IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 05 OF 2014

Rahim S/o Ibrahim Pathan,
Age: 34 years, Occ: Labour,
R/o: Hattenagar Road No. 5
Latur ... Appellant

V E R S U S

The State of Maharashtra ... Respondent

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Mr. Kuldeep S. Kakhalekar, Advocate holding for
Mr. Nilesh Ghanekar, Advocate for Appellant
Smt. D.S. Jape, APP for respondent- State

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CORAM : T.V. NALAWADE &
K. K. SONAWANE, JJ.

DATED : 4th JUNE, 2019.

ORAL JUDGMENT :- (Per: K.K. Sonawane, J.)

The instant appeal calls in question the impugned Judgment and order dated 05-12-2013 rendered by Additional Sessions Judge-3, Latur, in Sessions Case No. 77 of 2012. The appellant-accused was convicted for the offence punishable under Section 302 of the Indian Penal Code ("IPC") and sentenced to suffer imprisonment for life and to pay a fine of Rs. 1000/- in default to suffer rigorous imprisonment for one month. Being aggrieved by the impugned Judgment and order of conviction and resultant sentence, the appellant-accused, taking recourse of remedy under Section 374 of the Code of Criminal Procedure ("Cr.P.C."), preferred the present appeal to redress his grievance.

2. The factual matrix of the matter in nutshell is that, the ill-fated victim Rubina was the wife of appellant-accused. Their marriage was solemnized prior to ten years of the incident. The spouses were residing in their own house located in Hatte nagar area, Latur. The parents, brother also residing in the same locality of residential house of victim – Rubina. Unfortunately, there were no issues to the spouse. The deceased-Rubina could not conceived during wedlock from the husband. It has been alleged that the appellant- accused developed habit of drinking liquor. He was also addicted to gambling. He had frittered away cash, gold ornaments etc. in the gambling. Eventually, he was bent upon to sell the residential house, which was recorded jointly in the name of deceased-wife-Rubina and appellant-accused in the record of civic authority. He was insisting the deceased-wife for sale of residential house. There were frequent quarrels in between the spouse. The appellant-husband used to give threats of life to wife-Rubina. The parents as well as brother of the victim-Rubina made endeavour to give understanding to the appellant-husband, but there was no improvement in his behaviour. It has been contended that on 16-04-2012 at about 2.00 p.m, the appellate-accused picked up quarrels with Rubina on account of sale of house property. In the quarrel, he gave threats of life to wife-Rubina. The deceased-Rubina divulged about apprehension to parents, brother etc. But, it had something different in-store for victim-Rubina. On 18-04-2012, first informant, brother Mohd. Mehraj was on duty at the place of his employment. At about 3.30 p.m., brother of the appellant-accused came to him and informed that his brother - appellant-accused was

fighting with wife-Rubina and he was not in mood to listen. Therefore, first informant - Mohd. Mehraj rushed to the house of Rubina on motor-bike. He barged into the house of victim Rubina and saw that in the bed-room, brother-in-law i.e. appellant-accused fallen his wife-Rubina on the floor and attempted to strangulate her by putting Dupatta around her neck. But, after seeing the first informant, brother-in-law, the accused-appellant woke up and fled away from the spot. The brother – Mohd. Mehraj saw sister- Rubina laying on the ground in withered condition. He came out of the house and yelled for help. The neighbourers and parents thronged at the spot. The victim – Rubina was escorted to the Government Hospital at Latur, but on examination, doctor declared her dead.

3. The MLC was passed to the concerned Police Station and accordingly, AD No. 30 of 2012 came to be registered. The dead body of victim-deceased-Rubina was referred for autopsy. The Medical Expert performed the autopsy and opined that death of deceased-Rubina was caused due to 'asphyxia by compression of neck with ligature'. The first informant - brother Mohd. Mehraj filed the report to Police and blamed the appellant-accused for death of sister Rubina.

4. Pursuant to FIR of Mohd. Mehraj, Police of Gandhi Chowk Police Station, Latur registered the Crime No. 70 of 2012 under Section 302 of the IPC and set the penal law in motion. The concerned Investigating Officer visited to the spot and drawn the panchnama of scene of occurrence. He collected the blood stain cloths of the deceased under panchnama. After compliance of procedural formalities, Investigating Officer preferred the charge-sheet against appellant - accused for the

charge of murder of wife-Rubina under Section 302 of the IPC.

5. Learned Sessions Judge proceeded to frame the charge against accused, but he pleaded not guilty. In order to bring home guilt of the accused, prosecution examined in all nine witnesses in this case. The learned Sessions Judge recorded statement of the accused under Section 313 of Cr.P.C. The learned Sessions Judge considered the evidence adduced on record on behalf of prosecution and arrived at the conclusion that appellant-accused committed murder of wife-Rubina. Therefore, learned Sessions Judge held appellant-accused guilty for the offence punishable under Section 302 of the IPC and passed the impugned Judgment and order of conviction and resultant sentence, which is the subject-matter of present appeal.

6. Learned counsel for appellant assailed that learned Sessions Judge did not consider the evidence of prosecution witnesses in its proper perspective and committed error in convicting the appellant-accused in this case. The key witnesses of the prosecution turned hostile. There are no incriminating circumstances brought on record to establish nexus of accused with the alleged cause of death of deceased Rubina. The appellant-accused was not present in the house, during relevant time of alleged incident. Therefore, burden cannot be shifted on the appellant – accused to explain the cause of death of deceased. The learned trial Court failed to appreciate the relevant provisions of law in proper manner. The learned trial Court committed grave error for appreciation of recitals of FIR proved by the Police Personnel (PW-9). Smt. Gauri More. The learned counsel for the appellant-accused criticized that first informant PW-3 Mohd. Mehraj lodged

report, but he denied the contents of the FIR. Prosecution examined PW-9 Gauri More, author of the FIR. The learned Sessions Judge considered the recitals of the FIR as substantive evidence and drawn adverse inference against accused. There are discrepancies in the evidence of prosecution witnesses. PW-2 Syed Bandeali, father of the victim - Rubina also did not support the prosecution case. Prosecution witness stated that at the relevant time of incident, appellant-accused was at his shop. He was called later-on in the hospital. According to parents and brother of the deceased Rubina, appellant-accused has no nexus with the alleged crime. Therefore, adverse inference drawn by learned Sessions Judge is incorrect, inappropriate and deserves to be quashed and set aside.

7. Learned counsel for the appellant-accused relied upon judicial precedents in the case of ***Subramaniam Versus State of Tamil Nadu and another*** reported in ***2009 All MR (Cri) 2118 (SC), Ramesh s/o. Shankar Dhotre Versus State of Maharashtra,*** reported in ***2010(10) LJ Soft (URC) 1, Murlidhar and others Versus State of Rajasthan*** reported in ***2005 Cr.L.J. 2608, Sawal Das Vs. State of Bihar*** reported in ***1974 SC 778, Sohel Maheboob Shaikh Versus State of Maharashtra*** reported in ***2009 (10) LJ Soft (SC) 138 :: 2009 (5) AIR Bom. R (SC)283*** *and* ***Dasari Siva Prasad Reddy Versus Public Prosecutor, High Court of Andhra Pradesh*** reported in ***AIR 2004 SC 4383.***

8. Learned APP raised objection and submits that learned trial Court has correctly appreciated the entire evidence on record in proper manner and interference in it is unwarranted.

9. Before evaluating guilt of the appellant-accused, it is imperative to ascertain the exact cause of death of deceased-Rubina in this case. Prosecution examined PW-6 Dr. Dharamraj S/o Apparao Dudde. He conducted autopsy on mortal remains of the deceased-Rubina. He mentioned about the injuries noticed on the dead body of deceased Rubina in post-mortem. The PW-6 Dr. Dudde, in para No.2 of his deposition, given detail description of injuries sustained to deceased as below -

> "Evidence of incomplete ligature mark over neck, anteriorly just at the level of thyroid 3 Cm. wide 7.5. Cm. below chin (upper border) on left side. It is 4 Cm below ear (mastoid) on right side 5 Cm. below right angle of mandible mark is patchy and faint assent on right lateral aspect of neck. Posteriorly- It is 8 Cm. below the occipital protuberance of 2.5 Cm. width & 8 Cm. length on posterior aspect of neck. Neck circumference -32.5 Cm. Anteriorly left side of neck there are five abrasions linear ranging from 0.5 Cm. In length & 0.1 to 0.1 M.M. in thickness. All injuries are vertical. On right lateral aspect irregular injuries two in number upper abrasion in 5Cm. Below angle of mandible obliquely horizontal 1 Cm. X 0.2 C., also 1 Cm. below this injury there is semi lunar superficial abrasion of size 1 Cm. X 0.2 Cm. Third Abrasion – just above mid portion of right clavicle 1.5 Cm. X 0.2 Cm. Superficial. All injuries are reddish coloured. Evidence of contusion (extravasation of blood in epiglottis in respect of thyroid cartilage shows multiple petechial hemorrhage on both side.) The aforesaid injuries are ante-mortem."

10. The Medical Expert (PW-6) Dr. Dudde categorically opined that death of deceased – Rubina was caused due to asphyxia by compression of neck with ligature. According to Medical Expert, it was

the case of strangulation. He issued report of post-mortem (Exhibit-40). It is to be noted that there was no arduous cross-examination to the Medical Expert. The learned Sessions Judge drawn the inference that the death of deceased-Rubina was homicidal in nature. In view of evidence of Medical Expert and attending circumstance on record, we do not find any error in the conclusion drawn by learned Sessions Judge about the cause of death of deceased Rubina. Obviously, her death was found homicidal in nature caused due to strangulation.

11. Now, crucial issue to be ponder over is in regard to nexus and proximity of the present appellant-accused with the alleged cause of death of deceased-Rubina. According to prosecution, appellant-accused is the author of injuries received to the victim-Rubina resulting into her death due to strangulation.

12. It is not in dispute that except Medical Expert and Police Personnels, rest of the prosecution witnesses examined on behalf of prosecution, made volte-face and found reluctant to support the prosecution case. PW-2 Sayed Bandeali is father of deceased Rubina. At the inception, he supported the case, but later-on he changed his version. He testified that relations between spouses i.e. appellant-accused and his daughter-Rubina were not cordial and there were frequent quarrels in between them. The appellant-accused was addicted to liquor and gambling. He was insisting his daughter to sell out residential house but his daughter-Rubina was not ready for the same. He came to know all these things from his daughter Rubina. He has also deposed about threat of life to daughter Rubina by the appellant-accused. He added that on the day of incident, he received

phone call that accused killed his daughter-Rubina. Therefore, he immediately rushed to the house of Rubina. She was in unconscious condition. Hence, she was taken to the Government Hospital in auto rickshaw, but doctor declared her dead.

13. However, surprisingly, PW-2 Sayed Bandeali, father of the deceased in cross-examination reneged on his earlier version made before the Court and stated that relations between spouses were cordial. His daughter did not conceive, and therefore, she was always remained under mental stress. In the cross-examination, he conceded that his daughter-Rubina committed suicide by hanging herself to the tree. It is worth to mention that the PW-2 Sayed Bandeali did not support the prosecution case in his cross-examination, despite the same, he was not declared hostile by the prosecution under Section 154 of the Evidence Act, 1872. The divergent versions of PW-2 father of victim, during the course of trial, devastated the gravity of entire prosecution theory of murder of daughter Rubina by her husband-appellant/accused.

14. PW-3 Mohd. Mehraj, brother of victim Rubina also did not support the prosecution case. He turned hostile. He denied about the contents of FIR lodged by him. Learned Prosecutor declared him hostile and preferred to cross-examination him to elicit the truth, but it did not evoke result. It reveals that the key witnesses of the prosecution decided to make departure from what they had stated in his FIR or in their statements before the police.

15. The prosecution made abortive attempt to examine PW-4-Rehana Sayed, mother of the deceased to bring on record the incriminating circumstances against appellant. But, she had also found guilty of modulation. She retracted her accusatory statement made against the accused in the Court. She refused to cast allegations against son-in-law for death of her daughter Rubina. The PW1-Navnath Sable, Panch of the spot panchnama and PW-5 Shaikh Khurshid, panch of Inquest Panchnama also refused to nod in favour of prosecution to prove the contents of document of respective panchnamas. In such backdrop, we proceeded to scrutinize the findings of conviction expressed against appellant - accused by learned Sessions Judge, Latur. In the impugned Judgment, learned Sessions Judge in paragraph No. 17 observed as below:-

> "17. It is no doubt true that, PW. No. 2 Sayed Bandeali has stated in his cross-examination that, on the date of incident accused had been to his shop, but, his shop appears to have been situated at the distance of three kilometers from the house and there was ample opportunity for the accused to visit his house from his shop. On the contrary, the contents of the complaint, which are proved by PW. No.9 Gauri More, clearly reveals that, on the date of incident, the accused was present in his house. From the contents of the complaint and the examination-in-chief of PW. No.2 Sayed Bandeali, it clearly appears that, dead body of deceased Rubina was found in the house, wherein accused and deceased Rubina were alone residing. Thus, this is case of custodial death and it is for the accused to explain as to how deceased Rubina died. However, the accused has not stated anything about the

> death of deceased Rubina, in his statement recorded under Section 313 of the Criminal Procedure Code. He choose to keep quiet. Hence, considering the evidence on record only one conclusion can be drawn that, deceased Rubina was throttled by the accused, and hence, she died a unnatural death."

16. Perusal of aforesaid findings reflect that the learned Sessions Judge kept implicit reliance on the evidence of PW-2 Sayed Bandeali as well as recitals of the FIR, scribed by PW-9 Gauri More to arrive at the conclusion of guilt of the accused. The approach of learned Sessions Judge appears superficial and erroneous one. He drawn the conclusion that the death of victim was custodial death and it was imperative for the accused husband to explain how the deceased Rubina died. It reveals that the learned Sessions Judge overlooked or glossed over serious legal infirmities in this case. It was fallacious to appreciate that the shop of accused was located at a distance of 3. k.m. from his residential house. Therefore, there was ample opportunity for him to visit to the house from his shop for committing crime. This sort of speculative findings rests on assumption is totally impermissible and inadmissible in law. There is no evidence available on record about the last scene together of the accused in the company of deceased wife Rubina at the relevant time. In contrast, kith and kin of Rubina turned hostile and refused to cast aspersion on the appellant-accused for her homicidal death.

17. There were no incriminating circumstances brought on record to prove the motive of crime. PW-3 Mohd. Mehraj and PW-4 Rehana,

brother and mother of the victim-Rubina, testified that the relations in between the spouses were cordial. They added that the deceased Rubina was remained under mental stress as she could not conceive during wedlock from husband. According to brother and mother, she committed suicide by hanging herself to the tree. PW-2 Sayed Bandeali father, as referred above initially supported the prosecution case, but lateron he changed his version during the course of evidence before trial Court. Therefore, his evidence does not inspire confidence for appreciation in this case. The prosecution totally failed to bring on record the motive of the crime on the part of accused in this case.

18. It is also strange to appreciate that learned Sessions Judge in its findings expressed in aforesaid paragraph No. 17 of the Judgment that the contents of the complaint i.e. FIR are proved by PW-9 Gauri More, which clearly reflects that on the day of incident accused was present in his house. We find painful to appreciate such approach of learned Sessions Judge for use of document of FIR in this case. It would be reiterated that PW-3 Mohd. Mehraj, first informant of the impugned FIR (Exhibit-59) categorically deposed in his evidence that he had not stated the contents of FIR (Exhibit-59). He denied the portion marked "A, B and C" recorded in the FIR (Exhibit-59). The prosecution adduced evidence of Police Personnel PW-9 API Gauri More attached to Gandhi Chowk Police Station. She testified that FIR (Exhibit-59) was reduced into writing as per say of the complainant.

19. There is no doubt that PW-9 Gauri More, scribed the document of FIR. But, in absence of substantive evidence about its recitals, it has

no evidential value for appreciation in the eye of law. The learned Sessions Judge unwittingly overlooked the provision of Sections 145 and 157 of the Evidence Act, while appreciating the contents of FIR brought on record in the evidence of PW-9 Gauri More. The law postulate that the FIR can be used under Section 145 to contradict or under Section 157 of the Evidence Act to corroborate the testimony of witnesses, who made it. It is to be noted that the FIR being former statement under Section 157 of the Evidence Act of PW-3 Mohd. Mehraj, it may be proved to corroborate his testimony. But, PW-3 Mohd. Mehraj turned hostile and denied about the recitals referred in the FIR at portion marked "A, B and C" being an statement verbalized by him before Police. In such circumstances, no question arises for use of the FIR to corroborate or contradict the testimony of PW-3 Mohd. Mehraj. We are at loss to appreciate on what basis and under which provisions the learned Sessions Judge relied upon the contents of FIR and drawn inference that accused was present in the house at the time of alleged incident. There are no any circumstances available on record to establish that accused was present in the house at the relevant time.

20. In view of incredulous and dubious evidence of prosecution witnesses, it is preposterous and incomprehensible to conceive that at the relevant time of alleged incident the accused was present in the house, and therefore, it was a case of custodial death. The learned Sessions Judge put the burden on the accused to explain the cause of homicidal death of his wife and arrived at the conclusion that as accused failed to explain as to how the deceased Rubina died nor he

has stated anything about cause of death of Rubina in his statement under section 313 of the Cr.P.C. But, he maintain silence. Therefore, it was held that the accused-appellant was the author of the homicidal death of deceased Rubina by strangulation. This attempt of the learned Sessions Judge found absurd, imperfect and not within the ambit of law.

21. Undoubtedly, the death of deceased Rubina was homicidal in nature. It has brought on record that after the alleged incident PW2-Sayed Bandeali, PW-4- Rehana and PW-3- Mohd. Mehraj parents and brother of deceased Rubina were rushed to the spot and they escorted the injured-Rubina to the Government Hospital, at Latur for medical treatment. But, the concerned doctor on examination declared her dead. These star witnesses of the prosecution did not state about the presence of accused at the scene of occurrence. But, they ventured to state that at the time of alleged incident, accused was at his shop. The message about incident was sent to him and thereafter accused came in the hospital to see his deceased wife. In such peculiar circumstances, the positive evidence in regard to presence of the appellant-accused at the scene of occurrence during relevant period of incident, found lacking in this case. It would difficult to draw adverse inference against appellant-husband for homicidal death of his wife. It is true that both husband and wife were living together in the house. But, the evidence of prosecution witnesses indicate that at the time of alleged incident occurred in the noon hours, the appellant-accused was at his shop. As referred above, there were no circumstances on record to perceive that it was custodial death and it is for the accused-

husband to explain the circumstances in which deceased Rubina died, as provided under Section 106 of the Evidence Act, which contemplates about the facts especially within the knowledge of the accused.

22. The principle laid down under Section 106 of the Evidence Act is that the burden to establish those facts, which are within personal knowledge of the accused, is cast on him and if he fails to establish or explain these facts, an adverse inference may be drawn against him. It is the rule of law that neither the provisions of Section 103 nor Section 106 of the Evidence Act would absolve the prosecution from discharging its general or primary burden to prove its case beyond reasonable doubt. It is only when prosecution led evidence, which if believed, will sustain conviction, or, makes out a *prima facie* case, that the question arises to consider the facts of which burden of proof may lie upon the accused. The Hon'ble Apex Court in the case of ***Sucha Sing Vs. State of Punjab*** reported in ***(2001) 4 Supreme Court Cases, 375***, in paragraph No. 19 has observed as under:-

> "19. We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special kowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference."

23. In the case of ***Mangu Sing Vs. Dharmendra and another*** reported in ***(2015) 17 Supreme Court Cases, 488*** and one

connected matter, the Honourable Apex Court reiterated the ratio and held that prosecution cannot relieve from its preliminary burden to prove the guilt of the accused beyond reasonable doubt.

24. In the matter in hand, the circumstance on record are sufficient to draw inference that the appellant-accused was not found available in the company of deceased wife Rubina either soon before or soon after the incident. The prosecution witnesses PW-2 Sayed Bandeali, PW-4 Rehana and PW-3 Mohd. Mehraj parents and brother of deceased unequivocally exonerated the appellant - accused from the charges pitted against him. It is evident from the evidence of all these star witnesses of the prosecution that accused was not available in the company of deceased-Rubina at the relevant time in the house, but he was at his shop. It has brought on record that after receipt of information about the alleged incident, he rushed to the hospital and saw the dead body of his wife. Nothing incriminating recovered from the spot to establish presence of accused at the scene of occurrence. In such circumstances, presumption under Section 106 of the Evidence Act cannot be drawn.

25. The learned Sessions Judge overlooked these legal infirmities in the prosecution case and drawn the adverse inference against accused based on surmises and conjectures. There was no positive evidence on record that at the time of incident husband and wife were last seen together in the house. The evidence of prosecution witnesses are totally silent on this material aspect. In view of factual aspect of the case on legal parameter, we are of the considered opinion that

inference drawn by the learned Sessions Judge in the impugned judgment is erroneous, illegal and rests on the figment of imagination. The learned Sessions Judge relied upon the circumstances, which are totally inadmissible in evidence under the provisions of law. Therefore, we have no hesitation to arrive at the conclusion that the evidence recorded before learned trial Court is not at all sufficient to draw adverse inference against accused for murderous attack on his wife. In such circumstances, the impugned findings of conviction expressed by learned Sessions Judge are perverse, improper, and therefore, required to be quashed and set aside.

26. In view of aforesaid discussion, the present appeal deserves to be allowed. Accordingly, the Criminal Appeal stands allowed. The impugned Judgment and order of conviction and resultant sentence is hereby set aside and quashed. The appellant-accused is acquitted for the offence punishable under Section 302 of the IPC, with which he was charged and convicted. Fine amount, if any, deposited by the appellant-accused be refunded to him, after appeal period is over. Since the appellant-accused is in jail, he be set at liberty, forthwith, if not required in any crime. The writ of this order be sent to concern Jail authority for compliance of provisions of Section 437-A of the Cr.P.C on execution of PR bond of Rs.15,000/- with one solvent surety of like amount for a period of six months. The order regarding muddemal property is maintained as it is.

Sd/- Sd/-

[K. K. SONAWANE] JUDGE

[T.V. NALAWADE] JUDGE

MTK
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