

**Criminal Appeal No. 616 of 2002**

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**Judgment pronounced on : 12 December 2017.**

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

1) The appeal is filed against the judgment and order of Sessions Case No.71/2000 which was pending in the Court of the learned 3rd Ad-hoc Additional Sessions Judge, Ahmednagar. The trial Court had convicted the appellant-accused for offences punishable under sections

302, 201, 498-A of Indian Penal Code and imprisonment of life is given to him. Both the sides are heard.

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

3) The first informant, Sopan Bothe is resident of Walki, Tahsil and District Ahmednagar. Deceased Tarabai was his daughter and Tarabai was given in marriage to the appellant about one and half years prior to the incident in question. There are allegations that after one year of the marriage, ill-treatment was given to the deceased by her husband, present appellant and the parents of the appellant. The husband was asking the deceased to bring Rs.50,000/- from her parents as he wanted to purchase a tempo. He was working as a driver. The appellant is addicted to liquor and he used to give beating to the deceased after consuming liquor. The deceased used to disclose about the ill-treatment which she was receiving in the matrimonial house from the husband and his parents to her parents on the occasions when she used to visit the house of her parents. The parents of the deceased and others had tried to convince the appellant and his parents

to behave well and such attempts were made on 2 to 3 occasions. Even promise was given to give the amount after making some arrangement.

4) Few days prior to Diwali festival of 1999 the deceased had visited the house of her parents and at that time she had injury near her left eye. She disclosed that the husband had quarreled with her as she had not brought Rs.50,000 and after taking liquor he had virtually thrown a bucket at her and due to that she had sustained injury. On that occasion the deceased had stayed in the house of her parents for 5 to 6 days. The husband had then taken the deceased back to the matrimonial house. The deceased had visited the house of her parents at the time of Diwali of 1999 and on that occasion she had disclosed that the husband had warned her to come with Rs.50,000 otherwise she should not return to the matrimonial house. On that occasion she stayed in the house of her parents for about a month but her parents could not make arrangement of money. Then the appellant visited the house of the parents of the deceased and he took her to the matrimonial house.

5) On 5-2-2000 at 6.00 p.m. a brother of the appellant, namely Bapu visited the house of the parents of the deceased and he inquired as to whether Tarabai had come to their house. Tarabai had not come to the house of her parents. Then the brother of the appellant informed that on that day there was quarrel between Tarabai and the appellant and the appellant had left Arangaon by saying that he wanted to reach the deceased to Walki, to the house of her parents. The brother informed that appellant had returned alone but Tarabai was not in his company.

6) After receiving this information, the parents and other relatives of Tarabai started searching for Tarabai. She was not traced on 5-2-2000 and 6-2-2000. On inquiry the appellant and his sister expressed that she would return but she did not return. On 8-2-2000 at 11.00 a.m. when the first informant, Sopan went to Arangaon with his relatives, there he learnt that the dead body of Tarabai was found in a well from Arangaon. The field where the well is situated belongs to one Gahile.

7)           Somebody from Arangaon informed police about the death and then police came to the spot. During inquiry of unnatural death, police prepared inquest panchanama and referred the dead body for post mortem examination. The spot panchanama was also prepared. Some injuries were noticed on the face and on the neck of the deceased. Post mortem was conducted on the dead body on 9-2-2000. The doctor gave opinion that the death had taken place due to throttling. After receipt of the opinion, Sopan gave report against the appellant and his parents and the crime came to be registered for the aforesaid offences against the three accused.

8)           The present appellant came to be arrested on 9-2-2000 itself. He was referred for medical examination and two injuries like abrasions were found on his person. Police recorded statements of the relatives of the deceased on parents' side and after completion of the investigation filed charge sheet against the appellant and his parents for the aforesaid offences. charge was framed for the aforesaid offences. All the accused pleaded not guilty. They took defence of total denial. The prosecution

examined in all seven witnesses. The trial Court has believed the oral evidence given by the relatives of the deceased on parents' side and the trial Court has held that only the appellant had the opportunity to finish the deceased and there was motive for the crime.

9) The defence has admitted the documents like inquest panchanama which is at Exhibit 19; the spot panchanama which is at Exhibit 22 and the post mortem report which is at Exhibit 29. It can be said that the defence has not disputed seriously that it is a case of homicide. Though in the inquest panchanama some injuries were noted, the panchas were not in a position to give definite opinion on the basis of those injuries. There were scratches found on the neck.

10) Dr. Ashok Ghuge (PW-5) is examined by the prosecution to prove the post mortem report. He conducted the post mortem examination on 8-2-2000 between 3.45 p.m. and 5.30 p.m. He found following surface wounds on the dead body.

- "1. Four abrasion marks on left lateral side of neck below mandible 5 cm, 7 cm, 9 cm and 12 cm below mandible on neck all 1/2 x 1/2 cm in diameter and reddish in colour.
2. Two abrasions on right side of neck below right mandible 3 cm and 4 cm from mandible on neck. 1/2 x 1/2 cm in diameter both.
3. Left ear lobule is lost. White in colour.
4. Abrasion on left cheek 1/2 x 3 cm in white colour.
5. Small bite marks seen on both eye brows and both lips by watery animals."

The doctor has given evidence that injury Nos.1 and 2 mentioned above were *ante mortem* in nature but the injuries Nos.3 to 5 were *post mortem* in nature. Dr. Ghuge (PW-5) has given evidence that on internal examination he found haematoma under scalp at left fronto parietal region of the size of 4 x 6 inches. Brain was congested. He noticed that subcutaneous haematoma was present on the neck anteriorly and trachea was congested. Lung was also congested and heart was empty. 400 ml semi digested food was found in the stomach. Haematoma present in small bowel wall at six places.

11) Dr. Ghuge (PW-5) has given specific reasons for opinion that the death took due to throttling as follows :-

"Swollen subconjunctival haemorrhage present in both eyes with both eye balls protruding. Tongue in between teeth and teeth marks present on the tongue. Tongue tip cyanosed. Blood stained oozing present from nostrils. No any oozing from mouth and ears. The above features are features for throttling. Injury Nos.1 and 2 in col. No.17 of Exhibit 29 are possible if a person sitting on knee presses the neck of the other person with the help of fingers and he resists and if the first again pressed the neck with the help of fingers. The above symptoms are noticed on the dead body and the same are mentioned in column No.21 of post mortem notes. The symptoms mentioned in column No.20 are corresponding to the symptoms mentioned in column No.17 of the P.M. notes. The injuries 1 and 2 mentioned in column No.17 are sufficient in ordinary course to cause death of a person. If neck of the person is pressed with the help of fingers the death can be resulted within six minutes. I have not noticed any symptoms of drowning. After receiving the viscera report I am firm with my opinion regarding cause of death mentioned in the P.M. report Exhibit 29."

12) Thus, the doctor has given specific opinion that death took place due to throttling. The *post mortem* report at Exhibit 29 prepared by him is consistent with his oral evidence. In the cross-examination, it was suggested to the doctor that the injuries which were found on the dead body can be caused to a woman if she resists for sexual intercourse. This suggestion was hypothetical in nature. As the defence has admitted the *post mortem* report and as this suggestion is given, this Court holds that Tarabai died homicidal death. Opinion is given that the death took

place within six hours of the last meals. The doctor could not give opinion about the time of the death which had passed prior to the *post mortem* examination and he has deposed that he cannot tell fixed time whether the death was caused prior to 6 to 7 hours of the *post mortem* examination. Rigor mortis was absent on the dead body and no sign of decomposition was found. These circumstances need to be kept in mind as the case of the prosecution rests mainly on the circumstantial evidence.

13) The aforesaid evidence has ruled out the possibility of suicide, death due to drowning. The spot panchanama at Exhibit 22 shows that the well is situated in village Arangaon and the land belongs to one Gahile. The well was constructed in stones but it was not having parapet wall. Water was having depth of 11 feet and there were steps to the well for getting into the well. The water was at the level of 2 feet from the last step of the well. At the distance of 50 feet from this well there was Arangaon - Shindewadi kaccha road. Nobody has brought on record as to whether the well is 1situated towards side of Walki or this well is situated at other side of village Arangaon.

Even the distance between the well and the residential place of the accused is not brought on the record.

14) Sopan (PW-4), father of the deceased, has given evidence that the deceased was cohabiting with the accused in village Arangaon. Similar evidence is given by other relatives of the deceased like Bajirao (PW-3) cousin brother and Jalindar (PW-1) real brother of the deceased. In the statement given under section 313 of the Criminal Procedure Code the accused has stated that the deceased was cohabiting with him at the relevant time.

15) Jalindar (PW-1), Bajirao (PW-3) and Sopan (PW-4) have given evidence that on Saturday (5-2-2000) the day since when the deceased was not traced, a brother of the appellant by name Bapu had come to them and he had made inquiry as to whether the deceased had come to them. This evidence was put to the accused in the statement under section 313 of the Cr.P.C. and the accused had admitted that his brother had gone to the house of these witnesses to make such inquiry. Sopan (PW-4) has given evidence that the brother of the appellant

had informed that there was quarrel between the deceased and the appellant and then the appellant had left village Arangaon with the deceased by saying that he would reach the deceased to Walki. The brother of the accused, appellant is not examined in Court and so the evidence of the aforesaid nature has become hearsay. In view of provision of Sections 6 and 8 of the Evidence Act only some part of the evidence given by Sopan (PW-4) and other relatives can be used and it can be inferred that the appellant had sent his brother to Walki or his brother had come to Walki in search of the deceased. Inference is not possible on the basis of this evidence that the deceased had left Arangaon with accused on 5-2-2000.

16) The accused-appellant has admitted that he had given missing report to police on 6-2-2000. That report is given Exhibit 18. In that report also the accused had informed to police that the deceased had left his house at 4.00 p.m. on 5-2-2000 and since then she was missing. The trial Court has used this document to hold that the deceased was lastly in the company of the accused. The trial Court has committed serious error in using the

portion of the report and presuming that the deceased was lastly in the company of the accused in his house. It needs to be kept in mind that the dead body was found in a well from Arangaon and it is not certain as to what is the distance between the well and the residential place of the accused. The report can be used only as a circumstance under section 8 of the Evidence Act but the dead body was not recovered on the basis of the information supplied by the appellant and so only for limited purpose and under section 8 of the Evidence Act the report can be used. On the basis of this report it can be held that it is the accused who had informed police that the deceased was missing since 5-2-2000.

17) Shaikh Anwar (PW-2) and Uttam Tangade (PW-6), the investigating officer are examined by the prosecution to prove recovery of weapon, knife. They have given evidence that on 11-2-2000 the accused gave statement under section 27 of the Evidence Act and after giving statement he took police and panchas to a spot and from a tree he produced a knife before police. It is not the case of the prosecution that blood was detected on this

knife. Though there is this evidence and the documents like Exhibit 21 and Exhibit 22 are there, even the doctor (PW 5) has not given evidence that knife was used against the deceased. The doctor has given opinion that it is a case of throttling. Thus, the aforesaid evidence on the statement recorded is not the incriminating circumstance in the present matter.

18) Dr. Laxman Pawar (PW-7) is examined by the prosecution to prove that on 9-2-2000 when the doctor examined the accused he found following two injuries on the person of the accused.

"1. Abrasion below left elbow joint 1 x 1 cm brown black in colour.

2. Three abrasions over left side chest region below left clavicle 5 x 25 cm each. brown black in colour with scab formed."

The certificate of the injury is proved at Exhibit 41 in the evidence of this doctor. The doctor has given evidence that such injury can be caused if a person wants to assault other person and he rests his knees on the ground at that time. This opinion has no basis and this is 100%

hypothetical opinion. Injury No.1 was found on the left elbow and injury No.2 was found on left side of the chest. In the statement given under section 313 of the Cr.P.C. the accused has contended that he jumped from tree and due to that he had sustained these injuries. The size of the three abrasions mentioned in injury No.2 shows that apparently such injuries cannot be caused due to use of nails if the deceased had offered resistance. Further the doctor has given evidence that the age of the injury was 2 to 7 days. Thus, this evidence is also not that convincing and it cannot become incriminating circumstance against the accused.

19) In case of throttling, the examination of nail clippings of the accused was essential as some part of the skin of the deceased could have been found in the nail clippings of the accused if he had throttled her, but no such evidence has been collected.

20) The circumstance of last seen or custody needs to be proved convincingly so that Court is satisfied that provisions of Sections 106 and 114 of Evidence Act need

to be used against the accused. If other probability is left due to the nature of prosecution evidence, the Court is not expected to use these provisions of Evidence Act. In the present matter other probabilities are available.

21) The prosecution has examined aforesaid three witnesses to give evidence on ill-treatment. Evidence is given for offence punishable under section 498-A IPC and this evidence could have been used as evidence on motive. Evidence is given that there was demand of Rs.50,000/- from the accused-appellant as he wanted to purchase a tempo for transport business. This demand was made one year after the marriage and the incident in question took place after one year and 9 months of the marriage. Evidence of the father of the deceased shows that on every occasion it is the accused who had taken the deceased from the house of the parents to the matrimonial house. The evidence does not show that on any occasion the accused-appellant had put condition to give amount of Rs.50,000 first for taking the deceased back to the matrimonial house. Further, if there was such ill-treatment then in ordinary course the father of the deceased would

have given report against the accused. When he learnt about missing of the deceased on 5-2-2000 itself the father did not approach police till 9-2-2000 till the receipt of the opinion of the doctor who conducted the *post mortem* examination. This creates a clear possibility that the allegations made in the F.I.R. and the allegations made by these three witnesses on ill-treatment are afterthought in nature. The evidence on the record shows that the deceased used to visit the house of her parents almost as per her desire and the accused had never prevented the deceased to visit the house of her parents. The distance between Arangaon and Walki was hardly 8 kilometers. Thus, evidence on motive is very weak and on the basis of aforesaid evidence it is not possible to convict the appellant-accused for offence punishable under section 498-A of the IPC.

22) The aforesaid evidence shows that the case of the prosecution rests entirely on circumstantial evidence. As the death took place away from the residential place and nobody had seen the accused-appellant in the company of the deceased at that time i.e. on 5-2-2000, and

as the doctor is not certain about the time of the death of the deceased, it is difficult to believe that the deceased was lastly in the company of the accused only. The conduct of the accused of giving of the report, informing the brother and taking steps to search the deceased was not consistent with the guilt. It can be said that due to the aforesaid circumstances a strong suspicion is created against the accused but the suspicion cannot take place of the evidence. On the basis of such pieces of evidence which are not convincing, conviction for such serious offence is not possible. The trial Court has considered and used some circumstances which could not have been used as the incriminating circumstances against the accused and due to that the trial Court has committed error in giving conviction. If the prosecution is not able to prove the offence punishable under section 302, IPC, there is no question of convicting the accused for offence punishable under section 201 of the IPC. Similarly the evidence on demand is based mainly on the so called disclosures made by the deceased. As the prosecution has failed to link the accused with the homicide, the so called disclosures also cannot be used under section 32 of the Evidence Act

against the accused. Thus, conviction for the offence punishable under section 498-A IPC is also not possible.

23) In the result, the appeal is allowed. The judgment and order of the trial Court convicting the accused, appellant for offences punishable under sections 302, 201, 498-A of the Indian Penal Code is hereby quashed and set aside. The appellant is acquitted of these offences. The bail bonds stand cancelled. Fine amount, if paid, is to be returned to him.

Sd/-  
**(A.M. DHAVALE, J.)**

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

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