

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 364 OF 2013

Lahu s/o Gopinath Pawar
Age 32 years, Occ. Agriculture,
R/o. Kharda, Tq. Jamkhed,
District Ahmednagar

...Appellant

versus

The State of Maharashtra
(Copy to be served on Public
Prosecutor, High Court of
Judicature at Bombay,
Bench at Aurangabad).

...Respondent

.....
Mr. Anil M. Gaikwad, advocate for the appellant
Mr. S.Y. Mahajan, additional P.P. for respondent-State
.....

**CORAM : S. S. SHINDE AND
V. K. JADHAV, JJ.**

DATED : 4TH JUNE, 2018

JUDGMENT (PER V.K. JADHAV, J.) :-

1. The challenge in this appeal is to the judgment of conviction dated 16.09.2013, passed by the learned Additional Sessions Judge, Ahmednagar in Sessions Case No. 345 of 2012 for the offence punishable under Section 302 of I.P.C. thereby sentencing the appellant/original accused to suffer imprisonment for life and to pay fine of Rs.5000/- in default to suffer S.I. for three months.

2. The prosecution version, as unfolded during trial, is as under:-

a. Deceased Sarika was the wife of appellant-accused Lahu Gopinath Pawar and their marriage was solemnized 7 years prior to the date of incident. The incident took place on 29.6.2012. Out of this marital wedlock, deceased Sarika gave birth to two sons viz. Sujit and Ajay. The appellant-accused was originally resident of Tandulwadi Tq. Barshi and thereafter he shifted to village Kharda and hence, since last three years prior to the incident, he started residing at Kharda with his wife deceased Sarika and sons. Mother Vimalbai was also residing with deceased Sarika in her house. The appellant-accused was jobless as he was not doing any work and on that count the appellant-accused and deceased Sarika used to quarrel frequently. Due to the said quarrels, the appellant-accused used to abuse and assault Sarika. The informant and his family members used to convince the appellant-accused. One and half months prior to the incident, the appellant-accused had raised quarrel with deceased Sarika and assaulted her.

b. A quarrel had taken place between deceased Sarika and the appellant-accused on 27.6.2012 at the house of informant Umesh Bajirao Kale. The appellant-accused started beating Sarika and hence, Umesh and his wife intervened their quarrel. The appellant-

accused went to his home and Sarika stayed at the house of informant so as to avoid further quarrel. On the next day i.e. 28.6.2012, the appellant-accused left his house and came to the house of informant at 9.00 p.m. At 9.30 p.m. the appellant-accused and deceased Sarika with their son left the house of informant for their house but on the way also, accused was abusing Sarika. At that time, mother Vimalbai had been to the village Jategaon for attending the marriage ceremony. The elder son of Sarika was at the house of the father of informant.

c. On 29.6.2012 at about 2.30 a.m. the informant woke up for urinal and casually he had been to the house of Sarika. The informant noticed that the house of the appellant-accused was latched from outside. He went inside the house by opening the door and noticed that Sarika and her sons were sleeping in the house. The appellant-accused was not present in the house. On going near to Sarika, he noticed that there were throttling marks on her throat and she was dead. The informant informed the fact to relatives who had gathered there.

d. Accordingly, the informant lodged the complaint with Jamkhed police station which has been registered as crime No. I-89 of 2012 for the offence punishable under Section 302 of I.P.C. against the

appellant-accused.

3. During the course of investigation, A.P.I. Raghunath Nachan (P.W.7) prepared the spot panchnama (Exh.25). The Investigating Officer has also recorded the statements of witnesses as deposed by them. The Investigating Officer had also collected the postmortem report (Exh.20) and map of the spot of incident. After completion of necessary investigation, as there was sufficient evidence against the accused, the investigating officer has filed charge sheet against him in the court of J.M.F.C. Jamkhed. The learned Magistrate, has committed the case against the appellant-accused to the Court of Sessions, since the offence under Section 302 of I.P.C. is triable by Sessions Court. The prosecution has examined in all seven witnesses. The learned Additional Sessions Judge, Ahmednagar considering the oral as well as documentary evidence on record, found that Sarika died due to homicidal death and the accused committed her murder by throttling her. Learned Sessions Judge has observed that there is reliable circumstantial evidence to connect the appellant-accused with the alleged offence and therefore, accused is held guilty for the offence punishable under Section 302 of I.P.C. and accordingly convicted and sentenced the appellant-accused, as aforesaid.

4. Learned counsel for the appellant submits that the conviction recorded by the learned Sessions Judge is only on the basis of evidence of last seen as narrated by complainant (P.W.1) Umesh, when there is no direct evidence and only on the basis evidence of last seen and in absence any other corroborative circumstances like the motive, recovery of any incriminating articles or like, the learned Sessions Judge has erroneously recorded the conviction. Learned counsel also submits that learned Sessions Judge has not appreciated that when the case like present one which is based upon circumstantial evidence, the prosecution has to prove each and every incriminating circumstances independently and a complete chain of the proved circumstance which points out that only the accused is guilty of committing the said offence. The evidence like last seen theory as deposed by P.W.1 Umesh only cannot form the basis for conviction. Learned counsel further submits that there are various omissions and material contradictions in the testimony of P.W.1 Umesh and also in the evidence of P.W.3 Ranjana Pawar. Learned counsel for the appellant further submits that the prosecution witnesses in the present case are interested witnesses as they are closely related with deceased Sarika and they falsely deposed that they have seen the accused in the company of deceased lastly. Thus, the conviction recorded on the basis of evidence of last seen is without any corroboration and the other incriminating circumstances.

Learned counsel thus submits that the prosecution has failed to prove the case beyond reasonable doubt and the appellant accused thus entitled for benefit of doubt and the appellant-accused deserves to be acquitted.

5. Learned Additional Public Prosecutor submits that the prosecution evidence is consistent, truthful, trustworthy and reliable. Learned A.P.P. submits that onus to explain the circumstance under which deceased Sarika met with homicidal death is on the appellant-accused and in absence of such satisfactory explanation as to the cause of death of deceased Sarika, legitimate inference can be drawn that the appellant-accused has committed murder of his wife Sarika. Learned A.P.P. submits that minor omissions and elaborations in evidence of prosecution witnesses do not adversely affect the prosecution case if the witness had supported the prosecution case on vital aspects of the case.

6. The prosecution case entirely rests upon the circumstantial evidence. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstance must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence.

Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

7. In the instant case, the learned Sessions Judge found the following incriminating evidence against the appellant-accused.

- i) Homicidal death of deceased Sarika,
- ii) Motive,
- iii) Last seen together.
- iv) Failure to offer any explanation by the accused about homicidal death of deceased Sarika.

8. So far as the homicidal death is concerned, on careful perusal of medical evidence, we find no error in the findings recorded by the learned Sessions Judge that deceased Sarika met with homicidal death.

9. In case of circumstantial evidence, the motive assumes great significance and importance. The absence of motive is circumstance in favour of the accused. The lack of justified motive would also adversely affect the case of prosecution.

10. In the instant case, so far as the question of motive is concerned, the prosecution case mainly revolve around oral evidence of P.W.1/informant Umesh, P.W.3 Ranjana Suresh Pawar and P.W.5 Bajirao Uttam Kale. P.W.1 Umesh is brother of deceased Sarika, P.W.2 Ranjana is real sister and P.W.5 Bajirao is the father of deceased Sarika. According to P.W.1 Umesh, deceased Sarika was given in marriage to accused about 7 years back. Initially, she went for cohabitation with the accused at village Tandulwadi, Tq. Barshi. About 2/3 years back from the incident, deceased Sarika and her children came to reside at village Kharda with the accused. P.W.1 Umesh has deposed that since beginning accused was not doing any work. He used to demand money from deceased Sarika and on her failure to give the money, used to beat her. Thereafter he had stated about one incident dated 27.6.2012. According to him, on that day, deceased Sarika was at his house. Accused came to his house and picked up quarrel with his wife deceased Sarika. Accused beat Sarika and P.W.1 Umesh and his wife have separated the quarrel. In the night of 27.6.2012 deceased Sarika stayed in his house. On the next day i.e. on 28.6.2012 accused left the house since morning and returned back at 9.00 p.m. at the house of P.W. 1 Umesh. Deceased Sarika was taking dinner. She asked the accused about dinner but he refused the same under the pretext that he had already taken the

dinner. Thereafter, accused alongwith deceased Sarika and their son went to their house. P.W.1 Umesh has further deposed that accused was abusing Sarika on the way to his house also.

P.W.3 Ranjana has not deposed anything about the demand by the accused and according to her, there used to be quarrel between deceased Sarika and accused, as the accused was not doing any work. She has further deposed that accused and deceased Sarika had been to the house of her brother P.W.1 Umesh. P.W.3 Ranjana had also gone there. All of them pacified the quarrel between deceased Sarika and accused. Thereafter, deceased Sarika and accused went to their house and she went to her home.

P.W.5 Bajirao has deposed in the similar line that of P.W.1 Umesh. According to him, two days prior to the incident, deceased Sarika and accused came to his house in the evening time and deceased Sarika had asked the accused about dinner but he refused the same. Thereafter, they had quarrel and went to their house by abusing each other at about 9.30 p.m..

11. According to P.W.1 Umesh on 27.6.2012, deceased Sarika had been to his house and had taken night halt in his house and accused went to his house. On the next day, accused left his house

in the morning and returned back at 9.00 p.m. to the house of P.W.1 Umesh and thereafter, both of them left his house. At that time, the accused was abusing deceased Sarika. P.W.1 Umesh had also admitted in his cross examination that his parents were residing separately from him. Admittedly, as per the prosecution story, P.W.3 Ranjana is residing separately in the same village Kharda and her house is situated adjacent to the house of deceased Sarika. P.W.1 Umesh has not deposed about the presence of P.W.3 Ranjana and P.W.5 Bajirao on both days i.e. on 27.6.2012 and 28.6.2012 in his house nor their names are mentioned in the F.I.R. Exh.18. Furthermore, P.W.3 Ranjana and P.W.5 Bajirao have not deposed anything about the incident dated 27.6.2012 and also the house of P.W.3 Ranjana is situated adjacent to the house of deceased Sarika. If at all, deceased Sarika alongwith accused and her child left the house of P.W.1 Umesh at 9.30 p.m. on 28.6.2012, P.W.3 Ranjana in normal course would accompany them for going to her house. In absence of reference to the presence of P.W.3 Ranjana and P.W.5 Bajirao in the house by P.W.1 Umesh either on 27.6.2012 or 28.6.2012 and further in absence of their names mentioned in the F.I.R. Exh.18, we find it difficult to believe the evidence of P.W.3 Ranjana and P.W.5 Bajirao. Further, their evidence is contradictory to each other on the point of motive and also as to the presence of deceased alongwith accused at the house of P.W.1 Umesh.

12. P.W.1 Umesh has deposed that on 27.6.2012 a quarrel had taken place between deceased Sarika and accused and thereafter deceased Sarika stayed at his house in the night and on the next day, accused returned to his house at 9.00 p.m and thereafter deceased Sarika went with the accused. According to P.W.1 Umesh since beginning, the accused was not doing any work. He used to demand amount from deceased Sarika and on her failure to give the amount, used to beat her. Deceased Sarika was married to accused about 7 years back. Initially, she had cohabited with the accused at village Tandulwadi, Tq. Barshi and about 2/3 years prior to the incident, she came to reside at village Kharda with the accused alongwith the children. We find it difficult to accept that since deceased Sarika was not giving any amount to the accused, in the night of 28.6.2012, the accused had committed her murder. We do not think that the prosecution has established the motive on the part of the accused to commit serious crime like murder of his wife. It is well settled that lack of justified motive adversely affect the case of the prosecution. It has also come in the evidence of P.W.1 Umesh that in the night of 27.6.2012 deceased Sarika had stayed in his house and accused went to his house. On the next day, accused has left his house in the morning and returned back at 9.00 p.m. At that time deceased Sarika was taking dinner. She had asked the

accused about dinner but he refused the dinner under the pretext that he had already taken the dinner. At that time, there was no quarrel between them. On the other hand, deceased Sarika had asked the accused about dinner. As per the prosecution story even the accused had been to the house of P.W.1 Umesh at 9.00 p.m. to see his wife and child and both of them left the house at about 9.30 p.m. and according to P.W.1 Umesh the accused was abusing Sarika on the way to his house. We do not think that this evidence is sufficient to draw inference about justified motive when the prosecution case is solely based upon the circumstantial evidence.

13. It is well settled that last seen together by itself is not conclusive proof but alongwith other circumstances surrounding the incident, may lead to the inference of guilt of the accused. In this case, the time gap between death of deceased and the time when deceased was last seen with the accused is relevant.

14. As per the prosecution story, deceased Sarika was lastly seen alive in the company of accused when deceased Sarika and accused alongwith their child left the house of P.W.1 Umesh on 28.6.2012 at about 9.30 p.m.. At about 2.30 a.m. On 29.6.2012, when P.W.1 Umesh woke up for urinal, went to the house of the accused and he found that the house of accused was latched from outside. When he

unlatched the house, he found that accused was not present in the house. Deceased Sarika was found in the house. He saw that neck of Sarika was pressed and there were finger marks around the neck. We have carefully perused the contents of post mortem notes Exh.20 to find out the time of death. On perusal of findings recorded in respect of stomach and its contents, it appears that there was 200 ml semi-digest food material and according to the Medical Officer, who has prepared the post mortem report, deceased Sarika died 2-4 hours after the last meals. It thus appears that deceased Sarika met homicidal death around 1.30 a.m. on 29.6.2012. P.W.3 Ranjana and P.W. 5 Bajirao, as discussed herein-above, had no occasion to witness the incident dated 27.6.2012 and even the incident happened in the night of 28.6.2012. Thus, P.W.1 Umesh is the only witness on the point of last seen together. There is no further evidence after 9.30 p.m. till the death of deceased Sarika, which might be around 1.30 a.m. on 29.6.2012.

15. P.W.1 Umesh has deposed that at about 2.30 a.m. he woke up for urinal and went to the house of the accused. We find this circumstance very suspicious. P.W.1 Umesh has deposed that since beginning i.e. since seven years, there used to be quarrel between deceased Sarika and accused on the count that accused was not doing anything and he used to demand money from deceased

Sarika. We find nothing in the evidence of P.W.1 Umesh about happening of any abnormal event. There used to be quarrel and also in the night of 28.6.2012 deceased and accused left his house and at that time deceased was giving abuses to deceased Sarika. In absence of any abnormal event while leaving the house in the night of 28.6.2012, we find no reason for P.W.1 Umesh to go to the house of accused at 2.30 a.m. on 29.6.2012. P.W.1 Umesh has admitted in his cross examination that one has to go to the house of deceased Sarika from village gate and then through the lane. P.W.3 Ranjana was residing adjacent to the house of deceased Sarika. Admittedly, there were household articles including television set etc. in the house, in which deceased Sarika was residing. The prosecution has proved the contents of spot panchnama Exh.25 through P.W.4 Mithun Kale. On careful perusal of the contents of spot panchnama, it appears that house of deceased Sarika was a small room having tin shed admeasuring 10 x 15 ft.

16. It further appears that no incriminating material was found on the spot. Even the house hold articles, including utensils etc. were not in scattered condition. Even there is no reference about mattress or quilt used for sleeping purpose spread on the ground floor of the room. There is nothing in the spot panchnama to draw inference that the said incident of murder was committed in the house of deceased

Sarika. Even there is nothing in the contents of spot panchnama to indicate that accused was residing in that small room having tin shed roof alongwith deceased Sarika and the children when the same is relevant in the light of defence raised by the accused.

17. The accused has submitted his statement under Section 313 of Cr.P.C. in writing, wherein it has been contended that deceased Sarika had children from her husband Ganesh Pawar and deceased Sarika was not cohabiting with her husband Ganesh Pawar on account of certain differences and as such deceased Sarika was residing at her parents house at village Survewadi (Kharda). According to the accused, deceased Sarika used to insist him for marriage and the accused was not ready to marry with her for the reason that she had her previous marriage. According to the accused, even P.W.1 Umesh and his father had grudge in their minds about him, as he was not ready to marry with deceased Sarika. The accused has raised specific defence that deceased Sarika was indulged in selling the country liquor and her parents had constructed the said room to facilitate the said business. Deceased Sarika was residing there for carrying out the said business. Deceased Sarika had many enemies due to her business of selling the country liquor. According to the accused, he was brought to the police station on 29.6.2012 when he was proceeding to Pandharpur

in the *Dindi*.

18. In the circumstances, the theory of last seen together does not by itself and necessarily lead to draw inference that it was the accused who committed the crime. There must be something more establishing the connectivity between the accused and the crime. In the instant case, mere non explanation on the part of the accused by itself cannot lead to the proof of guilt against the accused.

19. It is well settled that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established and those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. In the instant case, we do not think that the prosecution has established cogently and firmly the circumstances from which an inference of guilt of the accused can be drawn. We do not find those circumstances established by the prosecution are having definite tendency unerringly pointing towards guilt of the accused. There is no complete chain of circumstantial evidence.

20. Thus, in our considered opinion, the accused is entitled for the benefit of doubt. Accordingly, we proceed to pass the following order:-

ORDER

- (I) The Criminal Appeal is allowed.
- (II) The impugned Judgment and order dated 16th September, 2013 passed by the District Judge-3 and Additional Sessions Judge, Ahmednagar in Sessions Case No.345 of 2012 convicting and sentencing the Appellant for the offence punishable under Section 302 of the Indian Penal Code is quashed and set aside.
- (III) The Appellant – Lahu Gopinath Pawar is acquitted of the offence punishable under Section 302 of the Indian Penal Code. Fine amount, if deposited, be refunded to the Appellant. His Bail Bonds shall stand cancelled.
- (IV) The Appellant is in jail, he be set at liberty forthwith, if not required in any other case.
- (V) The Appellant shall furnish the Personal Bonds of Rs.15,000/- and surety of like amount under Section 437-A of the Code of Criminal Procedure, before the concerned trial Court at Ahmednagar.

(V. K. JADHAV, J.)

(S. S. SHINDE, J.)

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