

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.205 OF 2010

1. Anwar Gulam Hussain Shaikh.	]	
Age – 23 years, Occupation – Business,	]	
R/o. 20-2, C-Block, V. P. Nagar, Worli,	]	
Lotus, Mumbai.	]	
2. Yasmin Gulam Hussain Shaikh.	]	
Age – 19 years, Occupation – Household,	]	
R/o. 20-2, C-Block, V. P. Nagar, Worli,	]	
Lotus, Mumbai.	]	... Appellants /
		Original Accused

Versus

State of Maharashtra,	]	
(At the instance of Tardeo Police Station.)	]	... Respondent

Mr. V. S. Vanjara a/w Mr. Ganesh Gole for Appellants.
Mr. Rajan Salvi, APP for State.

CORAM :- A. A. SAYED &

SARANG V. KOTWAL, JJ.

RESERVED ON :- 27 SEPTEMBER, 2017

PRONOUNCED ON :- 10 OCTOBER, 2017

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. The present Appeal is preferred by the Appellants challenging the Judgment and Order dated 19/11/2009 passed by the learned Additional Sessions Judge for Greater Bombay in Sessions

Case No.330 of 2009 whereby both the Appellants were convicted for having committed an offence punishable under Section 302 read with 34 of the IPC and were sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.500/- each; and in default of payment of fine, to suffer rigorous imprisonment for one month.

2. The prosecution case is in respect of murder of one Salma Shaikh who was the stepmother of both these Appellants. The FIR in the present case was lodged on 16/02/2009 at 9.30 p.m. vide C.R.No.42 of 2009 at Tardeo Police Station by one Anwar Nawab Shaikh who was the brother of deceased Salma. According to him, the present Appellants, with one Ashfaq Ali who was a juvenile on the date of the incident and who was the cousin of both the Appellants, had committed murder of Salma in their residential house at V. P. Nagar, Worli, Mumbai, in the night of 16th and 17th February 2009. The investigation was conducted and the charge-sheet was filed and thereafter the case was committed to the Court of Sessions for trial.

2. During the trial, the prosecution examined 8 witnesses. PW 4 Dr. Vinod Chaudhari had conducted the post-mortem examination and had found 24 injuries on the dead body of deceased Salma. There were 9 abrasions on the face and the remaining contusions were either on the wrist or on the legs. The significant injury was on the neck suggesting strangulation by odhani. He has given cause of death as 'asphyxia due to smothering and strangulation'. PW 1 Anwar Shaikh was the first informant and the

only eye witness examined by the prosecution. PW 2 Irshad Shaikh was a panch for the inquest panchanama but he had not supported the prosecution case. PW 3 Nitesh Tanna was a panch for the spot panchanama who had proved the spot panchanama which was exhibited vide Exh.15. PW 5 Rajendra Sakpal was the panch for the arrest panchanama of the Appellant No.1. PW 6 PSI Santosh Kokare had recorded the FIR, had conducted the spot panchanama and had arrested the Appellant No.1 PW 7 PC Dattatray Chaure had carried the articles for chemical analysis.

3. We have heard Mr. V. S. Vanjara, learned Advocate for the Appellants and Mr. Rajan Salvi, APP for the State and with their assistance, we have read the evidence and perused the record.

4. The entire prosecution case revolves around the evidence of PW 1 Anwar Shaikh who is the brother of the deceased. PW 1 had lodged the FIR and he claims to be an eye witness to the incident. Since he is the sole eye witness and since he is an interested witness, we have scrutinized his evidence very carefully. He has stated that the deceased was his elder sister. She was married to one Gulam Shaikh about 10 to 12 years before the incident. The Appellants were the children from the first marriage of said Gulam Shaikh. PW 1 has stated that he was residing with his sister Salma and her family. He has deposed that on 16/02/1999 at around 7.00 p.m., he returned to the room of his sister. His niece Appo was knocking on the door. There was no response from inside. Therefore, he looked inside from

the window which was above the door. At that time, he saw that the Appellant No.2 had caught hold of the legs of his sister. The Appellant No.1 and the juvenile offender were strangulating Salma with odhani. He has further deposed that he raised shouts and called neighbours. He has further deposed that after neighbours came there, the Appellant No.2 opened the door and the Appellant No.1 and his companion ran from the house. He has deposed that he saw that Salma was still breathing and then he took her to Poddar Hospital at Worli but the doctor declared her dead. At 8.30 p.m., police came to the hospital, made inquiries with him and recorded the FIR in the hospital itself.

5. If the cross-examination of this witness is perused, it can be seen that his evidence, as a whole, appears very unnatural. He has stated that at about 5.00 p.m., he had gone to Dr. Kalam as he was not feeling well. Then he had slept in a neighbour's house. He has stated that the neighbour had gone for work at that time. He has deposed that the neighbour used to reside with his wife. Therefore, it is quite strange that this witness would go and sleep in the neighbour's house when the neighbour was not in the house. Thereafter he has deposed that at about 6.30 p.m., he had tea somewhere near the house of his sister and then he came to his sister's house at about 6.55 p.m. Then he says that he saw the incident from the window which was on the left side. The evidentiary value of the entire deposition of this witness has to be decided in the context of location of this window and as to whether it was possible for him to

simply look inside from the said window. In his deposition, he has stated that he had seen the incident from the window which was above the door. In the cross-examination, he has stated that he had seen the incident from the window which was on the left side. If the evidence of PW 3 Nitesh Tanna and the spot panchanama are seen, it is mentioned that the window was on the right side of the door at a height of 7 ft. from the floor. The window was 4 ft. in length and 1 ft. 4 inches in height and there was iron grill. Significantly, PW 1 has not stated that he had brought any stool and stood over it to look inside. He had also not stated that somehow he had raised himself to the height above 7 ft. to look inside the room. Therefore, the crucial question remains as to whether it was possible for him to look inside the room from the said window. There is no other window mentioned either by him or by PW 3 Nitesh Tanna or in the spot panchanama. The prosecution has not led any sufficient evidence to show that it was possible to look from the window at that height. PW 2 has not explained as to in what manner he looked inside. This was an important aspect of the matter, particularly because he is the only eye witness and the said window was the only place from where he claimed to have seen the incident. We are not satisfied with the evidence led by the prosecution to show that it was possible to look inside from the said window without any external aid.

6. The conduct of this witness appears unnatural. As mentioned earlier, he tried to explain his absence from the room and arrival at the spot by stating that he had initially gone to Dr. Kalam

and then had slept in the neighbour's house. It is not understood as to why, when he was residing with his sister, he should not sleep in his house when he was unwell. His evidence does not inspire confidence, inasmuch as, it is not corroborated by evidence of any of the neighbours. From the evidence, it is seen that it was a locality of residential hutments and houses and naturally, there had to be many people living in that area. There is absolutely no reason as to why the prosecution could not examine any of them to corroborate this witness.

7. Even after the incident when the door was opened by the Appellant No.2, the Appellant No.1 and his companion could easily run away. This fact is also inexplicable. This witness has not made any attempt to stop or apprehend them or he had not requested any neighbour to catch them if he had really seen the incident. There is no witness examined by the prosecution to show that the Appellant No.1 and the other boy ran away from the spot of the incident. Looking at the nature of the injuries and the smothering and strangulation, his version that he could see the deceased was breathing, also does not appear to be true.

8. There is no other corroborative piece of evidence. A T-shirt recovered at the instance of the companion of the Appellants showed presence of blood of 'A' group. However, there is no such incriminating circumstance against either of the Appellants before us. The prosecution has not proved the motive behind the murder.

Therefore, it is very difficult to rely on this short evidence led by the prosecution, that too consisting of an interested sole eye witness, to convict the Appellants. Therefore, we are inclined to grant benefit of doubt to both the Appellants. Hence the following order :

ORDER

- (i) The Appeal is allowed.
- (ii) The conviction and sentence recorded by the learned Additional Sessions Judge for Greater Bombay in Sessions Case No.330 of 2009 convicting the Appellants for having committed an offence punishable under Section 302 read with 34 of the IPC and sentencing them to suffer rigorous imprisonment for life and to pay a fine of Rs.500/- each; and in default of payment of fine, to suffer rigorous imprisonment for one month, are set aside.
- (iii) Both the Appellants are acquitted of all the charges framed against them.

(SARANG V. KOTWAL, J.)

(A. A. SAYED, J.)