

`IN THE HIGH COURT OF JUDICATURE OF BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.355 OF 2017

Vinod s/o Rangnath Pawar,
Age 36 years, Occu. Driver,
R/o Sawangi, Taluka and
District Aurangabad

... APPELLANT

VERSUS

1. The State of Maharashtra
Through Police Station Officer,
Police Station, Phulambri,
Tq. Phulambri, Dist. Aurangabad

(Copy to served on Public
Prosecutor, High Court of Bombay
Bench at Aurangabad)

2. Nazmabi Sayyad Raheman,
Age 30 years, Occu. Labourer,
R/o Naigaon, Taluka and
District Aurangabad
(Formal Respondent)

... RESPONDENTS

.....
Mr. Shrikishan S. Shinde, Advocate for appellant
Mr. S.P. Sonpawale, A.P.P. for respondent No.1 – State
.....

WITH

CRIMINAL APPEAL NO.491 OF 2019

Nazmabi w/o Sayyad Raheman,
Age 32 years, Occu. Labour,
R/o Naigaon, Taluka and
District Aurangabad

... APPELLANT

VERSUS

The State of Maharashtra
Through Police Station Officer,
Police Station, Phulambri,
Tq. Phulambri, Dist. Aurangabad

(Copy to served on Public
Prosecutor, High Court of
Judicature of Bombay
Bench at Aurangabad)

... RESPONDENT

.....
Mr. N.S. Ghanekar, Advocate holding for
Ms Varsha S. Ghanekar, Advocate for appellant
Mr. S.P. Sonpawale, A.P.P. for respondent – State
.....

**CORAM : R. G. AVACHAT, AND
R. M. JOSHI, JJ.**

Date of reserving judgment : 13th December, 2022

Date of pronouncing judgment : 19th December, 2022

JUDGMENT (PER : R.G. AVACHAT, J.) :

Both these appeals from conviction are being decided by this common judgment since the challenge therein is to one and the same order of conviction and sentence, passed by learned Additional Sessions Judge-2, Aurangabad in Sessions Case No.13/2015, by judgment and order dated 15/7/2017. Vide impugned order, the appellants have been convicted for the offence punishable under Sections 302 and 201 read with Section 34 of the Indian Penal Code and,

therefore, sentenced to suffer imprisonment for life and to pay fine of Rs.10,000/- each, and rigorous imprisonment for three years and to pay fine of Rs.5000/- each, respectively with default stipulations.

2. The facts giving rise to the present appeals are as follows :

Appellant Nazmabi is a widow of Sayyad Raheman (deceased). Nazmabi is alleged to have had extra-marital relationship with appellant Vinod. Both the appellants committed murder of Sayyad Raheman in the field of one Anil Jagdale at village Naigaon in the early evening of 27/9/2014. Shaikh Gaffar (P.W.1) lodged the F.I.R. (Exh.18). A crime vide C.R. No.137/2014, therefore, came to be registered against both the appellants. On investigation of the crime, the appellants came to be proceeded against by filing a charge sheet.

3. The case came to be committed to the Court of Sessions. Learned Additional Sessions Judge-2, Aurangabad (trial Court) framed the charge (Exh.9). The appellants pleaded not guilty. The prosecution examined 9 witnesses

and produced in evidence some documents. On appreciation of the evidence in the case, the trial Court convicted and sentenced the appellants as stated above.

4. Learned counsel for the appellants would submit that, the case is mainly based on evidence of two witnesses, P.W.4 Sayyad Kalim and P.W.5 Asma, daughter of the deceased. The evidence of both these witnesses has been shattered in their cross-examination. Then there remains nothing against any of the appellants. They, therefore, urged for allowing the appeals.

5. Learned A.P.P. would, on the other hand, submit that, P.W.4 Sayyad Kalim is an eye witness to the incidence. Evidence of daughter of the deceased indicates appellant Vinod took the deceased with him just some time before the incident. The appellant Nazmabi followed them to the field. The rest then followed. A 14 year innocent daughter has no reason to give evidence against her own mother. Pursuant to the disclosure statement made by appellant Vinod, a jacket on his person at the material time came to be seized. The C.A. reports indicate the jacket had blood stains. According to learned A.P.P., the evidence on record does not warrant

interference with the impugned order. He, therefore, urged for dismissal of the appeals.

6. Considered the submissions advanced. Perused the evidence relied on. The F.I.R. (Exh.18) was lodged on suspicion. Admittedly, the informant – P.W.1 Shaikh Gaffar did not witness the incidence. On having learnt Sayyad Raheman to have died, he reached to the field of Anil Jagdale. He found Sayyad Raheman was brutally assaulted. There were no clothes on his person below the waist. He was only clad in a shirt. The informant's evidence suggests that, he came to know from the villagers about the illicit relationship between the appellants inter-se.

7. Admittedly, deceased Sayyad Raheman met with homicidal death. Post mortem report (Exh.49) suggests he died of haemorrhagic shock due to multiple fractures along with head injury. The question is whether the appellants are the author of the homicidal death of deceased Sayyad Raheman.

8. P.W.2 Shaikh Lal is a witness to the scene of offence panchanama (Exh.21). A piece of spade handle came

to be seized in addition to broken bangles from the scene of offence. P.W. 3 Shaikh Ahemad is a witness to the disclosure statement made by appellant Vinod, pursuant to which another piece of a spade handle came to be recovered from the well under panchanama Exh.23, besides a jacket on his person at the material time.

9. The only evidence relevant for deciding both these appeals is that of P.W.4 Sayyad Kalim, a friend of the deceased and P.W.5 Asma, daughter of the deceased.

The evidence of P.W.4 Sayyad Kalim suggests that, on the fateful day, both the deceased and himself were to go to Aurangabad carrying bullocks from Naigaon. The deceased went home to deliver tea powder and sugar. He assured P.W.4 Sayyad Kalim of his return in a short while. Since the deceased did not come back, P.W.4 Sayyad Kalim claimed to have visited the house of the deceased. He learnt from the children of the deceased that, both the appellant Nazmabi and the deceased Sayyad Raheman went together to the field to fetch water. He, therefore, went to the field to witness appellant Vinod brutally assaulted the deceased with a wooden rod. Vinod gave threats of eliminating P.W.4 Sayyad

Kalim. P.W.4 Sayyad Kalim, therefore, claimed to have not shared the incident with anyone for next two days.

10. From the cross-examination of P.W.4 Sayyad Kalim, it has come on record that, on the following day, he was in the company of police. He even signed the inquest panchanama (Exh.13) as a witness. He, however, gave his statement to the police on 28th September i.e. two days after the incident and a day after he signed the inquest panchanama. The same suggests unnatural conduct on his part. Had he really witnessed appellant Vinod committing murder of his friend, P.W.4 would not have kept quiet. His statement under Section 164 of the Code of Criminal Procedure was also recorded by the Judicial Magistrate, First Class. He admittedly stated therein to have come to know about the incident on the following day. P.W.5 Asma did not state P.W.4 Sayyad Kalim to have had visited her resident on the fateful evening. The same suggests P.W.4 Sayyad Kalim is not a witness to the incident. His evidence is found to be unreliable.

11. Asma (P.W.5) is a daughter of the deceased Sayyad Raheman. Her evidence suggests that, appellant

Vinod would frequently visit her residence. Her evidence would further suggest that, there was illicit relationship inter-se the appellants. It is in her evidence that, on the fateful evening, appellant Vinod had come her residence and took the deceased with him. Her mother then followed them. P.W.5 Asma then went to sleep. She learnt about the incident on the following morning.

12. The evidence of P.W.5 Asma may suggest the appellant Vinod to have taken the deceased with him. Appellant Nazmabi followed then. P.W.5 Asma was confronted with her police statement. She admitted to have not stated therein that the appellant Vinod had come her residence to take her father (deceased) away. This is a material omission amounting to contradiction. This witness is none other than the daughter of the deceased. She is an interested witness. Her evidence further suggests that, there was discussion among all the family members over the incidence. She admitted to have come to the Court along with her grandmother. She further admitted to have been told of the incident by her grandmother. She went on to state to have learnt about the entire incident since her grandmother told her the same. In view of this, the evidence of P.W.5 Asma is

also found to be not fit to rely on.

13. Then remains the disclosure statement made by appellant Vinod, pursuant to which a piece of spade handle and jacket on his person at the material time came to be recovered. The C.A. reports (Exh.43 to 45) pertaining to both these articles are, however, do not further the prosecution case, since the blood group of the deceased could not be ascertained. Rest of the prosecution evidence does not bring the appellants closer to the charge. It is reiterated that, P.W.4 Sayyad Kalim is not proved to be an eye witness to the incident. The evidence of the daughter of the deceased could not make out a case that, the appellant Vinod took the deceased with him on the fateful evening and then her mother followed them, so as to make out a case of last seen together. We, therefore, reach to the conclusion that, the prosecution evidence fell short to establish the charge. Interference with the impugned order of conviction and consequential sentence is, therefore, warranted. Hence the order :

ORDER

(i) The Criminal Appeals are allowed.

(ii) The order dated 15/7/2017, passed by learned Additional Sessions Judge-2, Aurangabad in Sessions Case No.13/2015, convicting both the appellants for offence punishable under Sections 302 and 201 read with Section 34 of the Indian Penal Code is hereby set aside.

(iii) The appellants are acquitted of the offences punishable under Sections 302 and 201 read with Section 34 of the Indian Penal Code. They be set at liberty forthwith if not required in any other case. Fine amount, if paid, be refunded to them.

(R. M. JOSHI, J.)

(R. G. AVACHAT, J.)

fmp/-