

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

Criminal Appeal No. 318 of 2001

* The State of Maharashtra. .. **Appellant.**

Versus

- 1) Syed Rahim S/o Syed Janimiya
Age 25 years,
Occupation : Labour,
R/o Banjaranagar, Majalgaon,
District Beed.
- 2) Syed Janimiya S/o Syed Ibrahim,
Age 55 years,
Occupation: Labour,
R/o As above.
- 3) Bannabai w/o Syed Janimiya
(reported to be dead)

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Shri. S.J. Salgare, Additional Public Prosecutor, for
appellant.

Shri. S.P. Katneshwarkar, for respondent Nos.1 and 2.

Respondent No.3 is dead.

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

Judgment reserved on : 26 July 2017

Judgment pronounced on : 04 August 2017

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

1) The appeal is filed against the judgment and order of Sessions Case No.62/2000 which was pending in the Court of the Additional Sessions Judge, Beed. Respondents were charge-sheeted and tried for the offences punishable under sections 302, 201, 511 read with 34 of the Indian Penal Code. All the respondents are acquitted of these offences. Both the sides are heard.

2) The deceased Vazirabi was a daughter of first informant Umarkha, resident of Pathri, Tahsil Pathri, District Parbhani. She was given in marriage two years prior to the date of the incident to respondent No.1 Syed Rahim, who is resident of Majalgaon, Tahsil Majalgaon, District Beed. Respondent Nos.2 and 3 are the parents of respondent No.1. At the relevant time deceased was having a son aged about six months.

3) It is the case of the prosecution that for about six months no ill-treatment was given to the deceased but after that the husband and his parents started harassing

the deceased by saying that she was not able to cook food properly and she was not serving food to them in time. The accused were giving even beating to her on petty counts. The deceased had disclosed about such ill-treatment to her father and other relatives on parents' side. The parents had somehow convinced the deceased and they had sent her back to the matrimonial house.

4) About 15 days prior to the date of incident the father and other relatives on parents' side had visited village Takli on the occasion of one marriage. This marriage was attended by respondent Nos.2 and 3 also. They came together in the house of brother-in-law of the first informant to discuss the matter. The parents of the husband then complained that the deceased was not able to cook food properly. The parents of the deceased tried to convince them that the deceased had experience of everything including the cooking but the respondent Nos.2 and 3 were not convinced. On that occasion, respondent Nos.2 and 3 gave threat in respect of life of the deceased.

5) On 11-4-2000 at about 10.00 a.m. when the first informant Umarkha was present in the house, son-in-law of respondent No.2 namely Shaikh Afsar visited the house of the first informant and informed that the deceased had committed suicide by setting fire to herself. Umarkha collected his relatives and they went to Majalgaon. They went to the hospital as the dead body was taken to the hospital. As there was threat from the accused persons of the life of the deceased, Umarkha was sure that it was a homicidal death and he gave report to Majalgaon Police Station on the same day at about 2.30 p.m.

6) Prior to giving of the F.I.R., A.D. report at No.16/2000 was given to the police under section 174 of the Code of Criminal Procedure and the police had started inquiry. On 11-4-2000 spot panchanama was prepared between 11.00 a.m. and 11.30 a.m. Inquest was prepared on the same day between 9.30 a.m. and 10.30 a.m. and then the dead body was referred for post mortem examination. Post mortem was conducted on the dead body on 11-4-2000 between 2.15 p.m. and 4.00 p.m. The

doctor gave opinion that cause of death was cardio respiratory arrest due to asphyxia due to strangulation. The Doctor found circular ligature mark 2 cm in width which was around the neck. There were other injuries like contusions and abrasion over legs, chest. There were 100% burn injuries but they were post mortem in nature.

7) The statements of the witnesses came to be recorded during investigation and after completion of the investigation charge-sheet came to be filed for the aforesaid offences. The prosecution examined in all 9 witnesses for proving the offences. The trial Court has not believed the witnesses. Though the trial Court has found that it is homicidal death, the trial Court has acquitted all the accused of both the offences for which charge was framed. Defence of total denial was taken by the accused persons.

8) The trial Court has held that due to following circumstances the accused including husband cannot be held guilty of offence of murder.

- (a) The prosecution failed to prove motive for the crime.
- (b) The husband was not living in the said room with the deceased.
- (c) Information about the death was given immediately to police and relatives of deceased.
- (d) Persons mentioned in the A.D. report are not examined by prosecution as witnesses and close relatives on parents' side. The parents stated before Court that they have no complaint against anybody about the death of Vazirabi.

The trial Court has relied on some observations made by Supreme Court in the case reported as **1981 Cri.L.J. 298 (Rama and Others vs. The state of H.P.)**. It is on appreciation of circumstantial evidence.

9) In the present matter the prosecution relied on circumstantial evidence which is of following nature :-

- (a) The deceased was cohabiting with the husband, accused No.1 in the house where incident took place;
- (b) The death took place on the night between 10-4-2000 and 11-4-2000 in the house of accused;
- (c) The cause of death is asphyxia due to strangulation;
- (d) False information was given that death was due to burn injuries;

- (e) There were 100% burn injuries on the dead body but they were post mortem;
- (f) There were other ante mortem injuries on the dead body showing resistance offered by the deceased; and,
- (g) Motive, the accused were not happy with the work of the deceased.

10) The evidence of Sharif Pathan (PW 9), Police Sub Inspector, who made investigation shows that A.D. No.16/2000 was registered on the basis of report given by accused No.2 Janimiya. The report is proved as Exhibit 53. It shows that the A.D. was registered at about 8.30 a.m. on 11-4-2000. This report can be considered as relevant circumstance under sections 3 and 8 of the Evidence Act. It was informed that Vajirabi had died due to burn injuries and they were required to break open one window through which the husband Rahim had entered the room to open the door of the room which was found closed from inside by putting on latch. As per the report the incident had taken place at about 6.00 a.m.

11) The inquest panchanama at Exhibit 28 is proved by Prabhakar Kamble, panch. It is suggested to the

panch that he had not personally seen the injuries which were present on the dead body and he has admitted that suggestion. That admission cannot make much difference when he admits his signature appearing on the inquest panchanama and when he admits that it was prepared in his presence. It was prepared between 9.30 a.m. and 10.30 a.m. on 11-4-2000. It shows that blood was oozing from nostril and mouth and there was ligature mark on the neck though it is not described as encircling neck. One injury was noticed on the chest also. The deceased had passed stool during the incident.

12) In addition to the evidence of inquest panch the prosecution adduced evidence of Medical Officer Dr. Bhausahab (PW 7) who conducted the post mortem examination on the dead body on 11-4-2000 between 2.15 p.m. and 4 p.m. He found following seven injuries on the dead body.

- (i) Contusion on right thigh above knee of size 5×2 cm red in colour;
- (ii) Abrasion below right knee of size 2×1 cm red in colour;

- (iii) Abrasion over left nipple and areola of size 2×2 cm red in colour;
- (iv) Contusion on right forearm posterity of size 5×2 cm
- (v) Contusion on left anterior axillary old of size 2 x ½ cm red in colour;
- (vi) Circular ligature mark around neck 2 cm in width and red in colour;
- (vii) Superficial to deep burn all over body 100% with no signs of inflammation. Fracture to hyoid bone to upper side of size ½ x ½ cm.

The doctor has given evidence that injury Nos.1 to 6 were ante mortem in nature and only the burn injuries were post mortem in nature.

13) Doctor (PW 7) has given specific evidence that ligature mark which was noticed by him was circular and there was hemorrhage. The doctor has given opinion that the death took place due to cardio respiratory arrest due to asphyxia due to strangulation. The post mortem report at Exhibit 42 is proved in his evidence and it is consistent with the oral evidence. He has given evidence that fracture to hyoid bone can be caused when a rope is fastened around the neck or even when there is throttling, pressure put on hyoid bone with hands. It is true that the

doctor has admitted that some symptoms as mentioned by Modi in his book which were confronted to the doctor were not found on the dead body but it needs to be kept in mind that the dead body was having 100% burn injuries. He has denied the suggestion given to him that presence of ligature mark in the present matter is not sufficient to draw inference about the cause of death like asphyxia due to strangulation. He has made it clear that the circumstance like absence of sooth articles in oesophagus, larynx, trachea, bronchi and also lung are indicative of the fact that fire was set to the body when the lady was dead. The doctor was very firm in his opinion that the burn injuries were post mortem and the evidence remained unshaken during exhaustive cross examination.

14) In view of the aforesaid evidence of inquest panchanama and about the post mortem report there was no other possibility than to infer that it is homicidal death. The trial Court also gave the same finding in its judgment.

15) In a case like present one, when only accused persons know about the incident, the circumstances need to be considered very carefully. The circumstances like giving of A.D. report by father of the husband is already mentioned. The spot panchanama is proved in the evidence of Syed Muzafar (PW 2). He hails from Majalgaon. His substantive evidence shows that inside of the room one can of kerosene, one match box were present. This room had two windows and only due to the fire there was some damage to the windows. The panchanama at Exhibit 35 is proved in his evidence. This spot was shown by accused No.2, father of the husband.

16) The aforesaid room had the size of 10 ft x 20 ft having roof of tin sheets. It was having one door having two planks. On the southern side there was one more room but there was no door between the two rooms. In this room there was pool of blood. Then there were pieces of burnt clothes of the deceased. Some clothes were hanging on arrangement made in the room for keeping the clothes and fire had reached up to those clothes. The panch did not notice any kerosene lying on the floor. In

the can of kerosene there was one liter of kerosene. These articles were taken over under panchanama. The panchanama does not show that there was possibility of entering of anybody through the window of this room. Thus, the spot panchanama is not consistent with the defence taken by the accused.

17) For giving evidence on motive the prosecution examined Umarkha (PW 3), who is uncle of the deceased. His evidence shows that the marriage had taken place two years prior to the date of incident and after three months of the marriage ill-treatment was given to the deceased by husband and the parents of the husband. Evidence is given that the accused were complaining that the deceased was not able to cook food properly. He has deposed that the deceased used to disclose about the ill-treatment during her visits to the house of her parents. He has given evidence that one month prior to the incident they had gone to village Takli to attend one marriage and there the parents of the husband had also come. He has deposed that on that occasion quarrel had taken place between the parents of the husband and the

parents of the deceased and the parents of the husband were complaining that the deceased was not able to cook food properly. He has given evidence that on that occasion parents of the husband had given threats that the deceased will be finished and the parents of the deceased will have to come to attend the final rites. He has deposed that then on the day of the incident, son-in-law of accused Nos.2 and 3 came to their house and informed that the deceased had committed suicide by setting fire to herself. The report given by him to police on the same day is duly proved in his evidence as Exhibit 27. On all material points the report is consistent with the oral evidence and it gives necessary corroboration.

18) In the cross-examination of the first informant (PW 3) it is suggested to him that he knows the President of Pathri local body and the said President had helped him in the present matter and due to the influence of the said President police have filed false case. These suggestions are denied. The evidence in the cross-examination has not helped the defence in proving anything.

19) The prosecution has examined Gulabkha (PW 4) father of the deceased. His evidence is similar to the evidence of the first informant. It is suggested to him that the deceased was happy in her married life but he has answered that he does not know about it. He has admitted that accused Nos.2 and 3 were not happy as they were not invited for the marriage of the son of Mahboob. This is additional circumstance brought on the record by the accused, which is in addition to the incident which had taken place at Takli. In the cross-examination, he has admitted that he has no suspicion against anybody about the death of his daughter. Rabiya (PW 5) mother of the deceased is examined by the prosecution and her evidence is similar to the evidence of the father of the deceased. This witness also has admitted in her cross-examination that she has no complaint against anybody regarding the death of her daughter. The last witness on motive Wahidkhan (PW 6), a cousin of the deceased, was declared hostile by the prosecution.

20) The tenor of evidence given by the parents of the deceased in cross-examination shows that they

wanted to save the accused persons. It is a case of murder and a case of attempt of destroying the evidence of murder. Only due to evidence of aforesaid nature given by parents, Court cannot ignore the other evidence available on record. It can be said that the trial Court has indirectly allowed to compound the offence when aforesaid evidence could not have changed the fate of the matter.

21) The evidence as a whole given by the prosecution which includes the A.D. report given by accused No.2 shows that the deceased and accused No.1 were living in a separate room. In the report also it was not informed that the deceased had raised hue and cry. Unfortunately in the spot panchanama there is no mention about the neighbors. But the spot panchanama shows that the house was bearing No.2/795 showing that it was situated in the town. The circumstances are sufficient to infer that the incident took place in the room where the deceased was living with her husband. Due to these circumstances it was necessary for the accused No.1 to explain as to why there was no hue and cry from the deceased if she had set fire to herself. It was also necessary for him to explain as

to how there was ligature mark circling the neck. Even in the statement under section 313 of the Code of Criminal Procedure they have given answers showing ignorance and the husband has stated that they were living happily and he does not know the reason of death Vajirabi. Thus, virtually no explanation is offered by the accused when there are aforesaid incriminating circumstances against them. A.D. report given by the accused No.2 shows that the husband was living separate with the deceased in the said room from his parents and so the burden was more on the husband to explain the aforesaid things. Due to the aforesaid circumstances at the most it can be said that his parents tried to help him by giving report of aforesaid nature. But the possibility that they were informed accordingly by accused No.1 also cannot be rule out. It appears that during pendency of the matter, accused No.3 mother died. So the case as against accused No.3 needs to be disposed of as abated. Due to the circumstances mentioned above, this Court holds that benefit of doubt can be given to accused No.2 Syed Janimiya, father of the husband. However, the aforesaid evidence shows that the husband needs to be convicted for the offence of murder.

22) It is true that motive is relevant circumstance when the prosecution case rests entirely on circumstantial evidence. But that does not mean that entire evidence needs to be discarded when no evidence is given on motive or when evidence on motive is not believable. In a case of present nature, the accused who commits murder only knows as to what happened at the relevant time which moved him to commit such crime. If there was nobody in the vicinity to know the relations between the victim and the accused or when there was nobody to know these two persons there will never be evidence on motive in such cases. The purpose behind the provisions of sections 106 and 114 of Evidence Act will be frustrated and most of the culprits will get acquittal. Thus, approach of the trial Court on this point was wrong.

23) When due to facts and circumstances of the case provisions of sections 106 and 114 of Evidence Act become available for use the Court is duty bound to use these provisions. When the initial burden which is on prosecution is discharged by prosecution by proving the relevant facts like "only the accused/husband had the

opportunity to commit the crime", the burden shifts on him to prove what happened on that night which resulted in her death. If he fails to give explanation the only possible inference would be that he participated in the crime. In the present matter there was false information which can be used as explanation of the husband. The circumstance of giving false explanation, itself becomes one relevant circumstance for crime in view of provisions of sections 3 and 8 of the Evidence Act.

24) The trial Court has committed serious error in holding that the persons mentioned in the A.D. report ought to have been examined by prosecution and they were material witnesses. The A.D. report at Exhibit 53 is got proved by defence in the cross-examination of investigating officer (PW 9). In A.D. report it was informed that by breaking open door of one window accused Rahim (husband) had entered the said room. In view of this information, it was open to accused to lead such evidence as provided in section 103 of the Evidence Act as the burden was on the accused to prove such circumstance. There is nothing on the record to create such probability.

So, the reasoning given by trial Court has no base of principles reorganized by Evidence Act.

25) The learned counsel for the accused husband submitted that chain of circumstances is not established and so it is not possible to presume that only the husband had opportunity to commit the murder. He has placed reliance on a case reported as **AIR 1974 SC 778 (Sawal Das v. State of Bihar)**. In this case the Apex Court has laid down that the initial burden is on the prosecution to prove the case beyond reasonable doubt and the provision section 103 or 106 cannot absolve the prosecution from discharging such primary burden of proof. The Apex Court has laid down that only when the prosecution has led evidence which if believed will sustain conviction, or makes out a prima face case that the question arises of considering facts of which the burden of proof may lie upon the accused considering the act of which the burden of proof may lie upon the accused, the accused can be expected to explain the things. There is no dispute over the proposition made by the Apex Court. The relevant facts and circumstances in this regard are mentioned by

the Court.

26) The learned Additional Public Prosecutor placed reliance on the case reported as **(1993) 2 SCC 684 (Kundula Bala Subrahmanyam v. State of A.P.)**. The facts were totally different and it involved dying declaration. Facts and circumstances of each and every criminal case are always different. The observations made by the Apex Court that conduct of the accused is significant in the chain of circumstances can be used in the present matter. It is already observed that it does not look probable that there would not have been hue and cry if as per the case of the accused the deceased had set fire to herself. Absence of evidence of hue and cry is a circumstance which corroborates the case of the prosecution that it is homicidal death. Though it is opinion evidence of the doctor, the surrounding circumstances are sufficient to compel the Court to accept the opinion of the doctor. In a case of suicide by burn ordinarily pool of blood will not be available on the spot of offence and the most important circumstance is the ligature mark which was encircling in the neck. In view of the provision of section 106 read with section 114 of the Evidence Act this Court has no

hesitation to hold that only the husband of the deceased had tried to destroy the evidence of the crime by setting the dead body to fire. He tried to make evidence disappear of murder and so he committed offence punishable under section 201 of the Indian Penal Code also. This Court holds that the appeal deserves to be allowed and the husband needs to be convicted and sentenced for offences punishable under sections 302 and 201 of the Indian Penal Code. Benefit of doubt needs to be given to the father of the husband. In the result, following order :-

27) (a) The appeal is partly allowed. The judgment and order of acquittal given in favour of accused No.1- Syed Rahim Syed Janimiya by the trial Court is hereby set aside.

b) Accused No.1-Syed Rahim Syed Janimiya stands convicted for the offence punishable under section 302 of the Indian Penal Code and he is sentenced to suffer imprisonment for life and to pay a fine of Rs.1000/-. In default of payment of fine he is to undergo rigorous imprisonment for 15 days.

c) Accused No.1-Syed Rahim Syed Janimiya is convicted for the offence punishable under section 201 of the Indian Penal Code and he is sentenced to suffer rigorous imprisonment for one year and to pay a fine of Rs.500/-. In default of payment of fine he is to further undergo rigorous imprisonment for period of 7 days.

d) The substantive sentences given to accused No.1 are to run concurrently. The period for which the accused No.1 - Syed Rahim Syed Janimiya was behind the bars is to be considered for giving set off to him and that period is to be mentioned by the trial Court while sending conviction warrant.

e) The appeal as against accused No.2 - Syed Janimiya Syed Ibrahim stands dismissed and the appeal as against accused No.3 - Bannabai w/o Syed Janimiya stands disposed of as abated.

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

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

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