

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

Criminal Appeal No. 65 of 2001

Kailas s/o Damu Gaikwad,
Age 27 years,
Occupation : Agriculture,
R/o Naigaon, Taluka Kannad,
District Aurangabad.

.. Appellant.

Versus

The State of Maharashtra.

.. Respondent.

Shri. S.G. Ladda, Advocate, for appellant.

Shri. R.V. Dasalkar, Additional Public Prosecutor, for
respondent.

**Coram: T.V. NALAWADE &
SUNIL K. KOTWAL, JJ.**

Judgment reserved on : 31 July 2017

Judgment pronounced on : 04 August 2017

JUDGMENT (Per T.V. Nalawade, J.):

1) The appeal is filed to challenge the judgment and order of conviction given to the appellant by learned Additional Sessions Judge Aurangabad in Sessions Case No.117/1997. The appellant is convicted and sentenced for offences punishable under sections 302 and 498-A of

Indian Penal Code. His parents were also tried for these offences but they are acquitted. Both the sides are heard.

2) The deceased Sunita was daughter of first informant Gangubai, resident of Palshi, Tahsil Kannad and she was given in marriage to present appellant, Kailas when the deceased was aged about 6 years. The accused hails from Naigaon. After 6 years of the marriage i.e. when Sunita completed 12 years of the age, she was sent for cohabitation to the house of present appellant.

3) The ill-treatment to the deceased was started when sister-in-law of the first informant namely Kadubai expressed her desire to sell her agricultural land which was about one year prior to the date of incident. Kadubai has no male issue though she has three daughters. Present appellant wanted to purchase the said land but he was not having money. He then requested first informant to give him money for purchasing the land. Even promise was given by the parents of the deceased Sunita to give Rs.40,000/- to the present appellant and he was to make arrangement of the remaining amount.

4) About 6 months prior to the date of incident one Raibhan Jadhav of village Naigaon purchased the land of Kadubai for consideration of Rs.1.35 lakh. After that present appellant and his father went to the house of first informant along with Sunita and they requested to give money for purchasing the land. The first informant had taken Rs.25,000/- with her to help present appellant. As Kadubai was not available and she had gone to village Sarola, all these persons went to Sarola. There, Maruti Jangle, a relative of Kadubai met them and informed that the land was already sold by Kadubai and so there was no question of accepting money from the appellant. When they were returning they met Kadubai on the way and she also informed that the land was already sold by her. Upon that father-in-law of the appellant rushed at the first informant in anger. Due to this incident, the amount of Rs.25,000/- which was with the first informant was not given to the appellant by first informant. Then there was quarrel between present appellant and Kadubai.

5) The appellant and his parents had become angry as the land was not sold to them by Kadubai who is

close relative of the first informant. Then they started asking the deceased to bring Rs.40,000/- from her parents as they wanted to purchase other land. In that year due to demand, Sunita was not sent to her parents' house on the occasion of Diwali festival. On the last occasion, the father of Sunita visited the house of the husband of Sunita to bring Sunita to parents house for few days. Even some amount was paid by the parents of Sunita to the appellant and he was convinced. Then promise was given to send Sunita to her parents house for few days. The father of Sunita had returned from the matrimonial house of Sunita on Friday and there was promise to send Sunita on Tuesday. On the night of Friday itself a message was received by them that Sunita was dead. They went to Naigaon and they saw the dead body which was already taken out from the well from the field of the appellant.

6) On 29-11-1996 the present appellant and the deceased were present in the field where the well is situated. After 2.00 p.m. of that day the appellant approached the Police Patil and informed that Sunita had probably fallen in the well. The Police Patil went to the

well. He could not see the dead body. But he gave report to the concerned police station. On the basis of the said report, AD No.56/1996 was registered under section 174 of the Code of Criminal Procedure in Pishor Police station.

7) Police visited the spot and they took out the dead body. Spot panchanama was prepared and the inquest was also prepared. The dead body was then referred for post mortem examination. Doctor conducted post mortem on 30-11-1996 and he gave opinion that the death had taken place due to head injury, cerebral concussion. Viscera was preserved to ascertain presence of poison.

8) Mother of Sunita then gave report on 1-12-1996 to Pishor Police Station and Crime No.133/1996 came to be registered for offences punishable under sections 302, 498A, 34 of the Indian Penal Code against the present appellant and his parents. The appellant came to be arrested. During the course of investigation he gave statement under section 27 of the Evidence Act and on the basis of the statement, article which was used for causing

injury was recovered and similarly chappal and pieces of bangles of the deceased came to be recovered from the spot where injuries were caused. From the house the accused then produced two silver rings of toes which were in the house of deceased and they came to be seized under panchanama. Statements of the witnesses including relatives of the deceased on parents side came to be recorded. Statements of some villagers of the village of the appellant also of the Police Patil came to be recorded and charge-sheet came to be filed for the aforesaid offences. After committal of the case by the Judicial Magistrate, charge came to be framed for aforesaid offences and also for offence punishable under section 201 of the Indian Penal Code. All the accused pleaded not guilty. The prosecution examined in all 9 witnesses to prove the offence. The trial Court has held that it was homicidal death and it was caused by causing injury to head and then dead body was thrown by the present appellant into the well. It is further held that there was ill-treatment to the deceased from the appellant on the count mentioned in the F.I.R.

9) In the present proceeding learned counsel for the appellant submitted that the entire case is based on circumstantial evidence and the circumstances are not fully established and they have not completed the chain to point the finger only to the appellant as culprit. The learned counsel submitted that the appellant had immediately informed to the Police Patil after the fall of the deceased into the well and so this conduct was not consistent with the guilt. The learned counsel submitted that possibility that deceased had suffered heart attack when she had gone to well to fetch water and due to that symptoms of death due to drowning were not noticed by the doctor is not considered by the trial Court. He placed reliance on the cases reported as **AIR 1981 SC 765 (Shankarala Dixit v. State of Maharashtra)** and **AIR 1957 SC 589 (Bhagwan Das v. State of Rajasthan)**. On the other hand, the learned Additional Public Prosecutor submitted that it was necessary for the appellant to explain the circumstances as the death is homicidal in nature and only the appellant had the opportunity to cause the death. The learned APP submitted that the circumstance that it is homicidal death further indicates that false information

was given by the appellant to Police Patil. He submitted that there was motive for the offence also as there is evidence on the illegal demand made by the appellant to the parents of the deceased. The learned Additional Public Prosecutor submitted that the provisions of sections 106 and 114 of the Evidence Act need to be used and the trial Court has not committed any error in holding the appellant guilty of both the offences.

10) The defence has disputed that Sunita died homicidal death. In view of this circumstance, the evidence given on cause of death is being discussed first. To prove its case the prosecution relied not only on the opinion evidence of the doctor, Dr. Sanjay (PW 7) but also on other circumstances.

11) Dr. Sanjay (PW 7) has proved the notes of post mortem report in his evidence. He conducted the post mortem examination of the dead body on 30-11-1996 between 4.50 p.m. and 6.p.m. He found following external injuries on the dead body :

- (1) Abrasion on right axilla region 1/2 x 1/2 cm infra axillary area, reddish in colour.
- (2) laceration below right eye 3x1/2 cm with blood clot.
- (3) Laceration on right upper eye lid 1x1.2 cm blood clot placed transversely.
- (4) Laceration on left eye upper lid of size 3x1 cm pale in colour placed obliquely.
- (5) Laceration whole upper lip, pale and transverse
- (6) Left ear lobule eaten by aqua animals.

12) Dr. Sanjay (PW 7) has given evidence that injury Nos.1 to 3 found on the dead body were ante mortem and injury Nos.4 to 6 were caused by aqua animals.

13) Dr. Sanjay (PW 7) has deposed that on internal examination he found contusion over left parietal region of the size of 2 x 1 cm and that had caused fracture of skull. He has deposed that this injury had developed subdural haematoma, clot and it was over half portion of frontal region. Thus, there was injury to the head and brain. The oral evidence given by Dr. Sanjay is consistent with the post mortem notes at Exhibit 26. Separate opinion was sought by the investigating agency of this Doctor on the

cause of death and opinion was accordingly given which is at Exhibit 25. Viscera was sent for chemical analysis but no poison was detected in the viscera.

14) In support of the aforesaid expert opinion given under section 45 of the Evidence Act, there is reason given by the doctor. The defence of the accused is that the deceased accidentally fell into the well and she had died due to drowning. The doctor has given evidence that lungs were congested and no froth was noticed in the lungs. Similarly there was no water found in the stomach. There was blood containing fluid in buccal cavity. These symptoms according to the doctor (PW 7) are of homicidal death. The death took place due to head injury and there were no symptoms indicating that death took place due to asphyxia due to drowning.

15) In the cross-examination of the doctor (PW 7) it was suggested to the doctor by defence counsel that after cardiac arrest if a person falls in the well he may not gulp water. He has admitted this suggestion but the evidence remains on the fact that lung was congested and there

was no froth in it. In addition to that, other symptoms were present as already quoted.

16) It was suggested to Dr. Sanjay (PW 7) that injury No.1 can be caused due to fall in well and if head comes into contact of wall of the well. This suggestion is denied by the doctor by giving reason that more grievous surface injury will be found on the head when there is such fall. The injury on the head was caused by hard and blunt object as per the opinion given by this doctor. The evidence shows that weapon, wooden agricultural article, was recovered on the basis of statement given by the accused under section 27 of the Evidence Act but that article was not confronted to the doctor by the prosecution during his evidence. Though there is such situation the evidence is there that such injury can be caused by hard and blunt object and so the head must have been hit against hard and blunt object or the hard and blunt object must have been hit on the head. Thus the medical evidence rules out the possibility of death due to drowning.

17) The evidence of spot panchanama which is at Exhibit 31 is admitted by defence. The defence has not disputed that the well in which the dead body was found belongs to the accused. The description of the well is given in the spot panchanama. The description shows that by using heap of stones on surface of the well a wall like structure was created surrounding the well. At one place in this structure by putting wooden log scope was created to lift water from the well manually. However, there was no rope on this log and no pot which ought to have been there for taking water was found on the spot. The panchanama also does not show that any pot was recovered from the water of the well. The water was at a distance of 6 feet from the ground level and the total depth of the water was around 22 ft. Thus the total depth of the well from ground level was around 28 feet. Evidence of the investigating officer on the spot panchanama shows that there was no possibility of accidental fall in this well.

18) In view of the description of the well it was not possible to take water simply by bending into the well. In

that case also a pot could have been found. There were no steps for getting into the well and electric motor was installed inside of the well for pumping water. There were no chappals of the deceased in the vicinity of the well or inside of the well. When police reached the spot the dead body was at the bottom of the well and from there it was taken out. All these circumstances rule out possibility of accidental fall. As the death was not due to drowning, it is not possible to infer that the deceased had jumped into the well to commit suicide. Thus the possibility of suicide is also ruled out. Thus, only one possibility remains and that is of homicidal death. This leads to inference that after murdering Sunita, her dead body was thrown into the well. It needs to be ascertained as to who did that act.

19) The prosecution has given evidence on motive and also other circumstances. Gangubai (PW 1) mother of the deceased has given evidence that accused No.2 wanted to purchase agricultural land of one Kadubai, close relative of Gangubai. Kadubai intended to sell this land. The accused approached the parents of the deceased and they requested for help by giving some cash amount

like Rs.40,000/-/ Evidence is given that Kadubai sold the land to third person and then the dispute started. Even after sale of the land by Kadubai, accused were insisting to see that the land is given to him.

20) Gangubai (PW 1) has deposed that the deceased used to disclose about the ill-treatment given to her due to aforesaid circumstance, non fulfillment of the demand of the accused and there was also direct demand from the accused of such nature. Evidence is given that the accused had stopped sending the deceased to parents house as he had become angry due to the aforesaid circumstances. Evidence is given by Gangubai (PW 1) that her husband Suryabhan had gone to the house of the accused to convince the accused and to bring the deceased to the house for few days but he returned alone and on the same day, in the night time they received news that their daughter was dead.

21) Evidence of Suryabhan (PW 2), father of the deceased, is similar to the evidence of PW 1. Kailas (PW 5), brother of the deceased has given similar evidence.

He has added that at least on two occasions he had tried to bring Sunita from the matrimonial house for short stay but the accused had refused to send her to the parents house as they were angry due to aforesaid circumstances.

22) The prosecution has examined Kadubai (PW 6) also. This lady has given evidence that she wanted to sell the land but when she demanded the price of Rs.1.25 lakh the accused were not ready to give that price and so she sold the land to one Raibhan Jadhav. This land was sold six months prior to the date of the incident. Kadubai has given evidence that even after sale of the land to Jadhav, the mother of the deceased was insisting to see that consideration is returned to Jadhav and the land is given to the accused. She has given evidence that she heard that there was ill-treatment to the deceased on that count. It is true that her police statement was recorded late at least by 10 days. But the circumstance that her name was mentioned in the FIR is there and due to that not much can be made out due to the circumstance of giving police statement late.

23) To some extent the contents of the FIR are not consistent with the evidence given by Gangubai (PW 1). However the evidence of Gangubai as a whole needs to be considered to see the consistency with the FIR. The main ground that accused wanted to purchase the land of Kadubai remained there though there is inconsistency in the particulars in connection with the purchase of the land.

24) The aforesaid evidence shows that there was motive for the offence for the husband of the deceased. Absence of motive is certainly a circumstance which is relevant for assessing the evidence. However, other relevant circumstances available under section 3 of Evidence Act are also proved through witnesses. Other relevant circumstances can also prove the guilt of the accused and the absence of motive does not make other relevant circumstances weak. When the incident is wholly within knowledge of the accused, he knows what moved him to commit the crime, due to availability of provision of section 106 read with section 114 of the Evidence Act, the absence of motive cannot go to the root of the matter.

25) The provisions of sections 3 and 106 of the Evidence Act if considered together show that it was necessary for the accused to give explanation with regard to the information which he must have regarding the incident. If the accused gives false information, such circumstance itself can be used against the accused and such circumstance becomes additional link of the chain of circumstances and possible inference needs to be drawn against the accused due to existence of such circumstances.

26) In the present matter, Mahadu (PW 4) Police Patil of the village of the accused has given evidence that on that day at about 4.00 p.m. accused came to him and informed that deceased had fallen into his well. He has given evidence that he had visited the well after receiving the information but he could not see the dead body and he gave report to police. Report at Exhibit 16 dated 29-11-1996 is proved in his evidence and it is consistent with his oral evidence. On the basis of this report, AD was registered even when dead body was not visible to the Police Pail. Thus the information supplied by the accused

was believed by Police Patil and also by police and AD was registered and inquiry into the accidental death was started. This circumstance shows that accused only had the knowledge that the dead body of Sunita was lying in the well.

27) Evidence of the Police Patil is not disputed in the statement under section 313 of the Cr.P.C. given by the accused. He has only answered relevant questions by saying that he does not know. There is no reason to disbelieve the Police Patil. By this evidence the prosecution has established that the accused was in the company of the deceased on that day, at the relevant time and he knew that the dead body of the deceased was lying in the well. This circumstance makes it necessary to use provision of section 106 read with section 114 of the Evidence Act against the accused. Due to this circumstance there was onus on the accused to explain and make attempt to rebut the circumstance and to create other probability. The accused gave only false information which gives additional circumstance against him.

28) There is one more circumstance against accused, recovery of chappals of the deceased and sliver rings (जोडवे) of toes recovered on the basis of statement given by him under section 27 of Evidence Act. This circumstance is proved by examining panch witness and investigating officer. There was no chappal near the well and incident of assault had taken place at other place shown by the accused. Pieces of bangles of deceased were present on that spot. This record is at Exhibits 28 and 29. The evidence of PW 8 Bhausahab remained unshattered after extensive cross-examination. He is an independent witness. This circumstance is proved.

29) Learned counsel for the accused placed reliance on the case reported as **AIR 1957 SC 589** (cited supra). This case is on evidence of expert under section 45 of the Evidence Act. It is laid down that it is upto the Court to decide as to whether the opinion needs to be accepted. There cannot be dispute over this proposition. The trial Court has accepted the opinion and this Court sees no reason to interfere in that finding of the trial Court in view of the aforesaid circumstances.

30) Learned counsel for the accused place reliance on another case reported as **AIR 1981 SC 765** (cited supra). In this case the Apex Court while discussing the manner of appreciation of circumstantial evidence has laid down that the test which requires the exclusion of other alternative hypothesis is more rigorous than the test of proof beyond reasonable doubt. This Court is not disputing that proposition. The cases involving necessity of use of section 106 of the Evidence Act are of different kind. Each case involves almost different modus operandi of the accused and due to that in each case there are generally different facts. In the present matter evidence on all relevant circumstances quoted are pointing the finger only to the accused as guilty person. Thus the observations made by the Apex Court in this case is of no help to the accused.

31) On the other hand, the learned Additional Public Prosecutor has placed reliance on the judgment of the Bombay High Court in **Criminal Appeal No.682/1992** dated 4 July 2012 (**The State of Maharashtra v. Laxman Ganti**). Though the facts of this decided case are similar

to the facts of the present case, it is already observed that each case has different set of facts and there cannot be ratio as such for drawing inference on a particular fact by separating it from other facts. This Court holds that the trial Court has not committed any error in holding the appellant guilty for the murder of Sunita. Minimum possible sentence is given by the trial Court. No interference is possible. In the result, the appeal stands dismissed. The appellant is to surrender to the bail to undergo the sentence.

Sd/-
(SUNIL K. KOTWAL, J.)

Sd/-
(T.V. NALAWADE, J.)

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