

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 269 OF 2013

Pandit @ Pinu Sarjerao Sanap,
Age 23 years, Occu. Agriculture,
R/o Ulup Shivar, Taluka Bhoom,
District Osmanabad

..Appellant

Versus

The State of Maharashtra

..Respondent

Mr C.V. Thombre, Advocate for appellant
Mr K.D. Mundhe & Mr V.M. Kagane, A.P.P. for respondent-State

**CORAM : R.M. BORDE AND
A.M. DHAVAL, JJ.**

**DATE OF RESERVING
THE JUDGMENT : 23rd June 2017**

**DATE OF PRONOUNCING
THE JUDGMENT : 23rd August 2017**

JUDGMENT (Per A.M. Dhavale, J.)

1. The appellant along with his two brothers was prosecuted under Sections 302, 304-B, 498-A, 309 and 114 of the Indian Penal Code and by judgment in Sessions Case No.99 of 2008, learned Additional Sessions Judge, Osmanabad convicted the appellant only, for the offences under Sections 302, 306 and 309 of the Indian Penal Code and sentenced him as follows :

Sr.No	Section	Conviction and Sentence
1	302	Life imprisonment and fine of Rs.5,000/-, in default to suffer simple imprisonment for two years
2	316	Rigorous imprisonment for seven years and to pay fine of Rs.2,000/- in default to suffer simple imprisonment for six months
3	309	Simple imprisonment for six months

2. Aggrieved by the said conviction and sentence, the appellant – husband of the deceased has preferred this appeal.

3. Facts relevant for deciding this appeal may be stated as follows :

4. Deceased Vaishali, aged about 22 to 25 years was daughter of P.W.3 – Kusum, residing at Rameshwar Taluka Bhoom, District Osmanabad. About two years before the incident, in or about 2005, she was given in marriage to the appellant-accused no.1 Pandit Sanap resident of village Ulup, which is two K.ms. away from Remeshwar. Thereafter, she started co-habiting with him. On 27th February 2007, in the morning, dead body of Vaishali was found in her house. She had two incised wounds and three contused lacerated wounds on the neck and she died due to “Severe hemorrhage from left neck vessels due to severe lacerations to these vessels due to injury”. Her husband, appellant had consumed poison. Her mother received message on the same day at 9.00 a.m. She along with her relatives rushed to the spot and found that her daughter was lying dead in the house. One axe having blood stains was lying by the side of the dead

body. On the same day, at 2.40 p.m. she lodged first information report, which was registered at C.R.No.16 of 2007 under Sections 498-A, 302, 304-B, 309, 114 of the Indian Penal Code at Bhoom Police Station and was investigated into. P.W.3 - Kusum in her first information report alleged that dowry of Rs.35,000/- was agreed, to be paid, out of which Rs.20,000/- was paid at the time of marriage and due to her poverty, she agreed to pay the balance amount of Rs.15,000/- after one year. She could not make the payment even after one year. The accused and his two brothers Ranjeet and Dattatraya were demanding dowry of Rs.15,000/- from Vaishali and were subjecting her to ill-treatment in the form of abusing and beating. All the three accused also made demands of Rs.15,000/- from P.W.3 - Kusum by visiting her house at Rameshwar on some occasions. Whenever Vaishali was visiting her matrimonial house or whenever P.W.3 - Kusum was visiting Vaishali's house, Vaishali was weeping and deposing about the ill-treatment at the hands of accused persons. In January 2007, Vaishali had visited Rameshwar for attending '*Harinam Saptah*' and at that time, she reiterated that her husband's brother Ranjeet and step brother Dattatraya were instigating her husband and her husband at their instigation was assaulting her. When the accused and his brothers came to take back Vaishali, P.W.3-Kusum had assured that she would make the payment within short time. The investigation reveals that at the time of death, Vaishali was pregnant with gestational age of sixteen to eighteen weeks. The appellant had attempted to commit suicide. The Investigating Officer seized blood stained axe from the spot, drew spot panchanama and inquest panchnama. The clothes of Vaishali stained

with blood were seized. The autopsy was carried out on the dead body by P.W.1 Dr. Balaji. The statements of two Medical Officers to whom the accused had gone for treatment on poisoning were recorded. The statements of witnesses before whom accused No.1 made extra-judicial confession of murder and attempt to commit suicide were also recorded. The accused after arrest made a voluntary statement and produced his *Gamja*, underwear, Baniyan and Sweater, which were blood stained. While the accused was in the hospital, the Police Officer in presence of Medical Officer recorded his confessional statement. The seized articles were sent to Chemical Analyzer and the Chemical Analyzer's reports were obtained. After completion of investigation, the charge-sheet was submitted in the Court. In due course the case was committed to the Sessions Court.

5. The learned Additional Sessions Judge framed charge against the appellant and his two brothers at Exh.12 under Sections 498-A/34, 302/34, 304-B/34, 309 and 114 of the Indian Penal Code. All the accused pleaded not guilty.

6. The prosecution examined eighteen witnesses. The defence of the accused is of total denial. The appellant-accused has not given any explanation about the death of his wife in his house and the reason for him to attempt to commit suicide. The learned Additional Sessions Judge held the appellant alone guilty under Sections 302, 309 and 316 of the Indian Penal Code and sentenced him, as referred to above. He acquitted two brothers of the appellant. Hence this appeal.

7. Learned Advocate Mr Thombre has taken us through the evidence on record. He argued

(i) that the evidence regarding dowry demand and ill-treatment is not trustworthy and reliable. P.W.3-Kusum, P.W.4-Prabhu and P.W.5-Mohan have given several admissions showing that there is no substance in the allegations of dowry demand and ill-treatment before the incident. The learned trial Judge has rightly discarded the evidence on this point. Therefore, no presumption can be drawn about dowry death.

(ii) There was no motive for the accused to commit murder of his wife.

(iii) The learned trial Judge erred in relying on confessional statement of the accused before Police Officer Exh.67.

(iv) The Chemical Analyzer's report does not disclose blood stains on the axe and the clothes of the accused.

(v) Chain of circumstances was not complete so as to prove the offence beyond reasonable doubt

(vi) Hence, the appeal be allowed and the conviction be set aside and the matter if necessary be remanded.

8. Learned Additional Public Prosecutor submitted that there is evidence to show that the accused and his deceased wife were the only two persons residing in the house and during the night she was

killed. Thereafter, the accused had tried to commit suicide by consuming poison. There is extra-judicial confession by the accused before P.W.17-Laxman Sanap. There is reliable evidence of father of the accused, P.W.11-Sarjerao and his relatives to show that the murder was committed inside the house at night time when the accused and his wife were the only persons present inside. Evidence on record is sufficient and the learned trial Judge has rightly convicted the accused. No interference is called for in the judgment of conviction and sentence.

9. The points for our consideration with the findings are as follows :

1. Whether deceased Vaishali met with a homicidal death ? .. In the affirmative
2. Whether the accused committed murder of Vaishali ? .. In the affirmative
3. Whether the accused attempted to commit suicide ? .. In the affirmative
4. Whether the accused caused death of unborn child in the womb of deceased Vaishali ? .. Can't be considered/
.. sustained in absence of charge.
5. What order ? ..The appeal is partly allowed. Conviction and sentence u/s. 302 and 309 are maintained.

Conviction and
sentence u/s 316
is set aside

REASONS

Point No.1 - Whether death is homicidal ?

10. There is consistent unchallenged evidence of P.W.3 - Kusum, mother of the deceased Vaishali, P.W.4 - Raghu, maternal uncle, P.W.7 - Hanumant, the neighbour and panch to the spot panchnama. P.W.8 - Deelip Ghute, P.W.9 Subhash Sanap Police Patil, P.W.11 Sarjerao, father of the appellant and P.W.17 - Laxman Sanap that on 27th February 2007, in the morning, dead body of Vaishali was found lying in the house occupied by accused no.1 and Vaishali. Out of these witnesses, P.W.8, P.W.9, P.W.11 and P.W.17 are close to the appellant and P.W.11 is father of the appellant. They deposed that Vaishali had cut injuries on the neck with profused bleeding. Thereafter, P.W.18 - P.S.I. Jagtap came to the village and found the scene. He conducted spot panchnama Exh.29 in presence of P.W.7 - Hanumant and inquest panchnama Exh.31 and forwarded the dead body to Rural Hospital, Bhoom for post mortem.

11. P.W.1 - Dr. Balaji Phalke along with Dr. Sul, Medical Officer conducted the post mortem at 4.30 p.m. He found following injuries on the person of deceased Vaishali :

- (1) CLW over left side of mandible 7 cm x 2 cm x 2 cms.

Aterio posterior in direction. Injury was caused within 2 hours before death by forceful impact of object having one sharp edge and blunt another edge, from sharp side.

(2) CLW over neck left laterally. 5 cm x $\frac{1}{2}$ cm x 4 cm deep. Piercing left major blood vessels. Anterio posterior. Within 1-2 hours before death. By forceful impact with one object being sharp at one edge and blunt at other edge like axe.

(3) CLW medially and 3 cm below injury no.2, 4 cm x $\frac{1}{2}$ cm x 3 cm deep, oblique in direction. Within 1-2 hours before death. By forceful impact with sharp object blunt at other edge.

(4) Incised wound, in the midline of neck above the level of thyroid cartilage. 5 cm x 0.2 cm x 0.2 cm horizontal in direction. Within 1-2 hours before death. Caused by soft handed impact with a sharp weapon.

(5) Incised wound - in the midline of the neck 4 cm below injury no.4. Direction - Horizontal. Dimension 4 cm x 0.2 cm x 0.2 cm. Caused within 1-2 hours before death. Caused by weapon as stated above.

P.W.1 - Dr. Balaji deposed that deceased Vaishali died due to "Severe hypovolemic shock due to severe hemorrhage from left neck vessels due to severe lacerations to these vessels due to injury". His post mortem report is at Exh.20. He opined that the injury was sufficient to cause death in ordinary course. The injuries were dangerous to life. They could be caused by axe - Article 1. The evidence shows that somebody inflicted five blows on the neck. This

evidence has not been challenged. Hence point No.1 is answered in the affirmative.

Point Nos.2 and 3 :

12. In order to properly appreciate the evidence of the witnesses, some admitted facts are required to be stated. Deceased Vaishali, aged about 22 to 25 years was daughter of P.W.3 – Kusumbai. Her father had died long back. They were residing at Rameshwar, Taluka Bhoom, District Osmanabad. On 10th May 2005 or thereabout, Vaishali married to accused No.1 – Pandit and started co-habiting with him at Ulup, which is about two kilometers away from Rameshwar. Sister of accused Nos.1 to 3 is given in marriage to a bride from Rameshwar. The accused No.1 – Pandit, his father Sarjerao were residing outside Ulup in Sanap locality where there were five houses of Sanap families only. Vaishali gave birth to a male child and was again pregnant at the time of incident, which took place in the night between 26th February 2007 and 27th February 2007.

13. There is no direct evidence of any eye witness. The prosecution relied upon circumstantial evidence of following nature :

(I) On the fateful night, accused No.1 and deceased and their son aged about 1 to 2 years were the only persons residing in the house and dead body of Vaishali was found in the house and the accused offered no explanation to the incident as to how the murder took place and why he attempted to commit suicide.

(II) The appellant gave extra-judicial confession before P.W.17 Laxman Jagtap.

(III) The previous conduct in the form of dowry demand and ill-treatment to Vaishali.

(IV) The subsequent conduct of the accused and his attempt to commit suicide and silence of the appellant about killing/death of his wife.

(V) The denial of material undisputed events by the accused in statement under Section 313 Cr.P.C.

Custodial death with explanation

14. Though accused Nos.2 and 3 brothers of accused No.1 were also prosecuted for committing murder of Vaishali along with accused No.1, the admissions of P.W.3 Kusum disclose that accused No.2 who was working as a truck driver at Pune, while accused No.3 was residing with his mother at Jaiwantnagar, Taluka Bhoom. Evidence of P.W.11 Sarjerao, father of the appellant shows that he was residing along with accused No.1 and Vaishali in a separate house. He deposed that on the night of 26th February 2007, his daughter Shobha and son Ram had been to his house. They were chitchatting. He accidentally sustained injury to his forehead due to fiber chair pulled by his son Ram. Thereafter Shobha and accused No.2 left the house. He also left the house. Then accused No.1 and Vaishali were the only persons who stayed in the house.

15. P.W.6 Siddheshwar Sanap, nephew of appellant to whom the accused had made confessional statement but who had turned hostile has also stated that the accused No.1, Vaishali and Sarjerao were the only persons residing in the said house. P.W.8 Deelip Ghute has also stated that appellant, his wife Vaishali and his father were the only persons residing in the house.

16. In answer to question No.82, with regard to statement of P.W.11 Sarjerao, the appellant has given a strange answer that he was not knowing whether he and Vaishali were the only persons staying in the house.

17. Evidence of P.W.11 Sarjerao who had no reason to falsely implicate his son has gone unchallenged. We, therefore, hold that on the night intervening 26th February 2007 and 27th February 2007, the appellant and deceased Vaishali and their tender aged son were the only persons residing in the house.

18. The evidence of P.W.1 - Dr. Balaji shows that Vaishali died about four to six hours after her last meal. Her stomach was empty and small intestine contained digested food. When post mortem was conducted at 4.30 p.m. rigor mortis was fully developed. This suggests that the death must have occurred about twelve hours before the time of post mortem i.e. at about 4.00 a.m. The digested food suggests that if the deceased had taken her last meal between 9.00 to 11.00 p.m., she must have died somewhere between 1.00 a.m. to 5.00 p.m.

19. The law with regard to custodial death is laid down in **Trimukh Maruti Kirkan Vs. State of Maharashtra reported in (2006) 10 SCC 681** as follows :

"14. The question of burden of proof where some facts are within the personal knowledge of the accused was examined in State of West Bengal v. Mir Mohammad Omar &Ors. (2000) 8 SCC 382. In this case the assailants forcibly dragged the deceased Mahesh from the house where he was taking shelter on account of the fear of the accused and took him away at about 2.30 in the night. Next day in the morning his mangled body was found lying in the hospital.

This Court took note of the provisions of Section 106 of the Evidence Act and laid down the following principle in paras 31 to 34 of the reports : "31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

34. When it is proved to the satisfaction of the court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the

accused would tell the court what else happened to Mahesh at least until he was in their custody."Applying the aforesaid principle, this Court while maintaining the conviction under Section 364 read with Section 34 IPC reversed the order of acquittal under Section 302 read with Section 34 IPC and convicted the accused under the said provision and sentenced them to imprisonment for life.

15. *In Ram Gulam Chaudhary &Ors. v. Sate of Bihar (2001) 8 SCC 311, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for the absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they have murdered the boy. It was further observed that even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The accused by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference.*

It is also observed that, when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete.

22. *Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading*

evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

20. The statement of the accused under Section 313 Cr.P.C. shows that though he was especially within the knowledge of the incident of death of his wife, he has given no explanation for the same. He has failed to discharge burden on him under Section 106 of the Evidence Act.

Attempt to commit suicide

21. The accused has attempted to commit suicide by consuming poison. The prosecution has led evidence of P.W.2 Sanjay who deposed that the appellant was brought to him on 27th February 2007 at 11.50 a.m. for treatment as a case of poisoning. He was admitted in emergency ward. Thereafter as per letter Article-A, he was referred to Civil Hospital, Osmanabad for further treatment.

22. P.W.6 Siddheshwar Sanap, nephew of the appellant deposed that on 27th February 2007 at 6.30 a.m., the appellant came to him and told him that he had consumed poison. P.W.13 Dr. Vijaykumar Sul, Medical Officer from Bhoom deposed that the appellant was brought to him by two persons on 27th February 2007 for treatment of poisoning. Appellant was smelling of poison. He referred him to Civil

Hospital, Osmanabad for further treatment. P.W.10 Ashok Sanap is cousin of the appellant. He deposed that on 27th February 2007 at 7.00 a.m., his cousin Laxman came to him and told him that the appellant was lying under neem tree, as he was uneasy. He found the appellant lying unconscious under the neem tree. He and Siddheshwar took the appellant on bike to the Government Hospital at Bhoom. The appellant regained consciousness after 1 to 2 hours. P.W.16 Dr. Rahul Deshmukh was Medical Officer in Civil Hospital. As per his evidence, the appellant was admitted in his hospital at 11.00 a.m. as a case of poisoning. This evidence of the material witnesses on the point of poisoning has gone unchallenged. The reference letter from Medical Officer, Rural Hospital, Bhoom to Civil Hospital Exh.91, the case papers at Civil Hospital Exhs.92, 93 and 95 support the evidence of the above witnesses. Hence, we have no hesitation in accepting their evidence to hold that the appellant had attempted to commit suicide. Pertinently, in statement under Section 313 Cr.P.C., the appellant stated that he was not knowing it (answers to question No.55, 86, 97).

23. The circumstance of custodial death followed by attempt by the appellant to commit suicide are incriminating circumstances. The appellant has given no explanation whatsoever though the fact about mode of death of Vaishali was especially within his knowledge and burden was on him under Section 106 of the Evidence Act to explain the circumstances. He falsely denied the facts in statement under Section 313 Cr.P.C. Hence, relying on the above referred ruling, we hold that the above facts of custodial death and absence of explanation by themselves are sufficient to hold the appellant guilty

for commission of murder of his wife Vaishali.

Subsequent conduct

24. Besides, the P.W.6 Siddheshwar, P.W.8 Deelip Ghute, P.W.10 Ashok Sanap, P.W.17 Laxman Sanap disclose that they had met the appellant some time after the incident in the early morning. They are close to the accused. They have declined to admit that the appellant had confessed before some of them, but none of them has stated that the accused told them that his wife was killed by any outsider or even the fact that his wife was killed. None of them have stated that the appellant was weeping or was in grief. If somebody's wife is killed by somebody else, the natural reaction would bring him to tears, but there was no such evidence. He even did not tell them that his wife was murdered by any outsider. In fact, he did not tell them that his wife was dead. This subsequent conduct of the accused is additional factor supporting the ground of custodial death with no explanation and attempt to commit suicide.

Extra-judicial confession before P.W.17 - Laxman Sanap

25. There is strong supporting evidence of P.W.17 Laxman as extra-judicial confession. It is material to note that P.W.17 Laxman Sanap is related to the appellant. After the incident at 7.30 a.m., P.W.6 - Siddheshwar Sanap met him and told him that Vaishali was murdered and Pandit (the appellant) had consumed poison. He along with Siddheshwar went to accused No.1 - appellant. Accused No.1-appellant was found vomiting by the side of his house. He enquired

with appellant about the incident and the appellant told him that he had murdered Vaishali with the help of an axe and thereafter had consumed poison. His material evidence of extra-judicial confession has gone unchallenged.

26. P.W.10 Ashok, cousin of the appellant stated that when the appellant regained consciousness, he asked him what had happened and the appellant avoided to tell him anything.

27. P.W.6 Siddheshwar was not answering the question how he learnt that Vaishali was dead ?.

28. He gave the information to uncle of the accused by name Bhagwan who gave the information to Police Patil P.W.9 - Subhash.

29. In the light of above evidence, we find the evidence of P.W.17 Laxman reliable. He has no enmity with the appellant. He had no reason to depose falsely against the appellant. The surrounding circumstances corroborate his evidence. The subsequent conduct of the appellant is in consonance with the extra-judicial confession made by the appellant before him. Here there are several circumstances in support of the same. It is the case of custodial death, the appellant had attempted to commit suicide, the appellant was not weeping. The appellant has given no explanation as to who had murdered his wife.

30. There is additional evidence of extra-judicial confession before P.W.17 - Laxman Sanap. He must be related to the accused, as he is also Sanap. He deposed that on 27th February 2007 at 7.30 a.m., he was returning from his field to his house and told him that Vaishali had murdered and Pandit had consumed poison. Then both of them went

towards accused no.1. Accused no.1 told P.W.17 Laxman that he had murdered Vaishali with the help of axe and thereafter he had consumed poison.

31. In the light of these facts, we rely upon the judgment of Apex Court in the matter of **State of U.P. Vs. M.K. Anthony**, reported in **AIR 1985 SC 48**, wherein it is observed thus :

"15. There is neither any rule of law nor of prudence that evidence furnished by extra-judicial confession cannot be relied upon unless corroborated by some other credible evidence. The courts have considered the evidence of extra-judicial confession a weak piece of evidence. [See Jagta v. State of Haryana](#) and [State of Punjab v. Bhajan Singh](#) and [Ors. In Sahoo v. State of U.P.](#), it was held that 'an extra-judicial confession may be an expression of conflict of emotion, a conscious effort to stifle the pricked conscience; an argument to find excuse or justification for his act; or a penitent or remorseful act of exaggeration of his part in the crime.' Before evidence in this behalf is accepted, it must be established by cogent evidence what were the exact words used by the accused. The Court proceeded to state that even if so much was established, prudence and justice demand that such evidence cannot be made the sole ground of conviction. It may be used only as a corroborative piece of evidence. In that case, the evidence was that after the commission of murder the accused was heard muttering to himself that he has finished the deceased. The High Court did not interfere with the conviction observing that the evidence of extra-judicial confession is corroborated by circumstantial evidence. However, in [Pyara Singh v. State of Punjab](#)

(1978) 1 SCR 661, this Court observed that the law does not require that evidence of an extra-judicial confession should in all cases be corroborated. It thus appears that extra-judicial confession appears to have been treated as a weak piece of evidence but there is no rule of law nor rule of prudence that it cannot be acted upon unless corroborated. If the evidence about extra-judicial confession comes from the mouth of witness/witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused; the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, if it passes the test, the extra-judicial confession can be accepted and can be the basis of a conviction. In such a situation to go in search of corroboration itself tends to cast a shadow of doubt over the evidence. If the evidence of extra-judicial confession is reliable, trust-worthy and beyond reproach the same can be relied upon and a conviction can be founded thereon.

We rely upon unchallenged evidence of P.W.17 Laxman to hold that the extra-judicial confession (oral) by him is duly proved.

Previous ill-treatment

32. There is also evidence of dowry demand and ill-treatment led by deceased Vaishali's mother P.W.3 - Kusum and maternal uncles P.W.4- Prabhu and P.W.5-Mohan. P.W.3 - Kusum has admitted that the

marriage was solemnised near a temple. The food was cooked in the house. There was no musical band arranged. Mother of the appellant had expired and, therefore, the marriage was performed hurriedly. Her husband was dead and her financial condition was hand to mouth. She was not in a position to save Rs.500/- to Rs.1,000/- at a time. There was no previous disclosure about the ill-treatment and dowry demand. She admitted that she was not in a position to pay any dowry. P.W.4 – Prabhu and P.W.5 Mohan are the maternal uncles. P.W.5 – Mohan did not even attend the marriage of Vaishali. Considering their vague evidence of ill-treatment and previous and subsequent conduct, we find no substance in the allegations of dowry demand and ill-treatment to Vaishali on that count by the appellant. The learned trial Judge had rightly discarded the evidence on this point and acquitted the accused of the offence under Section 498-A of Indian Penal Code. Therefore, this part of the evidence cannot be used as a circumstance against the accused.

Extra-judicial confession before P.W.16 Exh.67 and P.W.18

33. Learned Sessions Judge relied on **Rajan Khristi Vs. Ashapura reported in 1997 Cr.L.J. 3702 Gujarat** and by order below Exh.61, he held that when the statement of the accused was recorded in writing before the Investigating Officer, it was admissible and bar of Section 25 of the Evidence Act was not applicable. Paragraph 13 of the said judgment shows that polygraphy test was conducted on the accused, which was held as not admissible but later on, the accused broke down and demanded pen and paper and wrote down his

confession. It was not before the Investigating Officer as wrongly shown in the placitum. It was before the F.S.L. Officer, P.W.14 Vasant.

34. In that case, since F.S.L. Officer was not the Police Officer, bar of Section 25 of the Evidence Act was not attracted. The said ruling is not applicable to this case. In this case, the P.S.I. Jagtap P.W.18 who was the Investigating Officer has recorded the confessional statement of the accused. It is clearly hit by Section 25 of the Evidence Act. Even if it is voluntarily made, still it is hit by Section 25 of the Evidence Act. In this regard, we rely upon the judgment of Apex Court in the matter of **Agnoo Nageshia Vs. State of Bihar reported in AIR 1966 SC 119.**

35. We find that the learned trial Judge erred in relying on the confessional statement of the accused Exh.67 recorded by the Police Officer in presence of P.W.16 Dr. Rahul Deshmukh.

Discovery of blood stained clothes

36. There was evidence about discovery of blood stained clothes of the accused but the Chemical Analyzer's report shows no blood stains. The evidence of panch P.W.15 - Gulab does not disclose that it was a discovery at the instance of the accused. We find that discovery of clothes of the accused merely on vague evidence of P.S.I. Jagtap cannot be said to be proved.

Weapon of offence Axe

37. It was pointed out that as per Chemical Analyzer's report Exh.64, no blood was found on the axe seized from the spot.

38. However, we find that P.W.3 Kusum had seen the blood on the axe. She has stated the said fact in her first information report Exh.23. P.W.4 Prabhu, P.W.8 Deelip Ghute, P.W.17 Laxman Sanap, P.W.9 Subhash and the Investigating Officer who drew the spot panchnama deposed that the blood stained axe was found from the spot and same was seized. The spot panchnama was accordingly drawn. It is at Exh.30. The same has been admitted by the accused, which shows that there was axe with blood stains found on the spot. There is consistent evidence of several witnesses who visited the spot that the axe was lying in the house near the dead body of Vaishali and it was stained with blood. This fact has not been challenged at all. In fact, the spot panchnama showing this position is admitted. Therefore, the Chemical Analyzer's report Exh.64 appears suspicious. The suspicion has grown as typed Chemical Analyzer's report does not disclose result of analysis of axe - Article-1. 'Article-1' has been subsequently added by pen. We find that the axe found on the spot near the dead body was the weapon used in commission of offence and it was stained with blood. The Medical Officer has opined that the injuries could have been caused by the said weapon. There are three contused lacerated wounds and two incise wounds. The incise wounds are only skin deep. Whereas, the injuries with depth are contused lacerated wounds. Therefore, all these injuries are possible by an axe.

39. Even if it is assumed that the axe found on the spot was not the weapon of offence, we rely on the judgment of Apex Court in the matter of **Himanshu Mohan Rai Vs. State of Uttar Pradesh and anr.**, reported in **2017 SAR (Criminal) 563**, wherein it is observed as follows :

15. It is possible that the prosecution may not recover the actual weapon in some cases. However, this cannot have the effect of discrediting reliable ocular testimony as we have here that the accused shot and killed the deceased, particularly when the lead bullets have been recovered and are found belonging to a commonly used 7.65 m.m. Caliber i.e. .32 bore weapon.

In Anvaruddin vs. Shakoor, this Court considered the effect of obscure and oscillating evidence of the ballistic expert. The Court observed that :

“10.... In this nebulous state of the evidence of the ballistic expert we are of the view that the High Court was wholly wrong in doubting the direct evidence of the three eye-witnesses on this ground. Where the expert evidence is obscure and oscillating, it is not proper to discredit the direct testimony of the eye-witnesses on such uncertain evidence. In such a situation unless the evidence of the eye-witnesses is shaken by some glaring infirmities, it would not be proper to doubt the correctness of their statements....”

Motive

40. There is no evidence on the point of motive. When the circumstantial evidence is clinching and unmistakably pointing out that the accused and accused alone has committed the murder, the

absence of motive is not relevant.

41. For the reasons discussed herein above, we find that the prosecution has established that the appellant had committed murder of his wife - Vaishali and had attempted to commit suicide. Though we have discarded dying declaration relied upon by the learned Sessions Judge, on the basis of material proved, we uphold his findings with regard to the murder of Vaishali by the accused and attempt to commit suicide by the accused no.1.

Causing death of quick unborn child

42. The learned trial Judge has also framed a point and held the appellant guilty under Section 316 of the Indian Penal Code and he has been convicted under Section 316 of the Indian Penal Code. However, we find that there was no charge framed for the offence punishable under Section 316 of the Indian Penal Code. Complete absence of charge under Section 316 of the Indian Penal Code must have caused lot of prejudice to the appellant. There is no proper evidence, no proper cross-examination and no proper discussion in the judgment. Causing death of quick unborn child may have different facets. The gestational age of the foetus in the womb was sixteen to eighteen weeks. There is no proper evidence whether it attracts Section 316 of Indian Penal Code. In the light of this, conviction under Section 316 of the Indian Penal Code cannot be upheld and the same will have to be set aside.

43. We find no reason to interfere with the sentence awarded for offence punishable under Sections 302 and 309 of the Indian Penal Code, but it must be stated that when conviction of imprisonment is to be awarded, it should be rigorous if there is an option. It can be simple when there is no option (in cases of weak male or female or old aged persons).

44. In the result, we partly allow the appeal. The conviction and sentence under Sections 302 and 309 of the Indian Penal Code imposed by learned Additional Sessions Judge, Osmanabad in Sessions Case No.99 of 2008 to the appellant is upheld. The conviction and sentence imposed by learned Additional Sessions Judge, Osmanabad to the appellant under Section 316 of the Indian Penal Code is hereby set aside.

(A.M. DHAVAL, J.)

(R.M. BORDE, J.)

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