

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

CRIMINAL APPEAL NO. 475 OF 2001

The State of Maharashtra,
through the Police Station,
Lohara, District Osmanabad

..Appellant

Versus

1. Satish Trimbak Rasal,
Age 30 years
2. Indubai Trimbak Rasal
Age 55 years
3. Vishwanath Shantaram
Gadhawe, Age 50 years
4. Kamlakar Sopan Rasal,
Age 35 years

All r/o Lohara (Khurd),
Taluka Lohara,
District Osmanabad

..Respondents

Mr P.G. Borade, A.P.P. for appellant
Mr K.J. Ghute Patil, Advocate for respondents

**CORAM : T.V. NALAWADE AND
A.M. DHAVALA, JJ**

**DATE OF RESERVING
THE JUDGMENT : 6.11.2017**

**DATE OF PRONOUNCING
THE JUDGMENT : 5.12.2017**

JUDGMENT (Per A.M. Dhavale, J.)

1. This is an appeal by the State challenging the judgment dated 21.7.2001 passed in Sessions Case No.12/2001 by learned II Additional Sessions Judge, Osmanabad of acquittal of the four respondents prosecuted for committing murder of father of accused no.1 Satish and husband of accused no.2 Indubai.

2. The facts as per F.I.R. may be stated as follows :

Deceased Trimbak aged around 60 years was handicapped due to Polio. He was resident of Lohara (Khurd). Accused no.1 Satish is his son, accused no.2 Indubai is his wife. It is claimed that since they were not maintaining him, he was residing at Lohara (Bk), District Osmanabad. Since two years prior to the incident, he had quarrels with accused nos.1 and 2. He was taking his meals and residing with third persons. He was demanding partition of his agricultural land. P.W.3 Vyankat Rasal is grandson of deceased Trimbak's mother's sister and he was his neighbour. P.W.3 Vyankat had seen quarrels and abusing to Trimbak by the accused nos.1 and 2 and he had intervened in the quarrel many a times. Since two months prior to the incident, Trimbak had gone to Lohara (Bk.) as his land dispute with wife and son was pending in the Court. On 28.4.2000 at 7.00 p.m., accused no.1 Satish and accused no.2 Indubai and her brother accused no.3 Vishwanath brought Trimbak from Lohara (Bk.) to Lohara (Khurd) in a jeep. Thereafter, P.W.3 Vyankat heard verbal exchange between them. They three had taken him to their house. Accused no.4 Kamlakar is maternal cousin of accused no.1. Accused nos.1 to 4 were moving in and out of the house. On 1.5.2000 at 3.30 p.m., P.W.3 Vyankat received a phone call from uncle of accused no.1's wife that Trimbak was dead. P.W.3 Vyankat visited the house of the deceased and found his dead body lying in the varandah of the house. There were bleeding injuries on back, hands, legs and on private parts and his baniyan and dhoti were stained with blood. There was ligature mark of strangulation on his neck. P.W.3 Vyankat

accordingly submitted report stating that accused nos.1 to 4 by means of fist blows and stones and by twisting private parts of Trimbak killed him between 8.00 a.m. to 11.00 a.m. On the basis of report lodged at 21.15 hrs., crime was registered at C.R.No.20/2000 at Lohara police station and the same was investigated into by P.W. 7 P.S.I. Jadhav. P.S.I. Jadhav had received the information about homicidal death of Trimbak at about 4.30 to 5.00 p.m. He had gone to Lohara (Khurd) for verification and seen the dead body in the courtyard of the house. There were external injuries on the body including ligature mark on the neck. There were other injuries on wrist, back, legs and mainly to penis and scrotum. There was blood on the clothes and body and on one cloth 'Uparne'. There was one stick with blood stains and one cord lying near the dead body. P.S.I. Jadhav arranged to get photographs of the dead body. He prepared inquest panchnama (Exh.25) on the spot and recorded F.I.R. and forwarded the body for post mortem. During the investigation, he drew spot panchnama, seized the clothes of the deceased and the weapons stick and cord. He arrested all the accused on 1.5.2000 and recorded statements of material witnesses. He forwarded the seized articles to Chemical Analyst at Aurangabad. After completion of investigation, the charge-sheet was submitted in the Court of Judicial Magistrate.

In due course, the case was committed to the Court of Sessions. The learned Additional Sessions Judge, Osmanabad framed charge at Exh.13 against all the accused. The accused pleaded not guilty. The prosecution examined seven witnesses. As discussed above, the case

is based on last seen together and custodial death. The learned II Additional Sessions Judge, Osmanabad acquitted all the accused. Hence this appeal.

3. Mr P.G. Borade, learned A.P.P. for the State has taken us through the evidence on record. He stated that there is convincing evidence as follows :

(I) Accused nos.1 and 2 son and wife of the deceased were not maintaining him and were harassing him, abusing and assaulting him. Therefore, deceased Trimbak had gone to Lohara (Bk.) for residing.

(II) On 28.4.2000 accused nos.1 to 3 went to Lohara (Bk.) in a jeep and brought Trimbak from Lohara (Bk.) to Lohara (Kd.). Deceased was crying while he was being brought to his house. It was witnessed by P.W.3 Vyankat Rasal, Sarpanch, P.W.5 Kisan Rasal.

(III) On the fateful day, 1.5.2000, the deceased was found killed and his dead body was found in his house. Accused nos.1 and 2 have not given any explanation about the same though they were residing with him in the said house. The medical evidence clearly shows that it was a case of homicidal death. Thus, the learned trial Judge ought to have accepted the evidence of prosecution witnesses and should have convicted the accused. In the alternative, he claimed that atleast accused nos.1 and 2 should have been convicted.

(IV) There is also evidence of P.W.6 Allah Baksh that he has provided huge amount of Rs.1,21,000/- to the deceased for his maintenance and the deceased had executed deed in respect of his land in favour of him (Allah Baksh). Allah Baksh was having civil litigation with deceased and accused nos.1 and 2. The land of the deceased was in possession of accused nos.1 and 2. He has also seen accused nos.1 to 3 taking deceased from Lohara (Bk.) to Lohara (Kd.).

4. Per contra, learned Advocate Mr K.J. Ghute Patil has strongly supported the judgment of the trial Court. He argued that the evidence of prosecution is not at all convincing, trustworthy and reliable. There was political rivalry between accused no.3 Vishwanath and P.W.3 Vyankat who were belonging to rival groups and had contested election against each other. The civil suits were pending between the parties. P.W.3 Vyankat's father had prosecuted deceased Trimbak and accused no.2 Indubai for committing murder of step mother of Trimbak by name Subabai, as he was related to Subabai. The said case has ended into acquittal. The partition had already taken place and there was no question of grabbing the share of deceased by accused nos.1 and 2. He pointed out that the witnesses who had seen abducting of deceased Trimbak by accused nos.1 to 3 have not taken any action nor reported the matter to the Police. It is not a case of custodial death. There is no material to connect the accused with the crime. Hence, the accused may be acquitted.

5. The points for our consideration with our findings are as follows:

- | | | |
|-------|--|---|
| (I) | Whether deceased met with homicidal death ? | .. Proved |
| (II) | Whether accused nos.1 to 4 in furtherance of their common intention committed murder of deceased Trimbak ? | .. In the affirmative against accused nos.1 and 2 only |
| (III) | What sentence and order ? | .. The Appeal is partly allowed.
The order of acquittal accused nos.3 and 4 is maintained. The accused nos.1 & 2 are convicted for committing murder of Trimbak. |

- REASONS -

6. Point no.1: P.W.1 Dr. Deepak Mendhekar has conducted post mortem on the dead body of Trimbak on 2.5.2000 at 7.00 to 8.45 a.m. brought by police of Lohara police station to him on 1.5.2000. He found following injuries on his person :

- (1) Face was swollen, eyes were closed. Tongue caught within teeth. Reddish colour found oozing from nostril and the mouth.
- (2) Condition of skin was with marks with blood.

Injuries

- (1) Ligature mark round the neck (continued below the Thyroid. Abrasions and echymosed round about the edge of ligature mark subcutaneous tissue under the marks echymosed.
- (2) Injury mark on lateral side of right eye of bruising nature 5 x 3 cm in size.
- (3) Injury mark near left eye of abrasion nature 1 x 1 cm in size
- (4) Abrasion mark on left side on left arm on medial site of 4 x 3 cm in size
- (5) Abrasion of 2 x 1 cm on left side of back below scapula
- (6) Abrasion mark seen on left wrist region 2 x 2 cm
- (7) Abrasion on left hand in interphalangeal region of -
 - (A) 2 x 1 cm
 - (B) 2 x 2 cm
 - (C) 2 x 1 cm respectively
- (8) Sloughing on skin of cubital, forearm and arm region right side
- (9) Abrasion mark on interphalangeal region of right hand between thumb and index finger
- (10) Scrotum swollen oedematous bluish colour and penis swollen inflamed along with abrasion of size 2 x 1 cm

(11) Abrasion mark on right lower limb at thigh region on leg region of 5" x 2".

7. P.W.1 Dr. Deepak has given opinion that the deceased has died due to compression of neck. He had found abrasion by the side of ligature mark and opined that it was a case of homicidal death. The abrasions on the neck supports his opinion that it was a case of throttling. Besides injuries to the scrotum and penis showing that those must have been squeezed or twisted. We find that these injuries can be neither accidental nor suicidal. The opinion of Medical Officer that those were homicidal is not disputed by the defence. On the basis of evidence of P.W.1 Dr. Mendhekar, we hold that Trimbak met with homicidal death.

8. Point no.2 : Murder by the accused nos.1 to 4:

The prosecution has led evidence of following nature :

(1) Last seen together : P.W.3 Vyankat Rasal, son of maternal cousin of deceased Trimbak, P.W.4 Kisan Rasal.

(2) Evidence of past harassment and neglect by accused nos.1 and 2 to the deceased. P.W.3, Vyankat, P.W.5 Kisan and P.W. Allah Baksh

(3) Dead body found in the house of accused nos.1 and 2. P.W.2 Gajendra in whose presence inquest panchnama (Exh.25) and spot panchnama (Exh.26) were drawn and clothes of the deceased Dhoti and baniyan (Articles 4 and 5) were seized vide Exh.27. In his presence, one noose of rope and one stick having blood stains were also seized from the spot (Exh.26).

9. P.W.4 - Jeep driver Shivaji Jadhav had brought deceased Trimbak from Lohara (Bk.) to Lohara (Khurd) at the instance of accused nos.1 to 3, but he has turned hostile. The Investigating Officer P.W.7 has deposed about the investigation carried out by him and about drawing of inquest panchnama, spot panchnama, seizure panchnama and forwarding of seized articles namely clothes of the deceased, stick and rope to the office of Chemical Analyst. The report of Chemical Analyst is at Exh.34, which shows blood stains on the clothes and the stick.

10. This is a case of custodial death. Admittedly, accused no.1 Satish is son of deceased Trimbak and accused no.2 Indubai is his wife. Admittedly, they were residing together at Lohara (Kd) in the house of the deceased Trimbak. The only difference is that as per the prosecution case, as accused nos.1 and 2 were not maintaining deceased Trimbak, he had gone to Lohara (Bk.) two months prior to 28.4.2000 and on 28.4.2000, he was brought home by accused nos.1 to 3 in a jeep. In normal course, accused nos.1 to 3 would be residing together under one roof and there is not even whisper by the accused that deceased Trimbak was residing separately from them.

11. There is cogent, convincing and unimpeachable evidence that on 1.5.2000 at about 4 to 4.30 p.m. dead body of deceased Trimbak was found in his house where accused nos.1 and 2 were also residing. There was ligature mark around his neck. As discussed earlier, the deceased was killed by compression of his neck and by twisting or

squeezing his private parts. There is no challenge to the evidence of P.W.1 Deepak Mendhekar that it was a case of homicidal death.

12. As per evidence of P.W.1 Dr. Deepak Mendhekar, the stomach of deceased Trimbak was found empty and he he found undigested food and gases in large intestine. On the basis of these observations, he stated that the deceased must have died at least four hours after taking his last meal.

13. Now the question arises as to which meal he must be referring to. Rigor mortis gives clue to the same. P.W.1 Dr. Deepak conducted post mortem on dead body on 2.5.2000 at 7.00 a.m. He noted that the rigor mortis had disappeared.

14. In Medical Jurisprudence and Toxicology by Modi, 25th edition 2016 at page 342, in respect of rigor mortis it is observed:

“Time of onset : This varies greatly in different cases, but the average period of its onset may be regarded as three to six hours after death in temperate climate, and it may take two to three hours to develop. In India, it usually commences in one to two hours after death.

“ Duration: In temperate regions, rigor mortis usually lasts for two to three days. In northern India, the usual duration of rigor mortis is 24 to 48 hours in winter and 18 to 36 hours in summer. According to the investigations of Mackenzie, in Calcutta, the average duration is nineteen hours and twelve minutes, the shortest period being three

hours, and the longest forty hours. In Colombo, the average duration is 12 to 18 hours. When rigor mortis sets in early, it passes off quickly and vice versa. In general, rigor mortis sets in one or two hours after death and is well developed from head to foot in about twelve hours. Whether rigor is in the developing phase, established phase, or maintained phase is decided by associated findings like marbling, right lower abdominal discolouration, tense or taut state of the abdomen, disappearance of rigor on face and eye muscles. If on examination, the body is stiff, the head cannot be fixed towards the chest, then in all probability, the death might have occurred six to twelve hours or so more before the time of examination.”

15. The death of Trimbak had taken place in the month of April, which are hot days. It can curtail the time of rigor mortis to some extent. In any case, deceased Trimbak must have died around 30 to 48 hours before the post mortem. Taking the normal course of meals at 11.00 a.m. to 1.00 p.m. and as per post mortem stomach of Trimbak was empty and undigested food was in the large intestine, his death must have occurred within four to six hours after his last meal. When these two opinions are taken together, we find that the Trimbak must have died on 30.4.2000 after four hours from the morning meal or after four hours of the evening meal. Taking the time of meals, he must have died at 4.00 p.m. on 30.4.2000 or at 1.00 a.m. on 1.5.2000. Considering the fact that the death took place particularly in hot days, it must have been on 1.5.2000 at about 1.00 to 3.00 a.m.

16. It is thus clear that accused nos.1 and 2 were having special knowledge as to what happened on the night in the house when deceased Trimbak met with homicidal death.

17. In the matter of appreciation of evidence, it is observed in State of **U.P. Vs. Hari Mohan AIR 2001 SC 142** :

"7. While appreciating the ocular testimony of witnesses and the circumstantial evidence in a criminal case, the criminal courts are expected to keep in mind the observations of this Court in State of Punjab v. Jagbir Singh, Baljit Singh & Karam Singh [1974 (3) SCC 277] wherein it was held:

" A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

8. This Court again in State of Himachal Pradesh v. Lekh Raj & Sons [JT 1999 (9) SC 43] reiterated the position of

law and while reminding the criminal courts of their obligations held:

"The criminal trial cannot be equated with a mock scene from a stunt film. The legal trial is conducted to ascertain the guilt or innocence of the accused arraigned. In arriving at a conclusion about the truth, the Courts are required to adopt rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The hyper-technicalities or figment of imagination should not be allowed to divest the court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstances keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth. The courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hyper-technical approach has to be replaced by rational, realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be a Utopian thought but have to be considered as part and parcel of the human civilization and the realities of life. The courts cannot ignore the erosion in values of life which are a common feature of the present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and the mankind."

9. Before appreciating the circumstantial evidence in the case, we are at pain to place on record our displeasure regarding the conduct of the investigation in the case. The investigating officer appears to have left no stone unturned

to help the accused-respondents. It appears that the valuable evidence, though available, was not collected apparently for ulterior purposes. The conduct of the investigating officer SI D.P. Tiwari (PW7) was even noticed by the trial court. On 30th October, 1978 while recording his statement, the trial court observed that "it appears that the IO was negligent and an irresponsible investigating officer". It was noticed that "the witness giving aforesaid statement and it appears that he wants to damage the prosecution case". It is not disputed that during investigation it had come in evidence that respondent No.1 was possessed of a licensed gun which was stated to have been used by him on 15.3.1977, the alleged day of occurrence, yet no effort was made by the IO to seize the gun or get it examined by an expert to ascertain whether any shot was fired from its barrel. He also failed to have taken into custody the letter written by the deceased for a sufficiently long period though its mention was made by the PW1 in the FIR itself. However, the defective investigation cannot be made a basis for acquitting the accused if despite such defects and failures of the investigation, a case is made out against all the accused or anyone of them. It is unfortunate that no action can be taken against the IO at this stage who, in all probabilities, must have retired by now.

18. In **Trimukh Maroti Kirkin Vs. State of Maharashtra, (2006) 10 SCC 681** in case of custodial death of like nature, observations are made in the light of custodial deaths of brides at matrimonial houses which are applicable to certain extent in the present case as well. It is observed that :

“ These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for

the prosecution to lead evidence. No member of the family even if he is a witness of the crime, would come forward to depose against another family member. The neighbours, whose evidence may be of some assistance, are generally reluctant to depose in court as they have to keep aloof and do not want to antagonise a neighbourhood family. The parents of other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculcate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy or inside the house should go unpunished.

14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutors* quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh*.) The law does not enjoin duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the

case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."

After taking resume of the law on the subject, it is observed :

22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime. In *Nika Ram v. State of H.P.* It was observed that the fact that the accused alone was with his wife in the house when she was murdered there with "Khukhri" and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In *Ganeshlal v. State of Maharashtra* the appellant was prosecuted for the murder of his wife which took place inside the house. It was observed that when the death had occurred in his custody, the appellant is under an

obligation to give a plausible explanation for the cause of her death in his statement under Section 313 Cr.P.C. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife.

Here, it is material to note the word “normally resided”

The Supreme Court observed with approval of following observations from **State of West Bengal Vs Mir Mohammad Omar & Ors (2000) 8 SCC 382:**

“18. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage the offenders in serious offences would be the major beneficiaries, and the society would be the casualty.”

19. The learned Additional Sessions Judge held that it was not proved that the occurrence had taken place inside the house as no blood stained soil was seized and was sent for chemical analysis and there were some contradictions in the evidence regarding the place, where body was found. In this regard we find that as per evidence of P.W.2 Gajendra on the call of police patil of village, he had gone to the house of the accused. He deposed that the body of Trimbak was lying

in the house. He has described in detail the nature of injuries found by him on the body. In his presence, inquest panchnama (Exh.25) was drawn. Unfortunately, the Investigating Officer did not draw the spot panchnama simultaneously. It is because when initially P.W.3 Vyankat had gone to lodge the F.I.R., the Investigating Officer had not recorded it. The police unnecessarily indulged in practice of verification of the statement made by P.W.3 Vyankat and after watching the dead body in the house, the F.I.R. came to be registered. This practice of police is deprecated. The police have no choice but to register F.I.R. if the facts disclose cognizable offence. This practice of verification has resulted into two discrepancies (1) A scene is created that there was delay in lodging the F.I.R., and (2) The spot panchnama is drawn late. The spot panchnama was drawn in presence of P.W.2 Gajendra, but it was drawn on next day in the morning. It was inside the house.

20. It was brought on record that there was no door to the house towards the northern side, where there was open ground. The learned trial Judge mistakenly assumed that the house was open from the northern side. It is to be assumed that there was wall on northern side. There was no door on northern side does not mean that a house would have no wall on one side. The door of the house was to the eastern side. The inquest panchnama shows that the police and the panchas had entered from the eastern side door and found the dead body in the varandah of the house. The spot panchnama also shows that the dead body was found in the varandah. Therefore, the stray statement of P.W.7 P.S.I. Jadhav that body was in the courtyard of the

house is certainly wrong. The Investigating Officer has taken photographs of the dead body and those are on record. Those also do not support his stand that the body was found in the courtyard. It was the duty of the prosecutor as well as the trial Judge to seek explanation of the Investigating Officer as to how he was deposing contrary to the panchnamas drawn by him.

21. If the body is found in the varandah kept on clothes, where there are tiles, it was not possible to collect blood mixed soil and the occurrence itself cannot be doubted on this ground. It is nobody's case that deceased Trimbak was murdered somewhere else and his body was brought into the house. It was almost impossible for any third person to do so. The Investigating Officer has stated that the blood was lying on the ground on the spot of the incident. However, he has not collected the blood on the ground on the spot. It is the case of faulty investigation and the benefit of faulty investigation cannot be given to the accused at every time. In **U.P. Vs. Hari Mohan**, (cited supra), the investigation was not only faulty but bias carried out with an object to save the accused. Still, the evidence on record when found reliable was held sufficient to hold the accused guilty.

22. In the present case, the accused have nowhere stated that deceased Trimbak had gone out at odd hours of night and later on his body was brought in their house in the circumstance they could have no knowledge about the said fact. We find that there is no possibility that deceased Trimbak was killed somewhere outside and his body was brought and kept in the house.

23. In the light of these facts, it was bounden duty of accused nos.1 and 2 to explain the situation and to furnish plausible explanation which could have shown their innocence, but the accused have given no explanation whatsoever. They have kept silence and that silence is fatal in the light of their duty to speak in view of Section 106 of Evidence Act.

24. It is obvious that dead body of Trimbak was in the house for a considerable time in injured condition. Accused nos.1 and 2 were residing in the same house and in all probabilities they must be aware about the death of Trimbak, but they did not report it to anybody. They made no efforts to take steps for cremation of the dead body. The evidence of Investigating Officer that both the accused were arrested in the same town on the same night shows that it was a case of custodial death. The conduct of the accused in not reporting the death to anybody and not taking steps for cremation is additional incriminating circumstance against them.

25. Additional evidence of last seen together: Apart from this evidence of custodial death, there is also evidence of last seen together and evidence of disputes between accused nos.1 and 2 and the deceased Trimbak.

26. P.W.3 Vyankat has lodged the F.I.R. He is son of maternal cousin of deceased Trimbak. The enmity was tried to be brought on record in the form of F.I.R. lodged by P.W.3 Vyankat's father against the deceased Trimbak and accused no.2 for committing murder of

Subabai who was P.W.3 Vyakat's father's mother's sister but it was way back in 1965. It was shown that father of P.W.3 Vyankat not having good relations with deceased Trimbak. That time, P.W.3 Vyankat (aged 35 years) was either not born or just born. If he would have enmity with Trimbak, in that case, P.W.3 Vyankat would not have tried to find out who has committed murder of deceased Trimbak. Evidence on record shows that P.W.3 Vyankat is neighbour of deceased Trimbak. He had every opportunity to observe what was going on in the house of deceased Trimbak. He has categorically stated that accused nos.1 and 2 were not maintaining deceased Trimbak and, therefore, he had left village Lohara (Kd.) and was residing at Lohara (Bk.). Lohara (Bk.) is 4 kms. away from Lohara (Kd.). He stated that all the accused on 28.4.2000 brought deceased Trimbak from Lohara (Bk.) to Lohara (Kd.) in a jeep of Shivaji Jadhav. He was taken in the house of the accused nos.1 and 2 and thereafter he was not seen alive by him. Accused nos.1 to 4 were moving in and out of the house. On 1.5.2000, he received message from uncle of wife of accused no.1 Satish that Trimbak was dead. He reported the matter to police patil and then to police and then his body was found there. The evidence of P.W.3 Vyankat, P.W.5 Kisan and P.W.6 Allahh Baksh shows that the accused nos.1, 2 and 3 quarreled with the deceased Trimbak. The evidence of P.W.5 Kisan that the deceased was residing at Lohara (Bk.) for two months before 28.4.2000 has not been challenged.

27. The suggestions by the accused disclose that deceased was having monetary transaction with P.W.6 Allahh Baksh and had

executed some deed in his favour. Allahh Baksh stated that he had advanced Rs.1,21,000/- to the deceased Trimbak and he had filed two suits, one for partition and other for recovery of money against deceased Trimbak and accused nos.1 and 2. The evidence shows that he was not allowed to enter the agricultural land. The evidence of P.W.6 Allahh Baksh that deceased Trimbak was residing at his house at Lohara (Bk.) is not well supported by any other witness and his statement was recorded quite late. Therefore, it cannot be believed, however, there is consistent evidence of P.W.3 Vyankat, P.W.5 Kisan and P.W.6 Allahh Baksh that accused nos.1 and 2 were having differences with the deceased Trimbak and they were quarreling with him and, therefore, Trimbak was residing at Lohara (Bk.) for two months. It is brought on record that accused no.2 Indubai has submitted application before P.S.I. Lohara police station against him, Allahh Baksh and one Vasant that they were giving threats to deceased Trimbak in respect of agricultural land. There is evidence that there was partition and separate lands were provided to each including the deceased Trimbak, but there is evidence that land of the deceased Trimbak was in possession of accused nos. 1 and 2. It is obvious that deceased Trimbak must have entered into some transaction in respect of his agricultural land with Allah Baksh which was not liked by the accused. This evidence shows that accused nos.1 and 2 had motive to commit murder of deceased Trimbak.

28. P.W.3 Vyankat, P.W.5 Kisan and P.W.6 Allahh Baksh have deposed that on 28.4.2000 accused nos.1 and 2 brought deceased Trimbak from Lohara (Bk.) to Lohara (Kd.) in a jeep of Shivaji Jadhav.

Their evidence is consistent. Once it is held that deceased was residing at Lohara (Bk.) for two months and his body was found at Lohara (Kd.), it is obvious that he must have come from Lohara (Bk.) to Lohara (Kd.). This fact was reported by P.W.3 Vyankat to the police patil – P.W.2. The fact that accused Satish and accused Indubai, son and wife of deceased Trimbak brought deceased Trimbak from Lohara (Bk.) to Lohara (Kd.) would not be so significant to make a report to the police since that time subsequent events were unforeseen.

29. P.W.3 Vyankat was having enmity with accused no.3, as he has made allegations against him about misappropriation of society funds, but there is no enmity between him and accused nos.1 and 2 so as to falsely implicate accused nos.1 and 2.

30. Learned Advocate Mr Ghute Patil for the respondents relied on:

- (I) **Ghurey Lal Vs. State of U.P., 2008 (10) SCC 450**
- (II) **Chandrappa & Ors. Vs. State of Karnataka, 2007(4) SCC 415**
- (III) **C. Chenga Reddy Vs. State of A.P., 1996 AIR (SC) 3390**

31. In **Ghurey Lal's case**, it is observed that “When the trial Court has found the substratum of the evidence as false and serious infirmities in the prosecution case, the appellate Court should be slow in reversing the judgment of acquittal as the trial Court has advantage to watch the demeanour of the witnesses. The reversal is justified only when the acquittal is totally perverse or wholly unsustainable. It

is settled law that the view taken by the trial Court is reasonable and probable, the Court should not interfere.”

32. There cannot be any dispute about the proposition of law in this regard but we find that in the present case, the circumstantial evidence forms complete chain and there is no scope for any hypothesis consistent with the innocence of the accused nos.1 and 2. However, in the present case, we find that the trial Judge has not considered the clinching incriminating circumstance of custodial death and the burden on the accused as per Section 106 of Evidence Act. The reason for disbelieving P.W.3 is also not proper. Hence we find that the view taken by learned trial Judge is not reasonable and probable view and needs interference.

33. Thus, the evidence of custodial death coupled with evidence of last seen together and previous dispute giving rise to a motive provide a complete chain of circumstances showing the complicity of accused nos.1 and 2. They were bound to give explanation about the events that took place in their house, but they have not done so. Therefore, they will have to be held responsible for the homicidal death of deceased Trimbak.

34. We find that there is no reliable evidence to show complicity of accused nos.3 and 4 in the crime. There is no evidence against accused no.4 whereas evidence against accused no.3 is not reliable. Hence, the appeal against accused nos.3 and 4 deserves to be dismissed. However, we hold accused nos.1 Satish and accused no.2

Indubai guilty for the offence punishable under Section 302 read with Sec. 34 of Indian Penal Code.

35. Considering all the facts, we find that this case cannot come in the exceptional category of the rarest of rare case and, therefore, the imprisonment for life will be the proper sentence to accused nos.1 and 2. Since we are awarding lowest sentence, it is not necessary to hear the accused on the point of sentence. Hence, we pass the following order:

- ORDER -

(I) The appeal is partly allowed.

(II) Acquittal of accused no.1 - Satish Trimbak Rasal and accused no.2 Indubai Trimbak Rasal in Sessions Case No.12/2001 of Osmanabad Court is hereby set aside. Both the accused are held guilty for offence punishable under Section 302 read with Sec.34 of Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/- in default to suffer rigorous imprisonment for twenty days each. They shall be entitled to set off of undertrial detention period as per the rules.

(III) The appeal against accused no.3 - Vishwanath Shantaram Gadhave and accused no.4 - Kamlakar Sopan Rasal stands dismissed. The bail bonds of accused nos.3 and 4 stand cancelled. Bail bonds of accused nos.1 and 2 are forfeited.

(IV) Accused no.1 Satish Trimbak Rasal and accused no.2 - Indubai Trimbak Rasal shall surrender before the learned trial Judge within a

period of fifteen days to undergo the sentence; failing which the trial Judge shall take necessary steps for execution of the sentence.

(V) Muddemal property shall be preserved till the appeal period is over.

(A.M. DHAVAL, J.)

(T.V. NALAWADE, J.)

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