

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

CRIMINAL APPEAL NO. 59 OF 2012

1. Sanjay S/o Narayan Choudante,
Age: 41 years, Occu. Legal Practitioner,
2. Sonabai Narayan Choudante,
Age: 70 years, Occu. Household,
3. Vimalbai W/o Santosh Choudante,
Age: 42 years, Occu. Household,

All R/o Bhim Nagar, Mudkhed,
Tal. Mudkhed, Dist. Nanded.

...Appellants
(Orig. Accused No. 1, 4 & 5)

versus

The State of Maharashtra,
Through Police Station,
Mudkhed, Tal Mudkhed,
District Nanded.

...Respondent

.....

Mr. Anil B. Gaikwad, Advocate for appellants.
Mr. D. Y. Nandedkar, Advocate to assist A.P.P.
Mr. S. D. Kaldete, A. P. P. for respondent/State.

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**CORAM : S.S. SHINDE &
N.W.SAMBRE, JJ.**

**RESERVED ON : 25/11/2014
PRONOUNCED ON: 17/04/2015**

JUDGMENT : (PER N.W. SAMBRE, J.)

. This appeal is by the accused persons, who are convicted for an offence punishable under Section 302 read with Section 34 of the Indian Penal Code by the Sessions Court, Nanded.

Appellant-accused No.1, in addition to above, is convicted for an offence punishable under Section 201 of the Indian Penal Code by the Additional Sessions Judge-3, Nanded in Sessions Case No. 09 of 2007 on 07/01/2012.

2. The brief facts relevant for deciding the present appeal are as under :

. Appellant-accused No.1 Sanjay married to Sunita, daughter of Baban Jamdhade on 14/04/2005. Appellant No. 1 Sanjay was practicing Advocate. Appellant No. 2 Sonabai is mother of accused Sanjay and appellant No. 3 is wife of brother of accused Sanjay. Accused Nos. 2 and 3 Santosh and Somdatta are brothers of accused No. 1 Sanjay, all are residing at village Mudkhed.

3. After marriage, Sunita (deceased) went to the house of accused for cohabitation and she was treated well initially for eight days.

4. It is further claimed by the prosecution that accused-appellant No.1 Sanjay demanded Rs.1,00,000/- from the father of Sunita for becoming a Judge, which demand was narrated by Sunita to her father, who is complainant in the present case namely

Baba Jamdhade. Baba Jamdhade was serving as Gangman in Railway Department and having regard to the size of the family, it was difficult for him to give Rs.1,00,000/- to accused No.1 and as such, expressed his inability, which was narrated by Sunita to accused No.1. As above referred demand was not fulfilled, the accused subjected Sunita to cruelty.

5. The complainant Baba Jamdhade invited Sunita and his son in law Sanjay for lunch, which was hosted on 22/05/2005, however as both of them did not turn up, upon inquiry at about 4-00 p.m. they learnt that Sunita has expired and they forthwith visited the place of accused No.1 and noticed that the body of Sunita was lying on the floor of the house of the accused and body was having black ligature around her neck.

6. Baba Jamdhade, father of deceased Sunita and father in law of accused No.1 Sanjay, lodged First Information Report at police station alleging the suicidal death of his daughter Sunita because of harassment meted out by accused persons on account of demand of dowry being not fulfilled.

7. On the basis of F. I. R., Crime No. 44 of 2005 for the offence punishable under Sections 498A, 306 read with Section 34 of

Indian Penal Code came to be registered against the accused at Police Station Mudkhed and initially, the investigation was carried out by P.S.I. Subhash Suryatal. He prepared the inquest panchnama by visiting the house of the accused and having noticed ligature mark around the neck of deceased Sunita, upon preparing the spot panchnama, seized broken pieces of bangles, one elastic hair bow, handkerchief and pair of Chappal of deceased from the spot. The dead body of deceased Sunita was sent for postmortem at Primary Health Center Mudkhed, where the Medical Officer conducted autopsy on the dead body of Sunita and noticed following injuries.

1. Contusion over left arm posteriorly middle part bluish discolouration 5 c.m. oval.
 2. Linear abrasion over left arm of size 4 c.m. over dorsal aspects, 7 c.m. above wrist joint.
 3. Abrasion over right forearm, it was linear size 5 c.m. oblique.
 4. Contusion over right arm posteriorly mid part to elbow oval shaped, size 6 c.m. x 5 c.m. reddish colour.
 5. Contusion over right forearm on ventral aspect size 4 c.m. x 3 c.m. oval bluish colour.
 6. Dis-coloured (reddish black) around over left shoulder and arm ventro medical aspect.
8. The Medical Officer also noticed ligature mark of brownish colour over neck below thyroid cartilage over cricoid cartilage of size 1.25 width extending upto 1.5 cm. Below mastoid process, V shaped, subcutaneous hemorrhage below the ligature mark. The said injuries

were ante mortem and upon internal examination of the dead body, the Medical Officer noticed mucosa below and within thyroid cartilage congested. Both the lungs were found severely congested with oozing of blood, noticed froth and bleeding on cut section. The Medical Officer collected viscera and skin of ligature mark and handed over the same for sending for chemical analysis.

9. Upon the medical examination, the Medical Officer concluded that the death of Sunita was caused due to asphyxia by compression of neck and accordingly, issued provisional post mortem report. Upon receipt of the provisional P.M. report regarding the cause of death, an offence punishable under Section 302 of the Indian Penal Code was added. The Investigating Officer seized the clothes of the deceased, arrested all accused persons, recorded statement of the witnesses. When the accused Sanjay was in the custody of police, he volunteered, in the presence of panchas to produce rope by which the neck of Sunita was compressed, which was hidden by him in his house behind the cupboard. In presence of panchas, the said discovery statement at the behest of accused Sanjay was recorded. Seized articles were forwarded for chemical analysis. The Investigating Officer having noticed that the accused in furtherance of their common intention subjected Sunita to cruelty, as demand of Rs.1,00,000/- was not fulfilled and as such, committed

murder and also caused disappearance of evidence of the commission of crime.

10. After completion of investigation, a charge sheet was filed against the accused persons for an offence punishable under Sections 498-A, 302, 201 read with Section 34 of the Indian Penal Code in the Court of Judicial Magistrate, First Class, Nanded, who committed the same to the Sessions Court, Nanded by an order on 10/04/2006.

11. On 24/07/2007 the Sessions Court framed charge at Exhibit-04 for the offence under above referred Sections. An additional charge for the offence punishable under Section 304-B of the Indian Penal Code was framed.

12. As the accused pleaded not guilty, the trial was set in motion. It is the defence of the accused persons in the statement under Section 313 of Criminal Procedure Code that they have not committed the crime and denied the alleged demand of Rs.1,00,000/-. They claimed that they are falsely implicated in the case.

13. After recording of evidence in the matter, learned

Sessions Court convicted the present appellants i.e. accused Nos. 1, 4 and 5 for an offence punishable under Section 302 of Indian Penal Code and accused No.1 in addition to above offence, convicted for an offence punishable under Section 201 of Indian Penal Code, however, acquitted the accused for offence punishable under Sections 498-A, 304-B read with Section 34 of Indian Penal Code and also acquitted other accused but for appellant No.1, for an offence punishable under Section 201 of Indian Penal Code. As such, present appeal by the appellants, who are convicted.

14. Mr. Gaikwad, learned Counsel for the appellants would urge that the judgment and order of the conviction is contrary to the evidence brought on record. He would further urge that the prosecution has failed to prove the case against the accused persons beyond reasonable doubt. He would further urge that as the conviction is based on the circumstantial evidence, the chain in regard to the entire circumstances pointing guilt towards present appellant-accused was not complete and as such, the conviction is liable to be set aside. He also urged that the fact that Sunita died of suicidal death is an admitted fact, as is apparent from the complaint lodged. He further added that the provisions of Section 106 of the Evidence Act is wrongly invoked by learned Sessions Court shifting of burden on the accused to prove the cause of death. According to

him, discovery of rope was not properly proved and appreciation thereof is contrary to the provisions of Section 27 of the Evidence Act. He would further urge that the spot panchnama was not properly proved and medical cause cited for the death draws only conclusion that the deceased Sunita has committed suicide. According to him, the findings are contrary to the settled proposition of law delivered by the Apex Court.

15. While countering to the above referred submissions, the learned A.P.P. would urge that the case against the accused persons was proved beyond reasonable doubt. According to him, the accused persons were present in the house at the relevant time when the deceased Sunita alleged to have committed suicide and as such, the Sessions Court has rightly invoked the provisions of Section 106 of the Evidence Act. He would further urge that the discovery, as is appreciated by the Sessions Court under the provisions of Section 27 of the Evidence Act was rightly proved, in view of the testimonies of the Investigating Officer and the panch witnesses. In addition to above, he has submitted that the prosecution has established the entire circumstances by completing the chain pointing out the guilt of the accused and said guilt is proved before the Court below beyond reasonable doubt. According to prosecution, the present appeal being devoid of merit, is liable to be

rejected.

16. In the light of above referred submissions, this Court proceeded to analyze the evidence based on which the accused persons are convicted and noticed that in support of the case of the prosecution, it has examined ten witnesses.

17. Complainant PW-1 Baba, father of the deceased is examined at Exhibit-29, who has lodged complaint at Exhibit-30, PW-2 Hemlata Vyas, who was Chairman of Mahila Suraksha Samiti, examined at Exhibit-31, has deposed in support of the matrimonial dispute, PW-3 Shantabai, mother of deceased Sunita at Exhibit-32 so as to prove the demand and harassment, PW-4 Yashwant, who was panch witness to spot panchnama at Exhibit-36 to prove the spot panchnama at Exhibit-37, PW-5 Dr. Faruki Rauf, Medical Officer, who was examined at Exhibit-39 to prove post mortem report at Exhibit-41 and short opinion at Exhibit-42, PW-6 Balaji Gajbhare, panch witness to recovery under Section 27 of the Evidence Act to the panchnama at Exhibits-46 and 47, PW-7 Dhammapal, brother of deceased Sunita at Exhibit-48 to prove the demand and harassment, PW-8 Dr. Devthankar, Medical Officer at Exhibit-51 to prove post mortem, PW-9 Subhash Suryatal and PW-10 Omprakash Jaiswal, Investigating Officers at Exhibits-52 and 53 respectively.

18. The social status of accused No.1 Sanjay, as a practicing lawyer, was not in dispute. It was brought on record that the said Sanjay initially married to one Pradnya and divorced her and entered into second wedlock with deceased Sunita. Accused No.4 i.e. appellant No. 2 is the real sister of complainant Baba and marriage of Sanjay with Sunita on 17/04/2005 was also proved. While analyzing the evidence on record, it is noticed that there is no direct evidence on the issue of murder committed by the accused and as such, this Court proceeded to evaluate the circumstantial evidence. This Court is required to analyze the issue as regards the death of Sunita, whether it was suicidal or homicidal?. Based on the testimony of witnesses PW-1 Baba, PW-3 Shantabai and PW-7 Dhammapal, who are parents and brother of deceased Sunita, it is noticed that on 22/05/2005 all of them were waiting for Sunita and her husband Sanjay for lunch. Having come to know that Sunita has expired, they immediately rushed to the said place. They noticed that the body of Sunita was lying down and none of the witnesses noticed the body of Sunita in hanging position. The contents of the complaint lodged by PW-1 Baba and his wife PW-3 Shantabai in categorical terms have deposed that they have not found rope on the spot, neither such rope was tying with rafter of roof. The defence has not examined any of the neighbours or an independent as witnesses, who have seen the

dead body of Sunita in hanging position. It is also noted that the accused husband who claimed to have taken down body from the hanging position, has neither lodged any complaint to police and as it is claimed by him that he was not present at the time of the incident, the said claim of the appellant was denied in suggestion by PW-3 Shantabai, who has in clear terms stated that the accused was very much present when they visited the spot of incident. They further claimed that the incident occurred on 22/05/2005 which was Sunday and there was no reason for the accused Sanjay to go to the Court, particularly in the back ground of the fact that accused No.1 was invited for lunch on that day at the parental house of the deceased Sunita. It was also brought on record that the place of occurrence of the incident i.e. house of accused No.1 is comparatively in close proximity to the police station and the distance between parental house of Sunita and that of Sanjay is hardly one km. It is required to take into account the suggestions and denials thereof by PW-3 Shantabai, PW-7 Dhammapal and PW-9 PSI Suryatal, who has prepared spot and inquest panchnama.

19. The defence set up by the accused persons was, that Sunita committed suicide under frustration, as accused Sanjay was not good looking. If we analyze the said defence, the Court noticed that deceased Sunita was an educated lady. The contention of the

defence that as marriage of Sunita was performed with accused Sanjay against her wish and hence she has committed suicide. While analyzing the theory of suicide, as is sought to be put forth by the accused, the evidence of PW-4 Yashwant, who is panch to the spot panchnama, is required to be taken into account and it is noticed that the description of the rafter, which is part of the roof, was brought on record. In the cross examination of PW-9, the Investigating Officer, who has prepared panchnama, the said details of rafter were also brought on record and suggestion given to the said witness PW-9 that Sunita by hanging to the said rafter has committed suicide and body was brought down by accused – mother in law was also denied by the Investigating Officer. The trial Court noticed that PW-1, 3 and 7 have deposed that they have not noticed rope at the spot of incident either hanging to the rafter or hanging around and rather denied the suggestion that the rope lying to the side of the body. In the evidence brought on record infers no marks of rope on the dust gathered on rafter, though it is claimed by the accused that Sunita has, in fact, by tying rope has committed suicide by hanging. Instead of noticing any mark of rope over the rafter of the roof, it is brought on record that the dust gathered on the rafter was not having any rope mark or other way round.

20. If the evidence of PW-5 Dr. Faruki Rauf and PW-8

Dr. Devthankar, who were examined at Exhibit-39 and 51 is considered, the said witnesses have deposed that PW-5 performed autopsy on the dead body of Sunita with PW-8 Dr. Devthankar in between 10-30 a.m. to 11-40 a.m. on 23/05/2005, in which they noticed that the dead body was moderately nourished and cold, rigor mortis well marked in lower extremity and absent in upper extremity. It is noticed that lividity was present and well marked over the back, back of buttocks and thighs. The said Doctor also noticed bloody froth coming out from nose and mouth and there was cyanosis of nails of hand and feet. The injuries noticed are already narrated herein before. The said Doctor noticed larynx was normal and further noticed thyroid cartilage was congested. Both lungs were severely congested with oozing of blood and there was froth and bleeding on cut section. He noticed ligature mark of brownish colour parchment like mark over neck below thyroid cartilage over cricoid cartilage of size of 1.25 cm. width extending up to 1.5 cm. Below mastoid process. He noticed ligature mark of V-shape, and subcutaneous hemorrhage below ligature mark. It is established in his evidence that, cause of death was due to asphyxia by compression of neck by strangulation. The Medical Officer collected viscera which was sent for analysis and issued post mortem report at Exhibit-41. He opined that ligature mark noticed are horizontal in nature and in ordinary course was sufficient to cause death. The said Doctor further

deposed that the injuries mentioned by him in Column No.17 of the post mortem report are possible to be caused while resisting the attempt of strangulation. The said Dr. PW-5 was subjected to cross examination and he stood to the cross examination by endorsing what has been stated in the examination in chief, as he has flatly denied the suggestion given to him by learned Counsel for the accused based on symptoms and signs so as to establish some other cause of death. Said Doctor has volunteered that in death by hanging and by strangulation, the type of asphyxia and most of the signs are similar. The Medical Officer PW-8 in his cross examination admitted that there was no fracture to larynx, hyoid bones, trachea, cricoid cartilages and coruna of hyoid bone, however, in his further cross examination though attempts were made by learned Counsel for the defence to establish the cause of death of Sunita was by hanging, nothing incriminating was noticed in the evidence of the said Medical Officer. He has opined that ligature mark below thyroid cartilages and over cricoid cartilages are not noticed in strangulation. The evidence brought on record that in case of death by hanging, ligature mark will be above thyroid cartilage underneath the ramus of mandible remained unchallenged. PW-5 Dr. Faruki deposed that ligature marks noticed by him were horizontal, however in provisional post mortem report at Exhibit-41 he mentioned the same as in V-shape. PW-8 has brought on record that the word 'horizontal' is not

mentioned in post mortem report and denied the suggestion that opinion Exhibit-41 given by PW-5 and post mortem report Exhibit-41 contains conflicting opinion as regards the cause of death.

21. Though the evidence of PW-5 and PW-8 was sought to be demolished for absence of firm opinion by the medical expert as regards the cause of death so as to pass on benefit to the accused, as the said fact was not established beyond reasonable doubt, this Court considered the explanation given in the examination in chief by PW-5 Faruki that, due to confusion, in Exhibit-42 he mentioned the word 'throttling'. However this Court having considered the evidence of PW-5 and PW-8, is of the opinion that the said contention of the accused is liable to be rejected as overall reading of the said evidence established the guilt of the accused No.1 beyond reasonable doubt.

22. The evidence of Medical Officer PW-5 Dr. Faruki Rauf at Exhibit-39 speaks of death of Sunita due to asphyxia by compression of neck by strangulation. The ligature marks, as per evidence of the said witness, were ante-mortem and horizontal. As such, the cause of death of Sunita was not caused by hanging but was because of strangulation, which was specifically established and the said cause points finger towards accused Sanjay.

23. This Court noticed that after marriage on 17/04/2005 the death of Sunita occurred on 22/05/2005 i.e. almost within 35 days of the marriage. The prosecution has brought charge against the accused that the accused committed murder of Sunita and caused disappearance of the evidence of the murder. The said cause was sought to be established by the prosecution, as death was noticed in the house of accused and there was no eye witness to the said incident. While establishing the case of circumstantial evidence to link the entire eventuality so as to bring the accused to the guilt, the prosecution canvassed that, there was demand of Rs. 1,00,000/- which was not fulfilled. The dead body of Sunita was lying on the ground when her parents PW-1 and PW-3 visited the said place. As regards the cause of death of Sunita, which was taken place admittedly in the house of accused, no proper explanation was coming forward from the accused persons to substantiate the theory of suicide by hanging. The prosecution established intention of the accused No.1 as can be claimed from, the body was brought down which was hanging by rope to the rafter, the discovery of rope at the instance of accused No.1, dust article from the rafter being not disturbed though it is claim of the accused that rope was tied to rafter, non-reporting of matter to the police station, which is in close proximity to the house of accused of commission of the crime in

question.

24. In the light of observations made by the Apex Court in the matter of ***Sharad Birdhi Chand Sarda vs. State of Maharashtra*** reported in ***1984 (4) SCC 116*** the Court is required to consider and analyze the prosecution case on the following principles.

- (i) The circumstances from which the conclusion of guilt is to be drawn should be fully established.
- (ii) The facts so established should be consistent with the hypothesis of guilt and the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
- (iii) The circumstances should be of a conclusive nature and tendency.
- (iv) they should exclude every possible hypothesis except the one to be proved.
- (v) 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.

25. Upon scrutiny of the evidence in the background of issue narrated herein above, the fact as regards compression of neck of the deceased, the evidence of PW-6 Balaji, who is witness to the recovery panchnama Exhibits-46 and 47, the evidence of Investigating Officer PW-10 Omprakash Jaiswal, who have deposed that on 26/05/2005 the statement was made at Exhibit-46 by accused Sanjay regarding production of hidden rope, which was seized vide panchnama Exhibit-47, evidence on the point of recovery of the said rope, which was used by the accused for strangulation of the deceased is worth accepting. The theory of accused that false case of recovery of rope was shown, If tested in the light of spot panchnama Exhibit-37, which was prepared on 23/05/2005, PW-4 Yashwant panch witness and PSI PW-9 Suryatal who has drawn the said panchnama, during their evidence stated that on the western side of the room, they noticed the bundle of service wire below the cupboard and nothing more was found. The above referred statement was sought to be relied upon by the accused in support of his case for discarding recovery of rope. However from the cross examination of panch witness Balaji, the recovery of rope was proved. Hence the case of the accused that discovery of rope was not proved is liable to be rejected. Though the issue was sought to be made out as regards the recovery of rope from the western side of room or there was no such recovery by raising challenge to the

evidence of the Investigating Officer, Omprakash Jaiswal on the said issue narrated, the accused Sanjay took him and panchas in his bedroom which was site of the incident and took out rope from the rear side of the cupboard. The evidence of panch witness Balaji, PW-6 also speaks of discovery of rope Article-G at the behest of accused Sanjay. C.A. reports Exhibits-27 and 28 speaks of observation of (striation) linear marks on surface on tissue material of the skin of the deceased and further certified that the marks were of rope Article-G. Very integrity of witnesses Balaji and Omprakash was attacked by the defence on the count that witness Balaji is maternal uncle of the deceased and the Investigating Officer was convicted in Ahmednagar Court for disappearance of evidence, however it was brought on record that the said Investigating Officer was acquitted by the High Court and as such, the trial Court has rejected the contention of discarding testimony of the said Investigating Officer. It is also noted that, even if the said panch witness is related to the deceased, however the evidence of said panch witness was not taken into consideration in isolation, as same was corroborated with the testimony of Investigating Officer and has rightly placed reliance upon the judgment of **Shivaji @ Shiva Shrimant Sonawane vs. State of Maharashtra** reported in **2010 ALL MR (Cri.) 1063** and **State of U. P. Vs. Kishanpal & ors** reported in **2009 ALL MR. (Cri.) 600 (S.C.)** so as to infer that, just because witnesses are related to

the deceased or complainant, their evidence can not be discarded. Upon analyzing the evidence of the witnesses, with these background of allegations against them, there is no ground for false implication of accused in the crime in question by these two witnesses.

26. The above referred observations reflects the commission of crime by accused No. 1-Sanjay under Section 201 of the Indian penal Code and guilt under the same is properly established.

27. If the evidence in the present case in the light of the judgment of Apex Court in the matter of **Dasari Siva Prasad Reddy Vs. Public Prosecutor, High court of A. P.** reported in **III (2004) CCR 125 (SC)**, in which the presence of the accused on the spot was noticed to be doubtful and the Apex Court has given benefit of doubt. In the light of the fact that on the date of incident, there was invitation for lunch at the maternal house of deceased Sunita, it being Sunday, the Courts were not working and accused has no reason to go to the Court nor it is brought on record by him that, he was present at some other place. The said fact coupled with the fact that the complainant PW No. 1 and his wife PW -3 visited the place of incident and noticed the presence of accused persons and denied the suggestions in the cross examination by PW-3 Shantabai as

regards late arrival of the accused on the spot, prompted this Court to draw conclusion that in the facts and evidence of this case, the said authority is not supportive to the appellants. Even in the statement under Section 313 of Cr. P. C. of the said accused, he has not mentioned that he was not present in the house when the alleged incident of hanging of Sunita took place. The fact of death of Sunita took place in the house of accused Sanjay, was very much established and as such, it was expected of the accused persons who were present and were having special knowledge about the fact, which they were required to bring on record by proper explanation as regards the cause of death of Sunita. Though Section 101 of the Indian Evidence Act casts burden on the prosecution to establish the case against the accused persons by bringing enough evidence on record by proving charge beyond reasonable doubt, however Section 106 of the Indian Evidence Act appears to be an exception to Section 102 of the Indian Evidence Act. The fact that Sunita died in the bed room of accused Sanjay within 35 days of her marriage and cause of such death was within special knowledge of accused Sanjay. Accused Sanjay has failed to discharge the same by giving appropriate explanation, as the prosecution has already established the case against accused Sanjay from the evidence discussed herein above. Having regard to law laid down in the matter of **Prashant Mahadeo Chavan Vs. State of Maharashtra** reported in **2008 All**

MR (Cri) 3069 and State of Maharashtra Vs. Baban Kishan Kulvarde reported in 2010 ALL MR(CRI) 2705 noticing failure of accused to explain as to how Sunita died, this Court is required to draw conclusion that, culpability of accusation in causing death of Sunita is established by circumstantial evidence. While evaluating the scheme of Section 106 of the Evidence Act and applicability of same to the fact of the present case, having regard to the circumstances, in which death of Sunita took place, such as, place and location of dead body, place of residence of the accused and deceased Sunita etc., having regard to the failure on the part of the accused in explaining the circumstance as regards death of Sunita, conclusion can be drawn that, burden was not discharged by the accused persons as the fact was in the special knowledge of the accused. For linking the chain of the circumstantial evidence the said aspect is material one, so as to point finger towards the guilt by accused. Upon examination of statement of accused under Section 313 of Cr. P. C., it is noticed that, though no definite version was given by the accused as regard death of Sunita, the body was first noticed by accused Sonabai, who stated in her statement that, the deceased was doing domestic work and Sonabai after long gap entered the house, noticed the body of deceased and as such, raised shout. It is further mentioned that, with the help of Surendra s/o Santosh, the body was taken down, however the said Surendra was

not examined by the defence so as to discharge the burden on the accused.

28. The Supreme Court had an occasion to consider the scheme of Section 106 in **Vikramjit Singh @ Vicky vs. State of Punjab (2007 All. S.C.R. 2094)** wherein the Apex Court has observed in para Nos. 12 to 14 thus:

"12. In the instant case, there are two versions. The learned Sessions Judge proceeded to weigh the probability of both of them and opined that the appellant having not been able to prove its case, the prosecution case should be accepted. In our opinion, the approach of the learned Sessions Judge was not correct. The High Court also appeared to have fallen into the same error. It invoked Section 106 of the Indian Evidence Act although opining:

"The section 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 from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference."

13. Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule, e.g., where burden of proof may be imposed upon the accused by reason of a statute.

14. It may be that in a situation of this nature where the court legitimately may raise a strong suspicion that in all probabilities the accused was guilty of commission of heinous offence but applying the well-settled principle of law that suspicion, however, grave may be, cannot be a substitute for proof, the same would lead to the only conclusion herein that the prosecution has not been able to prove its case beyond all reasonable doubt.”

29. Similar is the case in the matter of **Trimukh Maroti Kirkan vs. State of Maharashtra (2006) 10 S.C.C. 681**. Para Nos. 18, 31,32,33 and 34 read thus :

“18. The question of burden of proof where some facts are within the personal knowledge of the accused was examined in *State of West Bengal v. Mir Mohammad Omar & Ors.* (2000) 8 SCC 382. In this case the assailants forcibly dragged the deceased Mahesh from the house where he was taking shelter on account of the

fear of the accused and took him away at about 2.30 in the night. Next day in the morning his mangled body was found lying in the hospital. The trial Court convicted the accused under Section 364 read with Section 34 IPC and sentenced them to 10 years' RI. The accused preferred an appeal against their conviction before the High Court and the State also filed an appeal challenging the acquittal of the accused for murder charge. The accused had not given any explanation as to what happened to Mahesh after he was abducted by them. The learned Sessions Judge after referring to the law on circumstantial evidence had observed that there was a missing link in the chain of evidence after the deceased was last seen together with the accused persons and the discovery of the dead body in the hospital and had concluded that the prosecution had failed to establish the charge of murder against the accused persons beyond any reasonable doubt. This Court took note of the provisions of Section 106 of the Evidence Act and laid down the following principle in paras 31 to 34 of the reports :

31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the

major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the court to draw the presumption that the accused have murdered him. Such

inference can be disrupted if the accused would tell the court what else happened to Mahesh at least until he was in their custody."

30. The statement of appellant No. 3 Vimalbai if perused, she has stated that she has passed on message about the death of Sunita through two boys to parents of Sunita namely Baba and his wife. Even in the F.I.R., the attributions to appellant Nos. 2 and 3 i.e. accused Nos. 4 and 5 reflects the theory of suicidal death. Shantabai-mother of Sunita in her examination has stated presence of appellant Nos. 2 and 3 Sonabai and Vimalbai when she visited alongwith Baba-her husband to the place of incident near the dead body. She further narrated that both these accused informed about suicidal death. She has stated that the accused persons have committed her murder.

31. In her cross examination, she has disputed the statement as to whether accused Sonabai has given message of death of Sunita through two boys.

32. Sanjay Dhammapal Jamdhade, witness No.7, who was examined at Exhibit-48 in relation to the aspect of presence of accused Nos. 4 and 5 i.e. appellant Nos. 2 and 3 is concerned, he has narrated that accused No. 4 Sonabai narrated him about suicide by

his sister Sunita. From his evidence, the presence of accused Nos. 4 and 5, as per prosecution case, was not established.

33. So far as the defence of accused No. 3 that along with her grand son, she has removed knot of rope used for hanging by deceased Sunita and even if such defence is taken as incorrect defence, however it is required to be noted that while considering the case for conviction under circumstantial evidence, presence of both these accused on the spot of commission of crime with intention was not established. Both the accused persons from the evidence of any of the witnesses at the time of commission of crime was not in specific terms asserted.

34. In view of above, it will be improper on the part of this Court to proceed with the conviction of appellant Nos. 2 and 3 Sonabai and Vimalbai.

32. One more aspect of the matter which this Court must take note is that alleged incident took place in the bed room of accused Sanjay and deceased Sunita. Generally, family members particularly accused Nos. 4 and 5 will be hesitant in entering the room of newly married couple. It is also required to be noted that once the demand was not proved, the intention of above two

accused persons for commission of the crime cannot be termed to be established beyond reasonable doubt. Even otherwise, it is not the case of prosecution that all three accused persons conspired together to commit murder of Sunita. Since the death of Sunita is in bed room of accused Sanjay, it is primary responsibility of accused Sanjay to give explanation about the cause and circumstances, which have caused Sunita to commit suicide.

35. Even otherwise, the prosecution by bringing on record enough circumstantial evidence and medical evidence, has proved the case against accused Sanjay beyond reasonable doubt.

36. So far as accused Nos. 4 and 5 are concerned, even if the defence of accused No.4 that of entering the room after suicidal incident is taken to be incorrect, however the same appears with intention to save her son Sanjay. The said aspect cannot be part of chain of events to be considered against these two accused persons i.e. accused Nos. 4 and 5 for their conviction. As such, this Court is of the view that involvement of accused Nos. 4 and 5 i.e. appellant Nos. 2 and 3 in commission of crime is not proved beyond reasonable doubt and there is suspicion about involvement of these two accused persons in the commission of crime of murder of Sunita.

37. As such, as the prosecution has established the case against accused Sanjay beyond reasonable doubt, his appeal is dismissed, as view taken by learned trial Court ordering conviction of Sanjay appears to be just and proper.

38. In view of above, the appeal preferred by accused Sanjay Narayan Choudante is hereby dismissed.

39. So far as the appeal preferred by appellant Nos. 2 and 3 i.e. accused Nos. 4 and 5 Sonabai Narayan Choudante and Vimalbai w/o Santosh Choudante, in the light of above, stands allowed.

40. The conviction of accused No. 4 Sonabai Narayan Choudante and accused No. 5 Vimalbai w/o Santosh Choudante i.e. appellant Nos. 2 and 3 under Section 235(2) of Criminal Procedure Code for commission of an offence punishable under Section 302 of the Indian Penal Code is hereby set aside. The appellant Nos. 2 and 3 be set free, provided they are not required in any other offence.

[N.W. SAMBRE, J.]

[S.S. SHINDE, J.]