

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 505 OF 2001

The State of Maharashtra
Through the Police Inspector,
Police Station Karmad,
Aurangabad.

....Appellant.

Versus

Shivaji s/o. Bhujangrao Ukirde,
Age 41 years, Occu. Agri.,
R/o. Karmad, Tq. Dist. Aurangabad.

....Respondent.

Mr. V.S. Badakh, APP for appellant/State.

Mr. C.P. Sengaonkar, Advocate for respondent.

**CORAM : T.V. NALAWADE AND
ARUN M. DHAVAL, JJ.**

RESERVED ON : 09/11/2017

PRONOUNCED ON : 07/12/2017

JUDGMENT : [PER T.V. NALAWADE, J.]

1) The appeal is filed against judgment and order of Sessions Case No. 42/2001, which was pending in the Court of Ad-hoc Additional Sessions Judge, Aurangabad. The Trial Court has acquitted the present respondent, husband of deceased Gangabai and also the first wife of present respondent of the offences punishable under sections 302, 498-A r/w. 34 of Indian Penal Code (hereinafter referred to as 'IPC' for short). The State has challenged the decision of acquittal given in favour of the respondent only. Both

the sides are heard.

2) In short, the facts leading to the institution of the present proceeding can be stated as follows :-

Deceased Gangabai was a daughter of Vithalrao, who was resident of village Dhudad, Tahsil and District Aurangabad. The deceased was given in marriage to respondent Shivaji about 10 years prior to the date of incident. Gangabai has left behind one daughter, aged about 9 years and one son aged about 5 years, born out of her marriage with the present respondent. The respondent had married with Gangabai as he had no issue from first wife (original accused No. 2). The respondent is resident of village Karmad, Tahsil and District Aurangabad.

3) Both the accused persons had suspicion about the character of the deceased. The suspicion increased after the birth of issues to the deceased and they started giving illtreatment to the deceased. The respondent used to give beating also to the deceased. The relatives of the deceased from parent's side had tried to convince the respondent and his first wife to behave well, but their conduct did not improve and they continued to give illtreatment due to their suspicion.

4) Fifteen days prior to the date of incident, respondent gave severe beating to the deceased. The father of respondent felt that there was danger to the life of Gangabai and so, he reached Gangabai to the house of her parents. After 7-8 days, the husband, respondent visited the house of parents of the deceased and he took the deceased back to the matrimonial house. After that for one day the deceased had visited the house of her parent's and she had returned to the matrimonial house. The incident took place on 27.3.2000 when the deceased was cohabiting with respondent.

5) On 27.3.2000 at about 6 p.m. to 7 p.m. Haribhau, brother of respondent informed to Sarpanch of Karmad Shri. Bhaurao Mule that dead body of Gangabai was lying in the house situated by the side of tank. Sarpanch passed this information to Police Patil, police and to the parents of deceased on 27.3.2000 itself. The relatives of deceased including the first informant, brother of the deceased rushed to Karmad. The relatives of deceased, police and panchas went to the house which is situated in the land of the respondent which is used only for keeping agricultural implements etc. on the night between 27.3.2000 and 28.3.2000. PSI Ghodke also went to this house. They noticed that the house was closed from outside by putting chain and locked from outside, but the key to the lock was with the lock. They opened the door by using the key

and then they entered the house which consist of one room.

6) Police, Panchas and also the relatives of deceased on parent's side noticed that the dead body of Gangabai was lying in this house and there were bleeding injuries on the head. Pieces of broken bangles of deceased were lying in scattered condition there. The article, hoe and other articles, implements were lying there. There was blood on the handle of hoe. One chit having hand writing of accused, informing that he also wanted to finish himself by committing suicide was found on the spot. All these articles were taken over when spot panchanama was drawn. Inquest panchanama was prepared in this house and the dead body was referred for P.M. examination. Doctor gave opinion that the death took place due to both head injuries and strangulation.

7) Police searched for accused, respondent on 28.3.2000, but the accused was not available at his residential place from village and nobody knew whereabouts of the accused. Then the search of house of accused situated in the village was taken. In this house, one more chit was found in which the accused has admitted that he had finished his wife in aforesaid house and he wanted to commit suicide. In the first chit recovered from the farm house, the accused had described the well where he wanted to commit suicide.

Search of that well was also taken, but nothing was recovered from the well.

8) On 28.3.2000 brother of deceased gave report and the crime came to be registered on the basis of this report. During the course of investigation, statements of relatives of deceased on parent's side came to be recorded. The statement of Sarpanch and some other persons from village Karmad came to be recorded. Police arrested the accused on 29.3.2000 when he was traced. During investigation, it transpired that on the night between 27th and 28th, the accused was living in the lodge from Badnapur. There were blood stains on the clothes of the accused and so, the clothes were taken over under panchanama.

9) As two chits were recovered by the police, specimen hand writing of the accused was collected by the police in presence of panch witnesses. One note containing the account written by the accused was also recovered. These articles came to be sent to the hand writing expert for comparison.

10) The statement of the lodge owner where the accused had slept on the night between 27.3.2000 and 28.3.2000 came to be recorded. Test identification parade was arranged for giving an

opportunity to the lodge owner to identify the accused as accused had stayed there by giving fictitious name. The remaining articles which were taken over from the spot of offence were sent to C.A. office and after completion of investigation, chargesheet came to be filed against the present respondent and his first wife for aforesaid offences. The charge was framed for aforesaid offences and the plea was recorded. Both the accused pleaded not guilty. The prosecution examined in all 14 witnesses. Both the accused took the defence of total denial. No defence evidence was given.

11) The Trial Court has held that it is homicide. The Trial Court has held that the aforesaid two chits are in the hand writing of the respondent, accused. The Trial Court has held that on the clothes of the accused, which were taken over by the police, there were blood stains. The Trial Court has given acquittal by giving reason that prosecution has not produced the record to prove the ownership of the accused over the house where the dead body was found and the prosecution has not proved that the room was in the occupation of the accused.

Homicidal Death and other evidence particularly on custodial death :-

12) The defence has not disputed that it is a case of

homicide. Inquest panchanama at Exh. 18 is proved in the evidence of Bhausahab Choudhary (PW 2), who is cousin of deceased. The evidence is given on inquest also by Investigating Officer Ramesh Ghodke (PW 14). It appears that most of the panch witnesses used by police in the present matter are close relatives of deceased. This circumstance is being discussed separately at later stage. For consideration of the evidence given on inquest panchanama, this circumstance needs not be considered as the defence is not disputing that it is a homicide.

13) In inquest panchanama, Exh. 18, there is mention of bleeding injury of length of 4 inches and of the depth of ½ inch on the head. Some injuries were noticed on throat and right leg. No injury was noticed on private part. The panchas formed opinion that the death took place due to head injury.

14) Dr. Rathod (PW 10) has given evidence on P.M. report. He conducted the P.M. examination on 28.3.2000 between 11.30 a.m. and 12.30 noon. He found following antemortem injuries on the dead body.

- (i) C.L.W. over top of head horizontal, irregular edges, rag, blood-stained, fractured bone pieces were present, 9½ x 4.30 cms x bone deep.

- (ii) CLW over left mid-line 1 cm above injury No. 1, vertical 1 cm left to mid line 3 x 1½ cm x bone deep,
- (iii) Injuries over neck
 - (a) Abrasion horizontal on right side of neck, at the level of thyroid, cartidge 4 x 1 cm, on dissection, haemorrhage preset under-neath the skin,
 - (b) Contusion on left side on neck at the level of thyroid cartilege and above 3 cms from mid line, 3 x 2 cms,
 - (c) 4 cms above injury No. (b) abrasion over left mandibular region, 1x1 cm, on dissection- haemorrhage present in muscles on left part of thyroid cartilege.
- (iv) Abraded contusion on left leg, anteriorly in middle part, 3 x ½ cms.
- (v) Contusion over left calf laterally in middle part 7 x 3 cms,
- (vi) Multiple abrasions over injury No. 5, in area of 10 x 3 cms, of different sizes,
- (vii) CLW over right leg anteriorly in middle part, 1½ x 1 cm.
- (viii) 5 cms below injury No. 7, abraded contusion 1½ x 1 cm.

On internal examination, Dr. Rathod (PW 10) noticed following injuries.

- (i) Skull-vault fractured into pieces, at vertex, irregular, round shape, size 5 cms.
- (ii) Fracture lines radiating along (a) coronal suture on right upto base of middle cranial fossa, (b) on left upto 6 cm, (c) along sagittal suture upto 6 cms and (d) 5 cms to left parietal bone.
- (iii) Brain was found - contused - both parietal lobe mid line, brain matter congested and oedematous.

Dr. Rathod (PW 10) has deposed that the death took place due to head injuries and also due to strangulation. The P.M. report at Exh. 39 is consistent with the oral evidence given by Dr. Rathod and the final opinion at Exh. 40 is also given by this doctor.

15) In the cross examination of Dr. Rathod (PW 10), it is brought on the record that the doctor gave opinion that the injuries on the head and also strangulation caused the death as he felt that there are both the probabilities viz. the death due to strangulation and the death due to head injury. In the cross examination, it is brought on the record that injury Nos. 1 and 2 found on the head

can be caused by hard and blunt object even like a stone. It is not the suggestion of the defence that these injuries were sustained accidentally. Thus, the evidence on the record is more than sufficient to prove that it is homicide. The evidence further shows that the person who caused these injuries wanted to finish the deceased anyhow.

16) Bhagwan (PW 1) is real brother of deceased and he gave report on 28.3.2000. Tejrao (PW 4) is cousin brother of deceased and Antikabai (PW 7) is the mother of the deceased. They have given evidence that the deceased was cohabiting with the respondent, husband at the relevant time. Their evidence shows that the deceased had returned to matrimonial house about 7-8 days prior to the date of incident. Mule (PW 11), Sarpanch of the village Karmad has given evidence that it is the brother of the husband, who informed him that Gangabai was dead. From the evidence of Sarpanch, it can be gathered that the place where the dead body was lying was also informed by the brother of husband, accused. In the cross examination of the close relatives of deceased on parent's side, the defence has brought on the record that accused No. 2, first wife of present respondent, accused was living at Aurangabad with two issues born to the deceased and the deceased was living with respondent in village Karmad. It is also brought on the record that

respondent used to visit Aurangabad occasionally as the issues were kept for education at Aurangabad. Prosecution examined one Tulsabai (PW 13), who is immediate neighbour of the respondent in the village. But, she has turned hostile. In any case, the respondent has not disputed that at the relevant time, the deceased was cohabiting with him in village Karmad. In view of these circumstances and the provision of section 114 of the Evidence Act, this Court is expected to keep in mind the things which happen in ordinary course of nature.

17) The Trial Court has given acquittal by giving reason that the prosecution has not proved that the house where the dead body was found, the incident took place belongs to present respondent, husband. In this regard, the evidence brought on the record during cross examination of Bhagwan (PW 1) is important. It is brought on the record that after the marriage, he had visited the place where the dead body was found as it belongs to accused and the house is situated in the land of accused. He has deposed that on the night between 27.3.2000 and 28.3.2000 he visited this house second time. Thus, he has specifically stated that the land and the house belong to respondent, accused. In the cross examination, it is suggested to him that this land is acquired by the Government for the purpose of tank. The witness has shown ignorance about it.

Thus, the defence has not disputed that the land belongs to respondent and the house where the dead body was found also belongs to respondent and it was in occupation of respondent.

18) Prosecution has examined Bhausahab Choudhary (PW 2), cousin brother of deceased to prove the spot panchanama, Exh. 19. In the cross examination of this witness, it is brought on the record that the first informant and some other relatives of the deceased were with police when they all went to aforesaid house for preparing spot panchanama, inquest panchanama etc. Bhausahab (PW 2) and other cousin of deceased namely Tejrao (PW 4) have given evidence on the things noticed by them in this house when they visited the house on the night between 27.3.2000 and 28.3.2000. The record and substantive evidence show that the inquest panchanama was prepared between 4.15 a.m. and 5.00 a.m. of 28.3.2017 and the spot panchanama was prepared between 6.30 a.m. and 7.30 a.m. of 28.3.2000.

19) In the spot panchanama at Exh. 19, the things which were noticed by panchas are described as follows :-

- (i) The house is situated in the land Gat No. 235. It is having one room. The house is constructed in bricks, but it has roof of tin sheets. It has one door and one window.

(ii) The door of house was found to be closed and locked from outside, but the key to the lock was with the lock.

(iii) Inside of the house, the room, there were agricultural implements including a tank meant for spraying insecticides.

(iv) The house was in use as it was showing that recently the floor was cleaned by using cow-dung.

(v) In the middle of room, there were blood stains and pieces of broken bangles were lying in scattered condition.

(vi) One hoe was lying there and there was blood on the handle of hoe. One chit having blood stains was also lying there and some hair of the deceased in loose condition were lying on the floor.

(vii) The chit which was lying in this house was having the matter like, "I am also putting an end to my life by jumping in the well of Bodki". [मीसुध्दा बोडकीच्या विहीरीमध्ये आत्महत्या करित आहे]. Under this writing, there was signature of respondent in English by using the name as Shivaji.

20) The spot panchanama shows that there was arrangement to tether cattle in front of aforesaid house, but no blood was found outside of house and in the vicinity of house. Blood

was found only inside of the house. Thus, the spot panchanama shows that murder was committed inside of house. The circumstance that when police and panchas reached the spot, the house was found in locked condition from outside creates a probability that it was the job of insider and not of outsider. The outsider cannot have any reason to put lock from outside to the door of house if he had any reason to murder Gangabai. The evidence of Sarpanch to the effect that brother of respondent informed about this place and the death of Gangabai shows that only the relatives of the respondent knew about the death of Gangabai. The evidence of the witnesses including Ghodke (PW 14), Investigating Officer shows that on that night police could directly go to this house as the information was given by Sarpanch about the place where the dead body was lying and as the house belongs to accused.

21) It is not disputed by all the close relatives of the deceased including the first informant Bhagwan (PW 1) that after learning about the death of Gangabai, they went to spot with police on that night. In the cross examination of Bhagwan (PW 1), it is brought on the record that he knew that it was the house of accused as he had visited the house in the past. The room was in use and so, there is sufficient evidence to infer that the aforesaid house belongs to the accused, respondent and it was used by the

accused, respondent. In view of the suggestion given by defence that the land and the house were acquired by the Government from accused, it was necessary for him to produce the relevant record, but that is not done. Even if that record was available, the inference of use was possible as ordinarily when there is no sufficient back water and the land is not submerged, the farmers who were owners in the past, continue to cultivate that portion and use the structure if it is not pulled down after acquisition. In any case, when there is no record of acquisition, other probabilities are not required to be considered.

22) The aforesaid discussion shows that there is the evidence showing that the aforesaid place belongs to accused and it was in use of accused. Thus, there was no necessity of production of any record in respect of the land and the house. The Trial Court has committed serious error in holding that prosecution has failed to prove that the land and the house belong to accused as no record is produced in that regard. The aforesaid evidence is not less than the evidence required for proving the case of custodial death. Thus, the provisions of sections 106 and 114 of the Evidence Act are available in the present matter against the accused, respondent, but the accused has not offered any explanation.

23) The evidence of Bhausahab (PW 2) shows that after preparing spot panchanama, they went to Bodki well situated at the distance of 2000 ft. from this house. Police visited that spot as the well was mentioned in the chit recovered from the aforesaid house. However, other evidence shows that prior to visiting the well, police went to residential place of accused situated in the village to ascertain as to whether he was available in the house. The panchanama in respect of well is proved as Exh. 20. Nothing was recovered like dead body of respondent from the well. This panchanama was prepared between 16.15 hours and 16.30 hours. But, prior to that the search of house of accused was taken and that is being discussed at later place. Though nothing was recovered from the well, the circumstance like preparation of panchanama at Exh. 20 shows that everybody believed in the contents of the chits and they took all the steps to see as to whether the accused had committed suicide. This circumstance shows that no attempt was made of concoction and nothing has arisen out of imagination of Investigating Officer or others.

24) The evidence of Pandurang Choudhary (PW 8) shows that on 28.3.2000 search of the house of respondent, accused was taken. His evidence shows that articles like a chit and a note containing account written by the accused were taken over from the

house under panchanama at Exh. 34. There is mention of testing of the cot of the residential place to ascertain as to whether there was electric current as there was such mention in this second chit, which was left by the accused. The evidence of this witness shows that police had gone to the house of the accused to ascertain as to whether he is available at home. This witness is also from the Bhavki of the deceased. There is evidence of Ghodke (PW 14), Investigating Officer also on Exh. 34.

25) The contents of Exh. 34 are as under :-

- (i) Stop; there is current of electricity in the cot.
- (ii) I have murdered her in the room from the field.
- (iii) I am committing suicide.

This panchanama was prepared between 15.00 hours and 15.30 hours of 28.3.2000.

26) The contents of aforesaid chit and the circumstances already mentioned show that after ascertaining that the accused was not available at his residential place, at village, police went to the well mentioned in the first chit to see as to whether the accused had really committed suicide. The investigation made and the record like panchanama show that nothing was recovered from the aforesaid well. Thus, the accused, respondent had left the aforesaid chits, but

he had not committed suicide and he was not traceable. Such evidence is given by Investigating Officer Ghodke (PW 14).

27) The evidence of Investigating Officer Ghodke (PW 14) shows that police could trace the accused on 29.3.2000. Evidence is given that after the arrest of accused, respondent, police obtained specimen hand writing of the accused in the presence of panch witnesses on 31.3.2000. Tejrao (PW 4) has given evidence as panch witness and the 12 papers on which the specimen hand writing was obtained are on the record as D-1 to D-12. The panchanama of taking specimen hand writing is proved as Exh. 35 in the evidence of these two witnesses.

28) It is not specific case of the accused that he was living in joint family with either father or brother and the evidence on record also has not created probability that the accused was living in joint family. The evidence of spot panchanama shows that only accused was living there with his family and it is brought on the record that only because father was found in the vicinity of the house of the accused, the spot panchanama was drawn in the presence of father of the accused.

29) Evidence is given by Ghodke (PW 14), Investigating

Officer that he sent the aforesaid two chits and also the sample hand writing collected from the accused to hand writing expert. The record like requisition letter, covering letter is produced. Dhotre (PW 12), the hand writing expert is examined by the prosecution. Dhotre has given evidence on procedure which is required to be followed for comparison of the hand writing and the photographs taken by him during procedure are produced. His evidence shows that he has experience of examining more than three lakh documents and he has experience as a witness of 3000 cases. His evidence shows that all the documents were received by him on 4.4.2000. This date is also relevant and important as it shows that steps were taken by Investigating Officer immediately and the writing was sent to the expert after getting specimen hand writing of the accused.

30) Dhotre (PW 12) has given evidence that he formed opinion on the basis of examination made by him that there is no significant difference in the specimen hand writing supplied to him and the two chits (the chits, containing confession) and the author of these documents is one and the same. He was extensively cross examined by the defence counsel, but his evidence remained unshattered. The documents are at Exhs. 52, 53, 54 and 55 as the disputed documents and the specimen hand writing. This point will be touched again at later place.

31) Ghodke (PW 14), Investigating Officer has given evidence that when accused was arrested on 29.3.2000 under panchanama, his clothes were taken over. Babaji Dhok (PW 3) is examined as panch witness to prove the arrest and seizure panchanamas. This witness hails from Malkapur and it can be said that he is the only panch witness who is not relative of deceased. Babaji (PW 3) has given evidence that on 29.3.2000 the accused was arrested in police station and the panchanama at Exh. 23 was prepared when the clothes were taken over. He has given evidence that there were injuries like scratches on the right palm of the accused. There is mention of such scratches in panchanama, Exh. 23. Exh. 23 also shows that there were blood stains on both shirt and pant of the accused. However, no record is produced by the prosecution to show that accused was referred for medical examination to get certificate in respect of the injuries found on his right palm.

32) Ghodke (PW 14) has given evidence that the clothes of the accused were sent to C.A. office with covering letter at Exh. 61. The covering letter bears date of dispatch as 29.3.2000. The C.A. report at Exh. 66 shows that human blood was detected on the clothes of the accused. Blood of group 'B' was detected on the pant,

trouser of the accused. Blood group of the deceased was 'B' as per the other C.A. report. Though there is such evidence, the Trial Court has held that this evidence is not sufficient to link the accused with the incident in question.

33) Prosecution has examined Parashar (PW 9), the owner of Gayatri Lodge from Badnapur. Parashar has given evidence that one person had stayed in his lodge on the night between 27.3.2000 and 28.3.2000. He has given evidence that the said person had given his name as Kakasaheb and the said person had put his signature in the register of lodge. He has deposed that on 29.3.2000 police came to his lodge with the said person and he identified the said person as the same person who had stayed in his lodge by giving his name as Kakasaheb. Parashar has given evidence that after about two months, he was called by police to identify the same person in test identification parade and he identified the accused in test identification parade. A copy of entry made in respect of said Kakasaheb in the lodge is taken on record as Exh. 42 and this document is consistent with the evidence that one person by name Kakasabe had stayed in his lodge.

34) Prosecution has examined Anjali (PW 6), Executive Magistrate who conducted the test identification parade for giving

the opportunity to Parashar to identify the accused. The record of test identification parade is proved as Exhs. 28 to 31. The substantive evidence of the Magistrate and the record show that Parashar identified the accused on 9.5.2000 during test identification parade. Six dummies were used. Though there is such evidence of test identification parade, due to admission given by Parashar in his evidence that on 29.3.2000 the accused was brought to him by police and on that day, he had identified the accused, not much importance can be given to the record of test identification parade.

35) Parashar (PW 9) identified accused in the Court as the same person who had stayed in his lodge on the night between 27.3.2000 and 28.3.2000 by giving name as Kakasaheb. His evidence came to be recorded by the Court on 13.7.2001 when the incident had taken place in last week of March 2000, within one year and four months. Due to peculiar circumstances of the present matter, this Court holds that the evidence given by the lodge owner of aforesaid nature, the stay of the accused in the lodge on the night between 27.3.2000 and 28.3.2000 needs to be believed.

36) It can be said that police could have created panchanama after recording the statement of accused under section 27 of the Evidence Act and then they could have gone to the lodge

and then they could have taken over the record of the lodge. Though this lacuna is there and police had opted other mode, this circumstance is not sufficient to discard the prosecution evidence, the evidence of Parashar (PW 9). The evidence of Parashar shows that he did not know the accused prior to the stay of accused in his lodge and he came to know the name of accused only on 29.3.2000. There was no reason for police or Parashar to create false record. In any case, this circumstance can be used only in support of the case of prosecution that accused had absconded after commission of the crime and he had left the village on 27.3.2000.

37) The incident took place on 27.3.2000 in day time. The aforesaid evidence and circumstances show that everybody learnt about the incident on 27.3.2000 itself and before evening Sarpanch had passed the information to police and also to the relatives of deceased on parent's side. Though the death had taken place in day time of 27.3.2000, the accused, husband of the deceased was not available in the village and he has not given any explanation. In ordinary course, the husband was expected to take steps, atleast to inform police about the incident that somebody had murdered his wife if he was not involved in the offence. The accused did not take such steps. He was absconding till 29.3.2000 and there is no explanation from the accused about this inaction and circumstances.

This conduct of the accused is relevant under section 8 of the Evidence Act as subsequent conduct. This circumstance is also not considered by the Trial Court in proper perspective.

38) The evidence of Bhagwan (PW 1), real brother of deceased; two cousin brothers of deceased like Bhausahab (PW 2) and Tejrao (PW 4) and also of Antikabai (PW 7), mother of deceased is on motive. They have given evidence that there was illtreatment to the deceased. Their evidence shows that this was the second marriage of accused and he had married with deceased as his first wife, accused No. 2 did not conceive from him even after many years of the marriage. These witnesses have given evidence that accused had suspicion about the character of deceased and suspicion increased after the birth of issue. The evidence on record shows that the first issue was born immediately after one year of the marriage. The witnesses have given evidence that the deceased used to disclose about the illtreatment which she was receiving from the accused and reason for the illtreatment was aforesaid suspicion. The witnesses have given evidence that on one occasion, they had tried to convince the accused to behave well.

39) The aforesaid witnesses have given evidence that 15 days prior to the date of incident in question, father of the accused

had reached the deceased to the house of first informant by saying that there was possibility of killing of deceased by the present respondent. The witnesses have given evidence that accused came to the house of first informant after 8 days and he took the deceased back to the matrimonial house. The evidence shows that after four days, the deceased visited the house of her parents for one day, but she returned to the matrimonial house after stay of one day. The evidence of Antikabai (PW 7), mother shows that on the last occasion, after stay of eight days in the house of parents, the deceased was not ready to return to matrimonial house as the accused was giving illtreatment to her. However, this lady has fairly admitted that during short stay of one day on subsequent occasion, the deceased had expressed that accused had started behaving properly.

40) The aforesaid evidence shows that the deceased gave birth to two issues and first issue was born immediately after one year of the marriage. The accused could not get issue from the first wife and so, he had suspicion about the character of deceased. Due to peculiar circumstances of this case, this Court holds that this suspicion acted as a motive for the crime and this suspicion was the reason for giving illtreatment to the deceased by the accused. As there is the evidence given on disclosure made by the deceased

about the suspicion and also about the illtreatment and as there is also evidence that the witnesses had tried to convince the accused, this Court holds that the disclosures made by the deceased to these witnesses need to be used as evidence under section 32 of the Evidence Act. The last disclosure was made within 15 to 16 days before the incident in question. There was such suspicion and the medical evidence shows that the offender wanted to make it certain that Gangabai is dead and he used both modes to finish her.

41) The C.A. report at Exh. 65 with covering letter show that all the articles taken over from the spot of offence were having human blood. The spade (described as 'hoe' in the spot panchanama) was used as weapon and on the handle of this implement blood was detected. The C.A. report in respect of blood of deceased is at Exh. 64. Thus, article, agricultural implement which was available in the shed of the accused was used as a weapon.

42) Much was argued for accused on the circumstance that relatives of the deceased on parents' side were used as panch witnesses and the Trial Court has also considered that circumstance. It is true that almost all panch witnesses on spot panchanama and panchanama of search of house of accused, close relatives of the deceased on parent's side were used as panch witnesses. It can be

called as lapse on the part of police. However, there are circumstances in the present matter to show that the persons from the village of the accused have not given evidence whole heartedly against the accused. The immediate neighbour, who was expected to give evidence on last seen turned hostile. Even Sarpanch admitted few suggestions given to him in the cross examination to show that he has no knowledge as to who is the owner of the house where the dead body was found. It can be said that the persons from village of the accused were not co-operating the police.

43) This Court has already observed that the evidence given by relatives of deceased on parents side on the ownership of the accused in respect of the house where dead body was found needs to be considered separately and there is no reason to disbelieve them. Further, for accused some suggestions already mentioned were given in that regard, but no record of acquisition was produced. What remains then is the collection of other material like the material collected from the spot of offence including a chit containing confession and the material collected from the residential place from the village which also include a chit, containing confession.

44) Due to circumstance that panch witnesses are close

relatives of deceased, the evidence requires close scrutiny. It is already observed that accused came to be arrested on 29.3.2000. Both the chits were recovered by police on 28.3.2000. The first chit was recovered in the early hours of 28.3.2000 and the copy of F.I.R. was sent to the Court of Judicial Magistrate, First Class ('J.M.F.C.' for short) on 28.3.2000. In the F.I.R. itself, the first informant had mentioned about the finding of such chit and so, before the arrest of the accused, it was informed to Magistrate in the F.I.R. that one chit was recovered and circumstance, was made a record of the Court. The first remand report dated 30.3.2000 shows that police had informed to the learned J.M.F.C. that one more chit was recovered from the residential place of accused and for that police wanted police custody as they wanted to obtain specimen hand writing of accused. On the basis of this remand report, police custody remand was obtained by police. The record does not show that there was any grievance from the accused in respect of the first or second chit. The specimen hand writing of the accused was obtained on 31.3.2000. One panch used on Exh. 35 dated 31.3.2000 was Babaji Dhok (PW 3) and other panch witness was Tejrao (PW 4). The record shows that the learned prosecutor who conducted the matter for State somehow missed to prove Exh. 35 in the evidence of Babaji (PW 3), who was examined in the Court as witness on 25.6.2001. Even in the evidence of Tejrao (PW 4), who was examined in the

Court on 25.6.2001, the learned prosecutor missed to bring on record evidence in respect of Exh. 35. It appears that the learned prosecutor recalled Tejrão (PW 4) for giving evidence on Exh. 35 and Tejrão was examined on 5.7.2001. Thus, it was possible for prosecution to take evidence of independent witness on taking specimen hand writing of the accused by examining Babaji Dhok (PW 3), but the learned prosecutor called Tejrão (PW 4). Babaji Dhok had not turned hostile. There are more such circumstances on the record showing that witnesses were recalled by the learned prosecutor. These circumstances show that the learned prosecutor was either incompetent or he was not that sincere. He had not collected the relevant data after going through the entire record for each witnesses and so, these lapses were committed by the prosecutor. Due to all these circumstances, this Court holds that there is no reason to disbelieve the panch witnesses, even though they were close relatives of the deceased on parents' side. The evidence also shows that there was no room for concoction or creation of false record of two chits containing extra-judicial confession of the accused. This Court holds that the record of the extra-judicial confession needs to be used against the present accused in the present matter.

45) The aforesaid discussion shows that there are following

incriminating circumstances which are fully established by the prosecution.

(i) The incident of murder took place in the house, in the shed of accused situated in his field in day time of 27.3.2000.

(ii) The weapon used for murder was agricultural implement available in the house and ligature material easily available.

(iii) The assault made on the deceased was not all of a sudden, but it was pre-planned as two modes were used to finish Gangabai.

(iv) The door of the house of accused was locked from the outside by using lock, but the key was kept with the lock showing that it was the job of person using that house and not the job of outsider. In ordinary course, the outsider would not have locked the door and would not have kept the key with the lock. This circumstance needs to be considered along with the two suicide notes showing that the accused wanted to disclose the incident to others as he wanted to commit suicide.

(v) The clothes of the accused were having blood stains on 29.3.2000. The accused has not given any explanation on this circumstance.

(vi) The accused left the village on 27.3.2000, he absconded and he was not available to police till 29.3.2000. The accused has not offered explanation as to why he left the village, as to why he did not approach police to inform the police about the murder of his wife.

(vii) In the two chits written by the accused, there is extra-judicial confession of accused and there is corroboration to this confessional statements.

(viii) The deceased had disclosed to the first informant and other relatives about the suspicion which accused had about her character and also about the illtreatment, the accused was giving to her out of the suspicion. The last disclosure was made about 15 days prior to the date of incident in question and this was the motive for the crime.

46) The Trial Court has not considered the aforesaid circumstances against the accused as a whole. The Trial Court has held that the few circumstances are fully established by the prosecution. But it is also held that they are not sufficient to draw inference of guilt. The reasoning given by the Trial Court shows that the evidence on illtreatment was mainly considered to ascertain as to whether it was sufficient for proof of 'illtreatment' as defined

under section 498-A of IPC when these circumstances ought to have been considered for offence of murder also. When death, murder took place in the custody of accused, there cannot be evidence of other nature. When the case rests on circumstantial evidence, the Court is expected to consider each and every piece of circumstantial evidence available under section 3 of the Evidence Act, separately and then consider all the circumstances together. The finding of the Trial Court that the absence of record about the ownership and possession in respect of house where the incident took place is fatal to the prosecution case, is erroneous. The evidence already mentioned by this Court is not at all considered by the Trial Court. Thus, the Trial Court has not considered the relevant facts in the present matter and also the circumstance that the accused has not offered explanation when it was necessary for him to offer explanation in view of the provisions of section 106 and 114 of the Evidence Act. All these circumstances point finger only to the accused as the culprit.

47) The Trial Court has placed reliance on the observations made by this Court in the case reported as **1999 CRI.L.J. 3841 (BOMBAY) [Dada Shankar Pawar Vs. State of Maharashtra]**. The facts of this reported case were totally different. The facts and circumstances of each and every criminal case are always different.

A single circumstance here and there can make a lot of difference in criminal case. It is already observed that aforesaid established circumstances are ignored by the Trial Court and their relevancy is not properly considered by the Trial Court. When the facts of the reported case were not identical, the Trial Court placed reliance on the case to give decision of acquittal.

48) In view of the discussion of the evidence made above this Court has no hesitation to hold that the prosecution has proved both the offences against the respondent, accused. Thus, the decision of the Trial Court needs to be interfered with. The accused needs to be convicted and sentenced for the offence of murder, which is the main offence. In view of the facts of the case already discussed, this Court holds that it is not a rarest of rare case. The incident took place due to suspicion which the accused had about the character of deceased. Thus, the death penalty is not warranted in the present matter. In view of these circumstances, there is no need to give hearing to the respondent, accused on the point of penalty. In the result, following order.

ORDER

(I) The appeal is allowed. The judgment and order of Trial Court delivered in Sessions Case No. 42/2001, acquitting the respondent/accused - Shivaji Bhujangrao

Ukirde of the offences punishable under sections 302, 498-A of IPC is hereby set aside.

(II) Respondent/accused - Shivaji Bhujangrao Ukirde stands convicted for the offence of murder punishable under section 302 of IPC and he is sentenced to suffer imprisonment for life and to pay fine of Rs.5,000/- (Rupees five thousand). In default of payment of fine, he is to further undergo rigorous imprisonment for three months.

(III) Respondent/accused - Shivaji Bhujangrao Ukirde stands convicted for the offence punishable under section 498-A of IPC and he is sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.500/- (Rupees five hundred). In default of payment of fine, he is to further undergo rigorous imprisonment for one month.

(IV) Both the substantive sentences to run concurrently.

(V) The accused is entitled to set off in substantive sentence in respect of the period for which he was behind

bars as under trial prisoner in the the present matter.

(VI) The accused is to surrender to his bail bonds for undergoing the sentence. The Trial Court is to issue conviction warrant according.

[ARUN M. DHAVALA, J.]

[T.V. NALAWADE, J.]

SSC/