

**(2011) 02 BOM CK 0162**

**Bombay High Court (Nagpur Bench)**

**Case No:** Criminal Appeal No. 215 of 1997

Ganesh Gedam and Sau.  
Gangabai Gedam

APPELLANT

Vs

State of Maharashtra

RESPONDENT

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**Date of Decision:** Feb. 9, 2011

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 106
- Penal Code, 1860 (IPC) - Section 201, 302, 34

**Citation:** (2012) BomCR(Cri) 845

**Hon'ble Judges:** A.H. Joshi, J; A.B. Chaudhari, J

**Bench:** Division Bench

**Advocate:** R.B. Gaikwad, No. 1, R.M. Daga and F.N. Haidari, No. 2, for the Appellant; S.S. Wandile, Additional Public Prosecutor, for the Respondent

**Final Decision:** Allowed

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**Judgement**

A.H. Joshi, J.

This is an appeal against conviction of:

[a] Appellant No. 1 for the offences punishable under s. 302 and 201 read with Section 34 of Indian Penal Code, and the sentence of Life Imprisonment and a fine of Rs. 10,000-00, in default, Rigorous Imprisonment for one year for the former offence, and Rigorous Imprisonment for two years and a fine of Rs. 2000/-, in default, Rigorous Imprisonment for six months for the latter offence.

[b] Appellant No. 2 for the offence punishable u/s 201 read with Section 34 of Indian Penal Code, and the sentence of Rigorous Imprisonment for two years and a fine of Rs. 2,000/-, in default, Rigorous Imprisonment for six months.

2. The Appellants were charged as follows:

Appellant No. 1 for offences punishable under Sections:

[a] 302, Indian Penal Code, for intentionally or knowingly having strangled to death Lata Ganesh Gedam in the night of 22nd October, 1992, and;

[b] 201 read with Section 34 of Indian Penal Code, for throwing the dead body of deceased Lata in the well in order to cause to disappear evidence of said offence of murder with an object to screen himself from legal punishment.

AND

Appellant No. 2 for offences punishable under Sections:

[a] 109 of Indian Penal Code for abetting Appellant No. 1 in commission of said offence of murder by telling him a lie and consequently igniting quarrels between the Appellant No. 1 and the deceased, to prejudice his mind so as to instigate the Appellant No. 1 to drive out of house deceased Lata, and;

[b] 201 read with Section 34 of Indian Penal Code, for throwing the dead body of deceased Lata in the well in order to cause to disappear evidence of said offence of murder with an object to screen herself from legal punishment.

3. The Appellant Nos. 1 and 2 are respectively husband and mother-in-law of deceased Lata.

4. The case is based on circumstantial evidence, as there are no eye-witnesses.

5. Prosecution rests its case on testimonies of PW 2 Saraswati Urkuda Nan aware, PW 3 Sadashiv Shaitalu Kumre, PW 10 Indira Ambadas Danage, and PW 11 Sarita Sukhdeo Gedam, to prove the fact that the:

[a] Relations between deceased Lata and Accused No. 1 were not well;

[b] They used to frequently quarrel;

[c] There was even a demand of money and that the marriage between Lata and Accused No. 1 was not approved by Accused No. 2, and;

[d] Accused No. 2 was main inspirer of quarrels.

6. Other witnesses examined by the prosecution, namely PW 1 Lila Sukhdeo Wagmare and PW 4 Aayabai Shriram Dange, respectively the mother and sister of the deceased, are examined to show or prove ill-treatment.

7. PW 5 Dr. Satish Ramdas Chintawar is examined to prove the cause of death to be asphyxia consequent upon strangulation.

8. Remaining witnesses PW 6 Vithalrao Ramji Wuike and PW 12 Kishor L. Supare are the witnesses of registering the case of Accidental Death, First Information Report and of investigation.

9. Crucial witnesses PW 2 Saraswati UrkudaNannaware, PW 3 Sadashiv Shaitalu Kumre, PW 9 VatsalabaiKashinath Ghodmore, PW 10 Indira Ambadas Danage and PW 11 Sarita Sukhdeo Gedam have turned hostile.
10. Investigating Officer in his examination has exerted to prove that certain statements made by these witnesses and denied during their Examinations-in-Chief and cross-examinations, were, in fact, made by the witnesses.
11. Heard both the sides.
12. In order to challenge the conviction, learned Adv., for the Appellants has asserted points during oral arguments, which were not in specific terms raised in Memo of Appeal. These points are as follows:
- [a] The prosecution has failed to prove the case beyond a reasonable doubt.
  - [b] The prosecution itself is not sure whether the deceased died due to cardio respiratory arrest secondary to asphyxia consequent on strangulation.
  - [c] Prosecution has not clearly established whether it was a suicide or a homicidal death.
  - [d] As the question of cause of death has not been put to the accused in their statements recorded u/s 313 of Criminal Procedure Code, the case deserves to be remanded to Trial Court to overcome the said deficiency.
13. To support his case, learned Adv., for the Appellants has placed reliance on following reported judgments:
- [1] Sunder Singh v. State of Uttaranchal (2011) 1 SCC 114,
  - [2] [State of Punjab Vs. Naib Din](#), ,
  - [3] [Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra](#), , and
  - [4] Arvind Dayaram Choure and Anr. v. State of Maharashtra 2003 ALL MR 45.
14. In contrast learned APP Mrs. S.S. Wandile urged the following points:
- [a] It being a case of death akin to custodial death, the burden is on the accused to explain as to the circumstances in which Lata died.
  - [b] The judgment impugned is well reasoned.
  - [c] Asphyxia consequent upon strangulation as described in the present case is corresponding to the description narrated in Modi s Medical Jurisprudence.
15. This Court has perused entire oral and documentary evidence, and the citations relied upon.
16. It would be convenient to take a brief resume of oral and documentary evidence, which is done herein below.

17. PW 1 Lila Wag mare mother, and PW 4 Aayabai S. Dange sister of the deceased.

Testimonies of these two witnesses do not result in bringing on record even a single fact which would lead to:

-Circumstances as to how accused are connected with murder.

-Act of cruelty or other such acts on the part of the accused persons showing any motive or intention.

-These witnesses are not the witnesses of any fact, and all that they say about ill-treatment etc., is hearsay.

These witnesses, therefore, have no worth of being a witness of relevant fact.

18. PW 2 Saraswati Nan aware, PW 9 Vatsalabai K. Ghodmore, PW 10 Indira A. Danage, and PW 11 Sarita S. Gedam.

These witnesses are examined to prove quarrels etc., between deceased Lata and accused persons.

These facts are not proved as witnesses have turned hostile.

Prosecution has exerted to prove version of these witnesses which they had omitted to depose through the oral evidence of Investigating Officer PW 12 Kishore Supare.

19. Prosecution has very fervently relied on the testimony of PW 5 Dr. Satish Ramdas Chintawar. The injuries narrated by this witness, as found on the corpse, are as follows:

(1)Over the neck:

Neck was swollen as a whole and skin was peeled off all over the neck. On exploration of neck, extravasation of blood was noted in subcutaneous tissues. Blackish brown was in colour. Congestion was noted in deep muscles of the neck.

On deeper exploration, greater cornua of hyoid bone on right side was fractured and was internally displaced. Congestion was noted around fracture site. On exploration of larynx and trachea, sub mucosal haemorrhage was noted. In our opinion the above injury was about 48 to 72 hours and could have been caused due to strangulating force over the neck and it was ante-mortem.

[Quoted from page Nos. 65 and 66 of the Appeal paper-book. Underlining is done to highlight the relevant and important portions].

20. This witness, however, in the Examination-in-Chief as well as in the cross-examination, makes certain statements which are as follows:

2. In our opinion, most probable cause of death of patient Lata could be due to cardio respiratory arrest secondary to asphyxia due to strangulation....

3. ...

4. ...

5. ...

6. There may be external injury on the neck if a person is strangled with the help of rope or hand. It is not correct to say that hyoid bone can be fractured if the person gets impact on the hyoid bone. Now says, if the hyoid bone comes in impact of anything, then hyoid bone can be fractured. ....

[Quoted from page Nos. 66 and 67 of the Appeal paper-book. Underlining is done to highlight the relevant and important portions].

21. The statement of PW 5 Dr. Satish creates and brings on record a possibility that cause of death narrated by the witness is probable than certain or the sole cause.

This witness further admits that the injury in the nature of a fracture to hyoid bone as found in the present case is possible due to impact of a thing thereon.

22. In so far as testimony of PW 6 Vithal Ramji Wuikeis concerned, it is of no much importance, as there is no dispute as to the fact of recording of MARG and FIR.

23. In so far as testimonies of Panch witnesses are concerned, PW 7 Ramdas Lonare is hostile, and PW 8 Bhagwant Tukduji Popte relates only to seizure of clothes.

Moreover, the articles recovered do not lead to collection of incriminating evidence and, therefore, these witnesses are of no significance in the case.

24. In so far as PW 12 Kishore Supare is concerned, his testimony discloses certain crucial things as admitted by him in the cross-examination. The relevant portion reads as follows:

4... The well in which the dead body of Lata was found, was at the distance of 6 to 7 feet from the house of the accused. The house of the accused is having a Angan of 40 to 50feet. The house of Eknath Gedam is also near the well. I do not remember whether the house of Eknath Gedam is at a distance of 150 paces from the house of the accused. The well in which the dead body of Lata was found is surrounded by 5/6 residential houses. All the Mohalla people used to fetch the water from the same well.

5. I do not remember whether at the time of enquiry I saw 2-3 many relatives were residing along with the accused persons in their house....

[Quoted from page Nos. 99 and 100 of the Appeal paper-book. Underlining is done to highlight the relevant and important portion].

25. The quotation in foregoing para will reveal that police have not enquired with the residents in the neighbourhood in the process of investigation to retrieve the facts if anybody had seen the corpse of deceased Lata at the bottom of the well,

since all neighbours are fetching water for their day-to-day need from the well, subject-matter.

26. It is also seen that nothing has come forward from the evidence of these witnesses that any efforts were made by the Investigating Officer to collect evidence as to movements or whereabouts of the deceased, and of accused, corresponding to the time of death as could be estimated from the time of death revealing from the Post-mortem Examination.

27. Considering all these testimonies, the sum effect that emerges is as follows:

[a] There is no evidence of ill-treatment.

[b] There is no reliable evidence of any quarrel immediately preceding the death.

[c] There is no evidence of deceased being found in company of Accused No. 1.

[d] No evidence is brought to prove that Lata was killed first and her corpse was thrown in the well by Accused Nos. 1 and 2 together, or by anyone independently.

[e] There is no evidence on record to suggest that around the time immediately proximate to the estimated time of death, the deceased and accused No. 1 were found together in their house which will raise in law against Accused No. 1 a presumption of custody.

[f] Since the death of Lata in the house is not proved, the same is not liable to be described as a custodial death.

[g] Until the death is proved to be a custodial death, the presumption and need of duty and burden on the accused to explain circumstances arising from Section 106 of Evidence Act does not arise.

28. The effort of prosecution to prove certain statements of these witnesses as retraction by them does not have value in the eye of law, which is available as contradiction or omission whenever proof of such contradiction and omission is sought to be relied by the defence against the witness.

Versions of the prosecution witnesses PW 2 Saraswati, and PW 9 Vatsalabai, PW 10 Indira, and PW 11 Sarita, therefore, do not come to the help of prosecution to any extent and manner, whatsoever.

29. In the light of what this Court has found from the evidence, it is not necessary to discuss the case laws cited at bar.

30. This Court, therefore, arrives at a conclusion that the offence of murdering Lata by Accused No. 1, and Accused Nos. 1 and 2 having committed the act constituting the offence u/s 201 of Indian Penal Code, is not proved.

31. In the result, appeal succeeds. The conviction and sentence of both the Appellants is set aside.

32. Valuable property be disposed of if / returned in accordance with law. Fine amount, if / deposited, be refunded. Bail bonds stand cancelled.