

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.229 OF 1997**

Nitin Digamber Kothawade, ]  
R/of Kalwan, Dist. Nashik ] .... Appellant

***Versus***

The State of Maharashtra ] .... Respondent

Mr. A.P. Mundargi, Sr. Counsel, a/w. Mr. R.S. Desai,  
for the Appellant.

Smt. V.R. Bhosale, A.P.P., for the Respondent-State.

**CORAM : P.V.HARDAS &**  
**DR. SHALINI PHANSALKAR-JOSHI, J.J.**

**DATE : 16<sup>TH</sup> APRIL, 2015.**

**ORAL JUDGMENT [Per Dr. Shalini Phansalkar-Joshi, J.] :**

1. The Appellant, who stands convicted by the Additional Sessions Judge, Nashik in Sessions Case No.173 of 1995 by the Judgment dated 27<sup>th</sup> February, 1997 for the offences punishable under Sections 498-A, 302 and 201 of IPC and sentenced to suffer imprisonment for one year and to pay fine of Rs.500/-, in default to suffer R.I. for two months; imprisonment for life and to pay fine of Rs.5,000/-, in default to suffer R.I. for one year and R.I. for six months and to pay fine of Rs.500/-, in default to suffer R.I. for two months, respectively, by this Appeal challenges his conviction and sentence.

2. Facts, as are necessary, for deciding this Appeal can briefly be stated thus :-

The marriage of deceased Surekha, the daughter of PW-12 Ramdas, was performed with the Appellant on 26<sup>th</sup> May, 1995. It was an arranged marriage. After the marriage, she stayed in the house of her parents for about 15 days in the month of June, 1995. During her stay, she complained about the humiliation and taunting by Appellant, his parents i.e. Original Accused Nos.1 and 2, and his brother, Accused No.4, Sachin, on the ground that she was of dark complexion, too slim and, hence, not suitable to be the wife of the Appellant. Her parents tried to convince her and sent her back. However, on 23<sup>rd</sup> July, 1995, PW-12 Ramdas was informed about her death in suspicious circumstances at the house of the Appellant. Hence, he rushed there and found her dead body with a ligature mark on her neck.

3. Meanwhile, her father-in-law Digamber Kothawade, on the same day at about 9:30 am, has given the report about Surekha's death to Kalwan Police Station. PW-17 Head Constable Shivaji Gawali has, on the basis of the said report (Exhibit-83), registered the case of accidental death as A.D. No.19 of 1995. He handed over the enquiry of that A.D. to PW-18 PSI Dadaji Saste. He immediately went to the spot, along with the

Photographer PW-5 Anil Mahajan, who took the snaps of the dead body of Surekha from various angles. He called two Panchas including PW-1 Sunil Deore and in their presence, made Inquest Panchanama (Exhibit-31) and sent the dead body for postmortem examination. In the presence of PW-1 Panch Sunil Deore, PW-18 PSI Saste also made the Scene of Offence Panchanama (Exhibit-32). From the spot, he seized articles, like, the mattress, nylon belt, iron basket and cut piece of cloth.

4. On the same day, at about 5:30 pm to 6 pm, PW-12 Ramdas, father of deceased Surekha, came to the Police Station and lodged complaint against the Appellant and co-accused. On his complaint, C.R. No.56 of 1995 (Exhibit-59) was registered by PW-18 PSI Saste against the Appellant, his parents and brother for the offences punishable under Sections 498A and 302 r/w. 34 of the IPC and as per the orders of Sub-Divisional Police Officer, Niphad, he handed over further investigation to PW-15 PSI Nandakishor Kulkarni.

5. After being entrusted with the investigation, PW-15 PSI Kulkarni recorded the statements of various witnesses, including the relatives of the deceased and the mediators in the marriage. On the same day, he arrested the Appellant and other co-accused. He collected the Postmortem Report (Exhibit-52) from PW-11 Dr. Machindranath Barde.

He made certain enquiries with PW-11 Dr. Barde to satisfy himself that it was a case of asphyxia due to strangulation. On 24<sup>th</sup> July, 1995, he sent the viscera preserved by the Medical Officer to the Chemical Analyzer vide requisition (Exhibit-63). On that day, he also sent other muddemal articles seized during investigation to Chemical Analyzer at Aurangabad along with letter (Exhibit-64).

6. On 27<sup>th</sup> July, 1995, during custodial interrogation, the Appellant expressed his willingness to produce the bed-sheet stained with the blood. The Memorandum Panchanama of his statement was made vide Exhibit-44 in the presence of the Panch PW-6 Daulat Pawar. Thereafter, Appellant guided Police and Panch to his house and produced the blood stained bed-sheet, which came to be seized under Panchanama (Exhibit-45). On 31<sup>st</sup> July, 1995, PW-15 PSI Kulkarni sent the said bed-sheet to the Chemical Analyzer at Aurangabad along with his forwarding letter (Exhibit-65). The C.A. Reports are produced on record at Exhibits "66" to "73". He also recorded the statements of some of the witnesses and on 3<sup>rd</sup> August, 1995, handed over further investigation to PW-16 Dy.S.P. Sanjay Mohite.

7. On 9<sup>th</sup> August, 1995, PW-16 Dy.S.P. Mohite directed PW-15 PSI Kulkarni to take PW-3 Dr. Dattatraya Metkar, who has acted as mediator in the marriage of Appellant and deceased, to the Court of Judicial

Magistrate, First Class at Kalwan for getting his statement recorded. Accordingly, PW-15 PSI Kulkarni produced PW-3 Dr. Metkar in the Court of PW-10 Mohan Kshirsagar, Judicial Magistrate, First Class, Kalwan, who recorded his statement under Section 164(5) of the Cr.P.C. vide Exhibit-50. Further to completion of investigation, PW-16 Dy.S.P. Mohite filed Charge-Sheet in the Court against the Accused on 9<sup>th</sup> October, 1995.

8. On the case being committed to the Sessions Court, the Trial Court framed charge against the Accused vide Exhibit-19. The Accused pleaded not guilty and claimed trial.

9. In support of its case, Prosecution examined in all 18 witnesses, whereas, the Defence examined one witness by name DW-1 Hemant Bhamare. On appreciation of their evidence, the Trial Court held the guilt of the Appellant to be proved and convicted him, as aforesaid, while acquitting the other three co-Accused.

10. In this Appeal, we have heard learned Senior Counsel for the Appellant Mr. Mundargi and learned A.P.P. Smt. Bhosale. In order to effectively deal with their submissions, in our considered opinion, it would be useful to refer to the evidence on record.

11. This is an unfortunate case in which a young bride by name

Surekha has lost her life within less than two months from the date of her marriage. Certain dates in the case are relevant, like, her marriage with the Appellant took place on 26<sup>th</sup> May, 1995; immediately after the marriage, from 27<sup>th</sup> to 30<sup>th</sup> May, 1995, she was in menstruation; thereafter, on 1<sup>st</sup> June, 1995, Shree Satnarayan Pooja was performed and on 4<sup>th</sup> June, 1995, Rutu Shanti Pooja was performed. Thereafter, she went to the house of her parents for about 15 days, as per the custom. Then she went to the house of the relative for attending a wedding and returned to the house of Appellant just about 8 to 10 days prior to the incident on 23<sup>rd</sup> July, 1995, when her dead body was found in the house of the Accused with ligature mark on her neck.

12. As per Prosecution case, her death was as a result of strangulation by the Appellant, hence homicidal in nature; and the motive for the Appellant to strangle her was the Appellant being not happy with her complexion and used to taunt and humiliate her on that count.

13. As the period of the co-habitation of Appellant and deceased is of such a short duration, of less than even a month, the entire Prosecution case revolves around the question as to the nature of her death. The burden naturally is on the Prosecution to prove that Surekha had succumbed to the homicidal death. Then only the burden will shift on the

Appellant to explain the circumstances in which her death has occurred.

14. The Prosecution has, therefore, relied on the evidence of PW-11 Dr. Machindranath Barde, who, with the help and assistance of Dr. Rathod of Rural Hospital, Deola, has conducted the postmortem examination on dead body of Surekha in the Cottage Hospital at Kalwan on 23<sup>rd</sup> July, 1995. On external examination, they found rigour mortis present on upper limbs and lower limbs. They also noticed postmortem lividity present on both side lower limbs, on the back side lumbar region. The eyes were closed and congested. Tongue was caught by teeth. Some blood stains were found over both the lips and nostrils. However, they did not notice any injuries on external genitals or for that matter on any other part of her body. The material finding of their examination is noted in Column No.17, as follows :-

*“Ligature mark on the neck anteriorly placed extending from right mastoid extending anteriorly above thyroid cartilage upon the left mastoid region of the size of 10” x 1”. It was reddish brown in colour and was dry parchment like Echyomosis was found present around the ligature mark. According to them, this injury was antemortem.”*

15. On internal examination, they found presence of cerebral

congestion, larynx trachea and bronchi were oedematous and congested. Both the lungs were found congested. Petachial haemorrhage was found present. Blood was found in the right side of the heart, whereas, left side of it was empty.

16. As the viscera was preserved for analytical examination and report, at the time of issuing Postmortem Report (Exhibit-52), they did not give any opinion as to the cause of death.

17. Thereafter, on 24<sup>th</sup> July, 1995, on the enquiry made by the Police vide Exhibit-53, PW-11 Dr. Barde gave his opinion about the approximate time, during which the death was caused as between 2 am to 4 am. and on the receipt of C.A. Report, which did not disclose presence of any poisonous substance, the final cause of death was given by him as *“asphyxia due to strangulation”*. In evidence before the Court, he has stated that the ligature mark found on the dead body is possible if Muddemal Article No.6-rope is held at its two ends and is pressed against the neck.

18. The cross-examination of this witness by Defence Counsel is of utmost significance, as in his cross-examination he has given several admissions, which raise serious doubts about the final opinion (Exhibit-55) relating to cause of the death as *“asphyxia due to strangulation”*. First

admission is given by him that “he and Dr. Rathod reserved their opinion as to the cause of the death, even after completing external and internal examination, only because, on performance of postmortem examination, they could not definitely form their opinion as to the cause of the death”. He has further admitted that both of them had a feeling that there was possibility of poisoning or internal hemorrhage to the organs preserved for analytical examination and, therefore, final opinion as to the cause of death was reserved by them.

19. He has further admitted in his cross-examination that the presence of parchment like echymosis of the ligature and the empty bladder were the only two circumstances which led them to opine that the ligature was antemortem. He has also admitted that Dr. Modi, Dr. Parekh, Dr. Taylor and Dr. H.W.V. Cox are the authorities on Medical Jurisprudence and according to all these four renowned authors, almost all the symptoms of death by hanging and strangulation are same except for few exceptions. When his attention was drawn to the observations made on Page No.157 in the Modi's Book on Medical Jurisprudence, he has agreed that the marked distinguishing features of death by hanging and death by strangulation as stated by Dr. Modi therein are correct. He has further agreed with Dr. Modi's observation on the said page that in case of hanging, eyes are either closed or partly opened and tongue is caught

between the teeth, whereas, in case of strangulation, eyes are wide open, prominent and pupils dilated. Admittedly, in the present case, as noted in paragraph 13 of the Postmortem Report, the eyes were closed and the tongue was caught by teeth, which symptom thus goes more with death by hanging than with strangulation, in view of Modi's Book on Medical Jurisprudence.

20. This witness has further admitted in his cross-examination that in cases of strangulation, the palms are invariably found clenched, whereas, in the case of deceased Surekha, at the time of postmortem examination, palms were found open. Further, he has admitted that in cases of hanging, postmortem lividity tends to settle in the lower limbs. In the instant death of Surekha also, postmortem lividity was found present on both lower limbs, as noted in paragraph 12 of the Postmortem Notes.

21. The material admission given by him is that in all cases of hanging, the ligature is above the thyroid and in all cases of homicidal strangulation, it is below the cartilage. In the case of Surekha, the ligature was above the thyroid cartilage; again suggesting the case of hanging and not the strangulation. Further, he has admitted that in all cases of strangulation, the ligature mark is invariably all around the neck and is continuous in nature, whereas, in the case of hanging, the ligature mark

appears only on the anterior portion of the neck and it is discontinuous. In the present case, he has admitted that the ligature mark was only on the anterior portion of the neck and not on the posterior portion. Therefore, it was neither around the neck, nor continuous in nature, thereby again indicating the possibility of death by hanging than that of strangulation.

22. He has also admitted the fact that he did not notice any mark or indication showing struggle by the victim or any marks of injury on her body, thereby again ruling out the possibility of strangulation. The Inquest Panchanama (Exhibit-31) also does not reveal any injuries on the dead body. At this stage, it may also be stated that the Arrest Panchanama of the Appellant (Exhibit-37) also nowhere reveals any injuries even in the nature of scratches by nails etc. on the person of the Appellant. This fact again probabalizes death by hanging more than the death by strangulation. Further admitted by this witness, in cases of suspected homicidal strangulation, nail clippings of the person strangled should be collected for the purpose of analytical examination to find out if any trace of tissue matters can be found. In the instant case, no such efforts were made to collect the nail clippings of the deceased.

23. This witness has also admitted the fact that in all cases of strangulation, the person strangulating the victim uses more force than is

necessary to cause the death. Hence, in homicidal strangulation, internal bleedings or haemorrhage in the larynxial structure is invariably found. However, in the case of Surekha, he did not notice any internal bleeding or haemorrhage of the larynxial structure. Further, he has admitted that in cases of homicidal strangulation, the tongue is swollen and becomes livid. However, in the case of deceased Surekha, he found that the tongue was not swollen and livid, on the other hand, it was found congested.

24. His further admission is to the effect that before giving final opinion about the cause of death, it was necessary to examine the ligature to find out if there are any marks of friction on the fiber of the ligature. However, in the present case, Police did not send ligature to him for his opinion.

25. Though Prosecution has placed reliance upon the fact that some blood stains were found on both the lips and nostrils of the deceased and the bed-sheet with the blood stains was also seized from the spot, in support of its case to prove the death by strangulation, as per evidence of PW-11 Dr. Barde, no internal bleedings or haemorrhage was found in the larynxial structure. Hence, mere presence of blood stains on lips or nostrils, the death of Surekha cannot be termed as a result of homicidal strangulation when all other characteristics of such death are absent in the present case.

26. As regards the finding in the Inquest Panchanama (Exhibit-31) and the Spot Panchanama (Exhibit-32) that the feet of the deceased were touching to the ground and hence Prosecution is pressing for the case of strangulation and ruling out the possibility of suicide, this witness has admitted that, according to all the above referred four authorities on Medical Jurisprudence, suicide can be committed by hanging, even if feet of person are touching ground. Even there are certain cases of commission of suicide by hanging when a person is in a sitting position. He has further admitted that if the dead body lies suspended from the rope for a considerable long period, then, in that case, the length of the rope gets increased to some extent. Therefore, merely because the feet of the dead body were touching to the ground, the case of death by strangulation alone cannot be accepted, as it does not rule out the possibility of hanging also.

27. Just to summarize, therefore, the distinguishing features of death by hanging and death by strangulation on the basis of medical evidence brought on record and in the light of observations made by four renowned authors on Medical Jurisprudence referred above, in the context of the facts of the present case, can be stated in tabular form as follows :

| <b>Sr. No.</b> | <b>Death by Strangulation</b>                                                                  | <b>Death by Hanging</b>                                | <b>Features noted on dead body of Surekha in postmortem examination</b>             |
|----------------|------------------------------------------------------------------------------------------------|--------------------------------------------------------|-------------------------------------------------------------------------------------|
| 1              | Ligature is below the cartilage                                                                | Ligature is above the thyroid                          | Ligature was above the thyroid cartilage                                            |
| 2              | Eyes are wide open, prominent and pupils dilated                                               | Eyes are either closed or partly opened                | Eyes were closed                                                                    |
| 3              | Tongue is swollen and becomes livid                                                            | Tongue is caught between the teeth                     | Tongue was caught by teeth and it was not swollen and livid, it was found congested |
| 4              | Palms are invariably found clenched                                                            |                                                        | Palms were found open                                                               |
| 5              | Postmortem lividity                                                                            | Postmortem lividity tends to settle in the lower limbs | Postmortem lividity was found present on both lower limbs                           |
| 6              | Due to force, internal bleedings or haemorrhage in the larynxial structure is invariably found |                                                        | Did not notice any internal bleeding or haemorrhage of the larynxial structure      |

28. Thus, in this case, the entire evidence of PW-11 Dr. Barde, in view of the clear admissions given by him, does not establish beyond reasonable doubt that death of deceased Surekha was a case of homicidal strangulation. The possibility of death by hanging in such situations, in view of the specific differences and the distinguishing

features brought out in his cross-examination, always looms as large on the horizon. As a result thereof, it has to be held that the Prosecution has failed to prove the most important and crucial aspect of its case that the death of Surekha was homicidal in nature.

29. In view of this failure of Prosecution to prove that her death was homicidal, even accepting that her death has taken place within two months from the date of her marriage and that too in the house of the Appellant, when she was in the custody of the Appellant, the Prosecution cannot rely upon the presumption to cast a burden on the Appellant to prove the circumstances in which her death has occurred.

30. It is also not a case of dowry death punishable under Section 304-B of the IPC, when a husband or his relative can be held liable even in case of the death of the deceased occurring otherwise than under normal circumstances. Hence, even if the death of Surekha is held to be suspicious and had occurred otherwise under normal circumstances, it will not give rise to the presumption under Section 113-B of the Evidence Act, thereby attracting the ingredients of Section 304-B of the IPC. The necessary element to constitute the offence under Section 304-B of the IPC, under which dowry death is made punishable, the evidence to prove that soon before the death, the woman was subjected to cruelty for or in

connection with any demand of dowry. In this case, the Prosecution has not even alleged any such demand of dowry at the hands of the Appellant or his relatives. The charge against the Appellant is also only of 302 of IPC and not of 304-B of IPC.

31. In such situation, useful reference can be made to ***Mulak Raj and Ors. Vs. State of Haryana, (1996) 7 SCC 308***, where Prosecution has proved it to be a case of homicidal death of married woman in the house of her in-laws, but in the absence of satisfactory evidence establishing the complicity of her in-laws and her husband, it was held by the Apex Court that, *“merely because a deceased died homicidal death and her body was found in the kitchen with postmortem burns, it cannot be said that the said circumstance by itself would connect her husband and in-laws or anyone of them with the crime”*. In the instant case, the Prosecution has even failed to prove that Surekha has succumbed to the homicidal death. The possibility of death by hanging is not at all completely ruled out from the medical evidence itself. In such situation, the burden in no way can shift to the Accused to explain the circumstances under which her death took place.

32. Even as regards the offence punishable under Section 498-A of IPC, which, according to Prosecution, constituted a motive for the

Appellant to eliminate the deceased, the evidence on record is neither convincing, nor cogent or reliable. It is scanty and of general and vague nature. The married life of the deceased with the Appellant, as stated above, was hardly of less than two months. Out of that, at the most they had co-habited for a period of less than one month. Hence, there has to be some strong cause for the Appellant to do away with her. However, the only ground on which the harassment is alleged to the deceased is that of her dark complexion and being slim. As per evidence of her father PW-13 Ramdas and her mother PW-14 Vijayabai, Surekha has made complaint to them when she visited them in the month of Aashadh that her husband and in-laws were taunting and humiliating her on account of her dark complexion. According to the evidence of her parents, Surekha told them that her husband always says that he was repenting for marriage with her, as he was in a position to have better wife than she. However, they had convinced her that as she was just married, she should give some time and everything will be smooth in due course. Therefore, they had also not taken this grievance of Surekha seriously.

33. Moreover, it was an arranged marriage. As admitted by her father, before the settlement of marriage, on about three occasions, the Appellant and his relatives had come to see Surekha. Therefore, it was not a case that they were not aware of her complexion or her slim physique.

Conversely, as per the evidence of her father, she was having fair complexion and averagely built like any other normal girl. Hence, no question arises of the Appellant or his family members taunting or humiliating her on that count. Her father has also admitted that the two mediators, who arranged for this marriage, namely, PW-3 Dr. Metkar and his wife PW-4 Mangala, never told him that the Appellant or his family members have raised any grievance that Surekha was of dark complexion. It is pertinent to note that these two witnesses, who had acted as mediators for settlement of Surekha's marriage with the Appellant, had also denied that Surekha was ever subjected to such humiliation or taunting at the hands of Appellant or Surekha or her family members ever informed them about this harassment. Both of them were declared hostile, but nothing worthwhile is elicited in their cross-examination to prove the Prosecution case.

34. Thus, there is no sufficient and convincing evidence on record as to the cause of the alleged ill-treatment or the evidence relating to the actual harassment on the said cause. Hence, Prosecution has failed to prove even the motive for the Appellant to commit the murder of his wife.

35. The net result, therefore, is that in the absence of any incriminating evidence on record against the Appellant, he has to be acquitted of all the

charges. Consequently, this Criminal Appeal is allowed. The conviction and sentence of the Appellant for the offences punishable under Sections 498-A, 302 and 201 of the IPC is quashed and set aside. Appellant is acquitted of all the offences levelled against him. His Bail Bonds stand cancelled.

**[DR. SHALINI PHANSALKAR-JOSHI, J.]**

**[P.V.HARDAS, J.]**