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

CRIMINAL APPEAL NO.50 OF 2002

Abdul Rauf s/o Gulam Ahmed,
Age: 55 years, Occ: Carpenter,
R/o. Indiranagar, Garkheda,
Aurangabad. **..APPELLANT**

VERSUS

The State of Maharashtra **..RESPONDENT**

Mr Santosh Bhosale, Advocate for appellant
(appointed);
Mr V.S. Badakh, A.P.P. for respondent

**CORAM : T.V. NALAWADE &
ARUN M. DHAVALA, JJ.**

**RESERVED ON : 04/12/2017
DELIVERED ON : 19/12/2017**

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

The appeal is filed against the judgment
and order of Sessions Case No.111 of 2001, which
was pending in the Court of learned 3rd Adhoc
Additional Sessions Judge, Aurangabad.

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2. The trial Court has convicted the appellant, who was accused No.3, for the offences punishable under Sections 376(f) and 302 of the Indian Penal Code and sentence of imprisonment for life is given for the offence of murder.

3. Heard both the sides.

4. In short, the facts leading to institution of the present proceeding can be stated as follows :

The deceased, victim girl, aged 10 years, was daughter of present appellant, original accused No.3. The appellant was living with deceased, his elder son Parvez and his other issues in the house, where the incident in question took place, at Indiranagar, Garkheda, Aurangabad. About 1-1/2 month prior to the date of incident, the appellant had quarrel with his wife Zaibunnisa and due to quarrel, his wife had gone to Kingaon Raja to relative from parental side with son Parvez. On

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the date of incident i.e. on the night between 01/03/2001 and 02/03/2001, the accused was present in his house along with deceased and one elder son.

5. On that night, present appellant was in the company of accused No.1 Sikandar and accused No.2 Aslam. The appellant was addicted to ganja. These boys gave some money to the appellant and the appellant took them to his residential place. He prepared '*Shira*', Indian sweet, and cooked rice. He made children like deceased and her brother to wake up and gave them *Shira*.

6. After eating *Shira*, the victim girl and her brother went to bed. Accused No.1 Sikandar, who was aged about 19 years, at the relevant time slept in the house of appellant but accused No.2 Aslam left for home. For some time, the appellant left home and it is his contention that he had gone to his brother to see him.

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7. On 02/03/2001 in the morning, the appellant gave report to police that deceased had died due to dog bite, which she had few days prior to 02/03/2001. The police referred dead body for post mortem examination. Doctor, after conducting post mortem examination, gave opinion that death took place due to throttling. There were also signs of rape on the dead body.

8. On 03/03/2001 the appellant gave report to police against accused Nos. 1 and 2 that probably on that night Sikandar had raped victim girl and to suppress rape, he had committed murder of victim girl by throttling. On the basis of this report, crime at C.R. No.50 of 2001 came to be registered in Jawaharnagar Police Station, Aurangabad City for the offences punishable under Sections 376(f) and 302 of the Indian Penal Code. During the course of investigation, statement of the brother of deceased, Yusuf came to be recorded and statement of some other neighbours came to be recorded. Viscera was preserved but no poison was detected in

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the viscera. Nail scrappings were also preserved by Doctor. Accused Nos. 1 and 2 Sikandar and Aslam came to be arrested and charge sheet came to be filed against them for the aforesaid offences. Charge was framed and plea was recorded. Both the accused pleaded not guilty. The prosecution examined as many as 11 witnesses till 11/07/2001. The trial Court made order to make present appellant-accused in the case by using provisions under Section 319 of the Code of Criminal Procedure. An opportunity was given to the appellant to get recorded the evidence afresh but he accepted evidence, which was already recorded by filing pursis. In the statement recorded under Section 313 of Code of Criminal Procedure, the accused took defence of total denial. No defence evidence is given by the appellant. The trial Court acquitted accused Nos. 1 and 2 but the trial Court has convicted present appellant by holding that he had opportunity to commit offence and as murder took place in the custody of the appellant he is liable for conviction. As there were signs

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of rape, he is convicted for offence of rape also punishable under Section 376(f) of the Indian Penal Code.

9. The record shows that the appellant has not disputed that it is homicide. Further, the appellant had given report to police though it was as against accused No.1, which is at Exhibit-24. In this report, he had informed that it was case of murder. This record can be used under Section 8 of the Indian Evidence Act.

10. Dr. Sitalal Rathod (PW-8) is examined to prove post mortem report prepared by him after conducting post mortem examination. Post mortem examination was conducted on 02/03/2001 between 9-30 p.m. and 11-00 p.m. Post mortem report and evidence of Doctor show that rigor mortis was present partly in lower limbs and there was no sign of decomposition. There was P.M. lividity on back except at pressure sites. At Column No.13 of post mortem report, Doctor observed that pupils were

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dilated, there was conjunctival haemorrhage in mouth in partially opened condition.

11. Doctor found following injuries on the dead body, as mentioned in Column No.17 of post mortem report:

Surface wounds and injuries: - Their nature, position, dimensions (measured) and directions to be accurately stand - their probable age and causes to be noted : - If bruises be present what is the condition of the subcutaneous tissues ?	<u>Injuries over face</u>
(N.B. when injuries are numerous & cannot be mentioned within the space available they should be mentioned	1) Abrasion straight linear, vertical over forehead 0.5 cms. right to middle 1 cms. above the upper margin of orbit, 1.2 cms. in length and 0.2 cms. in width. directed downwards reddish without scab. 2) Abrasion - dash like, horizontal over the left side of face at maxillary region 7 cm. below the upper margin of orbit and 7 cm. from middle line 0.5cm. X 0.2cm. directed laterally reddish without scab. 3) Contusion over the lower lip on left side, corresponding to lateral incisor and canine teeth in an area of 2.8 cm. X 1.5 cm. reddish swollen. <u>Injuries over neck</u> 4) Abrasion present over right side of neck, antero-lateral aspect, comma like, concavity facing downwards forwards and medially, situated 5 cm. below the right mastoid and 4.2 cm., from midline of size 0.5 cm x 0.4 cm reddish without

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on a separate paper which should be signed)	scab. 5) Abrasion present over right side of neck antero-lateral aspect, comma like, concavity facing downwards forwards and medially situated 1 cm. below the above injury No.4 6.5 cm. below the right mastoid and 3.5 cms. from midline of size 0.5 cm. by 0.2 cm. reddish without scab. 6) Abrasion present over right side of neck, antero-lateral aspect, dash like more or less horizontal, directed medially and downwards situated 1 cm. below the injury No.5. 7.5 cm below the right mastoid and 3.6 cm from midline of size 1 cm. X 5 cm. reddish without scab. 7) Abrasion present over right side of neck antero-lateral aspect, comma like concavity facing downwards, forwards and medially 2.5 cms. below the above injury No.6. 10.5 cms. below the right mastoid and 3.5 cms. from midline of size, 5 cm by 3 cms reddish without scab. 8) Abrasion present over right side of neck, antero-lateral aspect, regularly curved, vertical, concavity facing forward and medially 5 cm below the above injury No.7. 11 cms below right mastoid and 3.8 cm., from midline of size 1 x 2 cms. reddish without scab. 9) Abrasion over left side of neck, antero-lateral aspect, circular directed medially, 6 cms below the left mastoid and 3.8 cms. from midline of size 1 x 1 cm. reddish
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	without scab. 10) Abrasion over the left side of neck antero-lateral aspect, horizontal, straight, directed medially 3 cms below the above injury No.9, 10 cms below the left mastoid and 2.5 cms from midline of size 2 cms x 0.5 cms reddish without scab. 11) Abrasion over left side of neck, antero-lateral, aspect, circular, directed medially, 12 cms below the left mastoid, 3.8 cms from midline and 1.5 cm., below injury No.10, of size 1 cm x 0.7 cms reddish without scab. <u>Injury over limb</u> 12) Abrasion over the antero-lateral aspect of left index finger at upper end of proximal phalynx of size 0.5 cm x 0.5 cm reddish without scab.
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12. Dr. Sitalal Rathod (PW-8) has given finding that all aforesaid injuries were ante mortem in nature. He found that meninges congested and there was patchy subarachnoid haemorrhage, brain matter was congested and oedematoes with patechial haemorrhage in the white matter. In dissection of neck, Doctor found following injuries.

Multiple, irregular, reddish, hemorrhagic contusions, under the abrasions of neck on either side of mid line in the dermis, subcutaneous tissue, muscles and fascia in an area of 8 cms x 3 cms on right side—hyoid bone intact.

13. Dr. Sitalal Rathod (PW-8) found sub pleural patchial haemorrhage in larynx, trachea.

14. There is one circumstance in the post mortem report like Dr. Sitalal Rathod (PW-8) noticed anus was having reddish colour and it was having dilated appearance.

15. Doctor had collected vaginal swab, vaginal smear etc. Doctor had noticed 150 gms. of whitish and pale yellowish coloured pulpy material, which was semi digested in stomach. Post mortem report at Exhibit-20 prepared by Dr. Sitalal Rathod is consistent with his oral evidence.

16. Dr. Sitalal Rathod (PW-8) was cross examined by Advocate of accused No.1 only to some extent and Advocate of present appellant had declined to cross examine the Doctor. It is already observed that the appellant did not dispute that it is case of homicide. Doctor has given evidence that injuries mentioned in Column No.17 are possible during scuffle, which may take place, if one resists rape. No semen was detected in vaginal swab, which can be seen in Chemical Analyzer's report at Exhibit-29. Post mortem was conducted after many hours of the incident, more than 20 hours. Doctor has not given specific opinion that he formed opinion that there was rape. There were injuries on the face of the deceased, which were at lower lip etc., but there were no injuries on the private part external or internal. It is not case of prosecution that on the clothes or bed sheet, *chadar* or where the incident took place, there was some semen and no such semen was detected as per Chemical Analyzer's report. No

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blood was also detected on the clothes. These circumstances create doubt about the case of prosecution that sexual intercourse did take place. However, the circumstances mentioned in post mortem report and evidence of Dr. Sitalal Rathod is sufficient to infer that there was at least attempt of rape.

17. The prosecution has relied mainly on evidence of brother of deceased viz. Yusuf (PW-6). His evidence was recorded on 06/07/2001 when the incident in question had taken place on the night between 01/03/2001 and 02/03/2001. The evidence was recorded on oath and after ascertaining that he understands sanctity of oath.

18. The evidence of Yusuf (PW-6) shows that on that night, his mother was not at home and only he and deceased were present in the house along with present appellant. He has given evidence that at about 12 hours of the night, his father made them to wake up when they were sleeping and he offered

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them *Shira* for eating. He has given evidence that he went to bed after eating *Shira* and on the night, he had noticed that father had left house for some time and one person, accused No. 1 had slept on the cot where the deceased was sleeping. He has given evidence that in the morning, he tried to wake up deceased but she did not wake up. He has tried to say that at that time accused No.1 was sleeping on the cot and when his father went out to call neighbours and relatives, accused No.1 left the house by putting on his clothes. He identified accused Nos. 1 and 2 as the two boys who were in the company of his father on that night. He has given evidence that one of the two accused had made payment to his father and his father was addicted to ganja. In the cross examination made by Counsel of accused Nos. 1 and 2, he admitted that his sister had dog bite two days prior to date of incident. In the cross examination, it is suggested to this boy that accused No.1 was not present there on that night and he had not left in the morning after putting on clothes. This

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suggestion is denied. In any case, the evidence of this boy can be used for limited extent, as according to him, after eating *Shira*, he went to bed and woke up in the morning. His further version that for sometime his father was not at home is not that convincing.

19. Salmabee (PW-4) is sister of wife of appellant. She is also neighbour of the appellant. She has given evidence that on the morning of 02/03/2001, it was informed to her that victim girl did not wake up from sleep and there was some problem. She has given evidence that she found injuries on the dead body. She has tried to give evidence as against accused No.1 that he was present in the house and after her entering in the house, he left house after putting clothes on his person. Her evidence is mainly as against accused No.1. State has not challenged the decision of acquittal given in favour of accused No.1 and so, evidence need not be discussed in detail of this lady.

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20. Shaikh Abdul Kadar (PW-5) is other neighbour of the accused. He has given evidence that he had visited residential place of appellant on 01/03/2001 and he had seen deceased in the house and accused No.1 was doing some exercise. It can be said that this witness has tried to help the appellant-accused by saying that quarter to 5-00 to 5-00 p.m. accused No.1 was present in the house, but it is not the case of anybody that accused No.1 had entered the house in the evening of 01/03/2001.

21. Rashida (PW-7) has given evidence that at about 7-30 a.m. on 02/03/2001, the appellant had come to her to inform that deceased did not wake up and there was something wrong. She has given evidence that when she visited the house, accused No.1 was sitting on the cot in the house of appellant. This evidence is also not against the appellant.

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22. Prior to making of order under Section 319 of the Code of Criminal Procedure, the appellant had given evidence on oath but as he is made accused, that evidence cannot be used against him. It was not statement recorded under Section 164 of the Code of Criminal Procedure.

23. There is evidence of Javed Ahmed (PW-10), brother of appellant. His evidence shows that at the relevant time, wife of appellant was not at home. He has tried to say that about 2-00 a.m. on that night, the appellant had come to his house and he was in his company for about one hour and then the appellant left for home. He has given evidence that the appellant had disclosed to him that one Sikandar was present in his house. It can be said that there was no need for prosecution to examine PW-10, but, when he was examined, the prosecution wanted to prove offence as against Sikandar and that is why, he was examined. In any case, when Sikandar is acquitted of the offence, his evidence cannot make much difference in the case. Even if it

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is presumed that the appellant had left home and during that time, Sikandar was present in his house, there is other evidence against the present appellant. However, such possibility is not there.

24. Balasaheb (PW-11) was attached to Jawaharnagar Police Station on 02/03/2001 and he received message that in the locality where the appellant was living, mob had gathered, as daughter of appellant was dead. He has given evidence that he went to the spot but father of deceased was not available and he deputed police for search of father of the girl. He has given evidence that there were injuries on the dead body. He has given evidence that on that day, father of girl gave information which was recorded as report. The report is at Exhibit-23. The present appellant has not disputed that he had given this report. In this report, he admitted that on that night, he was present in the house and in the morning, he realized that daughter was dead. However, he had informed that she had died due to dog bite as on

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previous Wednesday she had dog bite. On the basis of this report unnatural death was registered under Section 174 of the Code of Criminal Procedure and then steps were taken like preparing inquest and sending dead body for post mortem examination. This report and evidence of Balasaheb (Pw-11) shows that only after the arrival of police, some steps like giving of A.D. report were taken by the present appellant and only after that A.D. was registered at 14.15 hours. This record and circumstances are certainly against the present appellant as he did not approach police immediately and secondly, he gave false information that his daughter had died due to dog bite. There is virtually no record to show that deceased had dog bite. In ordinary course, the appellant being father, must have taken deceased to Doctor, if she had dog bite. Oral evidence of his son, who has tried to help present appellant cannot be of any use in this regard.

25. The spot panchnama is at Exhibit-18. It appears that spot panchnama was not disputed by the

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defence. The spot panchnama shows that house of appellant consists of one room. The blood stains were present on *Godhadi* (as bedding) and on the floor and pieces of bangles of deceased were lying. *Odhani* was taken over due to suspicion that there were some blood stains on *Odhani* and bed sheet was also taken over. It is already observed that no semen was detected on the articles taken over by police and even in vaginal swab. The spot panchnama is consistent with the case that same incident had taken place in house of appellant and due to resistance occurred by the deceased, her bangles got broken.

26. The discussion made above shows following things.

(i) At the relevant time, only the appellant, his son Yusuf (PW-6) and deceased were living in the house where the incident took place.

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(ii) On the night between 01/03/2001 and 02/03/2001 the appellant was available in the house.

(iii) The daughter of appellant was murdered by throttling in the house.

(iv) The way in which murder took place indicates that force was used for throttling and PW-6 could not have done it.

(v) The present appellant knew that his daughter had died and it was murder as there were visible injuries on the neck and and there were even blood stains but he did not approach police immediately to inform about murder.

(vi) The appellant approached police late, in noon time, only after arrival of police to the spot and when police had started searching for him and he gave report, which was false.

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(vii) The First Information Report was given by the appellant on 03/03/2001 in the noon time and first time, in the first information report, he expressed suspicion against accused No.1, Sikandar that he must have committed rape and then he must have been murdered his daughter by throttling.

(ix) The appellant had accepted money from Sikandar, accused No.1 and PW-6 has given evidence in the cross examination that the appellant is addicted to *ganja*. Thus, appellant had taken money from accused No.1, who was hardly aged about 19 years at the relevant time and the appellant had done it with some bad intention. This inference is possible due to F.I.R. given against accused No.1.

27. The first information report at Exhibit-24 given by appellant in respect of incident can be used against him under Section 8 of the Indian Evidence Act. The deceased was in his custody at the relevant time and due to that, it was necessary for the appellant to explain as to how the deceased

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died. He did not disclose the circumstance of murder till 03/03/2001. In the A.D. at Exhibit-23 he gave false information to police that death had taken place probably due to dog bite. Due to this circumstance, provisions of Section 106 and 114 of the Indian Evidence Act can be used against the appellant. The aforesaid circumstances show that it was job of insider. He tried to create circumstance like visit to the house of his brother on that night and even if that short visit of the appellant is accepted, that cannot absolve him of the aforesaid liability.

28. The evidence of PW-6 shows that at about 12 in the night, he and deceased were made to wake up and then *Shira* was given to them. In the stomach, 150 gms. Semi digested food was detected showing that within 3 to 4 hours of last meal murder was committed. The other things like starting of developing rigor mortis in lower limb which was noticed by Doctor at 9-30 p.m. is already mentioned, but decomposition had not started. All

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these circumstances are sufficient to infer that murder took place in the house of appellant and circumstances point finger to the appellant. The evidence of his son (PW-6) can be used to hold that for getting money, he had given access to accused No.1 in his house but his subsequent conduct shows that appellant had opportunity and reason to finish deceased. The conduct of accused No.1 was not consistent with his guilt, if evidence of witnesses is believed. It does not probably that accused No.1 stayed in the house of appellant after committing murder of deceased in the night time and only when appellant called others after realizing that his daughter was dead, accused No.1 left the place. It is not possible to believe these witnesses on their versions that till morning accused no. 1 was present in the house. In view of these circumstances, this Court holds that trial Court has not committed any error in convicting the appellant for offence of murder punishable under Section 302 of the Indian Penal Code. However, for the reasons already given, this Court holds that it

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is not possible to convict the appellant for offence of rape made punishable under Section 376(f) of the Indian Penal Code.

29. Learned Counsel for the appellant argued that after using power under Section 319(4) of the Code of Criminal Procedure, trial Court ought to have recorded the evidence afresh but that was not done and so prejudice is caused to the appellant. This submission is not at all acceptable. The record shows that after making the appellant-accused in the case, opportunity was given to the present appellant in that regard but pursis was filed for appellant that he had no objection to use evidence already recorded. It needs to be kept in mind that such pursis was filed as evidence which was already recorded was given against accused No.1 Sikandar with the presumption that he was only facing trial. It can be said that by filing pursis, the appellant avoided to bring more evidence on record which could have been used against him. Thus, no prejudice is caused to the

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appellant. Further, some witnesses were cross examined by his Counsel and the Counsel declined to cross examine some witnesses when they were examined for other purpose.

30. Learned A.P.P. placed reliance on some observations made by the Apex Court on the procedure which needs to be adopted for using provisions of Section 319 of the Code of Criminal Procedure. In the case reported in **AIR 2008 SC 1661 (Nishan Singh vs State of Punjab)**, the Apex Court has laid down that the ground of non compliance of the procedure needs to be raised at the earliest and such ground cannot be raised after pronouncement of the judgment of the case. Further, case needs to be made out that by reason of procedural irregularity, failure of justice has occurred. In the present matter, the appellant filed pursis and due to that, witnesses were not examined afresh. It can be said that only due to circumstances which are established for proving custodial death, accused-appellant is getting

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conviction. Thus, there is no possibility of interference in the decision given by the trial Court, by which, the appellant is convicted for offence of murder.

31. In the result, following order :

: O R D E R :

(1) The appeal is partly allowed.

(2) The judgment and order of the trial Court convicting the appellant for offence punishable under Section 376(f) of the Indian Penal Code is hereby set aside. However, conviction given to the appellant for offence punishable under Section 302 of the Indian Penal Code is maintained and the appeal to that extent is dismissed.

(3) The fine amount, if any, deposited by the appellant in respect of penalty imposed for offence of rape is to be returned to him.

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(4) The appellant to surrender bail bonds for undergoing sentence.

(5) The fees of learned Counsel appointed for the appellant is quantified as Rs.7,500/-.

(ARUN M. DHAVALÉ, J.)

(T.V. NALAWADE, J.)

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