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

CRIMINAL APPEAL NO. 649 OF 2002

1. Uttam s/o Bapurao Gundale,
Aged 25 years, Occu. Labour,
R/o Aadgaon, Taluka Palam,
District Parbhani

2. Hanumant s/o Narayan Gundale,
Aged 24 years, Occu. Labour,
R/o Aadgaon, Taluka Palam,
District Parbhani .. Appellants

Versus

. The State of Maharashtra .. Respondent

Mr Satej S. Jadhav, Advocate for appellants
Mr P.G. Borade, A.P.P. for respondent

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

DATE : 31st October 2017

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

1. This is an appeal against conviction under Section 302 read with Sec.34 of Indian Penal Code and sentence of imprisonment for life and fine of Rs.1,000/- each in default rigorous imprisonment for one year passed against the two appellants, by the IInd Joint Additional Sessions Judge, Ambejogai in Sessions Case No.60/1998 on 17.8.2002.

2. The facts for deciding the present appeal may be stated as follows:

As per F.I.R. dated 29.3.1998 lodged by P.W.8 – Kantabai, wife of deceased Munja, aged 35 years, they were residents of Adgaon, Taluka Palam, District Parbhani and since four months before the incident, both of them were working at the brick-kiln of Yakubkhan at

Shirsala. Accused no.1 Uttam aged 25 years and accused no.2 Hanumant aged 23 years were cousins of deceased Munja. On 24.1.1998 at 2 to 3 p.m. both the accused came to the work place of Munja. They were provided tea and lunch at the house near brick-kiln and thereafter, at 5.00 p.m. deceased Munja along with them went to Shirsala for grinding the grains and chillies. That time P.W. 8 Kantabai had told both the accused that they need not go to Shirsala alongwith her husband, but they told her that she should cook food and they would come again, but neither Munja nor the accused came back. P.W.8 Kantabai felt that her husband might have gone to his village. Therefore, she did not make enquiry. After four days, on 28.1.1998, Kantabai learnt and verified and found at 11.00 a.m. that her husband's dead body was found floating in a well on road from Adgaon to Shirsala. Kantabai reported the Accidental Death on the same day (Exh.31). She also reported that her husband was in habit of consuming liquor. The police started inquiry into the Accidental Death case and two months thereafter, Kantabai lodged F.I.R. Her report of Accidental Case as well as F.I.R. disclose that the accused had left behind one bag containing clothes in her house, which she handed over to the police. After the incident, both the accused were not in the village for 1½ months. About four to five days before lodging of F.I.R., her brother in law Balasaheb told her that he (deceased Munja) had taken a contract of cutting trees at village Khadi about one year earlier and that time, there was quarrel between the accused and Munja. Both the accused threatened Munja that on some day they would kill him. About two days before lodging of F.I.R., both the accused came to the house of P.W.8 Kantabai under the

influence of liquor and accosted her for lodging F.I.R. against Bhimrao, Datta and Bapuro at Palam Police Station (in respect of separate incident) and told her that they had killed her husband at Shirsala and she could not do nothing. If she would go to lodge report at Police Station, she would meet same fate as that of her husband. On the basis of the said F.I.R., Crime was registered at C.R.No.32/1998 under Section 302 read with Sec.34 of Indian Penal Code and the same was investigated into. The papers of Accidental Death case enquiry were collected. The post mortem report disclosed that the dead body of Munja was in decomposed condition and the cause of death could not be determined. On the basis of the material of last seen together and extra-judicial confession of the accused before P.W.8 Kantabai, the police submitted charge-sheet in the Court. In due course the case was committed to the Court of Sessions. Learned IInd Additional Sessions Judge framed charge at Exh.12 under Section 302 read with Sec.34 of Indian Penal Code. The accused pleaded not guilty. The prosecution examined ten witnesses. The defence of the accused is of total denial. The learned IInd Additional Sessions Judge convicted the accused and sentenced them as referred above. Hence, this appeal.

3. Mr Satej Jadhav, learned Counsel for the appellants argued that the homicidal death itself is not proved, as the Medical Officer could not give any opinion as to the cause of death. There is strong possibility that deceased met with a death by accidental drowning. He also submitted that the evidence of last seen together is not reliable. The time of death is not proved. Even otherwise, there is no proximity between the last seen together and time of death. The F.I.R. is

lodged after two months. Besides, the accused had no motive to commit murder. Consider the facts, the conviction is not sustainable and it should be set aside.

4. Per contra, Mr P.G. Borade, learned A.P.P. argued that the evidence of last seen together and the extra-judicial confession is convincing. There was previous quarrel between the accused and deceased Munja. The motive has been established. The subsequent conduct of the accused in not returning to the village and leaving their clothes at the house of deceased Munja corroborates the prosecution story. Hence, the appeal be dismissed.

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

(I)	Whether deceased Munja met with a homicidal death ?	.. Not proved
(II)	Whether the prosecution has proved that accused nos.1 & 2 in furtherance of their common intention committed murder of Munja ?	.. Not proved
(III)	Whether accused nos.1 & 2 in furtherance of their common intention destroyed the evidence of murder ?	.. Not proved
(IV)	What order ?	..The Appeal is allowed. The conviction and sentence are set aside and accused are acquitted

- REASONS -

6. The prosecution has examined ten witnesses, which can be grouped as follows :

(A) Witnesses of last seen together :

P.W.2 Shaikh Osman working at a brick-kiln.

P.W.3 Hiraman

P.W.8 Kantabai, wife of the deceased the informant (proved her Accidental Death report dated 28.1.1998 Exh.31. F.I.R. dated 29th March 1998 lodged by Kantabai Exh.32)

P.W.9 Ayyub, who was working at the brick-kiln;
P.W.6 Muktabai who runs a liquor business. She deposed that Munja and accused came to her for consuming liquor. Later on, the accused were brought to her by Police and she identified them. In cross, she gave admission that she had seen the accused for the first time and had not seen them earlier;

P.W.5 – Asadkhan, a flour mill owner, who turned hostile. He stated that Munja alone had been to his flour mill at Shirsala at 4.00 to 5.00 p.m.

P.W.4 – Hausabai who deposed that Munja and two more persons had approached to her house at 9. p.m. at Shirsala for purchasing liquor. Later, she learnt that the said person was murdered. She denied that the accused persons before the Court had accompanied the deceased, but again stated that they had accompanied the deceased. In cross, she again gave admission that she was not in a position to say who had accompanied the deceased.

(B) Previous enmity – P.W.1 Balasaheb, brother of the deceased deposed about the quarrel between deceased Munja and the accused at village Khadi. As he did not depose as expected by the prosecution, he was cross-examined with the permission of the Court and he gave admissions. His knowledge about last seen together is hearsay but he deposed about the previous quarrel and threats given by the accused to finish deceased Munja. Besides, he deposed that there was also quarrel at Hyderabad.

(C) Extra-judicial confession : P.W.8 Kantabai deposed that about two days before lodging of F.I.R., the accused came to her and told her that they had killed her husband and threatened that they would kill her as well.

(D) The evidence of abscondence of the accused :
P.W.8 - Kantabai

(E) Panchnamas

P.W.10 – P.S.I. Shankar Sitikar
He has seized one white cloth (Uparna) from accused Hanumant under Panchnama Exh.44.

The defence has admitted inquest panchnama Exh.16, provisional post mortem report Exh.17, seizure of clothes of deceased Exh.18, the spot panchnama Exh.20.

7. Point No.1: The evidence on record shows that deceased Munja was last seen on 24.1.1998 when he left his house at brick-kiln, Shirsala at about 5.00 p.m. along with the accused. Munja had gone for grinding the grains and chillies from Shirsala. Thereafter, his dead body was found on 28.1.1998 floating in a well. The post mortem

report Exh.19 shows that the body was in decomposed condition. There were signs of decomposition. Blood was oozing from the nose and the lips were damaged. Doctor gave opinion that due to decomposed condition, he was unable to determine the cause of death. He has not disclosed the probable time of death.

8. The homicidal death has to be proved by the prosecution. In the present case, the dead body was found in a well. The admissions of the witnesses disclose that the well was having no parapet wall. It was situated in a residential locality. There are no specific injuries to the deceased to indicate possibility of homicidal death. The medical evidence is clearly not supporting the theory of homicidal death, much less eliminating the possibility of accidental death. There are admissions that deceased was having habit of consuming liquor. On 24.1.1998, he had gone to purchase the liquor. There is possibility of he falling in a well while returning in drunken condition.

9. Learned Additional Sessions Judge relied on the evidence of last seen together to come to the conclusion of homicide. We are unable to accept the reasoning given by learned trial Judge. There is evidence of last seen together, however, it is dated 24.1.1998, whereas the dead body was found on 28.1.1998. The time of death is unknown. The deceased might have died on 25.1.1998 or 26.1.1998. If there is no close proximity between the time of last seen together and the time of death, no inference of homicidal death can be drawn, as has been drawn by the trial Judge. Hence, point no.1 is answered as not proved.

10. Point No.2 : Murder by the accused: As the homicidal death itself is not proved, the issue of committing murder by the accused does not survive. Still we consider the evidence in the light of arguments advanced.

11. The inference about murder by the accused has been drawn on the basis of last seen together. Though there is delay of two months in lodging the F.I.R., on 28.1.1998 on the discovery of dead body, P.W.8 Kantabai has reported the Accidental Death to the police vide report Exh.31 in which she has specifically stated that both the accused had been to her house and they had tea and lunch with her husband Munja. Thereafter, they accompanied him to the grinding mill. They were agreed to return, but they did not return. There is corroboration to her evidence by P.W.2 Shaikh Osman. She has also produced bag containing clothes left behind by both the accused at her house. She has no enmity to falsely implicate the accused. The clothes are not proved to be of the accused by corroborative evidence.

12. We, therefore, hold that the prosecution has proved that accused nos.1 and 2 had been to the brick-kiln of deceased Munja on 24.1.1998 and they had left his house together at 5.00 p.m. However, there is no reliable evidence that they had agreed to return.

13. The evidence of P.W.7 - Ashrubai who is running the grinding mill shows that deceased Munja had been to her grinding mill along with two persons, but she has not identified those two persons as the accused persons. P.W.6 Muktabai had stated that Munja and the

accused had been to her liquor shop, but later she turned hostile in cross-examination and gave admission that she was seeing the accused persons for the first time in the Court. P.W.5 Asadkhan is running flour mill at Shirsala. He has stated that Munja alone had been to his flour mill.

14. None of these witnesses have deposed the relevant dates when Munja had been to them. As earlier stated, there is no evidence at what time Munja has died. For using the evidence of last seen together, it is essential that there should be close proximity between the time of last seen together and the date and the proximity should be so much that it rules out any possibility other than complicity of the persons lastly seen with the deceased. We find that there is no such evidence of last seen together.

15. The evidence of P.W.8 Kantabai is the material evidence. She had also stated about extra-judicial confession given by the accused before her. The F.I.R. is filed by P.W.8 Kantabai after a period of two months. She has admitted that just before lodging of the F.I.R., there was some quarrel between accused, brother of accused Hanumant and Uttam on one side and between her husband Munja and accused on the other side for which there was complaint filed with Palam Police Station against both the accused. It seems that this was the cause for lodging of F.I.R. in the present case.

16. P.W.1 Balasaheb, brother of deceased Munja has deposed that about one year back, the accused had a quarrel with Munja at village Khadi and the accused had threatened to kill him. There is evidence

of P.W.8 Kantabai that the accused had a quarrel with Munja over cutting of trees, but she has no personal knowledge and she was informed about the same by P.W.1 Balasaheb. This quarrel was allegedly taken place one year earlier. There is some evidence to show that the accused and deceased had gone together at Hyderabad and they had some quarrel there, but the evidence with regard to it is not convincing.

17. Admittedly, both the accused are cousins of deceased Munja. They had been to him on 24.1.1998 and Munja's wife P.W.8 Kantabai provided them tea and lunch. Thereafter, Munja voluntarily went along with them. P.W.8 Kantabai did not feel it unsafe for Munja. When Munja did not return on 24.1.1998 neither P.W.1 Balasaheb nor P.W.8 - Kantabai lodged report to the police station. Even when the dead body of Munja was found on 28.1.1998, there was no report about previous quarrel and threats given by the accused to Munja. The F.I.R. came to be lodged after two months. In the light of these facts, we find no substance in the allegations that deceased Munja had serious quarrel with the accused and the accused had given him threats of killing. We find that the prosecution has failed to establish that accused nos.1 and 2 had any motive to commit murder of Munja.

18. P.W.8 Kantabai has deposed that both the accused were absconding from the village for one and half months after the incident, but she had given admission that both the accused were labourers and used to go to the places wherever they were getting work. Therefore, mere absence of both the accused from the village is also not suspicious. Besides, P.W.8 Kantabai has not reported earlier

that absence of both the accused from the village was suspicious and they might have killed Munja and, therefore, they were absconding.

19. Thus, we find that the prosecution has failed to prove the homicidal death itself. Besides, there is no cogent, reliable and trustworthy material to show that both the accused must have committed murder of deceased Munja. Learned trial Judge gave flimsy reasons to hold that the homicidal death was proved. Even, the appreciation showing involvement of both the accused in the crime is not satisfactory. He did not take into consideration the fact that there was no proximity of time between evidence of last seen together and the time of death. We, therefore, do not agree with the conviction recorded by the trial Judge and the sentence imposed. Hence, we pass the following order :

- ORDER -

Criminal Appeal No. 649/2002 is allowed. The conviction and sentence of both the accused under section 302 r/w 34 of IPC is set aside. Both the accused are acquitted of the offences for which they are charged. Their bail bonds stand cancelled. Muddemal property, if any, be destroyed after the appeal period is over.

(A.M. DHAVALE, J.) **(T.V. NALAWADE, J.)**

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