2023:BHC-AUG:24030-DB

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.122 OF 2018

Nanasaheb Changdeo Nikam,
Age 27 yrs., Occ. Labour,
R/o Chorwaghalgaon, Tq. Vaijapur,
Dist. Aurangabad.

... Appellant

... Versus ...

The State of Maharashtra
Through Virgaon Police Station,
Tq. Vaijapur, Dist. Aurangabad.

... Respondent

...

Mr. K.A. Ingle, Advocate for appellant

Mr. S.J. Salgare, APP for respondent

...

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

RESERVED ON : 12th OCTOBER, 2023

PRONOUNCED ON : 06th NOVEMBER, 2023

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present appeal has been filed by the original accused No.1, who

has been convicted by learned Additional Sessions Judge, Vaijapur, Dist. Aurangabad, for the offence punishable under Section 302, 498-A of the Indian Penal Code, 1860 on 28.12.2015 in Sessions Case No.51/2014.

2 The fact which is not in dispute is – deceased Girija @ Nandabai got married to present appellant Nanasaheb on 28.01.2012. On the date of First Information Report i.e. on 31.03.2014 Girija had son by name Rohit aged 07 months. PW 1 Chhabu Khandu Rajput is the father of deceased Girija and PW 2 Janabai is her mother. PW 1 and PW 2 are resident of village Chinchban, Tq. Newasa, Dist. Ahmednagar, whereas accused is resident of village Chorwaghalgaon, Tq. Vaijapur, Dist. Aurangabad. Original accused No.2 is the mother of present appellant and accused No.3 is the brother.

3 With the above said background PW 1 Chhabu lodged First Information Report stating that after the marriage, his daughter Girija was treated properly for about 8-9 months, but thereafter all the accused persons started harassing her for the illegal demand of Rs.15,000/-, which they were in need for constructing house under 'Gharkul Yojana'. The harassment was in the nature of abuses, assault by fists and slaps and making her starved. Girija used to convey the ill-treatment meted to her, to her parents and other relatives. The relatives had then deposed and persuaded all the accused

persons not to harass Girija and they would fulfill the demand whenever they would get the amount. There was no change in the behaviour of the accused persons. They continued the harassment by making illegal demands. They also used to give threat that accused No.1 i.e. present appellant would perform second marriage. Even when she had come for the delivery, at that time, she had told about the harassment. After the son was born, accused No.2 had gone to fetch Girija after about one and half months, even at that time she was advised that Girija should not be ill-treated. It is further stated in the First Information Report that the informant received phone call in the evening around 6.00 p.m. on 30.03.2014 by his brother-in-law Harishchandra Dagdu Mali and other relatives that they have received a phone call from a contractor of sugarcane cutting labour from Chorwaghalgaon that there is snake bite to Girija and she has been admitted to Government Hospital, Vaijapur. PW 1, PW 2 and other relatives went to Vaijapur around 9.30 p.m., but they were informed that Girija has expired. After the postmortem was carried out the First Information Report was lodged on the contention that when informant had seen the dead body he found ligature marks and he was of the opinion that the accused persons had strangulated Girija.

4 After the offence was registered, accused persons came to be

arrested and prior to that when Girija was declared dead inquest panchnama was prepared and her dead body was sent for postmortem, by registering her death as accidental death.

5 During the course of the investigation panchnama of the spot was executed and statements of witnesses were also recorded. While in police custody accused Nanasaheb gave memorandum and discovered a rope made up of old clothes. It was seized under panchnama. After collecting the other documents charge sheet was filed.

6 After the committal of the case the prosecution examined in all 10 witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides learned trial Judge has acquitted original accused Nos.2 and 3, however, it was held that accused No.1 is the perpetrator of the crime and he has been sentenced to suffer imprisonment for life and pay fine of Rs.2,000/- (Rupees Two Thousand only), in default to undergo imprisonment for four months, for the offence punishable under Section 302 of the Indian Penal Code. He has been further sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1,000/- (Rupees One Thousand only), in default to undergo imprisonment for four months, for the offence punishable under Section 498-A of the Indian Penal

Code. Set off has been granted and the said conviction is under challenge before this Court.

7 Heard learned Advocate Mr. K.A. Ingle for the appellant and learned APP Mr. S.J. Salgare for the respondent.

8 It has been vehemently submitted on behalf of the appellant that the learned trial Judge has not appreciated the evidence properly. PW 1 Chhabu Rajput, PW 2 Janabai Rajput, PW 3 Baban Rajput – paternal uncle of deceased, PW 4 Kishor Barde, are the witnesses on the point of alleged ill-treatment on account of illegal demand. However, from their testimony it is very much clear that none of them had seen deceased in the company of accused prior to her death. The case was based on circumstantial evidence and, therefore, five golden principles laid down in **Sharad Birdhichand Sarda vs. State of Maharashtra** [**(1984) 4 SCC 116**] should have been proved. On the same set of facts if accused Nos.2 and 3 are acquitted, then accused No.1 could not have been convicted. Merely because he is the husband, it cannot be said that he should give explanation in respect of the circumstances in which his wife was found dead. Even as regards the alleged ill-treatment is concerned, none of the witnesses have stated that when the amount was demanded and at what time the last demand was made. There is no

proximity between the alleged demand and deceased was found to be dead. PW 1 and PW 2 had not even visited the matrimonial home of Girija for more times. The house was sanctioned by Government to the accused persons. Further, these persons were having knowledge that since beginning i.e. prior to the marriage between Nanasaheb and deceased Girija the said house was allotted to the accused having two separate rooms, in which accused Nos.2 and 3 were residing separately. Still false allegations have been made against accused Nos.2 and 3 that they had harassed her. The testimony of PW 3 and PW 4 would show that they have made substantial improvements in their substantive evidence as compared to their statements under Section 161 of the Code of Criminal procedure. The alleged evidence of discovery of the rope cannot be considered as it does not fulfill the requirement under Section 27 of the Indian Evidence Act. When the findings of the trial Court are perverse, then such conviction cannot be allowed to sustain. The learned Advocate, therefore, prayed for allowing the appeal and setting aside the conviction.

9 Per contra, the learned APP after taking exception vehemently submitted that the appeal itself is not maintainable in view of the fact that there was ample evidence against the appellant. It had come on record that accused Nos.2 and 3 were residing separately since prior to the marriage of

accused and deceased. They have been acquitted. The present appellant being the husband and residing in the same house should give explanation regarding the circumstance in which his wife was found dead inside the house. There is no attempt on the part of accused No.1 to give explanation in respect of the fact that wife was found dead inside the house. Thus, the burden on the shoulders of accused under Section 106 of the Indian Evidence Act has not been discharged. Therefore, the learned trial Judge has rightly convicted him. The cause of death as per the postmortem report Exh.30 and testimony of PW 8 Dr. Madhav Jadhav is 'asphyxia due to strangulation' which is homicidal in nature. The motive behind the crime was demand of Rs.15,000/- for the construction of the house. There is no necessity to interfere.

10 As aforesaid, with the able assistance of both sides we have gone through the record and proceedings and it can be certainly said that the case of the prosecution rested on the circumstantial evidence and, therefore, obviously the golden principles laid down in **Sharad Birdhichand Sarda** (supra) and subsequent thereto would apply.

> "153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade vs. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri. L.J. 1783] where the observations were made : [SCC para 19, p.807 : SCC (Cri) p. 1047]

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) 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.

154. These five golden principles, if we may say so, constitute the

panchsheel of the proof of a case based on circumstantial evidence."

Therefore, it is required to be seen, as to whether the said five golden principles i.e. panchsheel have been fulfilled by the prosecution in this case.

10.1 We will take note of recent judgment in **Rajesh and another vs. State of Madhya Pradesh** [2023 SCC OnLine SC 1202], wherein following are the observations :

> "In a case resting on circumstantial evidence, the prosecution must establish a chain of unbroken events unerringly pointing to the guilt of the accused and none other [**C. Chenga Reddy and others vs. State of A.P**. [(1996) 10 SCC 193], **Ramreddy Rajesh Khanna Reddy and another vs. State of A.P.** [(2006) 10 SCC 172], **Majenderan Langeswaran vs. State (NCT of Delhi) and another** [(2013) 7 SCC 192] and **Sharad Birdhichand Sarda vs. State of Maharashtra** [(1984) 4 SCC 116]. As long back as in the year 1952, in **Hanumant vs. State of Madhya Pradesh**, a Three Judge Bench of this Court observed as under :
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> > 'It is well to remember that in cases where the 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, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a

conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.'

Again, in **Padala Veera Reddy vs. State of Andhra Pradesh** [1989 Supp (2) SCC 706], this Court affirmed that when a case rests solely upon circumstantial evidence, such evidence must satisfy the following tests :

'1 The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

2 Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

3 The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

4 The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.'

11 The testimony of PW 8 Dr. Madhav Jadhav would show that he conducted autopsy on the dead body of Girija along with his colleague Dr. Kale between 12.00 hours to 13.00 hours on 31.03.2014. He found that there was injury as contused neck all around neck size 18 x ½ inch. Therefore, the opinion was given that the death is due to asphyxia due to

strangulation. In his cross-examination he denied that such contused marks would appear around the neck if a person hangs himself. Thereby the accused tried to take up a defence that the injuries were suicidal in nature, but the expert has denied it. He admitted that death of a person may be caused due to suffocation if a person by wrapping herself with clothes for long time sleeping. The first and the foremost fact to be noted is that in the spot panchnama we could not get a quilt or some wrapping near the dead body and secondly the Medical Officer says that suffocation can be caused to a person due to such wrapping of clothes to himself or herself. Here, the cause of death is strangulation and not suffocation, therefore, taking into consideration the testimony of an expert and the Postmortem Report Exh.30 we conclude that Girija's death was homicidal in nature.

12 The testimony of PW 9 Parashram would show that he stood as panch to the spot panchnama and as per spot panchnama Exh.33, the spot was shown by one Jalindar Tribhuvan. Here, said Jalindar Tribhuvan has not been examined by the prosecution. Unless a proper person shows the spot of incidence which can be said to be in absence of the informant or victim injured, the contents thereof cannot be read in evidence. Even if for the sake of argument it is accepted that the spot panchnama Exh.33 has been duly proved by examining PW 9 Parashram Moin, we can get that the said house

was divided into two rooms separating it from each other by a wall. This situation has been upheld by the learned trial Judge to be the accepted situation and, therefore, it is said that accused Nos.2 and 3 being residing separately the offence has not been proved against them. We are not convinced with that kind of reasons. Here, neither the informant nor the State have challenged the acquittal of original accused Nos.2 and 3. If two rooms are separated only by a wall, it cannot be said that the person residing on one side of the wall cannot come on the other side of the wall and then harass or commit murder. Therefore, the said reason itself is not appealing. The spot where the deceased was lying is said to be on the ground near the cot in the room. Therefore, the spot panchnama by itself is not corroborating the testimony of PW 8 Dr. Madhav Jadhav. It can also be seen from the spot panchnama that no abnormality was found. Almost all the rooms and surroundings appears to have been searched at the time of spot panchnama.

13 The prosecution has not examined anybody who had seen the deceased in the company of the appellant prior to the incident. As per the prosecution story, the incident had taken place around 6.00 p.m. of 30.03.2014. This has also been revealed as it appears from the testimony of PW 1 Chhabu that he had received phone call at that time. But according to him, his brother-in-law had received phone call from a sugarcane cutting

labour contractor from Chorwaghalgaon, but he has not named that person. His said brother-in-law Harishchandra Mali, who had received the phone call, has not been examined nor it appears that the name of the contractor was revealed from said Harishchandra Mali. Therefore, in absence of examination of the person who saw the dead body for the first time, we cannot exactly say that the alleged incident had taken place at 6.00 p.m. Exact time is rather not proved. PW 8 Dr. Madhav Jadhav has also not stated when the death might have occurred. It would come to a situation that the death had occurred in the day time and for that purpose we cannot presume that the accused might be inside the house at the relevant time. Specific evidence, therefore, was necessary to state that the deceased was in the company of her husband or the accused had not gone anywhere outside the house on that day. Merely because the dead body was inside the house and it was the normal place of abode for the accused, we cannot employ the principle under Section 106 of the Indian Evidence Act and put a burden on the accused that he should explain the circumstances in which his wife was murdered inside the house. To support our contention, we may rely on paragraph No.23 of the decision in **State of Rajasthan vs. Kashi Ram** [(2006) 12 SCC 254] which has been reiterated in recent pronouncement in **R. Sreenivasa vs. State of Karnataka** [2023 SCC OnLine SC 1132] which reads

thus -

> 23 It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., Re. [AIR 1960 Mad 218 : 1960 Cri LJ 620].'

14 The prosecution is relying on the discovery and seizure of a rope which is stated to have been used as murder weapon and it is said that the

discovery is by the present appellant. PW 6 Tulshiram Bhaginath Bharade is the panch to the memorandum panchnama. He has supported the prosecution and he says that after giving disclosure statement accused had led the discovery. He says that the said rope was recovered from the toilet/WC adjoining the house of accused. Careful perusal of his testimony with the memorandum panchnama Exh.25 would show that it was absolutely not admissible under Section 27 of the Indian Evidence Act. In other words, from the testimony of PW 6 Tulshiram and the contents of memorandum discovery panchnama Exh.25 we cannot say that the said discovery is admissible under Section 27 of the Indian Evidence Act. Even if we accept that any such statement was made by Nanasaheb, Exh.25/1 itself says that the said rope was outside the house in WC and in panchnama Exh.25/2 the description of the WC is also given. It is said that the said WC is at the front side of the house and it has no door frame. There was only a curtain. By taking curtain by side with hand accused has gone inside and took out the rope. It is to be noted that the alleged incident had taken place on 30.03.2014, accused came to be arrested on 31.03.2014 around 20.30 hours and then the discovery panchnama is on 04.04.2014. It is hard to believe that when the WC was outside the house, that too which had no door frame, latch, but only the curtain, then it would not have been used by anybody for

about 3 to 4 days. The exact place from where the rope was discovered is not stated in panchnama Exh.25/2. The description does not show that there is window or such small opening where such rope could have been concealed. Another aspect to be noted is that in the spot panchnama there is mention about the WC, but there is no mention about inspection of the same. The Investigating Officer PW 10 has not explained that though he came to know about cause of death as strangulation; yet, thereafter also he had not searched the house of the accused as well as the WC between 30.03.2014 to 04.04.2014. When on the day of discovery or prior to that accused had no control over the place from where the discovery is made, then we cannot say that the said place was exclusively within the knowledge of the accused and the said discovery after about five days can be considered as discovery under Section 27 of the Indian Evidence Act.

15 Therefore, taking into consideration the said evidence on the point of offence under Section 302 of the Indian Penal Code the learned trial Judge has appreciated the evidence wrongly. It was not considered that the said evidence is not fulfilling the golden principles above said in respect of circumstantial evidence and also the burden had never shifted or was on the shoulders of accused as contemplated under Section 106 of the Indian Evidence Act to explain the circumstances, in which his wife was found dead

inside the house.

16 Now, as regards the offence under Section 498-A of the Indian Penal Code and to some extent as motive for committing offence under Section 302 of the Indian Penal Code the prosecution is relying on the four witnesses i.e. PW 1 to PW 4. All of them have stated that initially Girija was treated properly, but thereafter after the house was allotted under the Government scheme to the accused, they started demanding amount of Rs.15,000/-. If we consider the testimony of PW 2 to PW 4, they have not stated the acts of ill-treatment allegedly given to Girija, which according to them, were conveyed by deceased to them. Mere use of the word ill-treatment or cruelty will not be sufficient requirement to prove an offence under Section 498-A of the Indian Penal Code. Only PW 1 Chhabu has stated that the accused used to abuse and assault his daughter and keep her starved and Girija used to convey the same to him and others. It is said that he and other witnesses had given understanding to all the accused persons. Here, again a fact is required to be borne in mind is that as against accused Nos.2 and 3 also the same allegations were made and same evidence was adduced. All these four witnesses had included accused Nos.2 and 3 also in the said illegal demand and the alleged acts of ill-treatment, but the learned trial Judge has acquitted accused Nos.2 and 3 and, therefore, as rightly said by the

learned Advocate for the appellant that there was no logic behind segregating the husband. Merely because he was staying with the deceased the segregation is not permissible when the allegations are same. Another fact to be noted is that as per the First Information Report the age of the son of deceased was seven months and about seven months prior to the First Information Report Girija had gone for delivery and after the delivery she stayed there for about one and half months. Accused No.2 had taken her back to the matrimonial home. That means, prior to the incident there was no fresh communication and the said gap as to when Girija was taken and she was found dead would come to more than 3-4 months. None of these four witnesses have stated as to after she went matrimonial home with the child whether the ill-treatment repeated or continued and, therefore, whatever evidence has been led in the form of examining these four witnesses was not sufficient to prove the offence under Section 498-A of the Indian Penal Code beyond reasonable doubt.

17 The other witnesses those have been examined are the panch witnesses even if some of them were supporting the prosecution; yet, the substantial evidence itself is not sufficient and, therefore, there is no necessity to discuss the testimony of panch witnesses.

18 Thus, scanning of the evidence would show that the learned trial Judge has not appreciated the evidence properly. Section 27 and Section 106 of the Indian Evidence Act has not been properly interpreted and utilized. We are, therefore, conclude that there was no such evidence which can be said to be proving the offence beyond reasonable doubt on record and, therefore, interference is required. The appeal, therefore, deserves to be allowed. Hence, following order.

ORDER

1 Criminal Appeal stands allowed.

2 The conviction awarded to the appellant – Nanasaheb Changdeo Nikam in Sessions Case No.51 of 2014 by the learned Additional Sessions Judge, Vaijapur, Dist. Aurangabad for the offence punishable under Sections 302, 498-A of the Indian Penal Code, stands quashed and set aside.

3 The appellant stands acquitted of the offence punishable under Sections 302, 498-A of the Indian Penal Code.

4 The appellant be set at liberty, if not required in any other case.

5 The fine amount deposited, if any, be refunded to the appellant

after the statutory period.

6 We clarify that there is no change as regards the order in respect of disposal of muddemal.

(ABHAY S. WAGHWASE, J.) (SMT. VIBHA KANKANWADI, J.)

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