

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

CRIMINAL APPEAL NO. 1315 OF 2012

Rupa Vilas Khot	]	
Aged 31 Years, Indian Inhabitant,	]	
Occ.Pharmist,	]	
Permanent Resident of	]	
12/B, A-Wing, PMGP Colony,	]	
Near Punjab and Maharashtra	]	
Co-op. Bank, Poonam Nagar, Mahakali,	]	
Andheri (E), Mumbai – 400 093	]	
	]	
Presently lodged at Yerwada	]	
Central Prison, Pune as convicted	]	Appellant /
Prisoner in the present matter	]	Org. Accused No.1

V/s.

The State of Maharashtra	]	
At the instance of	]	
M.I.D.C. Police Station	]	
Vide C.R. No.192 of 2011	]	Respondent

**ALONG WITH
CRIMINAL APPEAL NO. 190 OF 2014**

Sunil Vishnu Chavan	]	
Convict No.C/5663,	]	
Aged 47 Years,	]	
Presently Lodged at Kolhapur Central	]	
Prison, Kalamba, Kolhapur – 416 007	]	
	]	
R/o. Ashtavinayak Co-operative	]	
Housing Society, Bldg. No.2A, R. No.54,	]	
Jogeshwari Vikroli Link Road,	]	Appellant /
Durga Nagar, Jogeshwari, Mumbai-60	]	Org. Accused No.2

V/s.

The State of Maharashtra	]	
At the instance of	]	
M.I.D.C. Police Station	]	
Vide C.R. No.192 of 2011	]	Respondent

- Mrs.Nasreen S.K. Ayubi, Advocate appointed for Appellant in Criminal Appeal No.190 of 2014.
- Ms.Naima Shaikh a/w. Khan Abdul Wahab for Appellant in Criminal Appeal No. 1315 of 2012.
- Mrs.G.P. Mulekar, A.P.P. for Respondent-State.

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

DATED : 21th SEPTEMBER, 2017.

ORAL JUDGMENT (PER : DR. SHALINI PHANSALKAR-JOSHI, J.) :-

1] These two separate appeals are preferred by original Accused Nos.1 and 2 challenging the judgment and order dated 19th October, 2012 of Ad-hoc Additional Sessions Judge, City Civil and Sessions Court, Greater Mumbai in Sessions Case No. 551 of 2011, thereby convicting them for the offences punishable under Section 302 and 201 read with 34 of the Indian Penal Code (IPC) and sentencing them to suffer imprisonment for life and to pay a fine of Rs.5000/-

each; in default to suffer R.I. for 30 days on the first count and R.I. for two years and to pay a fine of Rs.5000/- each; in default to suffer R.I. for 30 days on the second count.

2] Brief facts of the appeal can be stated as follows;

Accused No.1 Rupa Vilas Khot is the wife of deceased Vilas Madhukar Khot. They were residing at building no.8, Shubharambh Co-Op. Housing Society, PMGP Colony, Andheri (East), Mumbai along with their minor son PW-12 Om Vilas Khot.

3] On 11/4/2011 while PW-1 PSI Sunil Khatpe, attached to MIDC Police Station, was on duty at about 7.30 a.m. Dr.Kamlesh Tripathi informed him on telephone that Vilas Khot has died in suspicious circumstances; hence PW-1 PSI Sunil Khatpe rushed to the spot. Accused No.1 was present there. He made inquiries with her; but she gave evasive replies. He found the dead body of Vilas lying on the wooden sofa wearing only half pant with several injuries on his face, neck, both arms and other parts of the body. Accordingly, he prepared the inquest cum spot panchanama (Exh.17) and sent body for postmortem examination. At the spot, he found the blood stains on the fridge, sofa-cover, bed-sheet. He removed the pillow covers and found

that there were blood stains on the three pillows. He also found the recently washed shirt and pant of the deceased in wet condition and kept for drying in the balcony. He also found that the just washed and wet pillow-cover and bed-sheet with blood stains thereon. He noted all these facts in the spot panchanama in presence of PW-3 panch Sanjay Mahadik. From the spot he also seized these incriminating articles. Then he returned to the MIDC Police Station and initially lodged ADR No.31 of 2011 under Section 174 of Criminal Procedure Code (CrPC) and, thereafter, considering the conduct of Accused No.1 in giving evasive replies and the prevailing situation on the spot of the incident, he lodged complaint Exh.18 against her.

4] On this complaint PW-14 PI Deepak Bagwe registered CR No.192 of 2011 and arrested Accused No.1 on the same day. In the course of interrogation with Accused No.1, the role of Accused No.2 was transpired and hence Accused No.2 was also arrested on the same day. The clothes on the person of Accused No.2 were seized under panchanama Exh.27.

5] It was revealed in the course of investigation that Accused Nos.1 and 2 were having extra marital affair and they had stayed on

26/10/2010 in Hotel Ganga at Jogeshwari by posing themselves as husband and wife. In view thereof, the statement of the owner of Hotel Ganga PW-9 Chetan Vyas was recorded. The register of the lodge bearing the entry of Accused Nos.1 and 2 with their signatures therein was produced by PW-9 Chetan Vyas and it was seized under panchanama Exh.39. PI Bagwe then obtained the specimen handwriting of Accused Nos.1 and 2 in presence of the panch PW-13 Raju Thakur and sent the same along with the Hotel register to PW-11 Hand Writing Expert Shri. Sagar Juikar.

6] During the course of investigation at the instance of Accused No.1, the towel used in the commission of the offence came to be seized under seizure panchanama Exh.21. All the seized articles were sent to C.A. on 13/05/2011. The C.A. Report is produced in the case at Exh.59.

7] As a part of further investigation, the Test Identification Parade of Accused Nos.1 and 2 was conducted on 15/06/2011 and 16/06/2011 respectively by PW-4 Executive Magistrate, Arjun Tambe. In the said Test Identification Parade, PW-9 Chetan Vyas, the owner of Hotel Ganga identified both the accused. The statement of PW-12 Om,

the minor son of deceased and Accused No.1 got recorded under Section 164 of CrPC before the Metropolitan Magistrate. PW-14 PI Bagwe has then collected the call detail records of the SIM Card of the mobile of deceased and that of the Accused No.2 from the concerned Cellular Companies, which reveal the exchange of calls between these two mobile phones, even after the death of Vilas. The PI Bagwe then collected the postmortem report Exh.33 from PW-7 Dr.Gajare. Thus, after completion of investigation, he filed charge-sheet in the Court of Metropolitan Magistrate, 22nd Court, Andheri, Mumbai against both the accused. In due course, the learned Magistrate committed the case to the Sessions Court, Mumbai.

8] On committal of the case to the Sessions Court, the Trial Court framed charge against the Accused vide Exh.6. Both the Accused pleaded not guilty and claimed to be tried, raising the defence of total denial and false implication.

9] In support of its case, the prosecution examined in all 14 witnesses and on appreciation of their evidence, the Trial Court was pleased to convict and sentence the Accused Nos.1 and 2 as stated above.

10] In this appeal, we have heard learned counsel for Accused No.1 Ms.Naima Shaikh and learned counsel for Accused No.2 Mrs.Nasreen Ayubi. Both of them have challenged the impugned judgment and order of the Trial Court on the count that apparently there is no convincing, cogent and reliable evidence on record to prove the guilt of the accused.

11] As per submission of learned counsel for Accused No.1, the star witness for prosecution, namely, PW-12 Om, the eye witness to the incident has totally exonerated Accused No.1 Rupa, his mother from the involvement in the incident. He has implicated Accused No.2 alone. Despite that the prosecution has not declared him hostile and therefore, the defence can very well take advantage of his evidence to disprove the case of prosecution against Accused No.1. It is submitted that there is absolutely no evidence to connect Accused No.1 with the alleged incident as evidence of PW-12 Om goes to prove that Accused No.1 was not present in the house at the time of incident as she has gone to sleep in the house of her mother. Even as regards the call detail records, it is submitted that the SIM Card was standing in the name of the deceased and not in the name of Accused No.1. Therefore,

the call detail records also cannot connect the Accused No.1 to the incident beyond reasonable doubt. It is urged that the recovery of towel at the instance of Accused No.1 is disbelieved by the Trial Court also. Moreover, the towel does not bear any blood stains.

12] In sum and substance, it is thus the submission of learned counsel for Accused No.1 that there may be some scattered pieces of incriminating circumstances against Accused No.1, but those incriminating circumstances are not proved beyond reasonable doubt by the prosecution. Merely on assumptions and suspicion, the Investigating Officer has implicated her and the Trial Court has held her guilt to be proved. Therefore, according to learned counsel for Accused No.1, the impugned judgment and order of the Trial Court is required to be set-aside qua Accused No.1.

13] As regards Accused No.2, it is submitted by his learned counsel that, the opinion of the Handwriting Expert is not conclusive against Accused No.2. The only incriminating material against him is the evidence of PW-12 Om; however, considering his tender age and the fact that he was a child witness who has exonerated his mother by stating that at the time of incident his mother was not present in the

house, much reliance cannot be placed on the evidence of this witness. According to learned counsel for Accused No.2, the possibility of this witness being tutored cannot be ruled out. It is urged that otherwise also the evidence of child witness needs to be accepted with lot of caution and care and needs to be proved as that of sterling quality. In this case, according to him, the evidence of PW-12 Om cannot successfully pass this scrutiny to call it as of “sterling quality”. According to learned counsel for Accused No.2, therefore, the benefit of doubt in this case cannot be denied to Accused No.2 also.

14] Per contra learned A.P.P. has supported the impugned judgment and order of the Trial Court for the reasons stated therein and also for the fact that the evidence of eye-witness PW-12 Om clearly implicates Accused No.2 and the evidence of the call detail records and the evidence of PW-9 Chetan Vyas, the owner of Hotel Ganga, clearly proves the involvement of Accused No.1, coupled with the medical evidence, proving that the injuries found on the dead body of Vilas cannot be caused by a single person. Hence, according to learned A.P.P., there is clinching evidence on record to prove the guilt of both the Accused; therefore these appeals needs to be dismissed.

15] We have given our anxious consideration to the submissions advanced by learned counsel for Accused Nos.1 and 2; and learned A.P.P. and also perused the entire evidence on record along with impugned judgment of the Trial Court and on perusal of the same, we are of the considered opinion that the prosecution has succeeded in proving its case against both the Accused beyond reasonable doubt. Our reasons for arriving at this finding can be stated as under;

16] In this case, the main reliance of prosecution is on the evidence of PW-12 Om, the minor son of the deceased and Accused No.1. He was residing along with them. At the time of giving evidence in the Court, in the year 2012, he was 10 years old and therefore, it follows that at the time of incident in the year 2011, he was about 9 years of age. After making preliminary enquiry about his understanding as to whether he was able to give rational answers and whether he was aware of the sanctity of the oath, the Trial Court has administered oath to him. His evidence goes to prove that deceased was his father and Accused No.1 was his real mother. He was residing along with them at the given address where the incident has taken

place. He was also knowing Accused No.2, as Accused No.2 was doing business of Cable Operator with his father. He used to address Accused No.2 as Sunil Bhaiya.

17] About the incident, PW-12 Om has deposed that Accused No.2 has throttled his father and killed him at night in their house. According to his evidence Accused No.1, his mother, was at that time in the house of her mother; which was situate behind their house. In his cross-examination on behalf of Accused Nos.1 and 2, his evidence is not at all shaken. He has denied suggestion that at the time of incident, he was not at home and he had gone along with Accused No.1 to the house of her mother. He has also denied that he was not knowing Accused No.2. He has identified Accused No.2 in the Court properly.

18] It may be true that PW-12 Om is a child witness and hence his evidence needs to be scrutinized with care, but then there is absolutely nothing in his cross-examination to disbelieve him, as regards the involvement of Accused No.2 in the incident and the way Accused No.2 has throttled the deceased.

19] It may also be true that PW-12 Om has not involved his mother-Accused No.1 in the incident but then one can understand, it may be because Accused No.1 is his mother and after this incident he was very much residing in the house of the mother-Accused No.1. His anxiety therefore to exculpate his mother cannot be denied. However, it becomes difficult to accept that Accused No.1, if has gone to the house of her mother for sleeping, would not take her minor son of 9 years of age with her. It also does not appear probable that, PW-12 Om will stay at night in the house and will not accompany his mother to the house of his grand mother.

20] In our considered opinion, the material piece of evidence in this case is that of PW-9, the owner of Hotel Ganga Shri.Chetan Vyas. According to his evidence on 26/10/2010 i.e. few months before incident Accused Nos.1 and 2 had come to his Hotel Ganga, which is situated in front of Jogeshwari Railway Station (East). They had made entry in the register at serial Nos.75 and 76. They had signed against this entry in the register and they were allotted one room. They had posed themselves as husband and wife and stayed in the allotted room for one day. He has identified both Accused Nos.1 and 2 in the Test

Identification Parade conducted by PW-4 Executive Magistrate Shri. Arjun Tambe. He has also produced the relevant register of his hotel, which was seized under panchanama Exh.39 in the presence of PW-8 panch Ajay Shukla.

21] As per evidence of PW-14 P.I. Bagwe, the specimen handwriting and signatures of Accused Nos.1 and 2 were obtained in presence of PW-13 panch Raju Thakur under panchanama Exh.49. PW-14 P.I. Bagwe has sent this register and the specimen signatures of Accused Nos.1 and 2 to PW-11 Handwriting Expert Shri. Sagar Juikar. His evidence clearly goes to prove that as per his opinion, he found similarity in the signatures of Accused No.1 in the register and the specimen signatures.

22] As regards the handwriting of Accused No.2 in the said register, though he could not arrive at any definite opinion, it is pertinent to note that the address given in the said register is that of Accused No.2, which is stated in the charge-sheet namely Ashtavinayak Co-operative Housing Society, Building No.2A, Jogeshwari Vikroli Link Road, Durga Nagar, Jogeshwari, Mumbai-60. Even the mobile number written in the said register 9324534490 is that of Accused No.2, as can

be seen from the evidence of PW-6 the Nodal Officer Rajesh Gaikwad from Reliance Communication, who has produced the necessary certificate to that effect vide Exh.29.

23] Therefore, this evidence on record, in our opinion, categorically goes to prove that both Accused Nos.1 and 2 had visited Hotel Ganga belonging to PW-9 Chetan Vyas and stayed there for a day, posing themselves as husband and wife. This evidence thus proves their extra marital relations.

24] Learned counsel for Accused Nos.1 and 2 have tried to point out some infirmities in the evidence relating to Test Identification Parade conducted by PW-4 the Executive Magistrate but then as per the well settled position of law, if the evidence relating to Test Identification Parade is subjected to such minor scrutiny, then no Test Identification Parade can be admissible in evidence as such evidence is bound to suffer from minor defects.

25] Further corroboration to the prosecution case coming from the medical evidence of PW-7 Dr.Pankaj Gajare. According to him, following external and internal injuries were found on the body of the

deceased, when he conducted the autopsy:-

“External injury over head and face :-

- 1) Contusion size of 4.5 x 2 cm, seen over left forehead just above eyebrow, reddish in colour.
- 2) Contusion size of 2.5 x 1 cm, seen over left forehead, 0.5 cm above injury no.1, reddish in colour.
- 3) Abrasion size of 2 x 1 cm seen over centre of forehead, reddish in colour and superficial.
- 4) Contusion size of 4 x 3 cm seen over posterior surface of right ear, reddish in colour, cut section extra vasated blood seen.
- 5) CLW Size of 0.5 x 0.1 x 0.1 cm, seen over right mastoid, reddish in colour.
- 6) Contusion size of 6 x 4 cm with swelling seen over right occipital region, reddish in colour.
- 7) Size of 4.5 x 3 cm, seen over left mastoid, reddish in colour, cut section extra vasated blood seen.
- 8) Contused left eye medially, blackish, swollen.
- 9) Abrasion size of 0.5 x 4 x 0.5 cm seen over left zyaomatico maxillary region, just lateral to left nostril over area of 4 x 4 cm, reddish in colour.
- 10) Abrasion size of 1 x 8 cm seen over left nostril reddish in colour.
- 11) Abrasion size of 3 x 2 cm seen over nasal bone, oblique and reddish in colour.

External injuries over face :-

- 12) Contusion size of 4.5 x 2.5 cm, with swelling seen over left upper lip, latgerally, reddish in colour.
- 13) Contusion Size of 3 x 1 cm, seen over left lower lip, laterally reddish in colour.
- 14) Contusion 3 x 1 cm seen over lower lip centrally over innner mucosal surface, reddish in colour.
- 15) Contusion size of 2 x 1 cm, seen over right lower lip, laterally, reddish in colour,
- 16) Fracture dislocation of left lower 2nd bicuspid teeth.

External injuries over Neck Region :-

- 1) Scratch (abrasion) size of 5 x 1.8 cm seen over right lateral neck region, 3.5 cm below right angle of mandible oblique, reddish in colour.
- 2) Abrasion size of 2.5 x 1 cm oblique seen over centre of neck, below thyroid cartilage, reddish in colour.
- 3) Small abrasion 12 in numbers, size of 0.5 x 5 cm seen over right side of neck, reddish and superficial.

External injuries over limbs:-

- 1) Contusion size of 2 x 1 cm round seen over right forearms, dorsally, 11 cm above right wrist at lateral border, reddish in colour.
- 2) Contusion size of 4 x 305 cm seen over right thigh laterally 3 cm below, Anterior Superior iliac spine, reddish in colour.
- 3) Contusion size of 3 x 1.5 cm, seen over left elbow, laterally reddish in colour.
- 4) Contusion size of 1 x 1 cm seen over left forearm, dorsal aspect, lateral border, 6.5 cm above left wrist, reddish in colour.

Internal injuries over Head region:-

- 1) Haemorrhagic contusion size of 9 x 6 cm, reddish in colour, seen over right frontal region.
- 2) Haemorrhagic contusion size of 3.5 x 3.5 cm, reddish in colour, seen over right parietal region.
- 3) Haemorrhagic contusion size of 10 x 5 cm, reddish in colour, horizontal seen over right tempo parieto occipital region.
- 4) Haemorrhagic contusion size of 7 x 3 cm, reddish seen over left frontal region.
- 5) Haemorrhagic contusion size of 9 x 4 cm, reddish, seen over left temporal region.
- 6) Haemorrhagic contusion size of 7 x 3 cm, reddish, seen over left occipital region, laterally.
- 7) Right and Left temporal muscle haemorrhages seen.

On Brain I following injuries found:-

- 1) *Contusion size of 2 x 2 cm seen over right anterior parietal lobe*
- 2) *Contusion size of 4 x 3 cm seen over right posterior parietal lobe region lateral surface.*

On dissection of neck region I following injuries found:-

- 1) *Contusion size of 9.5 x 3 cm, seen over left sternocleidomastoid interior surface, reddish.*
- 2) *Contusion size of 4 x 2 cm, seen over right tonsillar region just below right angle of mandible, reddish in colour.*
- 3) *Contusion size of 3.5 x 3 cm, seen over left tonsillar region, just below left angle of mandible, reddish.*
- 4) *Contusion size of 3.5 x 1.5 cm seen over right larynx upper surface, reddish in colour.*
- 5) *Contusion size of 1.5 x 1.5 cm seen over larynx left side upper surface.*
- 6) *Fracture of lesser Cornu of hyoid bone on right side"*

26] In the opinion of PW-7 Dr.Gajare, the cause of death was due to throttling (unnatural). He has categorically opined that, it is not possible for a single person to cause all the above said injuries. Even a cursory glance to the number of injuries found on the dead body makes it necessary to infer that these injuries are not likely to be caused by a single person. Therefore, it follows involvement of more than one person in the incident and Accused No.1 was also equally involved therein.

27] Another material piece of evidence in this respect is that of the spot panchanama, which is proved through the evidence of PW-3

panch Sanjay Mahadik and PW-14 P.I. Bagwe. It is pertinent to note that on the dead body of the deceased, only one under pant was found, whereas his shirt and pant were found to be just washed and kept in the balcony for drying. The spot panchanama also reveals that the pillow cover was also removed from the pillow and it was just washed and kept for drying. Now at such an early hours of 6.30 a.m. no one can found the clothes washed and kept them for drying in the balcony. No explanation is also offered on behalf of the either Accused No.1 or 2 in that respect. The C.A. Report Exh.59 clearly goes to prove that this pillow cover was found stained with human blood. Even the pillows were having the human blood stains. The clothes of the deceased, Exh.16 and 17, were also found to be washed and they were having the human blood stained thereon.

28] The crucial piece of evidence connecting both the Accused in this case is the call detail records. The evidence of PW-6 Rajesh Gaikwad, Nodal Officer from Reliance Communication proves that Accused No.2 was having the SIM Card of Mobile phone number 9324534490. The evidence of PW-10 Yogesh Rajapurkar, Nodal Officer of Airtel Mobile Company goes to prove that deceased was having two

SIM Cards of mobile numbers 9987455097 and 9967662652. The call detail records of these two mobile phones goes to prove that there were several calls exchanged between the mobile number of Accused No.2 i.e. 9324534490 and mobile number of deceased 9967662652. These calls are not only before the death of deceased but even after his death in the night. Again there is no explanation offered by any of the accused about these exchange of various calls on the mobiles of the deceased and that of Accused No.2. It is pertinent to note that the mobile phone record at Exh.43 shows that the last call was made from mobile number 9324534490 belonging to deceased to Accused No.2's mobile number 9967662652 on 11/04/2011 at 5.14 a.m.. This shows that Accused No.1 was using the said mobile of the deceased, as admittedly the deceased was already dead by that time.

29] Then there is also the evidence relating to subsequent conduct of Accused No.1 . The evidence of PW-3 Sanjay Mahadik goes to show that Accused No.1 had made call to him on 11/04/2011 at about 6.30 a.m. to 6.42 a.m. from this very mobile number 9967662652. Then he immediately along with his wife went to the spot. His wife, who is a staff nurse, checked the deceased and then

PW-3 Sanjay Mahadik called Dr. Tripathi, who examined the deceased and declared him to be dead. When Dr. Tripathi said that police were required to be called, Accused No.1 hesitated stating whether it was necessary to call the police.

30] The evidence of PW-1 P.S.I. Sunil Khatpe also goes to show that when he visited the spot, he found the conduct of Accused No.1 most unnatural, as she was giving very evasive replies.

31] As stated above, it does not appear probable that Accused No.1 will leave the minor son alone in the house and go to the house of her mother for sleeping. There is also no explanation as to who has opened the door for Accused No.2 to give him entry in the house at late hours. It is not suggested to PW-12 that he has opened the door and Accused No.1 entered in the house. The panchanama does not disclose that the door or window of the house was broken. It is also not the case that Accused No.2 was residing in the same house. Therefore, it necessarily follows that it is Accused No.1, who has facilitated the entry of Accused No.2 in the house and then both of them have committed the murder of the deceased.

32] Thus, from the entire evidence on record, no other inference but that of the guilt of both the accused can be drawn. In our considered opinion therefore, the Trial Court has rightly held the guilt of both the accused to be proved beyond reasonable doubt.

33] As a result, the Appeals hold no merit and hence, stand dismissed.

34] As Accused No.1 Rupa Vilas Khot is on bail, her bail bonds stands cancelled and on the request of learned counsel for Accused No.1, the period of eight weeks is granted to her surrender to jail to undergo the remaining part of sentence.

(DR. SHALINI PHANSALKAR-JOSHI, J.) (SMT. V.K. TAHILRAMANI, J.)