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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.110/2013

Sachin s/o Digambar Thalkari,
age 26 yrs., occu.agri.,
r/o Yusufwadgaon Tq.Kaij Dist.Beed.
...Appellant..

Versus

The State of Maharashtra,
through Police Station Officer,
Police Station, Yusufwadgaon.
Tq.Kaij Dist.Beed.
...Respondent...

.....
Shri V.D. Salunke, Advocate for appellant.
Smt.V.A. Shinde, APP for respondent.
.....

**CORAM: P.V. HARDAS &
N.W. SAMBRE, JJ.**

DATE: 17.06.2015

ORAL JUDGMENT (Per P.V. Hardas, J.) :

1] The appellant, who stands convicted for offence punishable u/s 302 of the Indian Penal Code and sentenced to imprisonment for life and to pay fine of Rs.5,000/-, in default of which to undergo further imprisonment for one month, by the Additional Sessions Judge, Ambajogai, by judgment dated 1.3.2013, in Sessions Case No.51/2012, by this appeal challenges his conviction and sentence.

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2] Facts as are necessary for the decision of this appeal may briefly be stated thus:

PW14 Kailash Munde, Police Head Constable, who was attached to Yusufwadgaon Police Station, was on PSO duty on 25.3.2012 till 8-00 a.m. of 26.3.2012. PW5 Ganesh came to the Police Station and informed about the death of his sister-in-law deceased Bhagyashri during the night at her residential house due to electric shock. The aforesaid information was scribed and on the basis of said information Accidental Death Case No.14/2012 was registered. The AD case was then entrusted to PW13 API Sonerao Bodkhe for inquiry. Exhibit 34 is the information given by PW5 Ganesh.

PW13 API Bodkhe, who was also attached to Yusufwadgaon Police Station, was entrusted with the inquiry in respect of the Accidental Death. He accordingly visited the scene of the incident at about 8-10 a.m. and drew the scene of the incident – panchanama in the presence of panchas. The said panchanama is at Exhibit 25. From the scene of the incident, he had seized one wire. In the evidence of PW13 API Bodkhe, some reference is made to certain statements alleged to

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have been made by PW5 Ganesh. PW5 Ganesh did not support the prosecution and was declared hostile. In the absence of the evidence of PW5 Ganesh in respect of making of those statements to PW13 API Bodkhe, the aforesaid statements would be inadmissible in evidence as hear-say evidence.

An inquest panchanama was thereafter drawn in the presence of panchas at Exhibit 28. The dead body was referred for *post-mortem* examination alongwith the letter at Exhibit 50. After the *post-mortem* was performed, the dead body was handed over to the relatives of the deceased. Meanwhile, PW4 Santosh, brother of deceased Bhagyashri, came to the Police Station and lodged a report.

PW15 Fahim Hashmi, who was in-charge of Yusufwadgaon Police Station, recorded the report of PW4 Santosh at Exhibit 32. On the basis of said report, he registered an offence vide Crime No.26/2012 u/s 302 and 498-A of the Indian Penal Code. The investigation of the said crime was done by PW15 API Fahim Hashmi. On the same day, he arrested the accused and recorded the statement of PW5 Ganesh. As pointed by us above, PW5 Ganesh did not

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support the prosecution as well as PW4 Santosh, who was the first informant. Both these witnesses alongwith the other witnesses were declared hostile. The educational certificates of the accused were seized under panchanama (Exh.46). The said certificates are at Exhibits 37 and 38. The electrical bill of the accused is at Exhibit 64. The electric connection was obtained in the name of father of the appellant - accused. PW15 API Hashmi called for a report from the Electrical Inspector, which was received and is at Exhibit 65. A photographer was called who took pictures of the dead body of deceased Bhagyashri. The seized property was referred to the Chemical Analyser and his report is at Exhibit 39. Further to the completion of investigation, a charge-sheet against the appellant was submitted.

3] We have heard Shri V.D. Salunke, learned counsel for the appellant and Smt.V.A. Shinde, learned APP for the respondent. With the assistance of the learned counsel for the parties, we have perused the evidence of the prosecution witnesses.

4] PW1 Shivkumar, PW2 Baburao, PW3 Lalitabai, PW4

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Santosh (first informant), PW5 Ganesh, PW6 Vijay, PW7 Mandakini (sister of deceased Bhagyashri), PW8 Rajmati (mother of deceased), PW9 Yogiraj (father of deceased), PW10 Shivraj and PW11 Avinash did not support the prosecution and were declared hostile. The trial Judge accepted the evidence of Medical Officer, who had performed the *post-mortem* i.e. PW12 Dr.Dattatraya Kendre and also relied on the evidence of PW16 Ratilal Katariya, Deputy Engineer and PW17 Smita Ravte, Assistant Electrical Inspector. The trial Judge came to the conclusion that since the incident had occurred in the wee hours of morning, it was incumbent on the accused to have explained the manner in which the deceased had died u/s 106 of the Indian Evidence Act. The trial Judge, therefore, came to the conclusion that in the absence of any explanation as well as evidence of the witnesses, adverted to above by us, proved the offence against the appellant beyond reasonable doubt.

5] The learned counsel for the appellant has rightly pointed out to us from the statement of the accused u/s 313 of the Code of Criminal Procedure that the evidence of the Medical Officer as well as the

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evidence of the PW16 Ratilal and PW17 Smita have not been put to the accused. We have, therefore, perused the statement of the accused u/s 313 of the Cr.P.C. and we find that the evidence of these witnesses has not been put to the accused. The incriminating circumstances flowing from the evidence of these witnesses had not been put to the accused in his statement u/s 313 of the Cr.P.C. and consequently will have to be left out of consideration. A reference may usefully be made to the judgment of the Supreme Court in *Sharad Birdhichand Sarda V/s State of Maharashtra (AIR 1984 SC 1622)*, particularly to paragraph nos.142, 143 and 144. The Supreme Court in the aforesaid judgment has held thus:-

"142. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz., circumstances Nos. 4,5,6,8,9,11,12,13,16, and 17. As these circumstances were not put to the appellant in his statement under s.313 of the Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this Court as far back as

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1953 where in the case of *Hate Singh Bhagat Singh v. State of Madhya Pradesh* (AIR 1953 SC 468) this Court held that any circumstance in respect of which an accused was not examined under s. 342 of the Criminal procedure code cannot be used against him ever since this decision. there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under s.342 of the or s.313 of the Criminal Procedure Code, the same cannot be used against him. In *Shamu Balu Chaugule v. State of Maharashtra*(1976)1 SCC 438 : (AIR 1976 SC 557) this Court held thus:

"The fact that the appellant was said to be absconding not having been put to him under section 342, Criminal Procedure Code, could not be used against him."

143. To the same effect is another decision of this Court in *Harijan Megha Jesha v. State of Gujarat* (AIR 1979 SC 1566) where the following observation were made:

"In the first place, he stated that on the personal search of the appellant, a chadi was found which was blood stained and according to the report of the serologist, it contained human blood. Unfortunately, however, as this circumstance was not put to the accused in his statement 160 under section 342, the prosecution cannot be permitted to rely on this statement in order to convict the appellant."

144. It is not necessary for us to multiply authorities on this point as this question now

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stands concluded by several decision of this Court. In this view of the matter, the circumstances which were not put to the appellant in his examination under s.313 of the Criminal Procedure Code have to be completely excluded from consideration. "

A reference may also be made to the judgments of the Supreme Court in -

[1] Rahim Beg V/s State of U.P.

AIR 1973 SC 343

[2] S.B. Chaugule V/s State of Maharashtra,

AIR 1976 SC 557

[3] Harijan Megha Jesha V/s State of Gujarat

AIR 1979 SC 1566

[4] Bhalinder Singh V/s State of Punjab

(1994) 1 SCC 726

[5] Kanhai Mishra V/s State of Bihar

(2001) 3 SCC 451

[6] Lallu Manjhi V/s State of Jharkhand

(2003) 2 SCC 401

6] The aforesaid judgments clearly lay down that if the incriminating circumstances are not put to the accused in his statement u/s 313 of the Code of Criminal Procedure, such circumstances will have to be left out of

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consideration. In the present case, if the medical evidence as well as the evidence of PW16 Ratilal and PW17 Smita is left out of consideration, the residue is not sufficient for convicting the accused for the offence alleged against him. PW1 to PW11 did not support the prosecution and were declared hostile. There is no evidence worth the name for sustaining the conviction of the appellant. In our opinion, therefore, the appellant is entitled to be given the benefit of doubt and deserves to be acquitted.

7] Resultantly, we allow the appeal, quash and set aside the conviction and sentence of the appellant and acquit him of the offence with which he was charged and convicted. Fine, if paid by the appellant, be refunded to him. Since the appellant is in jail, he be released forthwith if not required in any other case.

(N.W. SAMBRE, J.)

(P.V. HARDAS, J.)