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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO. 67 of 2015
WITH
INTERIM APPLICATION NO. 2343 OF 2021
WITH
CRIMINAL APPLICATION NO. 1470 OF 2017
IN
CRIMINAL APPEAL NO. 67 OF 2015**

Allauddin s/o. Islam Ansari

Age : 56 years, Occ : Business,
R/o. Transit Camp, Block No.9, N-Row,
Room No.3, Dharavi, Mumbai – 400 017
At present Central Jail, Kolhapur

Appellant

.. (Orig. Accused No.1)

Versus

The State of Maharashtra

(Through Dharavi Police Station, Mumbai,
C.R.No.68/2009, C.C.No. 196/PW/2011

.. Respondent

Mr. I. M. Khairdi a/w. Ms. Pooja Bendkule, Advocates for the
Appellant / Applicant.

Mr. S.S. Hulke, APP for the Respondent-State.

**CORAM : A. S. GADKARI &
MILIND N. JADHAV, JJ.**

**RESERVED ON : 26th JULY, 2022.
PRONOUNCED ON : 19th AUGUST, 2022.**

JUDGMENT (PER : MILIND N. JADHAV, J.)

1. The instant Appeal questions legality of the Judgment and Order dated 13.03.2013 delivered by the Additional Sessions Judge, City Sessions Fast-Track Court, Sewree, Greater Mumbai in Sessions Case No. 660 of 2011, convicting the Appellant under Sections 302 of the Indian Penal Code, 1860 (for short “IPC”) and sentencing him to

undergo imprisonment for life and fine of Rs. 5,000/-, in default to suffer rigorous imprisonment for six months. Originally trial commenced against accused No.1 - Allauddin and accused No.2 - Sallauddin (elder brother of the accused), however the trial court by the impugned judgment acquitted accused No.2 of all offences and convicted the Appellant i.e. accused No.1, Allauddin.

2. Relevant facts as such are necessary for deciding the present Appeal are as follows:

2.1. Kadarbi resident of Bhagatsingh Nagar, Kumbharwada, Dharavi, Mumbai since 2000 went to Rafa, Saudi Arabia in 2007 to work as a domestic help leaving behind her unmarried younger daughter Saliabanu who worked in a leather bag factory in Dharavi. Her two other elder daughters Shabnum and Sakina were married and living separately.

2.2. Saliabanu met the Appellant - Allauddin Ansari (accused No.1) in the factory where she was working.

2.3. Appellant was already married at that time but had divorced from his wife and had a daughter aged 8 years. His divorced wife was living in Bihar, at her native place. Saliabanu fell in love with Appellant and both of them decided to marry. Initially Kadarbi and family members of Saliabanu were against the proposal but subsequently they relented and performed her marriage with

Appellant. On 18.12.2008, Salibabanu and Appellant got married in Mumbai as per Muslim law. From the date of marriage both resided as tenants in a rented room situated on the first floor of a structure in Dharavi Transit Camp, Mumbai. Landlord of the structure and the rented room was of D. Jaipal Nadar, who resided in the room situated below the Appellant's room.

2.4. It is the prosecution's case that in January 2009, Saliabanu made a phone call to her mother Kadarbi and informed her that Appellant and his elder brother Sallauddin wanted to talk to her; both of them demanded an amount of Rs.3,00,000/- towards dowry from Kadarbi; Kadarbi expressed her inability to pay that much money; however thereafter both of them demanded the said amount from Saliabanu, insulted her and insisted that she bring the said amount from her mother who was working in Saudi Arabia.

2.5. The date of incident is 10.02.2009. On 10.02.2009, Kadarbi received a phone call in Saudi Arabia from her daughter Shabnum that Saliabanu had committed suicide by hanging. According to the prosecution on 10.02.2009 at 7:00 a.m. in the morning, Appellant informed his landlord Nadar that his wife had committed suicide by hanging and thereafter Appellant went to the house of Shabnum (sister) and informed her that Saliabanu had committed suicide by hanging. D. Jaipal Nadar, landlord and Shabnum both went to the

room where the Appellant resided and found that Saliabanu was lying dead on the ground. Police were informed, spot panchanama and inquest panchanama were performed and dead body of Saliabanu was sent to Sion Hospital for postmortem. Autopsy was performed by Dr. Rajesh Chandrakant Dere and postmortem report ("PM") was issued. The provisional cause of death recorded in PM report was *"evidence of constriction of neck by ligature (unnatural)"*.

2.6. Kadarbi, mother of Saliabanu somehow managed to get the air ticket and returned to India on 18.02.2009. She approached Dharavi Police Station on 19.02.2009 after making enquiry about her daughter's death and lodged the report. She is the first informant. On 22.02.2009, First Information Report (FIR) was registered at her behest and Crime No. 68 of 2009 was lodged against accused and his elder brother Sallaluddin under Section 498-A and 306 read with 34 IPC. Investigation was carried and on 03.03.2009 both accused were arrested, but were released on bail pending trial. During course of investigation, Investigating Officer (IO) addressed three letters dated 17.03.2009, 23.04.2009 and 07.05.2009 to the Medical Officer / Doctor who had performed the postmortem. All three letters were replied to by the Doctor in writing and final opinion was given for cause of death as, *"asphyxia following constriction of neck by ligature"*.

3. After completion of investigation IO submitted chargesheet before the learned Additional Chief Metropolitan Magistrate, 9th Court, Bandra, Mumbai. As the offences were exclusively triable by the Court of Sessions, the learned Additional Chief Metropolitan Magistrate, after complying with the mandatory provisions under Sections 207 and 209 of the Code of Criminal Procedure, 1973 (Cr.P.C.) committed the case to the Court of Sessions for trial. Charge was framed and read out to accused in vernacular, he denied the charge, pleaded not guilty and claimed to be tried.

4. Prosecution examined 7 witnesses; defence did not examine any witness. PW-1 and PW-3 are the mother and the sister of Saliabanu. PW-2 is the landlord of the structure/residence and the first person who saw the dead body of Saliabanu on being informed by Appellant. Exhibit-27 and Exhibit-41 are depositions of Dr. Rajesh Chandrakant Dere. Evidence of the Doctor was recorded on two occasions before two different Judges. When the evidence was recorded under Exhibit-41, it was not brought to the notice of the learned Judge that, evidence of Dr. Dere was earlier recorded before his predecessor (Exhibit-27) and had remained incomplete/part-heard. PW-5 and PW-7 are pancha witnesses.

5. Mr. Khairdi, learned counsel appearing for the Appellant has made the following submissions:-

5.1. That conviction of Appellant is based solely on the theory of “last seen together” and on the basis of medical evidence alone; that there is no eye witness to the incident; that there is nothing incriminating found either on the body or person of the Appellant or at the instance of the Appellant;

5.2. That there is no connecting chain of events to arrive at the guilt to point a finger towards Appellant; that the allegation of demand of money and resultant harassment punishable under Section 498-A IPC was disbelieved by the Court and there is complete exoneration by the trial court on this count; that medical evidence of PW-6 (also examined as PW-4) does not stand scrutiny in cross-examination and does not prove the guilt of Appellant conclusively;

5.3. That ligature mark of ‘A’ typical mark is said to be present even in suicidal hangings; that in the absence of any eye witness or other incriminating evidence connecting the chain of circumstances, Appellant deserves to be acquitted;

5.4. That evidence of landlord about the body of victim seen by him as hanging, and contention of prosecution that body was found lying on floor, ought to have been doubted and benefit of doubt been given to Appellant;

5.5. That the present case revolves around circumstantial evidence and the theory of last seen together and there is no eye

witness to the incident; that thus motive becomes a very important aspect and vital while awarding conviction; hence the acquittal under Section 498-A IPC ought to have been considered in favour of Appellant.

6. On the strength of the aforesaid submissions, Mr. Khairdi submitted that in the facts and circumstances of the present case the chain of circumstances leading to the unfortunate demise of Saliabanu cannot be said to be completed and hence there can be no other reason for deceased to have committed suicide by hanging. He submitted that there is no eyewitness to the incident and as such the entire case is based on circumstantial evidence; that there is no evidence brought on record to prove that deceased was ill-treated by accused or any of his family members made a demand for dowry from the deceased or her mother; hence, in absence of motive having been proved, accused could not have been charged for death of deceased; that trial court acquitted accused and his elder brother for the offence punishable under Section 498-A IPC which ought to have weighed on the trial court before holding accused guilty under Section 306; that the only strong circumstantial evidence in the present case was the "last seen together theory", but that alone cannot be held against accused to convict him; that merely because accused and deceased went to sleep in the room on the previous night and in the

morning accused found Saliabanu having committed suicide by hanging, it cannot be held that accused committed murder of Saliabanu; that in the present case, conviction of accused is also based on medical evidence and that also cannot be the sole ground for convicting the accused; that medical evidence itself creates suspicion and doubt when read and in that case benefit of doubt ought to have been given to accused; that none of the prosecution witnesses have given any positive evidence of deceased having been murder and thus it was incorrect to convict accused for offence of murder under Section 302 IPC; that the IO has not been examined in the present case and this *lacunae* in the case of the prosecution shows that prosecution has failed to prove its case beyond reasonable doubt and the accused therefore deserves to be acquitted.

7. ***PER-CONTRA***, Mr. Hulke, learned APP has drawn our attention to the deposition of the witnesses examined by the prosecution and contended that it is only the accused who could have explained the reason, cause and circumstances of death of his deceased wife. He submitted that there is no eye witness to the incident and that the first instance of spotting of the body of deceased was by PW2 - D. Jaipal Nadar, landlord at about 7:00 a.m. in the morning when he was informed by accused. PW-2 has deposed that he enquired with accused as to how his wife had expired and accused

informed him that on the previous night his wife was sleeping and he did not know the reason; that thereafter the dead body was seen lying on the floor by Shabnam Shaikh (PW-3) sister of deceased and PW-5 Police Officer, registered the FIR and conducted spot panchanama and inquest panchanama. He therefore submitted that conviction by the trial court of accused under Section 302 IPC stands completely proved by the chain of circumstances having been established by the prosecution. He submitted that according to the “last seen together theory” it was an admitted position that accused and deceased both went to sleep together in the room and it is only the accused who could have explained about the probable cause of death of his wife; that in fact accused had maintained a stoic silence as to how, when and at which time did he actually see the deceased hanging and he thereafter lowered or brought down the deceased from its hanging position and made her lie on the ground. He submitted that in absence of such material evidence in respect of above, prosecution’s case has been proved beyond reasonable doubt and accused is responsible for the death of Saliabanu. Hence, he has prayed for dismissal of the Appeal.

8. We have perused the impugned Judgment and Order dated 13.03.2013, heard both the learned counsel appearing for the respective parties and with their assistance, perused the pleadings,

depositions of the prosecution witnesses as well as the relevant exhibits germane to the matter. Submissions made have received due consideration of the court.

9. In the present case, it is seen that the spot of incident is a room admeasuring 10 ft X 10 ft and has a height of 8 ft. Victim was 5.3 inches tall. There is also no dispute that the “last seen together theory” is disregarded or disbelieved in the present case. Accused and victim being husband and wife, both went to sleep at night in the room and it is only on the following morning that accused informed about the demise of his wife. It is pertinent to note that there is no eyewitness who has seen the victim having been brought down from such a position and made to lie on the ground. Hence, the needle of suspension is pointed only towards one person i.e accused husband who was with his wife throughout the night, to explain the cause of death of his wife.

10. Medical evidence in the present case given by PW-4 Dr. Rajesh Chandrakant Dere states that, after conducting postmortem examination and receiving Chemical Analysis report, final cause of death is ‘asphyxia following constriction of neck by ligature (unnatural)’. Reading of the PM report clearly reveals that there is a ligature mark of 30 cm X 1 cm extending from the posterior of the neck below the thyroid cartilage till the mid-line of neck and that the

ligature mark is nearly horizontal. PM report further states that there were multiple scars due to fresh hesitation and cut over left forearm which *prima-facie* evidences resistance by the victim. PM report clearly shows injury mark which cannot be confronted with an injury involving hanging by the neck. In the case of hanging by the neck it is observed that the cervical vertebrae may be fractured. It is pertinent to note that strangulation means compression of neck by a force other than hanging wherein weight of the body has nothing to do with strangulation. There are various methods of strangulation and ligature strangulation is a violent form of death which results from constricting the neck by means of ligature or by any other means without suspending the body. In the present case in the spot panchanama a scarf (odhani) has been recovered which according to accused was used by the victim to commit suicide. However nothing pertaining to the scene of hanging, including the hook and/or ceiling or details thereof have come on record; save and except that accused saw the victim hanging. Hanging is usually suicidal but there has to be evidence to show that cause of death was due to hanging. Medical evidence in the present case however is to the contrary. Evidence given by PW-4 Dr. Rajesh Chandrakant Dere states that rigor mortis was present over the upper and lower limbs, eyes were partly open with subconjunctival petechial hemorrhage, limbs were extended at elbow and knee respectively and there was cyanosis of nail bed (i.e.

bluish discolouration of nail bed).

11. Medical evidence in the present case reveals the following external injuries:-

- (i) Ligature mark of 30 X 1 cm extending from posterior of neck below thyroid cartilage till midline of neck deficient on left side. Ligature mark nearly horizontally. On dissection Grayish area of underline tissues of ligature mark.
- (ii) Multiple scar and fresh hesitation cut over left forearm.

11.1. Following internal injuries were found:-

- (i) brain was congested and oedematous
- (ii) trachea shows frothy fluid
- (iii) both the lungs were congested on truck section evidence of pulmonary edema.

11.2. In this context it is pertinent to note the opinion given by PW-4 Dr. Dere in his cross-examination which reads as under:-

“ I had opined that the ligature mark present over the neck of the deceased appears to be caused by any soft material and is not consistent with the typical ligature mark seen in a case of hanging. I had also opined that considering the above scientific fact the ligature marks appears to be other than that of hanging and compression of neck is caused by ligature applied over around the neck. PW-4 in his examination in chief has stated as under.

“Again I received a letter dated 06.05.2009, whereby IO had sought my opinion. The IO specifically asked me whether the death would have been caused by putting pillow over the mouth of the deceased or by strangulation with the help of dupatta or any other reason. Now the said letter shown to me

it bears signature of IO and my signature as a token of receipt of the said letter, contents thereof are correct and it is mkd Ex.47. I replied the letter issued by the IO and opined that deceased died due to asphyxia following construction of neck by ligature by a soft material like dupatta. From the characteristic of the ligature mark there is high possibility of the ligature material being constricted around the neck of the deceased. There is no possibility of death being caused by smothering or throttling. I accordingly replied the letter. Now letter dated 07.05.2009 shown to me. It bears my signature, contents thereof are correct and it is marked Ex.48. I have ruled out the possibility of suicidal hanging based on position and direction of ligature mark. In this particular case ligature mark was above the thyroid cartilage and was horizontal and not oblique. Ld. APP wants to show the article allegedly used in commission of the offence, therefore sealed packet having seal and label of signatures of the pchas is opened in the court and one white and red colour dupatta locally known as Odhani is forthcoming and it is mkd Art.A. for identification purpose. Ligature mark on the neck of deceased is possible by Art.A.”

11.3. In his cross-examination, PW-4 has answered that the ‘A’ typical mark means the position of knot is other than mid-line of the neck and that in the present case there was ‘A’ typical mark. PW-4 in his cross-examination once again submitted that except the ligature mark there were no injury marks. It is further seen that the IO - PW-7 in his evidence has stated that on 22.02.2009, 05.03.2009, and 06.05.2009, three specific letters were written by the IO to obtain clarity with respect to the medical evidence and medical opinion of the medical officer. PW-7 has further stated that all the three letters were specifically replied to and reading of the said replies clearly stated that the injuries caused to the deceased could not be acquitted with the case of a suicidal hanging as such.

12. In the present case evidence of PW-2 and PW-3 shows that

there was a definite motive for commission of the incident, however, since trial court has not convicted the accused under Section 498-A and hence the theory of motive as far as demand of dowry stands disproved.

13. Further the “last seen together theory” stands proved in the facts and circumstances of the present case as alluded to hereinabove; there is no material on record to prove the fact that accused was a person who was not seen with the deceased on the previous night; hence the burden of proof shifts to the accused to disprove the same once the prosecution has proven its case and prove the sequence of events. Further if the PM report is carefully studied it reveals that death of victim took place between 12:00 p.m. and 1:00 a.m. in the night. On the basis of the above hypothesis, prosecution has proved its case beyond reasonable doubt.

14. It is seen that PW-2 landlord of the appellant and deceased Saliabanu, had let out one of his room to them. Regarding his evidence it is to be seen that PW-2 has turned hostile and did not support the prosecution case on material particulars. However, it is clear from his evidence that appellant and Saliabanu were residing together as husband and wife in the rented room belonging to him and prosecution has clearly set out the last seen theory through this witness. According to this witness and admittedly so, appellant and

deceased Saliabanu slept together on the previous night of incident. And in the morning appellant informed him that Saliabanu has expired by hanging, though in his cross-examination the witness has stated that he has seen Saliabanu hanging by a rope around her neck with an iron rod angle on the ceiling. There is no further evidence in record to prove this circumstance. It is not in dispute that the spot panchanama and the medical evidence clearly point out the use of “odhani” that is the long cotton scarf being tied around the neck of Saliabanu and therefore to this extend the testimony of PW-2 that he had seen a rope around Saliabanu’s neck is a minor discrepancy.

15. PM report vide Exhibit-28 stands proven, and satisfies the fact that there is evidence of constriction of neck by ligature which is unnatural. The medical evidence cannot be doubted because apart from the evidence PW-6 – Dr. Rajesh Dere in reply to specific query raised by the Investigating Officer Vide letters dated 06.03.2009, 22.04.2009 and 06.05.2009 have specifically opined that the ligature mark present over the neck of Saliabanu has been caused by any soft material and is not consistent with a typical ligature mark as seen in case of hanging. The opinion further proves that the fact scientifically, that the ligature mark appears to be other than that of hanging and compression of neck is caused by ligature applied around the neck. PW-6 - Dr. Dere has in his evidence specifically ruled out the

possibility of death bring caused by smothering or throttling and has ruled out the possibility of suicidal hanging based on position and the direction of the ligature mark since the said mark was above the thyroid cartilage; that since the said mark was horizontal and not obliged. In his cross-examination Dr. Dere has given cogent answers and it is clear from the opinion given by Dr. Dere, the present case not a case of suicidal hanging but it is the case of constricting the neck of the deceased Saliabanu by means of a soft ligature such as dupatta i.e. “odhani”. If this is the position that Saliabanu has met with a suicidal death then according to the last seen theory, it is only the appellant who needs to explain the cause of death of Saliabanu. The evidence on record proves that the appellant was sleeping with Saliabanu in the rented premises on the previous night only he can explain how she died. By merely coming up with the case of total denial cannot exonerate the appellant and therefore an inference needs to be drawn against the appellant on the basis of the chain of circumstances leading to unnatural death of Saliabanu.

16. It will be useful to refer to the observations of the Supreme Court of India in the case of *Trimukh Maroti Kirkan Vs. State of Maharashtra*¹, wherein in view of the provisions of section 106 of the Indian Evidence Act, 1872 where an offence like murder is committed in secrecy inside a house, how and in what way the burden of proof is

¹ 2007 Cri.L.J. 20

required to be established. In paragraph No.12, Supreme Court has made following observations / findings which are directly relevant to the present case and read thus:

“12.

Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.”

17. In the present case, the sole inmate of the rented room alongwith deceased Saliabanu was the appellant and he cannot get away by simply keeping quiet and offering no explanation as to how she died.

18. That apart, we may also refer to the relevant observations of the Supreme Court in the case of ***State Of U.P. Vs. Satish***², while analyzing evidence on the basis of the last seen theory has held that the last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes

2 2005 (3) SCC 114

impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the Appellant were seen together by witnesses.

19. In the present case, it seen that appellant and Saliabanu went to sleep together in the rented room and during the course of the night Saliabanu was murdered and the time gap between the time of both going to sleep and the probable time of murder as also in the morning when Saliabanu was allegedly found dead is small and the possibility of any third person having entered the rented room to disturb the privacy of appellant and Saliabanu is completely ruled out and therefore it completely establishes that the appellant is the author of the crime.

20. In the case *G. Parshwanath Vs. State Of Karnataka*³, in paragraph No.11, while enunciating the law relating to appreciation of evidence in a case based on a circumstantial evidence, paragraph No.11 of the said judgment as held as under:-

3 (2010) 8 SCC 593

“11. The evidence tendered in a court of law is either direct or circumstantial. Evidence is said to be direct if it consists of an eye-witness account of the facts in issue in a criminal case. On the other hand, circumstantial evidence is evidence of relevant facts from which, one can, by process of intuitive reasoning, infer about the existence of facts in issue or factum probandum. In dealing with circumstantial evidence there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion, however, strong cannot be allowed to take place of proof and, therefore, the Court has to be watchful and ensure that conjectures and suspicions do not take place of legal proof. However, it is not derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturisation of actual incident, but the circumstances cannot fail. Therefore, many a times it is aptly said that “men may tell lies, but circumstances do not”. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The Court thereafter has to consider the effect of proved facts. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. 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, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court.”

21. In view of the above discussions and findings, we are of the considered opinion that the Appellant having committed the murder of Saliabanu; the motive having been proved for no fault of the deceased and the “last seen together theory” established, the sentence awarded at by the learned trial court for convicting the Appellant for life imprisonment does not call for any interference and the same stands upheld in view of the aforesaid discussion and findings.

22. Criminal Appeal No.67 of 2015 is hereby dismissed. Interim Application, Criminal Application, if any, pending therein is also disposed.

[MILIND N. JADHAV, J.]

[A. S. GADKARI , J.]

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