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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1208 OF 2007

1. Smt. Hanifa Kitabulla Khan
2. Dr. Nazneen Kitabulla Khan
3. Kum. Parveen Kitabulla Khan
4. Imran Kitabulla Khan,
 All residing at Flat No.41, 4th floor,
 'B' Wing, St. Andrew Apartment,
 Mumbai Central, Mumbai-400 008.

..Appellants.
(Accused Nos.1 to 4)

Vs.

State of Maharashtra
 (at the instance of Agripada Police Station
 C.R. No.305 of 1998)

..Respondent.

Mr. Aabad H. Ponda, i/b Mr. Ashish Raghuvanshi for Appellants.
 Mrs. S.D. Shinde, APP for Respondent-State.

**CORAM: Smt. V.K. Tahilramani, Acting C.J. &
 A.S. Gadkari, J.**

Reserved On: 29th September 2015
Pronounced On: 8th October 2015.

JUDGMENT (Per A.S. Gadkari, J.):

1 The appellants have impugned the judgment and order dated 30th October 2007 passed by the Additional Sessions Judge, Greater Mumbai in Sessions Case No.350 of 1999 thereby convicting them under Section 302

of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.5000/-each, and in default of payment of fine to further undergo rigorous imprisonment for six months. By the said judgment and order, the appellant's have also been convicted under Section 201 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for three years and to pay fine of Rs.500/- each and in default of payment of fine to further undergo rigorous imprisonment for three months. The Trial Court has directed that the sentences to run concurrently.

By the said judgment and order dated 30.10.2007, the Trial Court was pleased to acquit the appellants for the offence punishable under Section 498-A of the Indian Penal Code.

2 The facts which can be enumerated from the record and are necessary to decide the present appeal can briefly be stated thus:

(i) The date of incident in the present case is 22.10.1998. The deceased/victim Mrs. Alimunisa Izaz Khan was the daughter-in-law of the appellant no.1. The appellant nos.2 and 3 are the sister-in-law of the deceased Mrs. Alimunisa. The appellant no.4 is the brother-in-law of the deceased. In other words, the appellant nos.2 and 3 are the daughters and the appellant no.4 is the son of the appellant no.1. The deceased Mrs.

Alimunisa was the wife of Mr. Izaz Khan, the son of appellant no.1.

(ii) That on 22.10.1998 PW-3 Police Inspector Shri Maruti Naik was on duty during day time at Agripada Police Station. He received a telephonic message from the control room that a woman had expired in the room no.32, Municipal Chawl No.2, Agripada. PW-3 alongwith police staff went to the said place and found that in the said room no.32 one woman expired. The name of the said woman was disclosed as Mrs. Alimunisa Izaz Khan aged about 24 years. On the enquiry made with the persons present at the said spot, it was informed to PW-3 that the said woman had a fall in the kitchen and due to which she expired. The complainant PW-3 Police Inspector Shri Maruti Naik thereafter conducted inquest panchanama of the dead body. An ADR bearing No.401/98 dated 23.10.1998 was registered by the police and the dead body was sent for postmortem examination. In the postmortem report, it was disclosed that the death of the deceased Mrs. Alimunisa was due to rupture of spleen

(iii) During the course of investigation, it was revealed that the younger brother of the appellant no.2 Mr. Abdulla had been to the said place for drinking water at about 2.30 p.m. when he noticed the appellant nos.3 and 4 coming out of the house. He accordingly recorded statement of Mr. Abdulla. During the course of investigation, the complainant suspected

that the deceased was assaulted in the bath-room as her clothes were found to be wet and so the complainant suspected that the death of deceased Mrs. Alimunisa was a homicidal death. He also suspected that the appellants have shifted the dead body of the deceased in the kitchen and tried to screen the evidence. Thus, PW-3 P.I. Shri Naik on behalf of the State lodged the First Information Report dated 27.10.1998 at Agripada Police station which was numbered as C.R. No.305 of 1998 and the investigation was thereafter transferred to PW-8 Police Inspector Shri Dhanraj Vanjari.

(iv) The Investigating Officer thereafter recorded the statements of the relatives and neighbours. During the investigation, he received postmortem report and the report from the Chemical Analyzer. After completion of the investigation, he submitted the chargesheet in the Court of Metropolitan Magistrate, 15th Court, Mazgaon, Mumbai. As the offence under Section 302 of the Indian Penal Code was exclusively triable by the Sessions Court, the learned Metropolitan Magistrate committed the said case to the Court of Sessions.

(v) After committal of the said case, the Trial Court framed charge below Exhibit-6 under Sections 302, 201, 498-A of the Indian Penal Code. The said charge was read over and explained to the appellants in vernacular language. The appellants denied the charge and claimed to be tried. The

defence taken by the appellant no.4 since beginning was that the deceased had a fall from the kitchen platform and she suffered injuries to her body and therefore she died. In his defence he stated that on 22.10.1998 in between 2 to 2.15 p.m. he took his sister i.e. appellant no.3 to her teaching class before which everything was okay and when he returned at about 2.45 p.m., his younger brother told him that the deceased had a fall from the platform of kitchen. He thereafter contacted PW-4 Dr. Mrs. Nahid Hashmi and before the said doctor came to the spot, the deceased had already expired. He has further taken the defence that he has been falsely implicated in the said case.

(vi) The learned Trial Court after recording the evidence of the witnesses and after hearing the parties to the said case was pleased to convict the appellants by the impugned judgment and order dated 30th October 2007 as stated hereinabove.

3 Heard Mr. Aabad H. Ponda the learned Counsel for the appellants and Mrs. S.D. Shinde, the learned APP for the State and with their assistance we have perused the entire record pertaining to the present case.

4 The learned Counsel for the appellant submitted that the present case is based on the circumstantial evidence and the circumstances as has

been put forth by the prosecution does not complete the chain of circumstances thereby resulting into the hypothesis of guilt of the appellants, has not been established beyond reasonable doubt by the prosecution. He further submitted that since beginning the stand of the appellants is consistent, that the deceased had a fall from kitchen platform and therefore she suffered injuries. He also submitted that the cause of death as has been mentioned by the doctor after performing the postmortem i.e. the rupture of spleen, is a result of the fall and the said doctor in his cross-examination has admitted that the organs like spleen is easily susceptible to injury after a fall. Mr. Ponda therefore submitted that this is a case where the deceased had a fall from the kitchen platform and suffered injury. He further submitted that the prosecution has failed to prove any motive behind the present crime. He contended that the learned Trial Court in its judgment and order at para-34 has taken into consideration the extraneous material while basing the conviction of the appellants. He submitted that the appellant no.4 Imran Khan in his statement recorded under Section 313 of Cr. P.C. in answer to Question No.41 has specifically put up his defence inter alia narrating the absolute truth in the present incident. He lastly contended that the investigating agency has failed to examine the younger brother namely Abdulla whose statement has been

recorded by the investigating agency and which is on record, however, has not examined him in the trial and therefore adverse inference as contemplated under Section 114(g) of the Evidence Act has to be drawn. In support of his contention, the learned Counsel for the appellant has relied upon the decisions namely **(1) Nizam & Ors. Vs. State of Rajasthan reported in 2015(9) SCALE513, (2) Vithal Tukaram More Vs. State of Maharashtra reported in 2002 CRI. L.J. 3546 and (3) Ashok Vs. State of Maharashtra reported in (2015) 4 SCC 393.** He therefore urged before us that the present appeal may be allowed and the appellants may be acquitted from all the charges levelled against them.

5 The learned APP for the State on the other hand submitted that the spot panchanama discloses that the articles were not found scattered at the spot of incidence. She further submitted that the height of the kitchen platform is only 2.5 feet and therefore it is not possible that because of a fall from the said kitchen platform, the spleen would rupture. She further contended that no family members i.e. the appellants took any steps to inform their neighbours after they noticed the deceased Mrs. Alimunisa was found lying in the kitchen. She lastly submitted that the evidence on record is sufficient to prove the hypothesis that the appellants alone are guilty of the offence. She therefore submitted that the conviction and

sentence of the appellants may be upheld and the present appeal may be dismissed.

6 The prosecution in support of its case examined in all 8 witnesses. In order to effectively deal with the submissions advanced by the learned Counsel for the appellants and the learned APP for the State, it would be useful to advert to, in brief, the evidence of the relevant witnesses.

7 PW-1 is Amina Khalil Ahmed Ansari. PW-1 in her testimony has deposed that she was acquainted with the appellants as they were residing in the same chawl where she was residing. She was also acquainted with the deceased Mrs. Alimunisa. She deposed that about two months prior to the death of Mrs. Alimunisa, on hearing of a noise of crying of a girl she had gone to 3rd floor of the chawl. She went to the room no.35 where Salina was residing. Salina informed her that the appellant no.2 must have beaten the deceased Mrs. Alimunisa. That Sharifa and Joya (PW-2) and two to three women from the said floor had also came there. They tried to convenience the appellant no.1, but she did not give any respond. Then she returned back to her house. On 22.10.1998 she came to know about the death of Mrs. Alimunisa at about 5.00 p.m. She went to the house of the appellants and saw the dead body of Mrs. Alimunisa. She

noticed injuries on the face and neck of the dead body of Mrs. Alimunisa.

In the cross-examination of this witness, an omission with respect to the word 'neck' has been brought on record. The contradiction to the fact that she had not stated to the police that she had gone to the room of Salina after listening the noise of crying as also been brought on record at the instance of the appellants. Certain other omissions have also been brought on record at the behest of the appellants. This witness has further admitted that when she visited the house of Mrs. Alimunisa, the portion of the dead body up to the neck was not visible.

8 PW-2 is Joya Mohamed Amin Ansari. PW-2 has deposed that since last 18 years she was residing at the above address. She was acquainted with the deceased Mrs. Alimunisa. Prior to two months of death of Mrs. Alimunisa, she had gone to the room of Salina which was situated on the 3rd floor. The other ladies from the said chawl were also present. She was called to the room of Salina because in-laws of Mrs. Alimunisa were subjecting her to ill-treatment and therefore appellant no.1 was called there, but she did not come. She thereafter returned to her house. She came to know about the death of Mrs. Alimunisa at about 4.00 p.m. to 5.00 p.m. on the said date. She went to the house of the appellants and saw the dead body of Mrs. Alimunisa. That there were injuries below the eye

and neck.

In her cross-examination, an omission to the effect that she saw injuries on the 'neck' of deceased has been brought on record. She has further admitted that on the date of incident, she had not met any other accused persons and she had not seen the deceased Mrs. Alimunisa. That on the death of Mrs. Alimunisa for the first time she had seen her.

9 PW-3 is Shri Maruti Sidhram Naik, Police Inspector. He was then attached to Agripada police station as Police Inspector (Law & Order). PW-3 has deposed that on 22.10.1998, P.S.I. Shri Shaikh was on duty as station house officer. PW-3 received information about the death of a lady and therefore he alongwith other staff members went to the room no.32, Municipal Chawl No.2, Agripada. It was situated on the 3rd floor. He met the appellant no.4 Imran Khan. The appellant no.4 showed the dead body of Mrs. Alimunisa and informed that she was wife of his brother. The appellant no.4 further informed that Mrs. Alimunisa died due to fall in kitchen. In the presence of panch-witness PSI Shri Shaikh drew inquest panchanama. He noticed injuries below left eye upto ear and lower side of head. The dead body was referred to postmortem examination. An accidental death bearing ADR No.401 of 1998 came to be registered. The enquiry was entrusted to PW-3. During the enquiry he recorded statements

of the witnesses. On the basis of said statement and opinion given in postmortem report on 27.10.1998, he filed the first information report. On the basis of his first information report, C.R. Bearing no.305 of 1998 came to be registered. His statement is at Exhibit 18.

In his cross-examination, this witness has admitted that from the statement of father (PW-6) of the deceased Mrs. Alimunisa, Section 498-A of Indian Penal Code was added to the present crime. No other admission and/or omission has been brought on record by the appellants from the cross-examination of this witness.

10 PW-4 is Dr. Mrs. Nahid Zafar Hashmi. PW-4 in her testimony has deposed that she completed her BUMA, CGO. She was running a dispensary which was situated at Fatimabai chawl, ground floor, Hans road, Mumbai-4000011. The dispensary was open since 11.30 a.m. to the midnight till the last patient is examined. That on 22.10.1998, she had open the dispensary at about 11.30 a.m. When she was in the dispensary a boy knocked the door and requested her to come to visit for examining the patient. She refused and directed the said boy to bring the said patient to the dispensary. The boy informed his name as Imran (appellant no.4). He further informed that he is brother of Dr.Nazneen Khan (appellant no.2). However, PW-4 refused to go for visit and directed the said boy that the

patient would be examined by his sister Dr. Nazneen. After some time Imran again came to her dispensary and requested her to give an injection 'Dexamethasone' and a syringe as directed by his sister. Again after some time, the appellant no.4 Imran came to her dispensary and again requested her to come to his resident to see the patient. She thereafter went along with him. After going to the house, she noticed that a lady was lying on a chatai and some persons were present there. The appellant no.2-Dr. Nazneen informed her that the lady lying on the chatai was her brother's wife and requested her to examine the said lady. PW-4 examined the lady. The lady was unconscious and did not respond. PW-4 advised the appellant no.2 Dr. Nazneen to shift the lady in Nair Hospital for treatment as she was unconscious. She thereafter returned to her dispensary. On enquiry, she was informed that the lady lying on the chatai had fallen down.

In the cross-examination, this witness has admitted that an injection which she had given was a life saving drug. That there was no danger in giving the said injection and therefore she had given the appellant no.4 the said injection. That all the symptoms which she noticed after examining the lady were similar to that of a dead person.

11 PW-5 is Smt. Salina Mohd. Riyaz Ansari. This witness did not support the prosecution. At the request of learned APP, she was declared

hostile and the learned APP has cross-examined her. No useful material to the prosecution has been brought on record in the cross-examination at the hands of the learned APP. In the further cross-examination at the behest of the appellants this witness has admitted that on the date of incident the appellant no.1 was out of station. That she did not see the appellant no.2 at that time.

12 PW-6 is Abdul Mamud Khan, the father of the deceased victim. It appears from his testimony that this witness has been examined by the prosecution with a view to prove the fact of harassment and/or cruelty which was alleged to have been meted out to the deceased Mrs. Alimunisa.

In his cross-examination, this witness has admitted that the accused were treating Alimunisa properly. This witness has further admitted that on the occasion when Alimunisa had been to his house, Alimunisa informed him that she was being properly treated by the appellants. As the trial Court has acquitted the appellants under Section 498-A of the Indian Penal Code and as the State has not preferred any appeal against the said acquittal, in our opinion, the evidence of this witness does not assume much importance while deciding the present appeal.

13 PW-7 is Dr. Kiran Sambhaji Kalyankar. PW-7 was then attached

to J.J. Coroner's Court as in-charge medical officer. On 23.10.1998, he conducted postmortem examination of Mrs. Alimunisa Izaz Khan. On examination, he noticed the following external injuries which have been written in Column No.17 of the postmortem report:

- (i) Contusion over left side face extending from 2 cms. above outer $1/3^{\text{rd}}$ of left eyebrow upto maxilla involving outer $1/3^{\text{rd}}$ of upper eyelid and area below lower eyelid, 7 cms. vertically, 11 cms horizontally x muscle deep on cut section reddish colour.
- (ii) Contusion with swelling of lower lip left to midline, size 3.5 cms. x 2.5 cms. inner mucosa also contused with overlying abrasion of size 2 cms. x 2 cms. reddish colour.
- (iii) Contusion over nasal bridge, 2 cms. x 1 cms. reddish colour.
- (iv) Abrasion 1 cms. lateral to outer canthus of right eye 1.5 cms. x 1 cm. reddish colour.
- (v) Contusion over dorsal aspect of left hand 3 cms. above knuckle of index finger of size 1 cm. x 1 cm. reddish colour.

PW-7 opined that the aforesaid injuries were ante-mortem in nature. On internal examination he found the following injuries which have been mentioned in the Column No.19 of the postmortem report:

- (i) Contusion of scalp over its under surface (subgallial haematoma) on left side frontal, parietal, temporal region of size

7 cms. x 6 cms.

(ii) Left temporalis muscle contused.

(iii) Contusion of scalp with subgallial haematoma over left side occipital temporal region of size 6 cms. x 7 cms.

PW-7 has further deposed that on internal examination 2000 CC blood with clots was seen in abdominal cavity. He also found that the spleen was ruptured near its hilum. Spleen was pale, hilar and ruptured region show blood infiltration and it was of normal size and shape. That his opinion in respect of cause of death of Mrs. Alimunisa was due to haemorrhage and shock due to rupture of spleen. He has further deposed that external injury nos.1 to 3 and 5 were possible by hard and blunt object and injury no.4 is possible due to fall. He has further deposed that rupture of spleen may be due to hard and blunt object having hit by force. This witness has proved the document namely postmortem report which is at Exhibit 28.

This witness was cross-examined at length on behalf of the appellants. In his cross-examination, this witness has in para-15 admitted as under:

“15. I agree with the proposition laid down in the book The Essential of Forensic Medicine and Toxicology by K.S. Narayan

Reddy on page 225 “closed abdominal injuries are caused by blunt force and occur in falls in traffic accidents and in assault by blunt weapons” and the passage on page 226 “ apparently trivial injuries may rupture abdominal viscera. In order of frequency the structures most likely to be damaged in blunt abdominal trauma are, liver, spleen, kidney, intestine, abdominal wall, mesentery, pancreas and diaphragm”.”

This witness has denied various suggestions. He expressed his agreement with various authors on Forensic Science in his cross-examination. This witness has further admitted that, as far as the rupture of spleen is concerned, it is possible on fall but height is important and associated other injuries are also important. This witness has denied that the injury nos.1,2,3 and 5 are possible even if a person fall at height.

14 PW-8 is Shri Dhanraj K. Vanjari, the Investigating Officer. PW-8 in his testimony has deposed about various steps taken by him during the course of investigation after same was transferred to him. In his cross-examination, no material which is useful to the appellants have been elicited.

15 Thus, after taking into consideration the entire evidence on record, it is clear that the present case is based on circumstantial evidence.

It is the settled position of law that in a case of circumstantial evidence the circumstances on which the prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. In case of resting on circumstantial evidence, it is incumbent for the prosecution to prove each and every circumstance on which it proposes to rely. The circumstances so proved should be of conclusive nature i.e. they should have a definite tendency of implicating the accused. The circumstances so established should form a complete chain which should exclude every hypothesis of innocence and unquestionably point towards the guilt of the accused. In other words the circumstances should be conclusive i.e. accused and the accused alone has committed the crime.

16 After analysing the entire evidence available on record, it can clearly be discerned that no witness has stated about the presence of accused persons/appellants in the house at the relevant time except the appellant no.4 who has stated about presence of the appellant no.1 while giving explanation in answer to question no.41, recorded under Section 313 of Cr. P.C. Thus, the prosecution has utterly failed to prove beyond reasonable doubt the presence of the appellants at the scene of offence at the relevant time. It is further to be noted here that PW-5 Smt. Salima Ansari who was declared hostile at the instance of the prosecution, in her

cross-examination has admitted that on the date of incident, the appellant no.1 was out of station and she did not see the appellant no.2 in the house. Thus, the witness was examined by the prosecution in support of its case has categorically admitted that the appellant nos.1 and 2 were not present at the scene of offence at the relevant time. In view of the admission of PW-5 Smt. Salina Ansari and in the absence of any other evidence that the appellants were present in the house, presumption under Section 106 of Indian Evidence Act does not apply to the present case.

17 As stated earlier, the prosecution has failed to prove the fact beyond reasonable doubt that the appellants were present at the scene of offence when the incident in question took place. PW-7 Dr. Kalyankar in his cross-examination, has admitted that in order of frequency the organ 'spleen' is most likely to be damaged in blunt abdominal trauma. Various passages from the books pertaining to the Forensic Science and Toxicology which are on record and which were put to PW-7 during the course of cross-examination, disclosed that the said organ 'Spleen' is quite susceptible to blunt abdominal trauma and may even be torn when jarred by jumping. It has further been stated by the author Philip R. Rezek and Max Millard that 'Auto accident are the commonest cause of traumatic rupture followed closely by falls'. It is to be noted here that since

beginning it is the consistent stand of the appellant no.4 that the deceased Mrs. Alimunisa had a fall from kitchen and after the fall she was unable to get up and therefore he called PW-4 Dr. Mrs. Nahid Hashmi. The spot panchanama which is at Exhibit 34 discloses that there were lot of articles including washing machine, gas cylinder etc. in the kitchen. It appears that there were aluminum tins arranged in the kitchen. The panchanama nowhere suggests that water was splashed or spread either in bath-room or in the kitchen. The contention of the prosecution is that the deceased Mrs. Alimunisa was killed in the bath-room and thereafter brought in the kitchen and therefore her hair and clothes were wet due to water. However, in our opinion that as there was every probability that deceased might have a fall from the kitchen platform and therefore she suffered injuries and was lying in the kitchen and after noticing her lying in the kitchen, somebody in the house might have sprinkled water on her face due to which her hair and clothes become wet. However, we may note here that the prosecution has not proved beyond reasonable doubt that the deceased Mrs. Alimunisa was murdered in the bath-room and her dead body was subsequently brought in the kitchen as stated above. We are of the considered opinion that the prosecution has utterly failed to prove the fact that any of the appellants were present in the house at the relevant time. It is further to be noted here

that the prosecution has failed to give any explanation about the cause of injuries on the face of the deceased Mrs. Alimunisa and in the absence of such evidence on record, coupled with admissions given by PW-7, an irresistible conclusion can be drawn that the deceased Mrs. Alimunisa might have had a fall from the platform of kitchen and suffered injuries in the said incident. It may also be noted here that PW-6 i.e. father of the deceased in his testimony has admitted that the appellants were treating the deceased Alimunisa properly and in view of the said admission, the entire motive as alleged by the prosecution behind the crime fails.

18 After taking into consideration the entire evidence on record, we are of the considered opinion that the chain of circumstances propounded by the prosecution is not complete, which leads to the hypothesis that the appellants and appellants are only the guilty of the said crime. As stated above, the chain of circumstances is broken at various stages and places and therefore the appellants are entitled for the benefit of doubt.

19 In view of above discussion, we hereby extend the benefit of doubt to the appellants and acquit them from the charges levelled against them. Hence the following Order:

The judgment and order dated 30th October 2007 passed by the Additional Sessions Judge, Greater Mumbai in Sessions Case No.350 of

1999 is hereby quashed and set aside and the appellants are acquitted from the charges framed against them. The appellant nos.1,2 and 3 are on bail and their bail bonds are cancelled. The appellant no.4 is in custody and he be released forthwith, if not required in any other case.

20 The appeal is allowed in the aforesaid terms.

(A.S. GADKARI,J.)

(ACTING CHIEF JUSTICE)

CERTIFICATE

**Certified to be true and correct copy of the original
signed Judgment.**