the first place required to be proved by cogent, convincing and reliable evidence on record. Secondly, those proved circumstances should form the chain so complete that no other inference but that of the guilt of the accused can be drawn from the proved circumstances. In the instant case, except for proving a single incriminating circumstance, which is also not put up to the appellant, prosecution has not succeeded in proving any other incriminating circumstance. Thus, the prosecution has not established the circumstances alleged against the appellant by cogent, convincing and reliable evidence and they do not form a complete chain to prove guilt of appellant.

16. In the circumstances, the conviction of the appellant, for the offences alleged against him cannot be sustained. The appeal is therefore, allowed. The conviction and sentence of the appellant, for the offences under Section 302 and 201 of IPC is quashed and set aside. The appellant is acquitted of both the offences. The appellant be released forthwith if not required in any other offence.

17. Copy of this judgment be sent to the appellant-accused in jail in which he is lodged at present.

**[ACTING CHIEF JUSTICE.]**

**[DR. SHALINI PHANSALKAR-JOSHI, J.]**

C E R T I F I C A T E

Certified to be true and correct copy of the original signed order.