

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1424 OF 2011**

Pundlik Basu Chavan,
Age-41 yrs, Occ-Labour,
R/o-Hulartanda, Tal-Muddevihal,
Dist-Vijapur.
Presently R/o-Waghrali,
Tal-Gadhinglaj, Dist-Kolhapur
(At present lodged in District Prison,
Kalamba, Kolhapur)

...Appellant
(Ori.Accused)

Versus

The State of Maharashtra

...Respondent

Mr. Shekhar Ingawale I/b Mr. Anand S. Patil for the Appellant

Mr. H. J. Dedia, A.P.P for the Respondent-State

**CORAM : SMT. V. K. TAHILRAMANI &
REVATI MOHITE DERE, JJ.
THURSDAY, 5th JANUARY, 2017**

JUDGMENT (Per Revati Mohite Dere, J.) :

1. This appeal is directed against the judgment and order dated 7th June, 2011 passed by the learned Additional Sessions Judge, Gadhinglaj, Kolhapur, in Sessions Case No. 13 of 2010, convicting and sentencing the appellant as under :

- for the offence punishable under Section 302 of the Indian Penal Code ('IPC'), to suffer RI for life and to pay fine of Rs. 2,000/-, in default, to suffer RI for 1 year;
- for the offence punishable under Section 201 r/w 511 of the IPC, to suffer RI for 3 years and to pay fine of Rs. 1,000/-, in default, to suffer SI for 1 year;

The said sentences were directed to run concurrently.

2. The prosecution case in brief is as under :

According to the complainant Kasim Nadaf (PW 3), the owner of a Mahindra Pick-up van, on 3rd March, 2010, when he was waiting at the stand for his vehicle to be hired, the appellant came up to him and stated that he wanted to carry domestic articles from Waghrali to Sawantwadi. The fair was settled for Rs. 1,600/-. Kasim went with his vehicle to Village Waghrali and the appellant loaded his articles in the van. The vehicle then proceeded to Sawantwadi via Ajra. Before reaching Sawantwadi, the vehicle stopped at a dhaba and the appellant called a person from his phone. The appellant thereafter, disclosed to Kasim that the person with whom he

wanted to work has declined to engage him and hence, he wanted to return to Gadhinglaj. On being asked for return fare, the appellant agreed to pay an additional amount of Rs. 500/-. While crossing the ghat section at Amboli, the appellant asked Kasim to stop the vehicle near a valley, pursuant to which, the vehicle was stopped. The appellant got down from the said vehicle and went to the rear side. The appellant called Kasim to the rear side of the vehicle and disclosed that he wanted to throw one gunny bag in the valley. Kasim inquired as to what was there in the gunny bag, however, the appellant was reluctant to disclose the same. When Kasim insisted on disclosing the contents of the gunny bag, the appellant stated that his wife's dead body was in the gunny bag. On further inquiry, the appellant disclosed that he had throttled his wife as she was not of good character. Kasim lured the appellant by saying that the bag could be thrown elsewhere and proceeded further. On the way, near Village Madalge, Kasim's friend Rajendra Mahadik's (PW 26) vehicle crossed his vehicle. Rajendra was on his way to Ajra, to deliver sugarcane. Rajendra called Kasim and asked where he was going. Kasim asked Rajendra to come back and meet him, pursuant to which, Rajendra turned back. When Rajendra came near Kasim's vehicle, Kasim narrated the incident to him and asked

him to inform the same to his friends at Gadhinglaj. Thereafter, Kasim proceeded to Gadhinglaj. After reaching Gadhinglaj, as per the information received, his friends encircled the vehicle and took the vehicle to the Gadhinglaj Police Station. At the Gadhinglaj Police Station, Kasim narrated the entire incident to the Police Station Officer. The Police Station Officer asked Kasim to take the vehicle to Nesari Police Station, as the place of incident i.e. Waghrali, fell within the limits of Nesari Police Station. A constable was provided to escort them to Nesari Police Station. On reaching Nesari Police Station, Kasim narrated the incident to the PSO on duty, pursuant to which, an FIR was lodged which is at Exhibit 11. Photographs of the vehicle were taken and the gunny bag was removed from the vehicle. On opening the said gunny bag, two pillows and a bed-sheet were found and below that, the dead body of a women was found. Inquest panchnama was prepared. The appellant identified the body as being that of his wife Gulabi and thereafter, the body was sent for post-mortem examination. PI Shri Yashwant Dhage (PW 28) prepared the panchnama of the scene of offence, recorded the statements of the witnesses and arrested the appellant. Statements of Kasim Nadaf (PW 3), Rajendra Mahadik (PW 26), Maruti Chougule (PW 27), Dinkar Mang and

Shakil Nadaf were recorded under Section 164 of the Code of Criminal Procedure. After completion of investigation, charge-sheet was filed in the Court of the learned Judicial Magistrate First Class. Since the offence was sessions triable, the case was committed to the Court of Sessions.

The case of the appellant was of denial and false implication. The prosecution in support of its case, examined 28 witnesses and the appellant examined one defence witness.

As far as PW 1-Gunvanta Patil; PW 2-Prabhu Desai, PW 12-Gangaram Kambale; PW 14-Suresh Patil; PW 16-Janabai Patil; and PW 17-Baburao Patil, are concerned, the said witnesses were declared hostile as they did not support the prosecution case. The said witnesses are residents of Village Waghrali, where the appellant was residing with Gulabi. PW 13-Sadashiv Pradhan, the owner of the tenement, where the appellant and the deceased were residing; PW 6-Munaf Shinga, panch to the seizure of clothes of the deceased; PW 15-Ganpati Undalekar, panch before whom a disclosure was made by the appellant, with regard to the route taken and PW 24-Prema Chavan, daughter of the appellant were also declared hostile.

As far as the other witnesses are concerned, PW 3-Kasim Nadaf is the complainant, to whom an extra judicial confession was made by the appellant; PW 4-Gansi Mitka, is the police head constable, who accompanied the complainant and appellant to the Nesari Police Station from Gadhinglaj Police Station; PW 5-Prakash Desai, is the police head constable who, at the relevant time, was on duty at the Gadhinglaj Police Station; PW 7-Rasul Mujawar, is the panch to the seizure of clothes of the appellant; PW8-Chandrashekhar Arbhavi, is the panch to the inquest panchnama and opening of the gunny bag; PW 9-Uttam Bhuimber, is the panch to the seizure of bangles and hairpin from the house of the appellant; PW 11-Parvati Kharabe, is the panch to the inquest panchanama; PW 18-Dr. Avinash Nalavade, is the Medical Officer, who conducted the post-mortem; PW 19-Jaywant Gurav, is the constable who recorded the FIR; PW 20-Birappa Kochargi, is the constable who seized the articles after the post-mortem was performed; PW 21-Dharmendra Bagade, is the carrier of the articles to the CA; PW 22-Arun Shintre, is the interpreter, who interpreted the evidence of PW 23, as she was not conversant with the language; PW 23 is Zomibai Jadhav, the mother of deceased Gulabi; PW 25-Asha Rathod is the daughter of the deceased; PW 26-Rajendra Mahadik; PW 27-Maruti

Chougule, are the friends of the complainant, who were informed of the incident and PW 28-Yashwant Dhage is the Investigating Officer. The appellant examined DW 1-Abdul Sattar Perampalli, the Magistrate who recorded the statements of the complainant PW 3-Kasim Nadaf and PW 26-Rajendra Mahadik, under Section 164 of the Code of Criminal Procedure.

3. Mr. Ingawale, learned Counsel for the appellant assailed the judgment and order on several grounds. He submitted that the prosecution has not proved its case beyond reasonable doubt. He submitted that most of the material witnesses were declared hostile and in the absence of any material evidence *qua* the appellant, it was unsafe to convict the appellant and as such, benefit of doubt be given to him. He submitted that the prosecution case is riddled with infirmities, inasmuch as, no reason/motive has come on record for the appellant to murder Gulabi; that it was highly improbable that the appellant would lift the gunny bag and load it in the complainant's vehicle all by himself; and that if the appellant wanted to dispose of the dead body, he would not have loaded all the utensils/domestic articles in the said vehicle. He submitted that non-disclosure by the complainant-Kasim, immediately to the Police

Stations, which were on the way before reaching Gadhinglaj, on learning that there was a dead body in a gunny bag, makes the prosecution case doubtful. He further submitted that there is no evidence to show that the appellant was living with Gulabi at Waghrali, as none of the witnesses i.e. neighbours who were examined, have supported the prosecution case. He submitted that in view of the improbabilities and inconsistencies in the evidence as well as in the medical evidence, the appellant be given the benefit of doubt and be acquitted.

4. Learned A.P.P supported the impugned judgment and order. He submitted that the prosecution had clearly proved the circumstances as against the appellant and that no interference was warranted in the impugned judgment and order.

5. Perused the papers and scrutinized the evidence with the assistance of the learned counsel for the appellant and the learned A.P.P.

6. At the outset, we may note that the prosecution case rests entirely on circumstantial evidence. The first question that arises for

consideration is, whether the dead body in the gunny bag was of the wife of the appellant i.e. Gulabi ? In order to prove the identity of the dead body, the prosecution has examined PW 23-Zomibai Jadhav. PW 23- Zomibai Jadhav, in her evidence, has deposed that her daughter Gulabi was married to one Mantesh Rathod from Narayanpur and that the couple had two children, a son Viresh and daughter Asha. She has stated that the appellant had taken Gulabi for labour work to Gadhinglaj. She has further stated that the appellant had taken Gulabi with him and that they were residing in Village Waghrali and that Gulabi's daughter was also residing with them. According to Zomibai, after a few days, she received a call from Nesari Police, pursuant to which, she visited the Nesari Police Station. She has identified the dead body as being of Gulabi, pursuant to which, the custody of the dead body was handed over to her for cremation. She has also identified the appellant. The said witness was cross-examined at length, however, nothing material has been elicited, to discredit her testimony. The fact remains that PW 23-Zomibai had identified the dead body of her daughter Gulabi. Zomibai's evidence also shows that the appellant had taken Gulabi with him and that they were residing at Village Waghrali.

7. PW 19-Head Constable Jaywant Gurav of the Nesari Police Station has stated that on 4th March, 2010 at about 2:00 a.m., Kasim had been to the police station along with the tempo. He has stated that Kasim disclosed that there was a dead body in the tempo and had asked him to record his FIR. He has stated that the appellant was present alongwith others and after confirming the allegations, he recorded the complaint which is at Exhibit 11. He has further stated that he called two panchas and prepared the panchnama of the gunny bag containing the dead body. The said panchanma is at Exhibit 18. He has stated that he seized two pillows and one bed-sheet from the gunny bag. The inquest panchnama (Exhibit 19) was also prepared by the said witness. It is stated in the said panchnama that the dead body was identified by the appellant as being of his wife Gulabi Pundlik Chavan. From the aforesaid material on record, it is evident that the dead body which was found in the gunny bag was that of Gulabi and as such the identity of the dead body is established.

8. The next question that arises for consideration is, whether the death of Gulabi was homicidal. The prosecution, in order to prove that Gulabi died a homicidal death, examined PW 18 – Dr. Avinash Nalavade,

the Medical Officer, who conducted the autopsy. He has deposed that on 4th March, 2010, he received the dead body of a woman from the Nesari Police Station and after examining the dead body, he found the following external injuries:

“Brusis on the neck on both side more on left side. Due to thumbs on the mid-portion of neck and brusis of finger nails on both side. More brusis on the left side.

Fracture of hyoid bone seen on dissection on the region of greater cornu with broken ends displaced inwards.

Abrasions over the scapular region.”

He has further stated that he noticed that the brain was congested, pleura was also congested and that there were hyperaemia in subcutaneous tissues and muscles beneath the nail-marks; that the lungs, pericardium were also congested; and that the left chamber of heart was empty, while right chamber was full of blood and congested. The probable cause of death was stated to be, “asphyxia due to throttling”. PW 18- Dr. Avinash Nalavade was cross-examined at length with regard to the manner in which the post-mortem was performed i.e. the probable time of death, etc. PW 18- Dr. Avinash Nalavade has stated in his cross-examination that

generally in cases of throttling, the eyes are wide open and that in the present case, the eye-lids were very much swollen covering the eye-ball. He has further stated in his cross that in cases of throttling, cynapsis occurs over the entire body, however, due to passage of time, due to diversion, it may go downward. He has denied the suggestion that he recorded the cause of death as throttling, at the instance of the police.

9. The submission of the learned Counsel for the appellant is that the post-mortem examination carried out by PW 18- Dr. Avinash Nalavade was improper, is devoid of merit. The evidence of the said witness clearly shows that he had conducted the post-mortem of the dead body and accordingly recorded his findings in the post-mortem report (Exhibit 31). There is no reason to disbelieve the said finding, that Gulabi's death was due to “asphyxia due to throttling”.

10. Learned Counsel for the appellant relied on the evidence of PW 25- Asha Rathod (Gulabi's daughter), to show that her evidence was inconsistent with the findings recorded in the post-mortem. He submitted that PW 25- Asha had disclosed that her mother was stabbed by Pundlik,

whereas, the post-mortem report shows that the cause of death was due to asphyxia due to throttling and that not a single stab wound was seen. It is pertinent to note, that PW 25-Asha Rathod was about 6 to 7 years at the time of her deposition. It appears that learned Judge put certain questions to the said witness, however, as she was unable to understand, no oath was administered to her. Perusal of the evidence of PW 25-Asha Rathod shows that nothing much turns on her evidence. She has stated that she was residing with her father and mother Gulabi. She has stated that when her mother died, she had gone with her in a vehicle and when she returned in the night, her father also came home, they had dinner; and thereafter, Pundlik stabbed her mother. She has stated that her father took her to his home on a scooter. She is unable to state the name of the village where she was taken, nor has she identified the appellant as her father. The said witness has stated that she was instructed by her maternal aunt and grandmother-Zomibai to depose in Court by stating the names of the persons. Considering the evidence of this child witness, we find that it is unsafe to rely on her testimony. Even otherwise, nothing much turns on her evidence.

11. The most crucial evidence/circumstance in the present case, is the extra judicial confession made by the appellant to Kasim (PW 3). According to Kasim, he was the owner of a Mahindra Pick-up van and that, he was using the said van for hire. He has stated that on 3rd March, 2010, when he was waiting at the stand for his vehicle to be hired, the appellant came upto him and disclosed that he wanted to carry domestic articles from Waghrali to Sawantwadi. The fair was negotiated for Rs. 1,600/-, after which, PW 3- Kasim took the vehicle to Village Waghrali and the appellant loaded his domestic articles in the said pick-up van. He has stated that the appellant stopped the vehicle near a dhaba near Sawantwadi, went aside and called a person on telephone. He has further stated that after speaking on the phone, the appellant disclosed to him, that the person with whom he wanted to work, had declined to engage him and therefore, he wanted to return to Gadhinglaj. The appellant agreed to pay an additional amount of Rs. 500/- for the return. While crossing the ghat section at Amboli, the appellant asked PW 3-Kasim to stop the vehicle near a valley, pursuant to which, the vehicle was stopped and the appellant got down from the said vehicle. According to Kasim, after getting down, the appellant went to the rear side of the vehicle and disclosed that he wanted to throw one gunny

bag in the valley. Kasim inquired as to what was there in the gunny bag, however, the appellant was reluctant to disclose the same. He has further stated that when he prevented the appellant from throwing the gunny bag and insisted on disclosing the contents in the gunny bag, the appellant told him that his wife's dead body was there in the said gunny bag. When PW 3 – Kasim inquired further, the appellant disclosed that his wife had consumed poison and he was under an apprehension of arrest, and hence had brought the dead body. On further probing, the appellant disclosed that as his wife was not of good character, he killed her by throttling her. He has stated that the appellant requested him to save him from the incident and begged for pardon. PW 3-Kasim has further stated that he asked the appellant to get into the vehicle, saying that the bag could be thrown elsewhere and decided to proceed towards Gadhinglaj. Near Village Madalge, PW 3-Kasim's friend, Rajendra Mahadik's (PW 26) vehicle crossed his vehicle. He has stated that Rajendra called him and asked him as to where he was going, to which, Rajendra Mahadik replied that he was proceeding to Ajra for delivering sugarcane. According to PW 3-Kasim, he stopped his vehicle and asked Rajendra Mahadik to turn back and meet him. Rajendra returned with his vehicle, pursuant to which, Kasim took him

aside and narrated the incident to him and asked him to inform the same to his friends at Gadhinglaj. He has stated that thereafter, he proceeded towards Gadhinglaj and when he reached near the School at Gadhinglaj, his friends Dipak Mang, Maruti Chougule, Shakil Nadaf and Appasaheb Magdum encircled the vehicle. He has stated that within a few minutes, Rajendra Mahadik also arrived there and thereafter, all of them took the vehicle and the appellant to the Gadhinglaj Police Station and narrated the incident. He has stated that the Police Station Officer, Gadhinglaj Police Station informed them, that it was necessary to lodge the report at Nesari Police Station, considering the jurisdictional issue and accordingly, provided one constable to escort them to Nesari Police Station. Thereafter, all of them went to the Nesari police Station, where Kasim narrated the incident, pursuant to which, a complaint/FIR was lodged with the Nesari Police Station, being Exhibit 11. Photographs of the vehicle were also taken. PW 3 – Kasim has identified the appellant.

12. The evidence of PW 3 – Kasim was assailed by the learned Counsel for the appellant on several counts. Mr. Ingawale urged that it had come in the cross-examination of the said witness, that there were several

outposts before reaching Gadhinglaj, however, despite the same, no complaint was lodged at any of the said places. It was also contended that no calls were made to the Gadhinglaj Police informing them about the said incident. It was also sought to be contended that PW 3 – Kasim had not confirmed, the existence of a dead body in the gunny bag , after the alleged disclosure by the appellant. According to the learned Counsel, all these facts show the unnatural conduct of Kasim and as such urges that his evidence ought to be discarded. Learned Counsel for the appellant further submitted that a perusal of the 164 statement of Kasim and the evidence of DW 1 -Abdul Sattar Perampalli, who recorded the same, shows that the appellant had not disclosed to Kasim, that the dead body was of his wife and that she had consumed poison or that he had throttled her.

13. A perusal of the evidence of PW 3-Kasim shows that the extra judicial confession made to him by the appellant is reliable and inspires confidence, in the peculiar facts and circumstances of this case. There is nothing on record to show that the appellant had inimical relations with Kasim, for him to falsely implicate the appellant, nor is there any material to show that the deceased was in anyway connected/related to Kasim. The

facts as revealed, show that the appellant had taken on hire Kasim's vehicle to transport certain domestic goods to Sawantwadi; that before reaching Sawantwadi, the appellant got down from the vehicle, went aside and made a call and returned to the vehicle, stating that the person with whom he wanted to work, has declined to engage him and therefore, he wanted to return; that he agreed to pay an additional amount of Rs. 500/- for his return; that when he reached the ghat section at Amboli, which is a secluded spot, the appellant asked Kasim to stop near the valley, got down from the vehicle and went to the rear side; and also asked him to come to the rear side and told him that he want to throw the gunny bag in the valley; that on Kasim's persistence, disclosed to him that the gunny bag contained the dead body of his wife and that he had killed her by throttling. Kasim on learning the said fact, told the appellant that they would find a better spot to throw the body, only in order to bring the appellant alongwith the dead body back to Gadhinglaj and report it to the Police Station. The vehicle was hired at Gadhinglaj and hence, it appears that Kasim thought it fit to report the matter to Gadhinglaj Police Station. The conduct of PW 3 – Kasim in informing Rajendra Mahadik and his friends, shows the steps he took to have the appellant apprehended. Kasim got the vehicle back to

Gadhinglaj, near a School at Gadhinglaj, where Kasim's friends encircled the vehicle and took the vehicle and the appellant to Gadhinglaj Police Station and from there to the Nesari Police Station. Merely because PW 3 – Kasim did not verify the contents in the gunny bag, does not in anyway affect the credibility of this witness. Kasim in his complaint/FIR (Exhibit 11), has set out in detail the sequence of events. The same has also been deposed by Kasim in his evidence before the Court. Kasim in his evidence has clearly stated that the appellant had disclosed to him that the gunny bag contained the dead body of his wife and that he had throttled her, as she was of bad character. It is pertinent to note, that there is no omission with regard to the same in the 161 statement, which was promptly recorded on the very same day. It appears that in Kasim's 164 statement recorded on 13th May, 2010, he has not stated that the appellant had disclosed to him, that the dead body was of his wife and that she had died due to consumption of poison or that he had throttled her. We are of the opinion, that nothing much turns on the same, as the said statement was recorded after more than 2 months of the incident. What is pertinent to note, is that Kasim in his FIR, dated 3rd March, 2010 has disclosed in detail all the said facts/details and has also reiterated the same in his evidence.

Learned Counsel for the appellant also contended that the possibility of the gunny bag belonging to PW 3-Kasim, cannot be ruled out. He relied on certain admissions given by Kasim, that the vehicle was earlier taken on hire and on the evidence of PW 24 – Prema Chavan, daughter of the appellant, wherein she had stated that she noticed the gunny bag lying in the tempo and on making inquiries with her father (appellant) about the same, he stated that the gunny bag was of the driver. It is pertinent to note, that PW 24 -Prema, was declared hostile by the prosecution. The reason for not supporting the prosecution, is evident from her evidence, that apart from the appellant, there was nobody to support the family and that they were facing difficulties, since the appellant was in prison. No credence can be given to the evidence of the said witness, in particular, to that part of the evidence, relied upon by the learned Counsel. Similarly, there is no material on record to show that the gunny bag was there in the vehicle prior to it being hired by the appellant.

14. We find that the extra judicial confession made by the appellant to PW 3 – Kasim is true and voluntary and can certainly be relied upon.

15. It is well settled that the evidentiary value of an extra judicial confession depends on the reliability of the witness, who gives the evidence. It is not open to any Court to start with a presumption that extra judicial confession is a weak type of evidence. Needless to state, it would depend on the nature of circumstances, the time when the confession was made and the credibility of the witness, who speaks of such a confession. An extra judicial confession can be relied upon and conviction can be founded thereon, if the evidence comes from the mouth of the witness who is unbiased, not even remotely inimical to the accused and in respect of whom, nothing is brought out, which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused. The words spoken by the witness are to be clear, unambiguous and should convey that the accused is a perpetrator of the crime. Thus, subjecting the evidence of such a witness to a rigorous test, on the touchstone of credibility, an extra judicial confession can be accepted and can be the basis of conviction. The extra judicial confession must be judged in the fact situation in each case and would depend not only on the nature and circumstances, but also on the time when the confession was made and the credibility of the witness, who testifies thereto.

16. Keeping the aforesaid principles in mind, it is evident that PW 3 – Kasim's evidence appears to be unbiased, natural, and not even remotely inimical to the appellant. Nor is there any material or motive brought on record to attribute an untruthful statement to the appellant. The circumstances in which the extra judicial confession was made, appears to be very natural, considering that the appellant wanted to dispose of the body of his wife Gulabi in the ghats in a remote place. It was due to the persistence of the PW 3 – Kasim who refused to let the appellant throw the dead body till he disclosed what was in the same, that the appellant disclosed the true and correct facts. Such a free and voluntary confession deserves the highest credit, because it is presumed to flow from highest sense of guilt. The evidence of PW 26 – Rajendra Mahadik and PW 27 – Maruti Chougule, friends of the informant offer corroboration to the evidence of PW 3-Kasim. The evidence of PW 26 – Rajendra Mahadik is consistent with the evidence of PW 3 – Kasim. He has identified the appellant as being a person in the vehicle. Similarly, the evidence of PW 6 – Munaf Shinga is consistent with the evidence of PW 3 – Kasim. The said evidence of PW 3 – Kasim Nadaf and PW 26 – Rajendra Mahadik is

corroborated by the evidence of PW 27 – Maruti Chougule, who encircled the vehicle alongwith others, when it arrived near a school at Gadhinglaj. Considering the evidence on record, we are of the opinion that it was the appellant who caused the death of Gulabi, by throttling her.

17. Having regard to the overall evidence, we do not find any infirmity in the impugned judgment and order dated 7th June, 2011 and accordingly confirm the conviction and sentence by dismissing the appeal.

(REVATI MOHITE DERE, J.)

(V. K. TAHILRAMANI, J.)