

Anand

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

CRIMINAL APPEAL NO.494 OF 2006
(Against conviction)

Joyeb Mohasin Punawala	].Appellant
Age:44 yrs	]
Residing at Shivam Building,	]
Om Traders, Adjacent to	]
Dreamland Hotel, Badlapur(W)	]
Thane.	]

V/s.

The State of Maharashtra	].Respondent
(Through Mumbra Police Station)	]

Mrs.Nasreen S.K.Ayubi, Advocate appointed for
the Appellant
Smt.V.R.Bhonsale,APP, for the Respondent/State

**CORAM : SMT.V.K.TAHILRAMANI AND
SMT.I.K.JAIN, JJ.**

DATE : 12TH FEBRUARY, 2015

ORAL JUDGMENT(PER SMT.V.K.TAHILRAMANI, J.)

. The appellant/original accused has preferred this Appeal against the Judgment and Order dated 04.03.2006 passed by the learned II Additional Sessions Judge, Thane in Sessions Case No.2 of 2005. By the said Judgment and Order, the learned Additional

Sessions Judge convicted the appellant under Sections 302 and 201 of the Indian Penal Code. For the offence punishable under Section 302, the appellant was sentenced to suffer life imprisonment and fine of Rs.100/-, in default rigorous imprisonment for ten days and for the offence punishable under Section 201, the appellant was sentenced to suffer rigorous imprisonment for three years and a fine of Rs.100/-, in default rigorous imprisonment for ten days. The learned Sessions Judge directed that the substantive sentence of imprisonment shall run concurrently.

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

(a) Deceased Nasrin was the sister of PW-1 Juyyeb Nalawala. Nasrin was married to the appellant about 18 to 19 years prior to the incident. They had one son by name Murtuja. Since a few years prior to the incident, Murtuja started residing with his maternal

grand mother because the atmosphere in the house of his parents was not good due to frequent quarrels. Initially, the appellant along with his wife Nasrin was residing at Dongri. The appellant then sold the room at Dongri. About three to four months prior to the incident, they started residing at Mumbra. The appellant was not doing any job. PW-1 Juyyeb tried to give job to the appellant, however, the appellant used to loose the job after a short period. The appellant used to demand money from his wife Nasrin. The Gold bangle of Nasrin was pledged by the appellant for obtaining money. The appellant used to consume alcohol. Nasrin used to come to the house of her mother for demanding money to give to the appellant. Nasrin's mother used to give her money, however, the appellant used to spend that money. The appellant used to beat his wife Nasrin in relation to demand for money. About six months prior to the incident, PW-1 Juyyeb i.e. brother of Nasrin had lodged

complaint at Dongri Police Station regarding the behaviour of the appellant. An N.C. came to be lodged. However, there was no change in the behaviour of the appellant even after lodging of the complaint and warning being given to the appellant by the police.

b. On 28.02.2004 the appellant telephoned his mother-in-law. He informed her on phone that Nasrin was dead. Hence, PW-2 Murtuja who is the son of the appellant and the deceased and who was residing with his maternal grand mother along with PW-3 Yusuf who was maternal uncle of the deceased went to the house of the appellant. They knocked on the door. After about 15-20 minutes the door was opened by the appellant. Murtuja and others inquired where Nasrin was. They got smell of foul odour when they entered the house. The appellant pointed out with his finger to the dead body of Nasrin. The dead body was swollen and in decomposed condition. The tongue was

protruding out. Therefore, the appellant was confined in the house and police were brought. PW-3 Yusuf then lodged complaint in the police station which is at Exhibit 37. In the said complaint, PW-3 Yusuf the maternal uncle of Nasrin has stated that on 28.02.2004 at 08:00 a.m. the appellant telephoned his mother-in-law and informed her that her daughter Nasrin has set herself on fire. Pursuant to the said information, PW-3 Yusuf, PW-2 Murtuja the son of the appellant and deceased Nasrin and others went to the house of the appellant. They saw Nasrin lying dead. The body was swollen and foul smell was emanating from the body. They all noticed that there were no burn injuries on the body. Hence, PW-3 Yusuf lodged complaint. However, the complaint of Yusuf Ali was not lodged as FIR but it was lodged as ADR. Thereafter, enquiry was held. Meanwhile, Juyyeb brother of Nasrin who was abroad came back to India. After he came back to India, he lodged formal FIR against the

appellant. After completion of investigation, charge sheet came to be filed.

3. Charge came to be framed against the appellant for the offences punishable under Sections 302, 498A, 201 and 202 of the Indian Penal Code. The appellant pleaded not guilty to the said charge and claimed to be tried. His defence was 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 Advocate for the appellant and the learned APP for the State. We have carefully considered their submissions, the facts and circumstances of this case, the Judgment and Order passed by the learned Sessions Judge and the evidence in this case. After carefully considering the same for the below mentioned reasons, we are

of the opinion that the appellant committed murder of his wife Nasrin.

5. The evidence on record shows that the appellant had the motive to commit the murder of his wife. The appellant was not doing any job and whenever his brother-in-law PW-1 Juyyeb got him a job, the appellant used to loose the job after short period of time. The appellant used to continuously demand money from his wife Nasrin. The Gold bangle of Nasrin was pledged by the appellant for obtaining money. Nasrin used to come to her mother to ask for money to give to the appellant. When Nasrin's mother used to give her money, the appellant used to spend that money. The appellant used to beat up Nasrin in relation to the demand for money. The appellant was addicted to alcohol and used to collect his friends in his house and drink alcohol. The atmosphere in the house was not peaceful. Thus, the evidence of PW-1 Juyyeb

shows that the appellant was continuously demanding money from his wife and beating her on account of demand of money. This shows that relations between the appellant and the deceased were not cordial.

6. The evidence of PW-2 Murtuja shows that at the relevant time only the appellant and the deceased were residing in their house at Mumbra. Murtuja i.e. the son of the appellant and the deceased has stated that since few years prior to the incident he was residing with his maternal grand mother as the atmosphere in his house was not peaceful. On 28.02.2004 a phone call was received from his father regarding the death of his mother. The phone was received by his grand mother. Thereafter, maternal uncle of his mother PW-3 Yusuf went to Mumbra Police Station. Thereafter they went to the house of the appellant. They knocked on the door. After 15-20 minutes the door was opened by his

father i.e. the appellant. They inquired about Nasrin. They got foul smell when they entered the house. The appellant pointed out with his finger the dead body of his mother Nasrin. The dead body of Nasrin was swollen and in decomposed condition. Thereafter, the appellant was confined inside the house and police were brought. They noticed that the tongue of Nasrin was protruding out.

7. The evidence of PW-3 Yusuf and the report lodged by Yusuf show that a phone call was received by his sister i.e. mother of Nasrin on 28.02.2004 at 08:00 a.m.. The phone call was from the appellant. The appellant informed regarding the death of Nasrin. When Yusuf came to the house of his sister at about 09:00 a.m., he saw her weeping. He made inquiry regarding why she was weeping. Then his sister informed him that the appellant had telephoned her and informed her that Nasrin had died. Thereafter, he along with PW-2

Murtuja went to Mumbra Police Station at about 10:00 to 10:30 a.m.. They visited police chowky and inquired whether they received any information regarding death of Nasrin. Police officer replied in the negative. Thereafter, they went to the house of Nasrin. The door was closed. They knocked on the door many times. Thereafter, the appellant opened the door. They made inquiry regarding Nasrin. Meanwhile, people in the neighbourhood assembled there. Yusuf told the persons to catch hold of the appellant and told them that he would bring police from the police station. Yusuf then brought the police. Yusuf then lodged complaint in the police station which is at Exhibit 37.

8. It is not in dispute that the appellant and his wife Nasrin were the only two persons residing in their house at Mumbra. The appellant and Nasrin had only one son Murtuja and Murtuja was residing with his

maternal grand mother. The dead body of the deceased was found in the house of the appellant. It was in decomposed condition and swollen. This fact is also not denied by the appellant. In his statement under Section 313 of the Code of Criminal Procedure, the appellant has admitted that for three days the dead body of his wife Nasrin was at his house. As the appellant and the deceased were the only two persons residing in the house at the relevant time, the burden would lie on the appellant to explain in what circumstances his wife Nasrin died. In such case, Section 106 of the Indian Evidence Act would come into play. 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 principles 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.

¹ (2006)12 SCC 254 : AIR 2007 SC 144

Though the Appellant was the only person in the house besides the deceased, he has not furnished any explanation in relation to how his wife sustained injuries and died. The appellant had tried to raise a defence that Nasrin had set herself on fire and she died due to this. However, this defence taken by the appellant is falsified by the medical evidence. PW-8 Dr.Dhananjay Bapurao More who conducted the post mortem on the dead body of Nasrin has stated that there were no burn injuries on the body. Thus, this false explanation given by the appellant furnishes another link in the chain of circumstances against the appellant.

9. PW-4 Farida was the neighbour of the appellant and the deceased. She was residing in the flat opposite the flat of the appellant and deceased. She has stated that on 28.02.2004 she got bad smell. She felt that the bad smell was on account of dead mouse.

When the door of the house of the appellant was opened, she noticed that foul odour was coming from inside the house of the appellant.

PW-6 Ismail was also residing on the same floor as the appellant. He has stated that bad smell was coming from the said flat since 3-4 days. Thus, from the evidence of these witnesses, it is seen that Nasrin had died a few days before 28.02.2004 on which date the appellant informed the mother of Nasrin that her daughter had died. The evidence of PW-2 Murtuja, PW-3 Yusuf & PW-1 Juyyeb shows that the appellant and the deceased were the only persons residing in the house at the relevant time. In addition, the evidence of PW-7 Imtiyaz also shows that the appellant and the deceased were the only two persons residing in the house at Mumbra. Imtiyaz has stated that Nasrin contacted him as she required a room on rent for residential purpose. Nasrin told him that a mosque should be near the place of residence. Imtiyaz told her that there was a

room available on rent at Mumbra as per her specification. Then Nasrin took the room at Amrutnagar on the 3rd floor. She was residing there along with her husband. Thus the evidence on record shows that the appellant and deceased Nasrin were the only two persons residing in the house and Nasrin was found dead in the house and not only no plausible explanation was given by the appellant – regarding her death but instead a false explanation was given by the appellant regarding her death. Thus this is a highly incriminating circumstance which heavily weighs against the appellant.

10. The evidence of PW-7 Imtiyaz shows that on 28.02.2004 the appellant came to his house. The appellant told him that Nasrin had poured Kerosene on her person and set herself on fire. The appellant told him that the incident had occurred the earlier night. Imtiyaz inquired from the appellant why he did

not tell him on the earlier day. However, the appellant kept mum. Imtiyaz then told the appellant to inform his parents and parents of Nasrin. This unnatural conduct on the part of the appellant also heavily weighs against him.

11. Mrs.Ayubi drew our attention to the evidence of PW-8 Dr. More who conducted the post mortem. She pointed out that Dr. More in his cross-examination has admitted that the death may also be natural. As far as this aspect is concerned, it is seen that body of Nasrin was found in a highly decomposed condition, hence, it was not possible for Dr. More to give an exact opinion about the death. However, Dr.More has categorically stated that no mechanical or burn injuries were seen on the body nor any signs noticed on the body which showed that it was a case of poisoning. It is worth while to mention here that it is not the defence of the appellant that Nasrin died a natural death or that she suffered from

any illness prior to the incident. On the other hand, in his statement under Section 313 of the Code of Criminal Procedure the appellant has stated that Nasrin had sustained burn injuries and died. This defence has been found to be totally false.

12. In addition to the above it is noticed that a question was put to the appellant regarding PW-7 Imtiyaz who stated that the appellant had come to his house and disclosed that Nasrin poured Kerosene on her person and set herself on fire. The appellant has admitted that this is correct. Thus, this shows that according to the appellant, it was a case of suicidal death caused due to Nasrin setting herself on fire. However, PW-8 Dr. More has stated that no burns were noticed on body of Nasrin. In such case, the admission of Dr. More that the death may be natural does not help the appellant in any manner and does not also cause a dent in the prosecution case. The

inquest panchanama as well as post mortem notes show that the tongue of Nasrin was protruding out. The appellant has also admitted in his statement under Section 313 of the Code of Criminal Procedure that the tongue of the deceased was protruding out. As stated earlier, Dr. More has categorically stated that no burn injuries were found on the body of the deceased. Moreover, symptoms like protruding of the tongue would not be seen in a case of burning. Even the spot panchanama does not show any sign of burning, charring on the walls or on any article in the house of appellant. Thus, it is seen that clearly a false defence has been set up by the appellant.

13. It is also necessary to mention here that the incident took place in a residential complex. If, indeed, it was a case of burning, the neighbours would have noticed flames or smoke coming out of the house of the appellant

but no one has noticed anything. According to the appellant, the incident occurred on the night of 27.02.2004 in his house. There are other flats also situated on the floor on which the flat of the appellant is situated. However, nobody has noticed anything amiss. If, indeed, it was a case of suicidal death, there was no reason for the appellant to keep quiet about the incident till 08:00 a.m. on 28.02.2004. If it was a case of suicidal death, the appellant would have immediately informed the police or sought the help of neighbours. The record does not show that the appellant made any attempt to save his wife. On the other hand, the evidence shows that the dead body of his wife was kept by the appellant in his house for three days. In such case, it cannot be accepted that Nasrin died because she set herself on fire and it was a case of suicidal death. Similarly, if it was a case of natural death, the appellant would not have waited for almost three days to inform

mother of Nasrin or the neighbours. As soon as he found that Nasrin was dead, he would have immediately informed mother of Nasrin, the neighbours and the police but he has not done so. This unnatural conduct on his part militates against his innocence.

14. It is apparent from the evidence of PW-2 Murtuja and PW-3 Yusuf that on 28.02.2004 for the first time the appellant gave information regarding death of Nasrin to the mother of Nasrin. Thereafter, PW-2 Murtuja and PW-3 Yusuf visited the residence of the appellant. The appellant was present in the house and when they opened the door, they got foul smell and noticed that the dead body was swollen and in decomposed condition. This fact is also not denied by the appellant. Thus, the conduct of the appellant of not informing the relatives of Nasrin immediately after the death of Nasrin is certainly inconsistent with the theory of his innocence. On the other

hand, it is totally consistent with the theory of his guilt.

15. The evidence of PW-6 Ismail who was resident of the building in which the appellant and the deceased were residing shows that foul smell was coming from the flat since 3-4 days and on 28.02.2004 one dead body of a lady was seen in the flat. This shows that to cause the evidence of the offence to disappear, the appellant had kept the dead body of his wife Nasrin at his house for 3-4 days and he did not inform anybody about the death of his wife. PW-7 Imtiyaz has stated that the appellant had informed him that Nasrin had poured Kerosene on her person and set herself on fire and that this incident took place the earlier day. However, on a query being put to the appellant about why the appellant did not inform him the earlier day, the appellant did not give any answer to Imtiyaz why he did not disclose about the

incident the earlier day. If the story of the appellant i.e. wife Nasrin poured Kerosene on her person and set herself on fire is believed, it shows that the appellant did not make any attempt to give her medical treatment or to save her. He also did not inform anybody including his neighbours or relatives of Nasrin immediately after the incident. Thus, the entire conduct of the appellant is consistent with his guilt. It is well settled principle of law that conduct of the accused previous and subsequent to the crime are relevant facts. Absence of any attempt on the part of the appellant to save the life of his wife Nasrin, his conduct in not attempting to give her any medical aid and the false plea of suicide raised by the appellant is yet another relevant fact.

16. Considering the evidence on record and especially the fact that the appellant and the deceased were the only two persons residing in

the house at the relevant time and the fact that the appellant kept the dead body of his wife in the house 3-4 days after her death till the body was decomposed, considering the false explanation given by the appellant and his conduct, it leads to the conclusion that the appellant caused death of his wife Nasrin. It is not a case of suicidal death but it is a homicidal death and only legitimate inference which can be drawn from the circumstances on record is that the appellant is responsible for the death of Nasrin. Thus, the prosecution has proved that the appellant is guilty of the offences punishable under Sections 302 and 201 of the Indian Penal Code. Thus, we find no merit in the Appeal. The Appeal is dismissed.

17. We quantify the legal fees to be paid by the High Court Legal Services Committee to the appointed Advocate Mrs.Nasreen Ayubi at Rs.5,000/-.

(SMT.I.K.JAIN, J.) (SMT.V.K.TAHILRAMANI, J.)