

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

CRIMINAL APPEAL NO. 130 OF 2002

Dattatray S/o. Munja Kundkar,
Age : 32 years, Occu. Agri & Labour,
R/o. Karewadi, Tq. Parli-Vaijnath,
Dist. Beed.

... Appellant

VERSUS

The State of Maharashtra.

... Respondent

.....
Mr V. R. Sonwalkar, Advocate for the appellant
Mr S. J. Salgare, APP for respondent/State
.....

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

DATE : 13.11.2017.

ORAL JUDGMENT (PER A. M. DHAVALA, J.) :

1. The accused, who has been convicted on the basis of evidence of last seen together for offence u/s 302 of IPC and sentenced to imprisonment for life and to pay fine of Rs. 2,000/-, in default, rigorous imprisonment for six months, has filed this appeal.

2. The facts relevant for deciding this appeal may be stated as follows :

The FIR Exh. 37 is lodged by Gaulanbai, wife of the Namdeo, on 29.10.98 on the basis of which crime was registered at C.R. No. 96/98 at Shirsala Police Station (Beed). As per FIR, deceased Namdeo, aged 30 years, was married to Gaulanbai and was residing with her and two sons Rajaram aged 13 years and Bhagwat aged 11 years at Karewadi, Tq. Parali. The deceased was habitual drunkard. On 28.10.98, at 11:00 a.m., his wife PW3 Gaulanbai went for labour work in agricultural field. That time her husband was alone in the house. He was not doing any work. When PW3 Gaulanbai returned to her house at 7:30 p.m., her husband was not there. He did not return in the night. Hence she and her mother-in-law made inquiry about Namdeo, but they did not get any clue. On the next day, in the morning at 11:00 a.m. PW3 - Gaulanbai came from Karewadi to Shirsala and made inquiry about her husband. Then she started proceeding to her maternal house at Revali. Then one unknown person told her that one drunkard was lying on the boundary of Shirsala and Karewadi and several persons had gathered there. PW3 went there and found that her husband was lying there dead with injuries to his neck, both elbows, back and private parts. Accordingly, she lodged FIR at Exh. 27 at 3:00 p.m. against unknown persons. The crime was registered and was investigated into. Autopsy was conducted on the body. The inquest panchanama

Exh.70 and spot panchanama Exh. 18 were drawn and clothes of the deceased were seized under seizure memorandum Exh. 20. The further inquiry revealed that, witness no. 5 Sangram and witness no.6 Haridas had seen Namdeo in the company of the accused. There was evidence that the accused and deceased had gone to one Laxmibai where they purchased liquor and consumed it. Deceased was in the company of the accused from 2:00 p.m. to 6:00 p.m. and both of them were in drunken situation. The inquiry also revealed that the accused alone returned by Jeep in the night at 11:00 p.m. The Post-mortem report revealed that, it was a case of homicidal death by throttling. The viscera preserved was sent to Chemical Analysis, which revealed no poison. The accused came to be arrested on 31.10.98. His clothes were seized on 02.11.98. The seized articles were forwarded to the office of Chemical Analyzer. No blood was found on the clothes of the accused. After completion of inquiry, the charge-sheet was submitted in the court.

3. In due course, the case was committed to the court of Sessions. The ld. Additional Sessions Judge, Ambajogai framed charge against the accused u/s 302/34 IPC. The accused pleaded not guilty. The prosecution examined 11 witnesses. The ld. Additional Sessions Judge accepted the evidence and held the accused guilty

and convicted & sentenced him as referred to above. Hence this appeal.

4. Heard ld. advocate Shri. V. R. Sonwalkar for the appellant, has taken us through the evidence on record. He submitted that, the only evidence against the accused is of last seen together as led by PW5 & PW6. PW2-Laxmibai who had allegedly sold liquor to the accused and the deceased has turned hostile. The evidence of PW5 & PW6 is not trustworthy and reliable. The accused had no motive to commit murder. There is no other evidence whatsoever to connect the accused with the crime. No injury was found on the person of the accused. The evidence is certainly insufficient to record the conviction and hence the appeal be allowed.

5. Per contra, ld. APP Shri. S. J. Salgare for the State argued that, there is consistent evidence of PW5 & PW6 about last seen together. There is very short time gap between the last seen together and the time of death. The accused has given no explanation. Hence, the conviction has been rightly recorded and it needs no interference.

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

Sr. No.	Points	Findings
1	Whether the deceased met with Homicidal death?	In the affirmative.
2	Whether the accused has committed murder of deceased Namdeo?	Not proved.
3	What order?	The appeal is allowed. The conviction and sentence of the accused is set aside and the accused is acquitted.

REASONS

The prosecution has examined 11 witnesses as follows:

[I] Evidence of last seen together :

- (i) PW5 - Sangram
- (ii) PW6 - Haridas
- (iii) PW3 - Gaulanbai, wife of the deceased.
- (iv) PW2 - Laxmibai, who sold the liquor, turned hostile.

[II] Evidence of the accused returning alone from Shirsala at 11:00 p.m.

- (i) PW 1 – Shaikh Ratan Noor Mohd.
- (ii) PW8 - Sheikh Tajoddin s/o Shaikh Shahabuddin.

[III] Medical Evidence :

- (i) The inquest panchanama proved by PW4 Rajabhau Exh.17.

- (ii) Provisional Death Certificate Exh. 48 & PM notes Exh. 49 proved by PW11 - Dr. Deepak Lande.

[IV] Panchas & Other witnesses :

- (i) The seizure of the clothes of the deceased panchanama Exh. 20.
- (ii) Seizure of the clothes of the accused and panchanama Exh. 21.
- (iii) PW7 - Sugamrao, a neighbour of PW3 Gaulanbai. He merely stated that, Namdeo was not doing any work and was addicted to liquor.
- (iv) PW9 - Shaikh Moin about discovery of the spot by the accused. Panchanama Exh. 33.
- (v) PW10 - API Citikar, the IO., who has produced and proved the following documents.
 - (a) FIR- Exh. 37.
 - (b) Spot panchanama Exh. 18.
 - (c) The extract of prosecution of PW2 Laxmibai under Prohibition Act (Exh. 39, 40 & 41).
 - (d) The request letter to MO for PM Exh. 43.
 - (e) Request for C.A. Exh. 42.
 - (f) Receipt of CA office and CA report Exh. 45 & 46.

7. As per the evidence of Medical Officer (Page 1) and PM reports and inquest panchanamas, the deceased had sustained 10 injuries of abrasions. There were abrasions even on the neck, pinna, ear, legs and back. As per PM report and evidence of Dr. Deepak Lande, the deceased died of 'Cardiac respiratory attack due to Asphyxia Secondary to strangulation (throttling)'. There is no

dispute that, the deceased met with homicidal death. Hence, on the basis of the evidence on record, we hold that the deceased met with homicidal death.

8. The case is based on circumstantial evidence of last seen together and PW5 & PW6 are the main witnesses. PW3 Gaulanbai, wife of Namdeo has given evidence of last seen together. She stated that, on the fateful day, her husband left her house along with the accused in the morning and she had seen them sitting near the bore-pump in the village at 10:30 a.m. Her evidence on this points is contrary to the FIR Exh. 27 and the contradictions have been proved. We find no substance in her evidence of last seen together.

9. PW5 Sangram of Moha has deposed that, on 28.10.98 at 3:00 p.m. he had seen the accused and the deceased Namdeo at S.T. Stand Moha and they were proceeding in auto rickshaw of Shivaji towards Shirsala. He was proceeding in the same auto rickshaw but got down at Moha chowk and he saw both of them going towards S.T. stand Shirsala. He further deposed that, again at 4:00 to 5:00 p.m. he saw both of them together in highly drunken condition at Shirsala S.T. stand. He then returned to Moha at 6:00 p.m.

10. He further deposed that, at 11:00 p.m. the accused alone came in the Jeep and went towards Karewadi. There is no material cross-examination of this witness. He has denied that, he had not seen them together.

11. PW6 Haridas is brother of PW3 Gaulanbai. He is resident of Revali, Tq. Parali. He deposed that, deceased Namdeo had met him at S.T. Stand Shirsala in front of one tailoring shop and he had seen them even at 2:00 p.m. He deposed that, both Namdeo and accused had consumed liquor. He had gone to market to purchase some goods. While he was returning to Revali, he again saw the accused and deceased together. He also stated that the, deceased had called him but he did not go to him as he was in drunken condition. He later learnt that, his brother-in-law Namdeo died and was lying in the field of Tukarm Telli. The evidence of PW5 & PW6, if believed, show that the deceased and the accused had gone from Karewadi to Shirsala in the morning. They had consumed liquor and they were there only upto 5:00 p.m. The evidence of PW5 Sangram that, he had seen both of them together at Moha at 3:00 p.m. is not consistent with the evidence of PW6 Haridas who had seen them at Shirsala at 2:00 p.m. and PW5 has seen them at Shirsala at 4:00 p.m.

12. PW6 Haridas is real brother of PW3 Gaulanbai. Gaulanbai was making inquiry about whereabouts of her husband. She saw dead body of her husband on 29.10.98 at 11:00 a.m. and she lodged report against unknown person at the Shirsala Police Station at 3:00 p.m. In normal course, PW3 Gaulanbai would have certainly informed about this incident to her maternal relatives who were residing at Revali, Tq. Parali, which is on the way to Shirsala and PW6 Haridas would have certainly told that the deceased was seen by him in the company of the accused on the earlier day. But, PW6 has certainly not disclosed this fact to PW3 Gaulanbai, who lodged the FIR. PW6 though brother-in-law of the deceased did not make any inquiry with the deceased. He did not even talk to him, which is quite unnatural. PW6 Haridas has deposed that, his statement was recorded by police on 31.10.98.

13. We find that, the evidence of last seen together is not convincing. However, we find that, even if the evidence of last seen together is believed, that by itself is not sufficient to connect the accused with the crime.

14. In the first place, the accused had no motive to commit the murder of the deceased. They were moving together and had

consumed liquor. The prosecution has absolutely no clue regarding the motive for the commission of murder of the deceased.

15. The dead body of Namdeo was found 1 km. away from Revali whereas; the deceased and accused were found together at Shirsala which is 15 k.m. from Revali. It is quite possible that after spending substantial time of the day by the accused and deceased together, the accused might have proceeded to his house and the deceased might have gone to Revali. The proximity of the time of the incident and the time of death is not proved. The post-mortem report shows that the deceased must have died about 2-3 hours after his last meal as semi digested food was found in his stomach. If the normal time of taking meal is 11:00 to 12:00 noon, the deceased was found alive upto 5:00 p.m. therefore, it is natural that the deceased did not die 2½ hrs. after the morning lunch. It is not clear whether the deceased had taken his meal in the evening and at what time he has died. The fact that, the deceased was alive upto 5:00 p.m. by the time his food must have been entirely digested, it indicates that there is no proximity of time of last seen together and time of death.

16. Besides, the prosecution has not collected scientific evidence in the form of nail clipping of the accused which could have

shown particles of the skin of the deceased. There was no blood found on the clothes of the deceased. We therefore find that the material on record was not sufficient to hold the accused guilty for commission of murder. The ld. trial Judge has not considered the material discrepancies pointed herein above. Hence, the conviction and sentence are not sustainable. The appeal thus deserves to be allowed. Hence the order.

ORDER

- (i) The appeal is allowed.
- (ii) Judgment and order of trial Court passed by II Additional Sessions Judge, Ambajogai in Sessions Case No. 59 of 2000 convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code is set aside.
- (iii) The appellant stands acquitted for the offences punishable u/s 302 IPC.
- (iv) The bail bonds shall stand cancelled.

- (v) Learned counsel Mr G. D. Jain was appointed as *Amicus Curiae* and he assisted the learned counsel Mr Sonwalkar for the appellant, is entitled for fees of Rs. 3,000/-.

[A. M. DHAVALE]
JUDGE

[T. V. NALAWADE]
JUDGE

sgp