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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.188 OF 2008

Navin Khimji Reshamwala	]	
age: 57 years,	]	
residing at: 102/A, Sanjeev Apartment	]	.. <u>Appellant</u>
N. S. Mankhikar Marg, Chunabhatti	]	Original
Sion, Mumbai 400 022	]	Accused.
	]	
(At present lodged in Nashik	]	
Central Jail, Nashik)	]	

V/s.

The State of Maharashtra	]	
at the instance of Sion Police Station	]	 Respondent
Mumbai	]	

Mr. S. V. Kotwal, I/by Mr. Ashish Sawant, for the Appellant.

Mr. A.S. Shitole, A.P.P., for the Respondent-State.

CORAM : SMT. V. K. TAHILRAMANI &
DR. SHALINI PHANSALKAR-JOSHI, JJ.

DATE : 29th JULY, 2015.

ORAL JUDGMENT : [Per: Smt. V. K. Tahilramani, J.]

1. The appellant original accused has preferred this appeal against the judgment and order dated 13.2.2008, passed by the learned Additional Sessions Judge, Kurla,

Bombay, in Session Case No.357 of 2007. By the said judgment and order, the learned Additional Sessions Judge convicted the appellant under Section 302 of the Indian Penal Code and sentenced the appellant to rigorous imprisonment for life and fine of Rs.10,000/- in default rigorous imprisonment for two months.

2. The prosecution case briefly stated is as under :-

Deceased Meena was the wife of the appellant. The marriage of the appellant with Meena took place in August, 2005. This was the second marriage of Meena. After the marriage, Meena started residing with the appellant on the first floor of Sanjeev Apartment, at Sion, Chunabhatti Mumbai. Few days after the marriage, quarrels started between the appellant and Meena. The quarrels reached to such an extent that Meena and the appellant decided to get divorce by mutual consent. Hence, they both went to Advocate Daiya (P.W.7). In the month of October or November, 2006. Both of them told Adv. Daiya that they wanted to take divorce by mutual consent and they instructed Adv. Daiya to draft necessary petition. Adv. Daiya took down the instructions

from the appellant as well as deceased and noted down the same. He then drafted the petition for divorce by mutual consent. In December, 2006, appellant went to the office of Adv. Daiya, for collecting draft petition. Adv. Daiya handed over two draft petitions (Exh.25 colly.) to the appellant for approval of the appellant and deceased Meena. On 6th or 7th January, 2007, the appellant informed Adv. Daiya, that he and his wife Meena wanted to meet him. Adv. Daiya gave them appointment on 9.1.2007 between 7.00 p.m. to 9.00 p.m. The appellant contacted Adv. Daiya between 7.00 p.m. to 9.00 p.m., but at that time as there was no electricity in the office of Adv. Daiya, he asked the appellant to contact him after some time. Thereafter the appellant contacted him between 9.00 p.m. to 9.15 p.m. At that time Adv. Daiya informed them that as there is electricity in the office, they could come. The appellant and deceased Meena, then came to the office of Adv. Daiya at about 9.30 p.m. After interacting with both of them, Adv. Daiya, made necessary corrections in the draft, the appellant and Meena were not agreeing on certain points. Due to this, they were talking to each other angrily. The appellant and deceased Meena left the office of Adv. Daiya at about 10.15 to 10.30 p.m.

On 9.1.2007, at about 12 midnight, P.W.4 Sakharam, who was working as Watchman in "Sanjeev Apartment" saw the appellant and his wife Meena returning home. He opened the gate for them. Thereafter the appellant and his wife Meena went to their flat. It is the case of the prosecution that at about 12.30 a.m. the appellant assaulted his wife Meena on the head with wooden log used for washing clothes. Meena sustained injuries and died on the spot. Thereafter the appellant at about 1.00 to 1.30 p.m, left his house and went to Sion police station. P.W. 1 PSI Nage was in Sion police station at that time. The appellant went to police station and gave his name and address. He stated on account of domestic reason quarrel took place between him and his wife. During the said quarrel, he assaulted his wife with wooden log on the head and caused her death. Her dead body was lying in the house. P.W. 1 PSI Nage noted down this information in the station diary (Exh.32). PSI Nage then went to the house of the appellant. The house of appellant was opened with the key which was with the appellant. On entering inside, they saw that the electric light was on. The body of the wife of appellant was seen lying in a pool of blood in front of the latrine. She was dead. A wooden log which is used for washing clothes was

lying near the dead body. P.W.1 PSI Nage then went to police station and lodged F.I.R. Thereafter investigation commenced. After completion of investigation, chargesheet came to be filed.

3. Charge came to be framed against the appellant under Section 302 of IPC. The appellant pleaded not guilty to the said charge and claimed to be tried. His defence is that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge convicted and sentenced the appellant as stated in para (1) above, hence this appeal.

4. We have heard the learned counsel for the appellant and learned APP for the State. We have carefully considered their submissions, facts and circumstances of this case, the judgment and order passed by the learned Sessions Judge and the evidence on record. After carefully considering the matter, we are of the opinion that the appellant assaulted his wife Meena with wooden log on the head and caused her death.

5. There is no eye witness in the present case. The case totally depends upon the circumstantial evidence. The circumstances against appellant are as under :-

i. The appellant and his wife Meena were the only two persons residing in the house at the relevant time. At about 12.00 mid night, the appellant and Meena was seen going into their house and at about 3.00 a.m. when P.W.1 PSI Nage went to the house of appellant, he found Meena was lying dead with injuries on her person.

ii. Motive.

iii. The banian and underwear of the appellant which were found in the house were found stained with blood. The banian and underwear of the appellant were stained with blood group "O". As per C.A. report the blood group of deceased was "O" and the blood group of appellant was "A".

6. The first circumstance is that the appellant and the deceased were the only persons staying in the house at the relevant time. No other person was residing in the house except the appellant and deceased Meena. P.W.5 Manoj was residing on the second floor of Sanjeev Apartment. The

appellant was residing on the first floor of Sanjeev Apartment with his wife Meena. P.W.5 Manoj has stated that the appellant got married and started residing alongwith his wife. The appellant and his wife were the only members in the house of appellant. P.W.6 Varsha was the sister-in-law of deceased Meena. P.W. 6 Varsha has stated that she knew the appellant as he was husband of her sister-in-law Meena. The marriage of appellant and Meena took place in August 2005. After the marriage, Meena started residing with her husband i.e. appellant in the flat at Chunabhatti. P.W. 6 Varsha has stated that the appellant and his wife Meena were the only members residing in that flat. Thus, the evidence on record shows that the appellant and the deceased were the only two persons residing in the flat at the relevant time. The evidence of P.W.4 Sakharam, who was watchman at Sanjeev Apartment shows that the appellant and his wife returned home on 9.1.2007 at about 12.00 midnight. P.W.4 Sakharam has stated that he opened the gate for them. The appellant and his wife went to their house. However, some time thereafter i.e. between 1.00 to 2.00 p.m. the appellant alone came down and he went out. The evidence of P.W.1 PSI Nage shows that at about 1.45 p.m., the appellant came to Sion Police Station and narrated some

facts to him which he noted down in the station diary. Pursuant to the information given by the appellant, PSI Nage went to the house of appellant. The door of the house of the appellant was opened with key which was with the appellant. When they entered the flat, they saw that Meena was lying dead in a pool of blood and a wooden log used for washing clothes was lying near the dead body. Thus, the evidence on record shows that the appellant and the deceased were the only two persons in the house. They entered the house at about 12.00 mid night and at about 3.00 p.m. P.W.1 PSI Nage, found that Meena was lying dead in the house with injuries on her person. In such case, Section 106 of the Evidence Act would come into play.

7. The evidence on record shows that the appellant and the deceased were the only two persons in the house at the time of the incident. In such case, the accused has to explain how the deceased sustained injuries and died. In this connection, we may refer to Section 106 of the Evidence Act. Section 106 of the Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In several recent decisions, the

Supreme Court has held that the principle which underlies Section 106 of the Evidence Act can be applied in such cases. In the case of **State of Rajasthan Vs. Kashi Ram**¹, the Supreme Court has observed that if the accused 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. It may be noted that the appellant has not given any reasonable or plausible explanation for the death of his wife.

¹ (2006)12 SCC 254 : AIR 2007 SC 144

8. The second circumstance against the appellant is motive. P.W.5 Manoj, P.W.6 Varsha and P.W.7 Adv. Daiya, have stated about motive. P.W. 5 Manoj was the neighbour of the appellant and the deceased. Appellant and deceased Meena used to reside on the first floor of Sanjeev Apartment and Manoj used to reside on the second floor of Sanjeev Apartment. Manoj has stated that initially the appellant was residing alone in the flat. Thereafter he came to know that the appellant was going to marry. Thereafter appellant got married and started residing in his flat alongwith his wife. 4 to 5 days after the marriage, they started hearing quarrels taking place between the appellant and his wife.

9. P.W.6 Varsha was the sister-in-law of deceased Meena. Varsha has stated that she knew the appellant as he was the husband of her sister-in-law meena. The marriage of appellant and Meena took place in August 2005. Three months prior to the incident Meena told her that she had some problem with the appellant. Thereafter 3 to 4 days prior to the incident, Meena informed her on telephone that she and the appellant were going to take divorce. This shows that all was not well between Meena and the appellant, otherwise there was no question of taking divorce.

10. Last witness on the point of motive is P.W.7 Adv. Daiya. He has stated that Meena had also approached him previously as her first husband had filed petition for divorce against her. In the said matter, Meena and her earlier husband settled the matter and secured divorce by mutual consent from the Family Court. Thereafter in the year 2006, Meena contacted him in the month of August or September, and told him that she wanted to file complaint under Section 498A of IPC against her husband namely Mr. Navin Reshamwala. Adv. Daiya, advised Meena to be patient and not to take such a drastic step. Thereafter in October or November, 2006, Meena alongwith the appellant came to his office. Both of them told him that they wanted to take divorce by mutual consent and both of them instructed him to draft petition for divorce by mutual consent. Adv. Daiya, took the instructions and noted them down. Thereafter he drafted the petition. Then appellant approached Adv. Daiya, in his office in December, 2006 for collecting draft petition. Adv. Daiya handed over two drafts (Exh.25 colly.) to him for their approval. Thereafter on 6th or 7th January, the appellant told Adv. Daiya that the appellant and his wife wanted to meet

him. Adv. Daiya told them to come between 7.00 p.m. to 9.00 p.m. on 9.1.2007. On 9.1.2007, the appellant contacted Adv. Daiya between 7.00 p.m. to 9.00 p.m. At that time as there was no electricity in the office, Adv. Daiya told the appellant to contact him after some time. The appellant contacted him between 9.00 to 9.15 p.m. At that time there was electricity in the office, hence Adv. Daiya told them to come. Then the appellant and the deceased Meena came to the office of Adv. Daiya at about 9.30 p.m. After interacting with both of them, necessary corrections were made in the draft. The said draft is at Exh.25 colly. Adv. Daiya has stated that the appellant and deceased were not agreeing on some points due to which they were talking to each other angrily. Thereafter they left his office at about 10.15 to 10.30 p.m. Thus, the evidence of P.W.4, P.W.5 and P.W.7 shows that all was not well between the appellant and the deceased and the relations between them were strained to such a extent that they were seeking divorce.

11. As stated earlier Adv. Daiya has stated that at about 10.15 to 10.30 p.m, the appellant and the deceased Meena left his office. The evidence of P. W.4 Sakharam, who

was Watchman of the building in which appellant and the deceased were residing shows that the appellant and Meena returned home at about 12.00 mid night. Thereafter between 1 to 2.00 p.m. the appellant came down alone and went out. About 1½ hour later, appellant returned with police. The evidence of P.W.1 PSI Nage, shows that at about 1.45 p.m. the appellant came to the police station and narrated certain facts to him which were noted down by him in the station diary. The station diary entry (Exh.32) shows that the appellant came to the police station and informed that due to domestic reason, quarrel took place between him and his wife in the house and during the course of the quarrel, the appellant assaulted his wife with wooden log used for washing clothes which caused her death. Thereafter P.W.1 PSI Nage and appellant went to the house of appellant. PSI Nage has stated that the appellant opened the door of his flat with the key which was with the appellant. Electric light was on. They saw body of the wife of appellant lying in a pool of blood near latrine. The wooden log used for washing clothes was lying near the dead body. Thereafter PSI Nage registered F.I.R. The sequence of events as seen from the evidence on record excludes the possibility of any other person entering into the

house of the appellant and causing the death of his wife.

12. It is the prosecution case that the appellant assaulted his wife with wooden log which led to her death. This is supported by the medical evidence. P.W.2 Dr. Ghuge conducted the postmortem on the dead body of Meena. On External examination, he found 9 contused lacerated wounds, out of which five were on the head.

According to Dr. Ghuge, all these injuries were antemortem injuries. On internal examination Dr. Ghuge, noted following injuries:-

- I) Sub Scalp haematoma 40 to 50 cc over frontal region.
- II) Depressed fracture of skull over frontal region.

Dr. Ghuge also noted fracture over right parietal region. In the opinion of Dr. Ghuge, the cause of death is head injury due to blunt impact in case of assault. According to Dr. Ghuge, all internal injuries corresponding to injury No.(1) and (3) in column No. 17 in the ordinary course of nature are sufficient to cause death. These injuries are possible by mallet (wooden log).

13. When P.W. 1 PSI Nage and other staff entered the house of appellant and saw wife of the appellant lying dead in a pool of blood with injuries on her person, he drew the spot panchanama (Exh.16). While drawing spot panchanama, one banian and one underwear stained with blood were found in the house. They were seized. According to the prosecution, these clothes were worn by the appellant at the time of incident. These clothes were sent to the Chemical Analyzer. As per Chemical Analyzer's report (Exh. 20 colly), these clothes were stained with blood of "O" group. The wooden log was also seized during the spot panchanama and sent to the Chemical Analyzer. As per Chemical Analyzer's report (Exh.20 colly), wooden log was stained with blood of "O" group. As per Chemical Analyzer's report Exh.20 colly, the blood group of the appellant is "A" and the blood group of the deceased is "O". In such case, finding of blood stains of "O" group on the clothes of appellant, is also a strong incriminating circumstance against the appellant.

14. Mr. Kotwal, the learned counsel appearing for the appellant has submitted that even if it is accepted that the act of the appellant of assaulting his wife Meena with wooden log

used for washing clothes, resulted in her death, the case would not fall under Section 302 of IPC but it would fall under Section 304 Part II or at the most 304 Part I of IPC. He pointed out that the evidence on record shows that quarrel was going on between the appellant and his wife Meena during which the appellant assaulted his wife Meena with wooden log which led to her death.

To show that the incident occurred during a sudden quarrel, Mr. Kotwal placed reliance on the station diary entry (Exh.32). P.W.1 PSI Nage has stated that the appellant quoted certain facts to him which he noted down in the station diary. The station diary entry (Exh.32) shows that the appellant came to the police station and informed him on account of domestic reason, quarrel took place between him and his wife and during this quarrel, he assaulted his wife with wooden log used for washing clothes and caused her death.

15. Mr. Kotwal pointed out that medical evidence shows that the only injury Nos 1 and 3 were serious injuries and they caused fracture of skull. On going through the medical evidence, we do find that only injury Nos 1 and 3 were serious injuries which caused fracture of skull, rest were contused

lacerated wounds which did not cause any internal damage. Mr. Kotwal submitted that the appellant did not come to the house armed with weapon, but he picked up wooden log which was lying in the house during the course of sudden quarrel and assaulted his wife Meena with the said wooden log. He further submitted that assault was not premeditated or preplanned, but it happened on the spur of moment in the heat of anger. Mr. Kotwal, submitted that in similar circumstances, the Supreme Court has held that the case would fall under Section 304 Part II of IPC. To support his contention, he placed reliance on the decision of Supreme Court in **Kusha Laxman Waghmare -vs- State of Maharashtra**². He pointed out that in the said case also there was injury to the brain as well as other injuries which is reflected in para (5) of the judgment which reads thus :-

“5. Dr. Parshuram Kotekar was examined as PW 4, who conducted the postmortem over the dead body of the deceased. According to him, the death was caused due to intrathoracic haemorrhage due to fracture of right and left ribs with intracranial haemorrhage”

² (2014) 10 SCC 298

Mr. Kotwal, pointed out that paragraph No.2 of the said decision shows that the appellant in the said case had assaulted his wife with wooden bar. The Supreme Court observed that the appellant Kusha Laxman Waghmare had assaulted his wife with wooden bar and after observing the injuries caused by Kusha, the Supreme Court held that the case would fall under Section 304 part II of IPC.

16. In the present case also, the appellant has used weapon like wooden bar. The incident in the present case occurred during a sudden quarrel. In such case, in our view, *exception four* to Section 300 would be attracted. However, in our view, the case would not fall under Section 304 part II, but it would fall under Section 304 part I of IPC because we are of the opinion that the appellant did not just have the knowledge that his act is likely to cause death as contended by Mr. Kotwal, but in fact the appellant intended to cause the death of Meena. We say so on the basis of weapon used, the part of the body where injuries were inflicted, force used while assaulting and the nature of the injuries. Looking to all these facts we are of the considered opinion that the case cannot fall under Section 304 part II of IPC.

17. Considering the evidence on record, we are of the view that *exception four* to *Section 300* applies to the facts of this case and the appropriate conviction would be under Section 304 part I of IPC. Hence the conviction of appellant under Section 302 of IPC is set aside and instead the appellant is convicted under Section 304 part I of IPC. In our view sentence of rigorous imprisonment for 8 years and fine of Rs.10,000/- in default rigorous imprisonment for two months would meet the ends of justice. Appeal is partly allowed in above terms.

[DR.SHALINI PHANSALKAR-JOSHI, J.]

[SMT. V.K.TAHILRAMANI, J.]