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**(2014) 12 BOM CK 0037**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 881 of 2014**

Anis Mohd. Rafique Khan

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

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**Date of Decision :** 15-12-2014

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 201, 302, 34

**Citation :** (2015) ALLMR(Cri) 620 : (2015) 1 BomCR(Cri) 781

**Hon'ble Judges :** P.V. Hardas, J;G.S. Kulkarni, J

**Bench :** Division Bench

**Advocate :** Rafique Ahmed Shaikh, Advocate for the Appellant; H.J. Dedhia, APP, Advocate for the Respondent

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## Judgement

G.S. Kulkarni, J.—The Appellant (Original accused no.1) who stands convicted for the offence punishable under section 302 read with section 34 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.5000/and in default of payment of fine to suffer imprisonment for six months and further convicted for the offence punishable under section 201 read with section 34 of the Indian Penal Code and sentenced to suffer imprisonment for 7 years and to pay fine of Rs.5000/and in default of payment of fine further suffer imprisonment for 6 months with a direction that the sentences to run concurrently, by the Sessions Judge, Thane, by judgment dated 9th July, 2014 in Sessions Case No. 465 of 2012 by this appeal questions the correctness of his conviction and sentence.

Briefly stated the facts as are necessary for decision of this appeal are thus :

2. PW 10 - Dnyaneshwar Dashrath Shivtare Police Inspector attached to Diagar police station was on duty on 7th March 2012 when PW 10 Police Patil of Phadke Pada village informed PW 10 that there was one rexine bag seen floating in the water at the pond of Phadke Pada. PW 10 Dnyaneshwar Shivtare immediately visited the spot along with his staff and noticed one rexine bag floating in water of the pond. The rexine bag was fished out from the water. The rexine bag was

opened in presence of two panchas. It was found that there was a a dead body in folding gesture inside the rexine bag. An inquest panchanama of the dead body was prepared in presence of panchas which is at Exhibit 39. Thereafter as FIR was lodged by the Police Patil, Crime No.I-31/ 12 under sections 302, 201 of the Indian Penal Code came to be registered which is at Exhibit 44. PW 10 - Dnyaneshwar referred the dead body for post mortem. A panchanama of the scene of the occurrence at Exhibit 46 was prepared. A blue colour rexine bag and a nylon string was seized from the spot, vide Spot Panchanama which is at Exhibit 46. PW 10 - Dnyaneshwar sent information through wireless message to various police stations for identification of the dead body. PW 10 - Dnyaneshwar on 7.3.2012 entrusted further investigation to Police Inspector PW 11 - Gauri Prasad Hiremath. P.I. Gauriprasad Hiremath recorded statements of some of witnesses so as to identify the deceased. On 17th March 2012 the father, sister and brother-in-law of deceased had approached Police Inspector Gauriprasad and recognised the dead body to be that of Anwar Shahabuddin Shaikh. P.I. Gauriprasad recorded statements of father, sister and brother in law of the deceased who expressed their suspicion on accused no.1 to have caused the death of deceased. PW 11 - Gauriprasad seized clothes of the deceased vide panchanama at Exhibit 40. On 18th March 2012 PW 11 - P.I. Gauriprasad arrested accused nos.1 and 2 vide arrest panchanama at Exhibit 41. A cell phone was impounded from the custody of accused no.1 vide panchanama at Exhibit 41. On 19th March 2012 the appellant is stated to have confessed the crime and had shown willingness to produce the motor bike used by him for disposal of the dead body in the pond. A memorandum panchanama prepared to this effect is at Exhibit 62. The accused took P.I. Gauriprasad along with the panchas towards Reti Bunder area and showed one motorbike which was found parked in an open plot. A seizure panchanama of the recovery of the motorbike was prepared. Thereafter, on 23rd March 2012 the appellant had shown willingness to point out the scene of occurrence and the place where he had thrown the dead body. A memorandum panchanama was recorded to this effect which is at Exhibit 63. The appellant accordingly took the police and panchas to his house and had shown the spot inside his house. A pair of chappals was recovered stated to be belonging to the deceased. Thereafter, the accused led the police and panchas to the pond located in Phadke Pada area where the appellant had thrown the rexine bag containing the dead body of the deceased. A running panchanama of all this discovery was prepared which is at Exhibit 63/1. P.I. Gauriprasad procured C.A. reports which are at Exhibits 55, 56 and 57. After completion of the investigation, a charge sheet was filed against the accused. The offences being exclusively triable by the Court of Sessions the case was committed to the Sessions Court. The learned trial Judge framed charges at Exhibit 35 under sections 302 and 201 read with section 34 of the Indian Penal Code. The accused pleading not guilty claimed to be tried. Prosecution examined 11 witnesses. The learned Sessions Judge appreciating the evidence which had come on record in the trial, convicted and sentenced the accused as aforestated.

3. In order to effectively deal with the submissions advanced before us by learned counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

4. Prosecution has examined PW 1 - Parshuram Patil who is the Police Patil and the informant. PW 1 - Parshuram Patil deposed that on 7th March 2012 in the morning at 10 a.m. when he was proceeding towards his office he saw persons gathered near the lake located on the road leading to Phadke Pada. He stopped his vehicle and saw a blue colour bag tied with a nylon string floating on the water. There was foul smell. He therefore, immediately informed the police at ShilDiagar police station. PW 1 - Parshuram Patil deposed that police arrived on the spot. The rexine bag was opened and a dead body of one male was found in the bag. He deposed that the limbs of the dead body were in folding condition and the dead body was in highly decomposed condition. PW 1 - Parshuram deposed that police had drawn a panchanama as also had recorded the FIR. A seizure panchanama of the articles at Exhibit 44 was drawn in his presence.

5. Prosecution has examined PW 2 Dashrath who is a panch witness who was declared hostile. In his cross-examination he admitted that a blue colour rexine bag was seized. He admitted that police seized the rexine bag and articles under a panchanama. He admitted that an inquest panchanama of the dead body was drawn. However, he deposed that he had no inkling in regard to the contents of the blue bag. The testimony of this witness is not of much assistance to the prosecution.

6. Prosecution has examined PW 3 - Shahabuddin Shaikh who is the father of the deceased who did not support the case of the prosecution and was declared hostile. In the cross-examination on behalf of prosecution he denied to have stated before the police that the deceased son had an affair with accused no.2 Mehjabin.

7. Prosecution has examined PW 4 Taslima who is the sister of the deceased who deposed that she was acquainted with the accused being her neighbour. She deposed that deceased was her brother who was working as a mechanic and used to visit Nagpur, Surat etc for his work. PW 4 Taslima deposed that accused no.2 Mehjabin had an affair with deceased Anwar prior to marriage of the accused Mehjabin with the appellant. PW 4 - Taslima deposed that at about 5 to 6 months prior to the incident there was a quarrel between the appellant and her deceased brother on account of the affair with his wife Mehjabin. PW 4 Taslima deposed that the appellant also came to know of the affair when he caught red handed the deceased along with his wife Mehjabin in his house. She deposed that the appellant had deserted his wife accused no.2 and that she was staying with her parents at their home at Kurla. PW 4 - Taslima deposed that again the appellant had found his wife along with the deceased at Kurla Railway Station and that the appellant had informed of the same to the father of PW 4. PW 4 - Taslima deposed that all these facts were disclosed to her and her sister by father of the appellant. PW 4 - Taslima deposed that she accordingly had gone

to Kurla Station but nobody was seen at the Kurla station and therefore, she had phoned father of the appellant who informed that they all had returned to the house at Kurla and advised PW 4 Taslima and her sister to return home at Mumbra. PW 4 Taslima deposed that she and her sister had reprimanded Mehjabin for having an affair with deceased Anwar. PW 4 deposed that her father had once slapped deceased Anwar and had driven him out of the house and thereafter deceased Anwar had gone to Surat. PW 4 deposed that deceased Anwar used to call from Surat after about 10 to 11 days as also used to visit their house and also he used to visit wife of the appellant. PW 4 deposed that because of this background marriage of Anwar was settled with a girl from Bandra which was to be held on 2nd May 2012. She deposed that after the engagement ceremony of deceased Anwar, he had gone to Nagpur for his mechanic work and returned on 1.3.2012. She deposed that she and her sister, father and the deceased had all gone to Amrut Nagar, Mumbra for shopping for the marriage of the deceased Anwar. She deposed that she returned from shopping at about 7 to 7.30 p.m. She deposed that at 7.45 p.m. her deceased brother Anwar had received a call on the cell phone of her father. Deceased Anwar thereafter left the house stating that he had received a call from his employer and informed that in case he was late he would return home the next day morning. PW 4 Taslima deposed that however, for two days deceased Anwar did not return and hence they searched deceased Anwar. A missing report came to be lodged by her father. PW 4 deposed that after 2/3 days father of the bridegroom of deceased Anwar had come to their house and informed that he had received a phone call that there was an accident of deceased Anwar and he had been arrested by the police. She deposed that the father of the bride of Anwar was told to deposit Rs.6000/in the bank account if he wanted release of his would be son-in-law from the case. The bank account number was given by him for deposit of the said amount. PW 4 Taslima deposed that her father and police personnel visited State Bank of India at Thane for verification of the bank account and it was revealed that the concerned bank account was from the branch at Pachora District Jalgaon. Police had informed her father to visit Pachora. PW 4 deposed that the account in Pachora was that of a third person who had refused to come to Mumbai for any investigation on the ground he was totally unconnected. PW 4 Taslima has deposed that she along with her husband and his brother had gone to Shivaji Hospital at Kalwa in search of deceased Anwar and on inquiry was informed that there was an unknown body received at the hospital. She deposed that she had identified the dead body of her brother deceased Anwar. She deposed that she had received dead body from the hospital for cremation. In her cross - examination, she admitted that she had not lodged any police complaint of any affair of deceased Anwar with the accused no.2 Mehjabin. PW 4 Taslima also deposed that clothes and chappals are easily available in the market.

8. Prosecution has examined PW 5 Nasima Shaikh who is the other sister of deceased Anwar who deposed that she was married with one Mehboob Shaikh 13

to 14 years before the date of the incident and had 3 sons. She deposed that her husband had died 7 years back and since then she was residing with her parents at Mumbra. She deposed that she was acquainted with accused as they were neighbours. She deposed that there was an affair between wife of the appellant - Mehjabin and her deceased brother which was prior to the marriage of Mehjabin with the appellant. She deposed to the incident in regard to her deceased brother trying to elope with the wife of the appellant from Kurla Railway station. She deposed that she had gone along with her sister PW 4 for shopping on 1.3.2012 in regard to the marriage of deceased Anwar and after returning home, a call was received by deceased Anwar from his employer after which the deceased had informed that he was going to Kalamboli for work and in case he is late he would return the next morning. PW 5 further deposed that deceased Anwar did not return for 3 to 4 days. She also deposed that the would be father-in-law of the deceased Anwar informed that deceased Anwar had met with an accident. She deposed that she learnt about the dead body of Anwar lying at Kalwa Hospital and that her sister and her husband had recognised dead body of the deceased. She deposed that she learnt that her brother Anwar was murdered due to affair with wife of the appellant (accused no.2). She deposed to have identified dead body of the deceased Anwar. In her cross-examination, nothing material was elicited.

9. Prosecution has examined PW 6 Dr. Mangesh Ghadge who was attached to Rajiv Gandhi Medical College, who deposed that he had received a dead body on 7.3.2012 at 1.55 p.m. which was later identified to be that of deceased Anwar. He deposed that he had conducted postmortem on the very same day. He deposed that the dead body was in a decomposed condition and he noticed that eyeballs and tongue were seen protruding. There was a foul smell and peeling of skin all over the body. PW 6 Dr. Ghadge deposed that he had not seen any external injuries on the dead body. He deposed that on the basis of the post mortem findings, it was difficult for him to determine the exact cause of death owing to decomposition of the entire body and therefore he kept the decision pending till the receipt of the C.A. report in respect of nail clippings and scalp hairs. On perusal of the C.A. report at Exhibits 56 and 55, he deposed that it would be difficult to determine the cause of death of deceased Anwar and accordingly he issued the post mortem report.

10. Prosecution has examined PW 7 - Rakesh Sinha who is a panch witness who was examined in regard to the memorandum panchanama of the recovery of motorbike at Exhibit 62/1. PW 7 Rakesh deposed that he was called on 23rd February 2012 at the police station as a witness to the memorandum panchanama of the appellant in disclosing that he had committed the murder of one person and had shown willingness to point out the place where he had thrown the dead body. The memorandum panchanama is at Exhibit 63. P.W.7 deposed that the appellant had taken the police and PW 7 to his house at Anjuman Building where he pointed out a place as his residence. A panchanama to this effect at Exhibit 63/1 was recorded. The spot panchanama was recorded

at Exhibit 64.

11. Prosecution has examined PW 8 - Sayed Hasan who is a salesman in the shop known as "Sadaf Bag Center" and was examined in the context of the recovery of the rexine bag. PW 8 identified the bag to have been purchased by the appellant from his shop. In the cross-examination, he admitted that several customers used to visit the shop on each day and it would be difficult to recognise all of them. He admitted that the rexine bag can be made available in any shops and that there was no special marks for identification of the bag to have been purchased from his shop.

12. Prosecution has examined PW 9 Vilas Patil who is the panch witness who was examined in regard to the memorandum of the appellant in making a confessional statement that he had committed the murder of the deceased and as regards the pair of chappals concealed in the drawing room of the house of the appellant. PW 9 deposed that he does not remember name of the other panch. He deposed that he was asked to put signature on papers and that he had made signature at the instance of the police. He deposed that the appellant did not disclose anything in his presence. He deposed that he cannot recognise the accused who was present in Court. PW 9 was declared hostile. In his cross-examination on behalf of the prosecution, he admitted that accused had not made a confessional statement in regard to the murder and that the pair of chappals was concealed in the drawing of the house of the appellant. He deposed that memorandum of the panchanama contained his signature and he did not remember the contents. He denied the appellant pointing out room No. 307 being his house and that the accused had entered the house and produced one pair of chappals concealed beneath the bedstead.

13. Having considered the testimony of the aforesaid witnesses, we now advert to the submissions as made on behalf of the parties. Learned counsel for the appellant submits that the Trial Court is in error in recording that the appellant is guilty of committing murder of deceased Anwar. He submits that the evidence as adduced on behalf of the prosecution in no manner proves much or less beyond reasonable doubt that the appellant is guilty of committing the crime of murder of the deceased. He submits that the circumstances as brought on record are weak and inconclusive and in no manner indicate guilt of the appellant. It is submitted that the testimonies of PW 4 Taslima and PW 5 Nasima who are sisters of the deceased are wholly unreliable and in no manner can be considered to hold that the offence of murder of deceased Anwar has been committed by the appellant.

14. On the other hand the learned APP supports the findings as arrived by the trial Court. The learned APP has placed strong reliance on the testimony of P.W.4 and P.W.5 - sisters of the deceased and that of PW 8 - Sayad Hasan who has deposed that blue rexine bag in question, which was used to put dead body of the deceased, was purchased from the shop where PW 8 was working. The learned APP submits that the findings as arrived by the trial Court are on proper

appreciation of evidence and hence the appeal deserves to be dismissed.

15. We have undertaken a careful scrutiny of the evidence as led on behalf of the prosecution. Case of the prosecution is purely on circumstantial evidence. The principal reliance of the prosecution is on the evidence of PW 4 Taslima and PW 5 Nasima and PW 8 Sayad Hasan. PW 4 and PW 5 are sisters of deceased Anwar who have deposed that deceased Anwar had an affair with wife of appellant and hence the appellant had a motive to eliminate the deceased Anwar. In examining the depositions of PW 4 and 5, we notice that versions of both these witnesses are much or less identical. However, none of the circumstance as deposed by these witnesses would lead to a conclusion that the appellant can be held to be guilty for committing the murder of deceased Anwar. In fact, the testimony of these two witnesses does not in any manner connect the appellant to have caused the murder of deceased Anwar. It is significant that the testimony of these two witnesses fails to derive any inference that the appellant could be connected to the commission of the crime in question. There is no incriminating material to show that between 1st March 2012 till the dead body was found on 7th March 2012 there were any incriminating circumstances which would conclusively establish that appellant and the appellant alone to have committed the murder of deceased Anwar. Moreover, PW 4 Taslima has admitted in her cross-examination that chappals which were recovered by the police at the behest of the appellant was easily available in market. We also find that the discovery of motorbike and chappals at the behest of the appellant would not be of any assistance to the prosecution to bring home the guilt of the accused in the absence of any corroborative material which would show how the involvement of these articles in the commission of the crime. Mere discovery at the behest of the appellant of such articles which cannot be related to the deceased, cannot be held to be conclusive to bring home the guilt of the accused. Much reliance has been placed on behalf of the prosecution on the testimony of PW 8 which in any opinion is of no assistance to the prosecution inasmuch as PW 8 has admitted in cross-examination that the rexine bag which was recovered by the police is available in several shops and that the bag in question has no special identification marks as purchased from their shop and hence we are afraid that his deposition could have been in no manner relied upon by the Trial Court in recording the findings of guilt of the accused.

16. We are therefore, of the clear opinion that the learned trial Judge could not have convicted and sentenced the appellant as recorded in the impugned judgment.

17. We accordingly allow Criminal Appeal by passing the following order:

#### ORDER

The conviction and sentence of the appellant/original accused no.1 Mohd.Anis Mohd.Rafique Khan is hereby quashed and set aside and the appellant is acquitted of the offence with which he was charged and convicted. Fine if paid by

him be refunded to him.

Since appellant - Mohd Anis Mohd Rafique Khan is in jail, he be released forthwith, if not required in any other case.