

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

CRIMINAL APPEAL NO.828 OF 2018

Kalekha Lalkha Pathan,
Age-29 years, Occu:Agril.,
R/o-Karla, Tq-Umri,
District-Nanded.

**...APPELLANT
(Orig. Accused)**

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr. Upendra B. Bilolikar Advocate for Appellant.
Ms. V.S. Choudhari, A.P.P. for Respondent - State.
...

**CORAM: SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 11th OCTOBER, 2023

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. The original accused in Sessions Case No. 9 of 2017 i.e. present appellant seeks exception to challenge the conviction awarded to him by the learned Additional Sessions Judge, Bhokar, District-Nanded on 9th October 2018, after holding him

guilty of committing offence under Sections 302, 201, 404 of the Indian Penal Code.

2. The prosecution has come with the case that PW-4 Devrao Laxman Kurade lodged report on 8th February 2017 with Umri Police Station stating that he is permanent resident of village Karla, District-Nanded. However, since last four years prior to the First Information Report (for short "FIR") he is residing at Mahagaon, Taluka-Nirman in Telengana State. His mother Sheshabai resides with his younger brother Maroti at village Karla. They have five acres land each in the name of both brothers. One Tukaram Puri from Karla gave phone call to the informant around 8.00 a.m. on 8th February 2017 stating that Sheshabai was found in dead condition near *Nala* in the village. There were bleeding injuries on her person and therefore, he was called to the village. He reached Karla around 10.00 a.m. and saw his mother's dead body near the *Nala*. He found injuries on the person of his mother and therefore, got suspicion that somebody might have murdered her. He made inquiry with his brother Maroti and came to know that mother was missing since 2.00 p.m. of the earlier day i.e. 7th February 2017. His brother

Maroti was under the impression that as mother used to attend *Kirtan* at various places, she might have gone to attend the *Kirtan* and therefore, he waited till night time and thereafter made inquiry. When Maroti could not get whereabouts of the mother, he started search again in the morning and then found the dead body. He had also informed the Sarpanch and other villagers. Police were also called. After the postmortem was done, the report was lodged against unknown person. Thus, the offence came to be registered vide Crime No.32 of 2017 against unknown person.

3. During the course of investigation, panchnama of the spot was carried out. Inquest panchnama was done and dead body was sent for postmortem. Later on, during the course of investigation, postmortem report has been collected and it appears that when Sub Divisional Police Officer (SDPO) Pradip Patil took over the investigation on 9th February 2017 he got two panchas arranged and then took search of the house of the accused. The front door was locked from outside and therefore, the lock was broke open and the search of the house was taken. They found blood stains on the wooden object of the cot having

plastic patties. The wooden object was partly burnt also and then there was an old cloth bag having blood stains. There were two bricks having blood stains, at the spot. Pieces of bangles were seized. Election identity card of the accused was also seized. Later on accused came to be arrested. His arrest was by effecting panchnama. Thereafter accused led the discovery of *Lungi* which he was wearing at the time of offence. It is stated that the said *Lungi* was used by the accused for carrying the dead body of the deceased from his house to the spot where he had thrown the same. An amount of Rs.17,000/- was also produced by the accused, which according to him, was the amount which he received by selling the gold and silver ornaments on the person of the deceased. Those articles were also discovered at his instance from Pampatwar Jewelers, Dharmabad. Statements of the witnesses were recorded and after the investigation was over, charge-sheet was filed.

4. After committal of the case, prosecution examined thirteen witnesses to bring home the guilt of the accused. After hearing both sides and perusing the evidence on record, the learned trial Judge has held that the accused has committed murder of

Sheshabai. Accused has been sentenced to suffer imprisonment for life and to pay fine of Rs.5000/-, in default, to suffer rigorous imprisonment for six months for the offence punishable under Section 302 of the Indian Penal Code. He has been further sentenced to suffer three years rigorous imprisonment and pay fine of Rs.3000/-, in default, to undergo simple imprisonment of three months for the offence punishable under Section 201 of the Indian Penal Code. Accused has been further sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.2000/-, in default to undergo simple imprisonment for three months for the offence punishable under Section 404 of the Indian Penal Code. All the sentences have been directed to run concurrently. Accused has been acquitted of the offence punishable under Section 394 of the Indian Penal Code. Hence this Appeal.

5. It has been vehemently submitted on behalf of the appellant that perusal of the evidence led by the prosecution of all thirteen witnesses would show that there was absolutely no evidence against the appellant. There was no direct evidence in this matter and therefore, obviously the case of the prosecution

was tried to be based on circumstantial evidence. It has come in the evidence that the deceased was missing from 2.00 p.m. of 7th February 2017 and the dead body has been found on the next day around 8.00 a.m. Nobody has seen the deceased and the accused in the company of each other. Merely because the search of the alleged house was taken by the investigating officer, it cannot be said that the accused would have caused the murder. There is no documentary evidence to prove that the said house was belonging to the present appellant. The chain of circumstances has not been clearly established. There is absolutely no explanation as to why the investigating officer decided to broke open the lock of the house of the accused, why they could not have waited or tried to contact the accused before making that attempt. No legal procedure has been adopted while breaking open the lock. After the lock was broken and the persons concerned went inside, PW-9 Mukund Pawale has clearly stated that several other persons also went inside. Possibility of planting certain articles by such persons at that time, which was in the absence of the accused, has not been ruled out. The attempt of try to reach the accused by dog squad appears to have been resorted to, but no evidence has been led to that

effect. The approximate time of death has not been told by the medical officer. PW-11 Pravin Pavale stated in his evidence that he had met accused around 2.00 p.m. of 7th February 2017 and accused requested to drop him at Shelgaon Railway Station. Thus, evidence of PW-11 Pravin would show that from 2.00 p.m. of 7th February 2017 the accused was with PW-11 Pravin Pavale till Shelgaon Railway Station. In absence of clear evidence, the learned trial Judge ought not to have convicted the appellant. Therefore, interference is required and appellant needs to be acquitted.

6. Per contra, the learned APP has strongly opposed the Appeal by supporting the reasons given by the learned trial Judge and submitted that there are pieces of evidence which are against the accused clearly disclosing the involvement of the accused in the crime. The situation which was in the house of the accused has been brought on record by examining the panch witnesses who were present at the time of taking search and also the investigating officer PW-13 Pradeep Patil. Some of the articles including the cot in the house of the accused were having blood stains and then it is supported by the C.A. Report

in the form of human blood being found. It appears that the murder has taken place because of the gold and silver ornaments which the deceased was wearing. After murdering Sheshabai, accused took those ornaments and sold it to the goldsmith. This discovery has also been proved by examining panchas and investigating officer. Therefore, the chain of circumstances has been complete. There is no dispute as regards the nature of death of Sheshabai as homicidal in nature and therefore, there was ample evidence beyond reasonable doubt, before the trial Court for convicting the accused. The Appeal, therefore, deserves to be dismissed.

7. At the outset, it is to be noted that though PW-4 Devrao Kurade has been examined to prove the FIR, his FIR as well as his testimony would show that his allegations were against unknown person. He has identified the ornaments seized in the matter as belonging to his mother. He has stated about the injuries found on the person of Sheshabai. Further, in connection to this fact, we can consider the testimony of PW-1 Anusaya Kadam who was the panch witness to the inquest panchnama. There is nothing in her cross-examination to disbelieve that the

inquest panchnama was executed in her presence and any the contents of the same are untrue. The inquest panchnama also speaks about the injuries on the person of deceased Sheshabai. Further in the same set of facts, testimony of PW-12 Dr. Vijaykumar Pawar, the autopsy doctor would show that he found in all six external injuries and two internal injuries on the dead body. The opinion was reserved for chemical analysis but then he says that all the injuries were sufficient to cause death in ordinary course of nature. The initial observations regarding the injuries led him to the finding that Sheshabai's death was due to head injury. In the cross-examination certain aspects regarding the situation about the injuries have been asked, which may appears to focus to get the probable time of death. Question was asked as to when rigor mortis would develop and the answer is that to develop rigor mortis on the dead body 6 to 10 hours are required. Further, according to him, injury No.4 in Column No.17 can be caused due to sickle and injury No.1 can be caused by *Katti* or any hard and blunt object. Though we are not able to get a different picture regarding the cause of death of Sheshabai, certainly from the testimony of this witness, we are unable to get what would have been the probable time of death.

In any way, none of the witness examined in this case speak that anyone of them had seen the accused in the company of the deceased alive prior to the time of finding the dead body. In other words, the case appears to be not based on 'last seen together' also.

8. PW-3 Ataur Siddiqui is the panch to the spot panchnama. The spot panchnama is of the house of the accused. Neither PW-3 Ataur Siddiqui nor the panchnama proved by him, Exhibit-18 nor the testimony of PW-13 SDPO Pradeep Patil gives a reason as to why the lock to the house of the accused was broke open. Why PW-13 SDPO Pradeep Patil would not have waited till the arrival of the accused or after intimation is given to the accused to come to village, the spot panchnama could have been executed. Under the guise of execution of spot panchnama; the investigating officer cannot take search of the house. PW-13 SDPO Pradeep Patil has not clarified, why he suspected the house of the accused which was in locked condition, that he would get some evidence regarding the death of Sheshabai. It appears from the testimony of informant PW-4 Devorao Kurade that Sheshabai, at the most, merely knowing

the deceased being the person from the village. There was absolutely no much acquaintance between the deceased and the accused. Therefore, the question arises as to why Sheshabai would have gone inside the house of the accused. Nobody has seen her going inside the house of the accused. The boundaries to the house of the accused have been mentioned in the spot panchnama. One Lalkhan Aminkhan Pathan resides adjacent to the house of the accused and there is also a public road going from the Northern side of the property. If the deceased was missing since 2.00 p.m. on the earlier day and her dead body was found on the next day at 8.00 a.m. of 8th February 2017, then it is hard to believe that for considerable time deceased would have been kept by the accused in his house. PW-13 investigating officer has not followed the procedure laid down in Section 100 of the Code of Criminal Procedure for taking a house search, nor the warrant appears to have been taken. PW-3 Ataur Siddiqui is the resident of Nagar Galli, Kila Road, Nanded and the house of the accused is situated in village Karla, Taluka-Umri, District-Nanded. Section 100(4) of the Code of Criminal Procedure requires, "before making a search under this Chapter, the officer or other person about to make it shall call upon two or more

independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do". In other words, PW-3 Ataur Siddiqui was not local inhabitant of Karla and there is no reason given by PW-13, the investigating officer to state that none of the independent respectable person from Karla was ready to act as panch to the search and seizure or no such person was available. Again, at the cost of repetition it is to be noted that when the lock has been broke open, the reason for the same ought to have been given. In absence of the same and for this procedural lacunas, the spot panchnama cannot be read in evidence.

9. Even for the sake of argument, if we say that PW-3 Ataur has proved the spot panchnama from where certain wooden articles including the cot were seized having blood stains on the same, yet the C.A. Report is not fully corroborating. What was found, was the blood stains but group of the blood detected on those exhibits could not be determined as it was inconclusive though it was stated that it was human blood. There is no such

mechanism brought on record to state that from those blood stains it could be recognized that when those blood stains appeared on the object. Therefore, from any angle the said piece of evidence was not sufficient to prove the guilt of the accused.

10. The next piece of evidence which is stated to be against the accused is the evidence of PW-7 Shankar Mane, before whom the appellant had allegedly given memorandum and then led the discovery. It is stated that one *Lungi* and shirt were seized by the Police from the house of the accused. This memorandum and seizure is stated to be on 11th February 2017. The house search, which was tried to be proved through PW-3 Aatur was on 9th February 2017. If every corner of the house would have been searched in the said house search, then how this *Lungi* and shirt would not have been found. PW-7 Shankar Mane does not say that either the shirt or the *Lungi* were having blood stains. When the dead body was stated to be carried in the said *Lungi* and there were bleeding injuries on the person of the deceased, it is rather surprising that the *Lungi* will not have any blood stains. Further, the investigating officer has not considered as to whether after the death it would have been possible for

only one person to pick up the dead body in a *Lungi* and take it to another place. The distance between the alleged house of the accused till the spot where the dead body was found, has not been brought on record.

11. PW-7 Shankar Mane has also deposed that Police had taken them to Dharmabad in the shop of Popatwar Jewelers and seized silver and gold ornaments. Interestingly the jeweler has not been examined in this case nor he has been prosecuted by the prosecution. Before we proceed further, we would like to take an account of the fact that the learned trial Judge has convicted the accused for the offence punishable under Section 404 of the Indian Penal Code which was for the dishonest misappropriation of the property possessed by deceased person at the time of his/her death. The property was recovered from the jeweler on the discovery made by the accused. Therefore, either the concerned jeweler ought to have been made as an accused or (in absence of *mens rea*) should have been examined as a witness. No much contradiction brought on record in the cross-examination of PW-7 Shankar Mane. Even if we consider that his testimony proves the discovery, yet that is not a single piece

of evidence which can lead us to conclude that accused is the perpetrator of the crime. It is one of the segment of the circumstances of the chain. When other circumstances are not pointing out towards the accused as the assailant, we cannot hold him guilty.

12. PW-9 Mukund Pavale is the villager who allegedly seen the dead body first. However, he is not the witness on the point of 'last seen together'. He has seen the accused only on 8th February 2017 sitting alone in front of his house. The conversation given by him does not give any suspicion over the accused.

13. PW-10 Nagesh Kamble is the witness to whom the accused met around 6.00 p.m. on 7th February 2017. He says that accused met him at Dharmabad Railway Station. Accused told him that he is having silver and gold ornaments and he want to sell those ornaments. On the request of the accused, he accompanied the accused. Accused proceeded ahead of him and he followed the accused. He says that accused showed ornaments to Pampatwar goldsmith, who weighed the ornaments

and gave amount of Rs.30,000/- to the accused. This witness has identified those gold and silver ornaments also. In his cross-examination he has stated that he was just knowing the accused because he is from the same village. His testimony is full of material improvements, including showing the ornaments by accused to the goldsmith, goldsmith weighing the same and giving amount of Rs.30,000/- to the accused. Therefore, his testimony is unbelievable.

14. PW-11 Pravin Pavale is another villager from Karla. He says that he himself and his friend Mohan were going to Umri on motorcycle around 2.00 p.m. of 7th February 2017. Accused met them and requested to drop him at Shelgaon Railway Station as he wanted to go to Dharmabad. Accordingly PW-11 Pravin dropped accused to Shelgaon Railway Station. If we have to consider this testimony together with the fact that deceased Sheshabai went missing since 2.00 p.m. of 7th February 2017 and then accused allegedly meeting PW-10 Nagesh Kamble at 6.00 p.m. on Dharmabad Railway Station, then chronology would go that around 2.00 p.m. PW-11 Pravin Pavale met accused in village Karla when they were going towards Umri and then

accused requested him to drop him to Shelgaon Police Station. Accordingly, PW-11 Pravin dropped accused to Shelgaon Railway Station. In his cross-examination, he has stated that they reached the Railway Station within ten minutes. One passenger train is available between 2.00 to 2.30 p.m. The approximate time that is required from Shelgaon Railway Station to reach Dharmabad has not come on record. But when accused was left at Shelgaon Railway Station, there was no question of his returning back. He would go to Dharmabad as decided or told by PW-11 Pravin. That means accused would be carrying the ornaments with him. If it is so, then Sheshabai would have been murdered much prior to 2.00 p.m. of 7th February 2017, but it is not even the prosecution case and the probable time of death has not been told by the autopsy doctor. This circumstance is absolutely not suggesting that the accused would have committed murder of Sheshabai.

15. The other witnesses are formal in nature. Therefore, minute scrutiny of the evidence led by the prosecution does not show that the golden principles for the proof of circumstantial evidence laid down in ***Sharad Birdhichand Sarda vs. State of***

Maharashtra reported in **(1984) 4 SCC 116** were proved by the prosecution. Each circumstance in the chain should unerringly point towards the accused to be the perpetrator of the crime. In fact there was no evidence against the accused in this case. It appears that the learned trial Judge got carried away because of the evidence tried to be brought on record that the house search of the accused disclosed blood stains. The learned trial Judge failed to consider that said piece of evidence is not legal on the touchstone of the provisions of law.

16. Coming back to the conviction for the offence punishable under Section 404 of the Indian Penal Code, it requires misappropriation of the ornaments on the person of the dead person. Here accused has been acquitted from the offence punishable under Section 394 of the Indian Penal Code. Misappropriation requires certain entrustment. Even if we accept that a dead person cannot give consent or show trust, yet dishonesty should be the main ingredient and after taking ornaments from the person of the deceased or knowing it to be belonging to the deceased, then there would be misappropriation. Here the motive is not coming forward, in a

sense that, how Sheshabai was taken inside the house of the accused has not been proved. The prosecution has not come with the case that Sheshabai was abducted and therefore, with this kind of evidence, the learned trial Judge ought not to have convicted the accused.

17. The re-appreciation and re-visiting of the evidence would lead us to the conclusion that the prosecution had miserably failed in proving the guilt of the accused, as the chain of circumstances was not established beyond reasonable doubt. The conviction based on wrong appreciation of evidence cannot be allowed to sustain and therefore, the Appeal deserves to be allowed. Hence we pass following order:-

ORDER

(i) The Appeal stands allowed.

(ii) The conviction awarded to appellant/accused – **Kalekha Lalkha Pathan** by learned Additional Sessions Judge, Bhokar in Sessions Case No.09 of 2017 after holding him guilty for committing offence punishable under Sections 302, 201, 404 of Indian Penal Code on 09.10.2018 stands quashed and set aside.

(iii) The appellant/accused stands acquitted of the offence punishable under Sections 302, 201, 404 of Indian Penal Code.

(iv) He be set at liberty, if not required in any other case.

(v) Fine amount deposited, if any, be refunded to the accused after the appeal period is over.

(vi) We clarify that there is no change in the order in respect of disposal of muddemal passed by the learned Additional Sessions Judge, Bhokar.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE