

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 460 OF 2014

Datta s/o Keshavrao Karhale,
Age : 42 years, Occu.: Agricultural Labour,
R/o : Girgaon, Tq. Basmath,
District Hingoli.

... Appellant
(Original Accused)

Versus

1. The State of Maharashtra,
Through Police Station, Basmath,
Tq. Basmath, District Hingoli.
2. Dashrath s/o Baliram Tipre (deceased)
- 2-A. Gayabai w/o Dashrath Tipre,
Age : 69 years, Occu.: Household,
R/o Ambedkarnagar, Basmath,
District Hingoli.
- 2-B. Madhav s/o Ambadas Gaikwad,
Age : 21, Occu.: Labour,
R/o Donwada, Tq. Basmath,
District Hingoli.

... Respondents

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Mr. Avishkar Shelke, Advocate for the Appellant (appointed).
Mr. R. D. Sanap, APP for Respondent No.1-State.
Mr. Govind A. Kulkarni, Advocate for Respondent Nos. 2-A and
2-B (appointed).

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**CORAM : V. K. JADHAV AND
SANDIPKUMAR. C. MORE, JJ.
DATED : 16th NOVEMBER, 2021**

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

1. This appeal is directed against the judgment and order of conviction dated 24.01.2014 passed by the Additional Sessions Judge, Basmath in Spl. C. (Atrocities) No. 5/2012.

2. Brief facts, giving rise to the prosecution story are as under:

a. Deceased Rekha was residing at Gautamnagar, Kawatha Road, Basmath. She was married to Ambadas Gaikwad and gave birth to three children out of their wedlock. Subsequently, their relations became strained and Rekha started residing separately along with her two children at Basmath. The appellant-accused no. 1 and the acquitted accused no.2 are also residents of Basmath. As per the prosecution story, appellant-accused no.1 and the acquitted accused no.2 had called Rekha to satisfy their sexual urge and they have committed sexual intercourse with her by consent. Though appellant-accused no.1 and the acquitted accused no.2 were ready to pay Rs.200/- to Rekha, she demanded Rs.500/-. Thus, both the accused persons got annoyed because of the said excessive demand and committed her murder.

b. On 22.09.2011 at about 7.30 a.m., one Apparao Kadam, who is the servant of PW 2 Vithal Magar, had informed him on phone that in their land gat no. 316, a dead body of one unknown lady was lying. There were injuries on her person. Thus, PW 2 Vithal along with said servant Apparao went to the land gat no. 316 and seen the dead body of one unknown lady lying in the cotton crop. Thereafter, PW 2 Vithal had given the said information to PW 1 Prakash Jadhav, who happened to be the Police Patil of village Borala. There were marks of violence on the dead body. PW 1 Prakash Jadhav has lodged report at Police Station Basmath Exhibit 32. On its basis, Crime No. 214 of 2011 came to be registered at Basmath Police Station for the offence punishable under Sections 302 and 201 of IPC.

c. On 22.09.2011, PW 14 P.I. Sarjerao Patil took over the investigation of crime no. 214 of 2011. PW 14 P.I. Sarjerao Patil has visited the spot where the dead body was lying. He has drawn inquest panchanama of the dead body at the spot of incident. He has also noticed compression marks on the neck. There was a green colour sari, petti coat and a blouse on the person of the dead body along with a scarf. There was also a pair of foot rings, ear tops and

one bangle. PW P.I. Sarjerao Patil has seized those articles at the time of drawing of inquest panchanama Exhibit 59. He has thereafter sent the dead body for postmortem examination. He has drawn panchanama of the place of incident in presence of the *pancha* witnesses. He has collected the soil mixed with blood and the soil without blood from the place of incident. One *chapple* (footwear) was found and that was seized. The said place was in the land gat no. 316. The spot panchanama is marked at Exhibit 56.

d. He has snapped the photographs of the dead body with the help of a photographer for identification purpose and those photographs were given for publicity on internet and he has also circulated those photographs to the local Police Station.

e. On 26.11.2011, one Gayabai, PW Dashrath, Devidas and Balaji went to the Basmath Police Station and informed that since 21.09.2011, sister of Devidas and Balaji, namely, Rekha Ambadas Gaikwad is missing from the house. PW P.I. Sarjerao Patil has shown them the photographs, cloths and ornaments and also shown the dead body. They have identified the dead body. They

also told that one gold *mangalsutra* was on the person of Rekha and also one silver *painjan* (anklets) and a nose ring were on the person of Rekha. However, those ornaments were not found on her dead body. PW P.I. Sarjerao Patil has recorded their statements and also recorded the statement of the husband, son and mother-in-law of deceased Rekha.

f. Further, during the course of investigation, it was transpired that one mobile was with deceased Rekha. She was working with one Gulam Mohammad for two hours in the morning and two hours in the evening. Said Gulam Mohammad used to contact deceased Rekha on her mobile and he informed the police about the mobile number of Rekha. PW P.I. Sarjerao Patil thus collected the call detail record (CDR) of the said mobile number. It was revealed that the last call on the said mobile was received from the mobile belonging to the appellant-accused no.1.

g. On 27.09.2011, while drawing arrest panchanama, one *mangalsutra* of nine gold beads, two anklets, one nose ring and two mobile handsets were found with the appellant-accused no.1. One mobile handset was of Samsung company and another was of

Rocker company. PW P.I. Sarjerao Patil has also seized one election I.D. card of accused no.1 and one pocket diary containing Rs.450/-. The said arrest panchanama is marked at Exhibit 68.

h. It was revealed during investigation that the accused persons are from Maratha caste and the deceased was from Scheduled Caste. Thus, PW P.I. Sarjerao Patil added the offence under the provisions of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, "Atrocities Act") and the further investigation was thus handed over to PW 11 Dy. S.P. Shri Manik Shivram Perke.

i. PW 11 Dy.S.P. Perke has recorded the statements of witnesses including PW 12 Suresh Khandekar. During the course of investigation, on 01.10.2021, appellant-accused no.1 while in the police custody, has made a disclosure statement that he is ready to show the place of incident. Accordingly, memorandum panchanama was prepared to that effect which is marked at Exhibit 46. The appellant-accused no.1 has accordingly shown the place of incident and PW 11 Dy.S.P. Perke has drawn the panchanama Exhibit 47. During the course of drawing the said panchanama,

appellant-accused no.1 has again made a statement that he is ready to show the place where he has concealed the wooden rod and the cloths which were on his person at the time of incident. Accordingly memorandum panchanama Exhibit 49 was prepared and thereafter, the appellant-accused led the *panchas* and the police party to the place where he has concealed the clothes and the said weapon. One black colour pant, one white shirt, one underpant and one wooden rod came to be seized and sealed under panchanama Exhibit 50. Similarly, accused no.2 has also made a statement and in terms of his statement, his clothes also came to be seized by drawing panchanama Exhibit 51 and recovery panchanama Exhibit 52.

j. PW 11 Dy.S.P. Perke has collected blood samples of the mother and father of Rekha for identification and he has sent all the articles for DNA test, along with some parts of bones of the dead body preserved for DNA test, to the lab at Kalina, Mumbai along with P. C. Rathod (B.No. 194) with a covering letter Exhibit 63. He has also collected the caste certificate of Rekha. After completion of investigation, charge-sheet came to be submitted.

k. On 06.06.2012, learned Additional Sessions Judge, Basmath has framed charge against both the accused persons vide Exhibit 18 for the offence punishable under Sections 3(1)(x), 3(1)(xi) of the Atrocities Act, Section 302 r/w 34 of IPC, Section 201 r/w 34 of IPC and Section 404 r/w 34 of IPC. The contents of the charge were read over and explained to both the accused persons for which they pleaded not guilty and claimed to be tried. The prosecution has examined in all 15 witnesses to substantiate the charge leveled against the accused persons. After completion of the prosecution evidence, statements of both the accused came to be recorded under Section 313 of Cr.P.C. The defence of both the accused is of total denial.

l. Learned Additional Sessions Judge, Basmath, by judgment and order dated 24.01.2014 in Spl.C. (Atrocities) No. 5/2012, has acquitted accused no.2 Sopan Anna Ingole, however, convicted the present appellant accused no.1 for the offence punishable under Section 302 of IPC and sentenced him to suffer imprisonment for life and to pay fine of Rs.500/-, in default to suffer R.I. for one month. The learned Additional Sessions Judge, Basmath has further convicted appellant accused no.1 for the offence punishable

under Section 404 of IPC and sentenced him to suffer R.I. for one year and fine of Rs.500/- in default to suffer R.I. for one month. The trial court has however acquitted the appellant-accused no.1 for the offence punishable under Section 201 of IPC and also for the offence punishable under Sections 3(1)(x) and 3(1)(xi) of the Atrocities Act. Operative part of the order dated 24.01.2014 passed by the learned Additional Sessions Judge, Basmath is reproduced herein below:

“1. Accused no.2 Sopan Anna Ingole is hereby acquitted under Section 235(1) of Cr.P.C. of the offences punishable under Section 302, 201, 404 of the Indian Penal Code and also for the offence punishable under Section 3(1)(x) and 3(1)(xi) of S.C. and S.T (Prevention of Atrocities) Act.

2. Bail bonds of accused no.2 Sopan Anna Ingole shall stand cancelled.

3. Accused no.1 Datta Keshav Karhale is acquitted under Section 235(1) of Cr.P.C. of the offence punishable under Section 201 of the Indian Penal Code and also acquitted of the offence punishable under Section 3(1)(x) and 3(1)(xi) of SC and ST (Prevention of Atrocities) Act.

4. Accused no.1 Datta Keshav Karhale is hereby convicted under Section 235 (2) of Cr.P.C. for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.500/- (Rs. Five hundred) in default to suffer R.I. for one month.

5. In case of commutation of imprisonment for life to a lessor punishment by Govt. the accused will be entitled to the set off under Sec. 428 of Cr.P.C. for the period for which he is in jail in this case.

6. Accused no.1 Datta Keshav Karhale is convicted for the offence punishable under Section 404 of IPC and sentenced to suffer R.I. for one year and fine of Rs.500/- in default to suffer R.I. for one month.

7. Muddemal article nos. 1 to 7, 10, 17, 19, 21 and 22 to 28 are being worthless hence they be destroyed after appeal period is over.

8. Muddemal article Nos. 8, 9, 11 and 12, 14 shall be given to the father of deceased Rekha Ambadas Gaikwad i.e. p.w. no.4 Dashrath Baliram Tipre on proper identification.

9. Muddemal article no. 13 mobile of rocker company was used in commission of Crime. It shall

be sell in public auction after the appeal period is over and the sale proceeds shall be credited to Govt.

10. Muddemal article nos. 15 - election card of accused no.1, Muddemal article no. 17 – pocket diary are marked at Exh. 93 and 94 respectively. Article No. 17 will be destroyed as per rules of destroying ‘C’ file. Article no. 15 shall be returned to accused no.1 after taking zerox copy.

11. Article no. 16 i.e. an amount of Rs.540/- (Rs. Five hundred and forty) were seized from accused no.1 so that amount shall be returned to accused no.1 after appeal period is over.”

3. Learned counsel for the appellant-accused submits that the prosecution case entirely rests upon circumstantial evidence and there is no direct evidence in this case. Learned counsel submits that the prosecution has altogether brought a new concept of “last call theory”. The prosecution case almost entirely rests upon the said last call theory. On 22.09.2011, the dead body of one unknown lady was found in land gat no. 316. There is no proper identification of the dead body. PW 4 Dashrath could not identify the dead body and he has merely identified the clothes. Learned

counsel submits that even keeping the said thing in mind, PW 11 Dy.S.P. Perke has also collected blood samples of the parents of deceased Rekha for DNA test purposes and the same, along with the samples of bone and other parts of the dead body of Rekha, were forwarded to the lab at Kalina, Mumbai. However, the prosecution has neither produced the said DNA report nor examined any witness on the said point. Apart from that, even though the dead body was found on 22.09.2011 in the morning, on the basis of the 'last call theory', appellant-accused no. 1 came to be arrested in connection with the crime merely on suspicion. The appellant-accused allegedly made a phone call to deceased Rekha on her mobile at about 7.00 p.m. on 21.09.2011. Learned counsel submits that the said phone call indicates that the appellant-accused no.1 and deceased Rekha were not together and they had merely contacted each other on phone.

4. Learned counsel has pointed out from the call detail record that there were some other calls received by deceased Rekha before the said call allegedly made by appellant-accused no.1. One of such calls is at about 6.30 p.m. and onwards which is of maximum duration. However, there is no investigation carried out by the

Investigating Officer in connection with the said call. It is not clear as to who has made the said call to deceased Rekha.

5. Learned counsel submits that certain incriminating articles shown to have been recovered from the possession of appellant-accused no.1 at the time of drawing of his arrest panchanama in the police station. Learned counsel submits that if the incident has taken place on 21.09.2011, it is unlikely on the part of the appellant-accused to keep the muddemal and certain articles belonging to deceased Rekha in his pocket till 27.09.2011.

6. Learned counsel submits that the cause of death as opined by PW 3 Dr. Ashok Mundhe is 'asphyxial death due to throttling'. PW 3 Dr. Ashok Mundhe has explained that there is no evidence of injury to scalp or skull. Even the weapon wooden log allegedly recovered at the instance of appellant-accused no.1 was not shown to PW 3 Dr. Ashok Mundhe to obtain his opinion as to whether certain injuries as noted and mentioned by him in column no. 17 of the postmortem report are possible by the use of said weapon wooden log. On the other hand, so far as the cause of death i.e. 'asphyxial death due to throttling' is concerned, the weapon like

wooden log has hardly any role to play. Learned counsel submits that even though the prosecution has come with the evidence through the C.A. report marked at Exhibit 110 indicating that the muddemal article wooden log and the full shirt on the person of appellant-accused no.1 were having blood stains and the blood detected on it is human, however, this incriminating circumstance was not put to appellant-accused no.1 in his examination under Section 313 of Cr.P.C. and as such, no opportunity was given to him to explain the said incriminating circumstance.

7. Learned counsel for the appellant-accused submits that the prosecution has come with a unique case of 'last call theory' and on the basis of the said last call theory, the trial court has observed that it is incumbent upon the appellant-accused no.1 to explain the said circumstance in terms of the provisions of Section 106 of the Indian Evidence Act. Learned counsel submits that the prosecution has failed to prove the case by establishing a chain of circumstantial evidence and the circumstances brought on record have no conclusive tendency to point out unerringly the guilt of the accused. Thus, the accused cannot be convicted merely on the basis of his non-explanation for such a scanty incriminating evidence in

the form of last call theory.

8. Learned counsel submits that when the prosecution case rests upon circumstantial evidence, motive plays a great role. In the instant case, there is no evidence about motive. Learned counsel submits that PW 14 P.I. Sarjerao Patil has deposed before the court that since the deceased made a demand of excess amount to the accused for having sexual intercourse with her, appellant-accused and the co-accused have committed her murder. Learned counsel submits that PW 14 P.I. Sarjerao Patil has no personal knowledge about it and the prosecution has not examined any witness to substantiate the said theory. Consequently, there is no evidence about motive. Learned counsel submits that on the same set of evidence, the trial court has acquitted accused no.2, however, convicted appellant-accused no.1 only on the basis of last call theory. Learned counsel submits that the appellant-accused thus deserves to be acquitted.

9. Learned counsel for the appellant-accused, in order to substantiate his submissions, placed reliance on the following cases:

1. ***Shambhu Nath Mehra v. The State of Ajmer*** [AIR 1956 SC 404].
2. ***Digamber Vaishnav & another v. State of Chhattisgarh*** [2019 All SCR (Cri) 1009].
3. ***Ratan Lal v. State of Rajasthan*** [2018 ALL SCR (Cri) 472].
4. ***Sahadevan and another v. State of T.N.*** [2012 Cri.L.J. 3014].
5. ***Sk. Yusuf v. State of West Bengal*** [(2011) 11 SCC 754].
6. ***State of U.P. v. Shyam Behari and another*** [2009 AIR SCW 5258].
7. ***State of Karnataka v. M. V. Mahesh*** [(2003) 3 SCC 353].
10. Learned counsel for respondent nos. 2-A and 2-B submits that the prosecution has proved its case beyond reasonable doubt on the basis of the chain of circumstantial evidence. Though there is satisfactory evidence about the fact that the last phone call received on the mobile number of deceased Rekha was made by appellant-accused no.1, he has not explained the same. Learned counsel submits that the prosecution has examined the service

providers of two companies i.e. Idea Cellular Ltd. and Vodafone. The prosecution has proved that deceased Rekha was having mobile handset of Samsung company with the particular sim on which appellant-accused no.1 has made a phone call on 21.09.2011 at about 7.00 p.m. There is satisfactory evidence about the motive. Furthermore, at the time of drawing of the arrest panchanama, certain incriminating articles came to be seized from the appellant-accused which include the ornaments of the deceased along with her mobile handset. The appellant-accused has failed to explain the circumstance under which he has got possession of the mobile handset of deceased Rekha. The burden is on the appellant-accused to explain the same in terms of the provisions of Section 114 (a) of the Indian Evidence Act. Furthermore, at the instance of the appellant-accused, the spot, where murder has been committed, was found. Learned counsel submits that the trial court has rightly convicted the appellant-accused. There is no substance in this appeal and the same is liable to be dismissed.

11. Learned counsel for respondent nos. 2-A and 2-B, in order to substantiate his contention, placed reliance on the case of ***Mohinder Sharma v. State*** [2013 SCC Online Del 740 : (2013) 2

DLT (Cri) 193].

12. Learned APP for the respondent-State submits that the prosecution has established the chain of circumstantial evidence. There is evidence about motive. There is evidence that the appellant-accused has made the last call to deceased Rekha and thereafter the dead body of Rekha was found lying in the agricultural land gat no. 316. Learned APP submits that at the instance of the appellant-accused, the incriminating articles such as the wooden log used in commission of the crime and his blood stained clothes came to be seized from the hidden place. Learned APP submits that the C.A. report Exhibit 110 indicates that human blood was found on the weapon wooden log so also on the shirt of the appellant-accused. Learned APP submits that certain incriminating articles including the mobile handset of deceased Rekha came to be recovered at the time of drawing of the arrest panchanama from the possession of the appellant-accused, for which no explanation has been tendered. Even the appellant-accused has not explained in terms of the provisions of Section 106 of the Indian Evidence Act about the said last call made by him to deceased Rekha. Learned APP submits that the trial court has

therefore rightly drawn the adverse inference about non-explaining the said circumstance. Learned APP submits that the trial court has rightly convicted appellant-accused no.1 for having committed murder of Rekha. There is no substance in the appeal and the appeal is thus liable to be dismissed.

13. We have perused the material exhibits tendered by the prosecution, the evidence of the prosecution witnesses, the statements of the appellant-accused no.1 and co-accused no.2 recorded under Section 313 of Cr.P.C. and the impugned judgment. After giving our thoughtful reflection to the matter, we are wholly satisfied that there is substance in this appeal filed by the appellant-accused no.1 and the same must be allowed.

14. On 22.09.2011 at about 8.00 a.m., the dead body of one unknown lady was found lying in the agricultural land gat no. 316 in the crop of cotton. There were injuries and marks of violence on the dead body. There were ligature marks on the neck and there was bleeding from the mouth. There was a green colour sari and a green colour blouse. On the basis of the report Exhibit 32 lodged by PW 1 Prakash Jadhav, Police Patil of village Borala, crime no. 214

of 2011 for the offence punishable under Sections 302 and 201 of IPC came to be registered in the concerned police station against unknown assailant.

15. The prosecution has examined PW 4 Dashrath Tipre, father of the deceased. PW 4 Dashrath was informed by the other relatives that Rekha was missing. Thus, he went to the Basmath Police Station to lodge missing report. At that time, he was shown the dead body at the Rural Hospital, Basmath. PW 4 Dashrath has deposed that he could not identify deceased Rekha. He was shown the clothes. He has identified the said clothes as belonging to Rekha. Except this witness, the prosecution has not examined any other witness to identify the dead body. Furthermore, PW 11 Dy.S.P. Manik Perke, during the course of investigation, by noticing the same, collected blood samples of the mother and father of Rekha for DNA test and he has sent all the articles, including the blood samples and some parts of bone of the dead body preserved for DNA test, to the laboratory at Kalina, Mumbai along with the covering letter Exhibit 63. However, the prosecution, for the reasons best known to it, has not placed on record the DNA report, nor examined any witness on the point of the DNA examination.

16. Even assuming that PW 4 Dashrath, father of Rekha, has identified the clothes of Rekha and as such, it was the dead body of Rekha, the prosecution has examined PW 3 Dr. Ashok Mundhe who has conducted the postmortem examination on the dead body. There is nothing in the postmortem report Exhibit 38 to indicate that the dead body, particularly the face, was not in identifiable condition. Apart from this, PW 3 Dr. Ashok Mundhe, has noticed seven injuries on the dead body of the said unknown lady and in his opinion, the cause of death is 'asphyxial death due to throttling'. Learned counsel appearing for the appellant-accused has not seriously disputed the homicidal death of the unknown woman. The prosecution has established the homicidal death so far as the dead body of said unknown lady is concerned. Even assuming that the said dead body was of Rekha, the prosecution has established the homicidal death of Rekha. Injury no. 3 -contused abrasion on right side neck, injury no. 4 - contusion on left side neck and injury no. 5 - multiple contusions over chest below thyroid lever indicate homicidal death due to asphyxia due to throttling. The other injuries on the dead body, as opined by PW Dr. Mundhe, are indicative of violence since the deceased had resisted the said assault.

17. It is needless to state that motive plays a great role when the prosecution case rests upon circumstantial evidence. In the instant case, the prosecution case entirely rests upon circumstantial evidence and there is no direct evidence. We find no evidence about motive. PW 14 P.I. Sarjerao Patil has deposed about the motive as revealed during the course of investigation. However, PW 14 P.I. Sarjerao has no personal knowledge and the prosecution has not examined any witness on the same. According to PW 14 P.I. Sarjerao Patil, the deceased had consented for sexual intercourse to the appellant-accused and the acquitted co-accused for certain amount. However, after completion of the same, deceased had demanded more amount than agreed. PW 14 P.I. Sarjerao Patil has deposed that appellant-accused and the acquitted accused therefore committed murder of Rekha. It is not clear on what basis PW 14 P.I. Sarjerao Patil has deposed in the said manner. We find that there is no evidence at all upon the motive.

18. We agree with the submission made by learned counsel Mr. Shelke on behalf of the appellant-accused that the prosecution has come with a unique concept of "last call theory". In the instant

case, admittedly there is no evidence of last seen together. The prosecution has also not claimed that deceased Rekha was lastly seen alive in the company of the appellant-accused at any point of time prior to her death. Even assuming that the appellant-accused has made a phone call to deceased Rekha on her mobile handset on 21.09.2011 at about 7.00 p.m., her dead body was found in the morning at about 8.00 a.m. on 22.09.2011 in one agricultural land. The postmortem of the dead body was conducted on 23.09.2011 at about 9.00 to 10.30 a.m. PW 3 Dr. Ashok Mundhe has admitted in para 6 of his cross-examination that the lady died 20 to 24 hours prior to postmortem examination. Thus, considering the time when the postmortem was conducted on the dead body, at the most it can be said that deceased Rekha died homicidal death in the morning of 22.09.2011.

19. So far as the last call theory is concerned, we have carefully gone through the call detail record Exhibit 76/1 to 76/14. It appears that at serial no. 607 and 608, there were two calls on the mobile of deceased from the mobile of the appellant-accused at about 19.00.55 and 19.02.10 hours for 43 seconds and 30 seconds respectively. However, we also find that as per serial no. 606 there

was a call received on the mobile of deceased at about 18.53.59 hours and the duration of the said call is of 208 seconds. However there is no investigation as to who has made the said phone call which is of maximum duration and which is prior to the call allegedly made from the mobile of the appellant-accused. It further appears that no witness has particularly identified the mobile of deceased Rekha. It was not shown to any of the prosecution witnesses except PW 12 Suresh Khandekar. PW 12 Suresh Khandekar allegedly sold the said mobile, which was belonging to him, to deceased Rekha for Rs.500/-. However, there is no positive evidence to indicate that deceased Rekha was using the said mobile bearing sim card no. 7507149722. PW 12 Suresh Khandekar was serving at Kurunda 132 KV Sub-station, MSEB since 1999 to 2009. He was also holding the additional charge of 132 KV Sub-station, Basmath. He has admitted in his cross-examination that the villagers use to contact him in case of any electrical difficulty and he used the above mentioned sim card for two to three months before giving it to Rekha. Thus, the evidence of this witness is not helpful for the prosecution in any manner.

20. The prosecution has examined PW 9 Sharad Naval, the

pancha witness. According to him, on 27.09.2011, he was called by the police at police station, Basmath at about 4.45 p.m. and one another *pancha* was Ashish Gaikwad. The appellant-accused was present in the police station. At the time of personal search of appellant-accused, certain muddemal articles were found in possession of the appellant-accused and those include (1) seven beads of yellow metal, (2) two *mangalsutra* of yellow metal, (3) seven disco beads, (4) two chains of white metal, (5) one mobile of Rocker company with sim card, (6) one mobile of Samsung company of black colour with sim card, (7) four currency notes of the denomination of Rs.100/- each, (8) two currency notes of the denomination of Rs. 50/- each, (9) three currency notes of the denomination of Rs.10/- each, (10) two currency notes of the denomination of Rs.5/- each, (11) Election I.D. Card of accused no.1, (12) one pocked diary containing some mobile numbers, (13) one mobile charger, (14) one nose ornament of yellow metal and (15) one money purse of black colour. The prosecution claims that particularly the *mangalsutra* and the beads and the mobile of Samsung company belongs to deceased Rekha along with one nose ornament of yellow metal. However, it is highly improbable and it is also unlikely on the part of the appellant-accused to keep those

incriminating articles in his pocket right from the date of the incident i.e. 21.09.2011 till he was arrested on 27.09.2011 in connection with the crime. Furthermore, none of the prosecution witnesses has identified the said ornaments i.e. seven beads of yellow metal, two *mangalsutra* of yellow metal, seven disco beads, two chains of white metal, one black colour mobile of Samsung company and one nose ornament of yellow metal as belonging to deceased Rekha. This so-called seizure of certain incriminating articles from the possession of the accused is highly suspicious and we are not inclined to place reliance on it.

21. It further appears that during the course of investigation, at the instance of the appellant-accused, the weapon wooden log having blood stains on it and his clothes including a shirt having blood stains and a pant came to be seized from the hidden place. However, if we consider the cause of death i.e. 'asphyxial death due to throttling' and so far as the nature of other injuries on the dead body, we hardly find that the weapon like wooden log has been used in the alleged commission of crime. Furthermore, the said article wooden log was not shown to PW 3 Dr. Ashok Mundhe to obtain his opinion as to whether the injuries as mentioned in

column no. 17 of the postmortem report of the dead body are possible or some of the injuries mentioned in column no. 17 are possible by the use of the article wooden log. It appears from the C.A. report Exhibit 110 that human blood was detected on the wooden log so also on the shirt of the appellant-accused. However, the blood group of deceased Rekha was not detected and the results were not conclusive. Furthermore, this particular incriminating evidence was not put to the appellant-accused during his examination under Section 313 of Cr.P.C. Thus, the appellant-accused has no opportunity to explain the said incriminating circumstance.

22. It appears that the learned judge of the trial court has convicted the appellant-accused mainly on the basis of the last call theory and particularly, for not giving any explanation to the incriminating circumstance of the last call theory as required under Section 106 of the Indian Evidence Act.

23. In the case of *Sk. Yusuf v. State of West Bengal* [(2011) 11 SCC 754], relied upon by learned counsel for the appellant-accused, the Supreme Court, in para 32 and 33 of the judgment has

held has under:

32. Undoubtedly, conviction can be based solely on circumstantial evidence. However, the court must bear in mind while deciding the case involving the commission of serious offence based on circumstantial evidence that the prosecution case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence case. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused and they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (Vide Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116, Krishnan v. State (2008) 15 SCC 430 and Wakkar v. State of U.P. (2011) 3 SCC 306).

33. No presumption could be drawn on the issue of

last seen together merely on the fact that Abdul Rajak (PW.2), father of the deceased had stated that Sahanara Khatun had gone to pluck jhinga and her dead body was recovered from there. The witnesses merely stated that the accused was present in the close proximity of that area. That does not itself establish the last seen theory because none of the witnesses said that the accused and deceased were seen together. Most of the witnesses had deposed that the accused was having spade. It may connect the appellant to the factum of digging the earth. A person going for catching fish normally does not take a spade with him.

24. The Supreme Court in the above case has referred the observations made in ***Sharad Birdhichand Sarda v. State of Maharashtra*** [(1984) 4 SCC 116], ***Krishnan v. State*** [(2008) 15 SCC 430 and ***Wakkar v. State of U.P.*** [(2011) 3 SCC 306. It is well settled that while deciding a case involving the commission of serious offence based on circumstantial evidence, the prosecution case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence case. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused and they should not be

explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

25. In the case of *Anjan Kumar Sarma and others v. State of Assam*, [(2017) 14 SCC 359], in para 23, the Supreme Court has made the following observations:

*“23. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. The other judgments on this point that are cited by Mr. Venkataramani do not take a different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in *State of Goa v. Sanjay Thakran* (2007) 3 SCC 755 in support of his*

submission that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of incident or before the commission of crime in the intervening period. It was held in the above judgment as under:-

“34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen

together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the

intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.”

The Supreme Court has observed that the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. In the instant case, there is no evidence about last seen together and the prosecution has come with a unique case of last call theory. We do not think that it is incumbent upon the appellant-accused to explain the said circumstance in terms of the provisions of Section 106 of the Indian Evidence Act and in absence of any such explanation, the same cannot be made the basis of his conviction.

26. In the case of ***Mohinder Sharma v. State*** [2013 SCC Online Del 740 : (2013) 2 DLT (Cri) 193], relied upon by learned counsel

for respondent nos.2-A and 2-B, in the facts of the said case, the Supreme Court has observed that the burden shifts on the accused to explain the circumstances under which he has got possession of the mobile phone of the deceased person and it applies to all crimes including murder. Further, the Supreme Court has also observed that each case has to be examined on its own factual matrix. In the instant case, the circumstance of seizure of certain incriminating articles including the mobile handset of deceased Rekha from the possession of the appellant-accused at the time of drawing of his arrest panchanama after a gap of six days is a highly suspicious circumstance and it is very unlikely on the part of the assailant to keep the incriminating articles such as the ornaments of the deceased and her mobile handset in his pocket from the date of the incident that i.e. 21.09.2011 till his arrest i.e. 27.09.2011.

27. In view of the above, discussion, we find no satisfactory evidence against the applicant-accused to convict him for having committed the offence punishable under Section 302 of IPC. The prosecution has failed to prove the case against the appellant-accused beyond reasonable doubt. On the same set of allegations, the trial court has acquitted the co-accused i.e. accused no.2,

however, convicted the present applicant merely on the basis of “last call theory”. We do not think that the approach of the trial court is proper, correct and legal while appreciating the evidence so also applying the law to the factual matrix of the case. The appellant-accused is thus entitled for the benefit of doubt. We accordingly proceed to pass the following order:

ORDER

- I. Criminal Appeal No. 460 of 2014 is hereby allowed.
- II. The judgment and order of conviction dated 24.01.2014 passed by the Additional Sessions Judge, Basmath in Spl. C. (Atrocities) No. 5/2012 convicting thereby the appellant accused no.1 Datta s/o Keshavrao Karhale for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.500/- (Rs. Five hundred) in default to suffer R.I. for one month and further convicting the appellant-accused no.1 Datta s/o Keshavrao Karhale for the offence punishable under Section 404 of IPC and sentenced to suffer R.I. for one year and fine of Rs.500/-, in default to suffer R.I. for one month, **is hereby quashed and set aside.**

- III. The appellant-accused no.1 Datta s/o Keshavrao Karhale is hereby acquitted of the offence punishable under Sections 302 and 404 of IPC in connection with the Spl. C. (Atrocities) No. 5/2012 (The State of Maharashtra Through Police-station, Basmath Tq. Basmath, Dist. Hingoli v. Datta s/o Keshavrao Karhale and another).
- IV. The appellant-accused no.1 Datta s/o Keshavrao Karhale shall execute P.B. of Rs.20,000/-, with one surety of the like amount to appear before the higher court as and when the notice is issued in respect of any appeal or petition filed against the judgment of this Court. Such bail bond shall remain in force for a period of six months from the date of its execution.
- V. Upon executing the P.B. as above, the appellant-accused no.1 be released forthwith, if not required in any other offence.
- VI. We quantify the fees of learned counsel Mr. Avishkar Shelke, appointed for the appellant, at Rs.15,000/- and the fees of appointed counsel Mr. Govind A. Kulkarni, appointed for respondent nos. 2-A and 2-B, at Rs. 10,000/-, which shall be paid by the High Court Legal Services Sub-committee, Aurangabad.

VII. At the request of learned counsel Mr. Avishkar Shelke, the legal fees of Rs.15,000/- quantified for his services shall be paid to the Bar Library, Advocate's Association of Bombay High, Bench at Aurangabad.

VIII. Criminal Appeal No. 460 of 2014 is accordingly disposed off.

(SANDIPKUMAR C. MORE, J.)

(V. K. JADHAV, J.)