

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD****CRIMINAL APPEAL NO. 426 OF 2006**

The State of Maharashtra
Through Police Station,
Latur (Rural).

Appellant.

Versus

1. Rabbani Jafarsab Saudagar
Age : 32 years, occu.: nil
R/o Shivaji Nagar, Nilanga,
District Latur.
2. Mobin @ Raju s/o Salim Shaikh
Age : 24 years, occu.: nil
R/o Khatib Galli, Mahavir Chowk,
Ambejogai, District Beed.

Respondents.

Mr. R.V. Dasalkar, A.P.P. for the appellant/State.
Mrs. Madhaveswari Mhase, Advocate for the respondents.

WITH

CRIMINAL REVISION APPLICATION NO. 77 OF 2006

Shaikh Rahim s/o Shaikh Ismail
Age : 20 years, occu.: Mechanic
R/o at present Ajam Chowk,
Labour Colony, Latur.

Petitioner.

Versus

1. Rabbani Jafarsab Saudagar
Age : 32 years, occu.: business
R/o Shivaji Nagar, Nilanga,
District Latur.
2. Mobin @ Raju s/o Salim Shaikh
Age : 24 years, occu.: business
R/o Khatib Galli, Ambajogai,
District Beed.

3. The State of Maharashtra
Through its P.S. Latur (Rural).

Respondents.

Mr. B.A. Darak, Advocate for the petitioner.
Mrs. Madhaveshwari Mhase, Advocate for respondent Nos.1 & 2.
Mr. R.V. Dasalkar, A.P.P. for State.

**CORAM : T.V. NALAWADE &
SUNIL K. KOTWAL,JJ.**

DATED : 20 February, 2018.

JUDGMENT : (PER SUNIL K. KOTWAL,J.)

1. The State of Maharashtra has challenged the judgment of acquittal of original accused Nos.1 and 2 in Sessions Case No.73/2005 of the offence punishable under Sections 302 read with Section 34 of the Indian Penal Code (hereinafter referred as "I.P.C."), passed by Ad hoc Additional Sessions Judge, Latur dated 22.02.2006. Similarly, the son of deceased namely Shaikh Rahim Shaikh Ismail has challenged the said order of acquittal by filing Criminal Revision Application No.77/2006.

2. Respondents are the original accused Nos.1 and 2.

3. The prosecution case, in nutshell, is that the deceased Bebi Ismail Shaikh used to live at Anjali Nagar, Latur with her two sons namely Shaikh Rahim and Shaikh Wasim. She was widow and used to look after the truck transport business. Accused No.1 Rabbani developed illicit relations with the deceased and on that count there were frequent quarrel in between accused No.1 and

sons of the deceased. On 04.07.2005 deceased left her house and thereafter did not return till next day morning. However, sons of the deceased did not file missing report to Police Station, Latur. On 05.07.2005 at about 4.15 p.m. P.S.I. Sayyad Azim (PW-8) received information that dead body of one unknown woman was lying near the field of one Reddy on the backside of Siddheshwar temple on Ring Road. Therefore, he rushed on the spot. By that time Shaikh Rahim (PW-1) also reached on the spot and identified the dead body of his mother. On the same day Shaikh Rahim (PW-1) lodged report (Exh.29) to Police Station, Latur at about 5.00 p.m. In the result, offence came to be registered under Section 302 of the Indian Penal Code.

4. During the course of investigation, spot panchnama (Exh.30) and inquest panchnama (Exh.33) were prepared. When the dead body of deceased was referred to Civil Hospital, Latur for postmortem examination, Dr. Smita Sudke (PW-3) performed autopsy examination and by issuing postmortem notes (Exh.40), opined that the deceased died due to asphyxia due to throttling.

5. On suspicion, accused Nos.1 and 2 were arrested. As per the disclosure statement of accused No.1 Rabbani, the ornaments of deceased were recovered from the pan stall of Shaikh

Mehboob (PW-7). After completion of investigation, charge-sheet was submitted against both the accused in the Court of Judicial Magistrate, First Class, Ausa.

6. Offence punishable under Section 302 of I.P.C. being exclusively triable by the Court of Sessions, this case was committed to Sessions Court, Latur.

7. Charge was framed against both the accused for the offence punishable under Section 302 read with Section 34 of I.P.C. They pleaded not guilty and claimed trial.

8. Prosecution examined total 8 witnesses in support of the prosecution case. After considering the oral and documentary evidence placed on record, the learned trial Court pleased to acquit both the accused of the offence punishable under Section 302 of the I.P.C. Therefore this appeal and revision application arise.

9. Heard learned A.P.P. for the State and learned Counsel Ms Mhase for the respondents.

10. Learned A.P.P. for the State submitted that Raju Mehmood Shaikh (PW-2), who is the driver of the deceased, has

proved that on the date of the occurrence deceased informed him on mobile phone that she was in the company of accused No.1. Learned A.P.P. has pointed out our attention towards the testimony of Raju Kharat (PW-4), who is the Manager of Hotel Raj, Ambejogai and who deposed that on 04.07.2005 accused No.1 Rabbani and one woman visited his hotel and left the hotel at about 4.00 p.m. According to learned A.P.P., accused No.1 and deceased were found together on 04.07.2005 and no proper explanation has been furnished by accused No.1 about the unnatural death of the deceased. He also pointed out that gold ornaments of the deceased were recovered from Shaikh Mehboob (PW-7) as per the disclosure statement given by accused No.1 in police custody. According to A.P.P., though direct evidence is not available, the above discussed circumstantial evidence is sufficient to establish guilt of the accused beyond reasonable doubt.

11. Learned defence counsel submitted that the time gap in between discovery of dead body on 05.07.2005 and finding of accused No.1 together with deceased is so long that onus does not shift on accused No.1 to furnish explanation about the unnatural death of deceased.

12. The next limb of the argument of learned defence

Counsel is that the ornaments, alleged to be recovered as per the disclosure statement of accused No.1, are not properly identified as the ornaments of the deceased. She pointed out that in the inquest panchnama (Exh.33), the ornaments are shown on the body of deceased, and therefore, recovery of some ornaments as per the disclosure statement of accused No.1 is absolutely doubtful. She has also pointed out that the prosecution has not placed on record mobile call data of the mobile phones of deceased and Raju Shaikh (PW-2) to prove that on the date of the occurrence really there was conversation in between these two persons. Thus, according to the defence Counsel, no clinching evidence is placed on record by the prosecution which is sufficient to establish guilt of the accused beyond reasonable doubt only on the basis of circumstantial evidence.

13. Undisputedly, in the case at hand, no eye witness is available who had seen the accused persons while throttling the deceased. The total prosecution case is based on the circumstantial evidence. Therefore, motive plays an important role in such matters.

14. In the case at hand, from the testimony of Shaikh Rahim (PW-1) it has been brought on record that accused No.1 had

illicit relations with the deceased. According to this witness, some amount out of sale consideration of one truck of the deceased was also paid to accused No.1 by deceased. However, accused No.1 was the beneficiary who can get pleasure of love as well as monetary support from the deceased. Therefore, obviously accused No.1 had no reason to kill the deceased who was his lover and friend in need of money. In the circumstances, illicit relations between accused No.1 and the deceased cannot be treated as the motive behind the murder of deceased. In the result, we have no hesitation to hold that the prosecution fails to prove that both accused had any motive to kill the deceased.

15. However, if the circumstantial evidence is so clinching that it points out finger only towards the accused as the culprits, then even in absence of proof of motive accused can be convicted on the basis of such trustworthy circumstantial evidence where every link of the circumstances is establish which leads the accused as killer of deceased.

16. The first circumstance relied upon by the prosecution is in the form of "last seen together". No doubt Shaikh Rahim (PW-1) had not seen the deceased and accused No.1 while going out together from his house. However, Raju Shaikh (PW-2), who

happened to be driver of deceased, deposes on oath that on the date of the occurrence at about 10.00 a.m. and at about 2.00 p.m. when he talked with deceased on mobile phone, that time she informed this witness that she was in the company of accused No.1 and they were proceeding towards Karnataka. However, the prosecution has not taken pains to produce and prove before the trial Court the mobile call data of mobile phones of Raju Shaikh (PW-2) and deceased to establish the truthfulness of the oral testimony of Raju Shaikh (PW-2). Therefore, only on the basis of uncorroborated testimony of this witness, the prosecution cannot prove that on the date of the incident deceased informed this witness that she was in the company of accused No.1 till 2.00 p.m.

17. To prove that accused No.1 and deceased were in the company of each other on the date of the occurrence, heavy reliance has been placed by prosecution on the evidence of Raju Kharat (PW-4) who is the Manager of Raj Hotel at Ambejogai and Pralhad Kamble (PW-5) whose Maruti Van bearing registration No.MAZ-9019 was used by accused No.1 on the date of the occurrence. No doubt, Raju Kharat (PW-4) deposes before the Court that on 04.07.2005 at about 1.00 p.m. accused No.1 visited his hotel alongwith one woman namely Aminabee and stayed in that hotel in Room No.118 till 4.00 p.m. Customer Register from that

hotel is also seized by police which is not disputed by defence. However, unfortunately the learned A.P.P. had not taken pain to get fixed the identity of woman namely Aminabee alongwith accused No.1, by showing at least photograph of the deceased to this witness. Therefore, on the basis of testimony of Raju Kharat (PW-4) and hotel register, the prosecution cannot establish that on 04.07.2005 till 4.00 p.m. accused No.1 and deceased were together in the company of each other.

18. Even Pralhad Kamble (PW-5) who was the driver of Maruti Van and who took accused No.1 upto Latur where one woman boarded in the same Maruti Van, has not identify the woman who was in the company of accused No.1 on the date of the occurrence. This witness was unknown person to the deceased, and therefore, the A.P.P. should have established the identity of the woman who boarded in the Maruti Van on 04.07.2005 at Latur. Therefore, even the evidence of Pralhad Kamble (PW-5) is of no help to the prosecution to establish that accused No.1 and deceased were found together on the date of incident. Otherwise also, the circumstantial evidence in the form of 'last seen together' is weak type of evidence. Unless there is proximity in between last seen together and time of death of the deceased, onus will not shift on the accused to furnish any explanation in respect of unnatural

death of deceased.

19. In the case at hand, even assuming that on 04.07.2005 accused No.1 and deceased were last seen together at about 9.00 p.m. as admitted by accused No.1 in his statement under Section 313 of the Code of Criminal Procedure, however, on that date the dead body of deceased was not discovered, but it was discovered on 05.07.2005 at about 4.15 p.m. on Ring Road at Latur. Even Dr. Smita Sudke (PW-3), who performed postmortem examination of the dead body of deceased, has not fixed probable time of death of deceased. Therefore, considering the long time gap in between last seen together evidence and discovery of dead body of deceased, we hold that such weak type of evidence is of no help to the prosecution to establish guilt of the accused only on the basis of circumstantial evidence when the motive behind murder of deceased is not established by the prosecution.

19. Thus, only circumstantial evidence in the form of recovery of gold ornaments as per disclosure statement of accused No.1 is available for consideration.

20. No doubt, Mohammad Ismail (PW6)-panch witness deposed before the Court that on 15.07.2005 in his presence accused No.1 made statement before the police that he kept the

ornaments of Bebi in his handkerchief with his friend Mehboob and he would show those ornaments. According to this witness, thereafter accused No.1 took the panchas and police to one Pan Stall near Brijwasi Hotel. However, as per the memorandum (Exh.46) accused No.1 made statement that he kept Bormal, Mangalsutra, ear tops, silver chain, silver hook and mobile phone wrapped in handkerchief with Mehboob Shaikh in front of Brijwasi at Golai. Obviously Mohammad Ismail (PW-6) has not given the particulars of the ornaments which are mentioned in the memorandum (Exh.46). In the memorandum (Exh.46) there is no reference of Pan Stall of Mehboob Shaikh. To the contrary, investigating officer Police Inspector Syed Azim (PW-8) has brought on record a different statement of accused No.1. According to Investigating Officer, on 15.07.2005 accused No.1 gave statement that he kept the ornaments of Bebi in handkerchief with his friend, running a Pan Stall in Golai. Thus, these three discovery statements are totally in conflict with each other. Therefore, the prosecution cannot prove beyond reasonable doubt that as per the discovery statement of accused No.1, the ornaments of deceased were recovered from the possession of accused No.1.

21. Otherwise also, from the inquest panchnama (Exh.33) it reveals that two silver anklets were in the legs of the deceased.

Even Dr. Smita Sudke (PW-3) has admitted in her cross-examination that gold ornaments in the neck, ear and silver chain in the legs of the deceased were found by her at the time of postmortem examination. When gold and silver ornaments of the deceased were found on the dead body of the deceased at the time of preparation of inquest panchnama and at the time of postmortem examination, then it is very hard to accept that after some days the same ornaments would be recovered from the friend of accused No.1 as per the disclosure statement of accused No.1. Therefore, otherwise also, the evidence placed on record by prosecution in the form of recovery of gold ornaments as per the information given by accused No.1, is totally unreliable and not trustworthy.

22. Accordingly, after careful analysis of the entire circumstantial evidence placed on record, we have no hesitation to hold that the prosecution miserably failed to establish each and every link of the circumstances to establish that the accused are killer of deceased. Therefore, benefit of doubt goes in favour of the accused. After going through the judgment passed by the trial Court, we are satisfied that the view taken by trial Court while acquitting the accused persons is possible view and no interference is called for in the present appeal and revision. Thus, the appeal and revision application being devoid of merit, deserve to be dismissed.

23. Hence, the following order.

ORDER

1. Criminal Appeal No. 426 of 2006 and Criminal Revision Application No.77 of 2006 are dismissed.
2. Bail bonds of the respondents shall stand cancelled.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE

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