

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

CRIMINAL APPEAL NO.318 OF 2013

Jaishree W/o. Rajabhau Devkar .. Appellant
Age-30 years, Occu-Labour,
R/o. Bhimai Nagar, Sakud Road,
Ambajogai, Tq. Ambajogai,
Dist. Beed
(Presently in Jail)

Versus

The State of Maharashtra .. Respondent
Through Police Station Officer,
Ambajogai (City) Police Station,
Tq. Ambajogai, Dist. Beed

Mr.S.J. Salunke, Advocate for the appellant
Mr.K.D. Munde, APP for the respondent/State
Mr.V.B. Deshmukh, Advocate Assist to APP

**CORAM : S.S. SHINDE &
S.M. GAVHANE, JJ.
DATED : 31.07.2017**

J U D G M E N T [PER: S.M. GAVHANE, J.] :-

. The appellant-accused who has been convicted and sentenced to suffer imprisonment for life and to pay fine of Rs.1000/- (Rupees One Thousand) in default, to suffer rigorous imprisonment for one month as per the judgment

and order dated 02.08.2013 in the Sessions Case No.102 of 2011 passed by the Additional Sessions Judge, Ambejogai has preferred this appeal challenging the said conviction and sentence.

2. Briefly stated the prosecution case is as under:

A. The deceased Rajabhau Mahadeo Devkar was husband of the accused. He was residing at Ramai Nagar, Sakud Road, Ambajogai with his wife- the accused and three children Rahul, Rohan and Nikita and his parents and brothers were residing at Parali-Vaijnath at the time of the incident.

B. On 28.07.2011 at about 04.00 pm the deceased who was casual labour came to the house from work. His children also came from the school. His son Rahul was playing at the neighbor's house. Accused was not present in the house. The deceased slept in the court yard. At

about 06.00 to 06.30 pm accused came to the house. As soon as she came deceased got up and asked her, "where she had been". Thereupon, accused replied that she had gone to work. Deceased raised quarrel with her saying that, "she did not go on work, but she is misbehaving". There was quarrel amongst them. Deceased started beating the accused by sickle or something like that. Their son Rohan intervened in the quarrel and he received injury to his little finger. Thereafter, deceased was found dead in the house.

C. The accused went to the Ambejogai (Town) Police Station and informed police that she had been to the hospital for treatment alongwith her son Rohan and daughter Nikita. When she returned from hospital she saw her husband (deceased) hanging to the roof of the house. With the help of her children she took down deceased and laid him on the ground. She took down the deceased from hanged position only with the hope that he might be alive, but he was dead. She also informed to police that

the deceased was in drunken condition and in tension and he committed suicide by hanging. Police reduced the said information/report given by the accused into writing.

D. On the basis of above information/report given by accused A.D. No.38/2011 came to be registered with Ambejogai (Town) Police Station at about 00.05 am. Immediately thereafter API Gite (PW-8) visited the spot of incident i.e. house of the deceased and prepared panchanama (Exh.27) of spot of incident in presence of Panchas Pandurang Kamble (PW-7) and Shailesh Kamble. So also, he prepared inquest panchanama (Exh.31) of the dead body and the dead body was sent for postmortem examination in SRTRM College and Hospital, Ambejogai. Dr.Vishwajeet Pawar (PW-1) conducted the postmortem examination and issued the provisional report-cum-death certificate (Exh.15) as well as postmortem report (Exh. 16). He opined that death was caused due to throttling (manual strangulation). However, viscera was preserved for analysis by Chemical Analyzer. He seized clothes on

the person of the deceased under Panchanama (Exh.11). He recorded statements of witnesses including father, son and daughter of the deceased.

E. On the same day i.e. on 29.07.2011 Bharat Deokar (PW-3) cousin of the deceased lodged the complaint stating that on 28.07.2011 he had gone to Ambejogai Sahakari Sakhar Karkhana. On that day at night at about 10.00 pm his son Kishor on phone informed him that the deceased has hanged himself at about 06.00 to 08.00 evening in his house. Therefore, he immediately went to the house of the deceased. He saw his uncle and aunt sitting and weeping in front of the house. Thereafter, he saw dead body of the deceased in the house and nylon rope in hanging position. It is alleged that there used to be quarrel between deceased and the accused on account of illicit relation of the accused on consuming liquor by the deceased and therefore, the accused was harassed. Therefore, the accused killed the deceased in his house by throttling. Treating the above said complaint as First

Information Report Crime No.119/2011 under Section 302 of the IPC was registered against the accused in Ambejogai (Town) Police Station, and API Gite (PW-8) continued further investigation.

F. During the investigation API Gite (PW-8) sent viscera taken by Dr. Vishwajeet Pawar (PW-1) to the Chemical Analyzer through police constable Anant Adgale (PW-2). In the meantime, he had arrested the accused. It appears that accused was released on bail. After completion of the investigation API Gite submitted charge-sheet in the Court of JMFC, Ambejogai who then committed the case to the Court of Additional Sessions Judge, Ambejogai as the offence under Section 302 of the IPC was exclusively triable by the Court of Sessions.

G. The charge was framed against the accused for the offence punishable under section 302 of the IPC to which she pleaded not guilty and claimed to be tried. Defence of the accused as it appears from the trend of

cross-examination of the prosecution witnesses and her statement under Section 313 of the Code of Criminal Procedure was that, false case is filed against her. Bharat Devkar (PW-3) was jealous about their marital life. Deceased has committed suicide by hanging himself in the house due to burden of loan. The deceased was not attending the work for one week or fortnight, whenever he comes to house the contractor was insisting the deceased either to attend the work or to refund the advance taken by him and therefore, the deceased was hiding himself, whenever contractor comes in his search.

H. To prove the charge against the accused, the prosecution has examined in all eight witnesses and relied upon Panchanamas and postmortem report referred to above. On considering the evidence adduced by the prosecution the trial Court has held that death of the deceased was homicidal and that the accused has caused death of the deceased. Accordingly, the accused was convicted and sentenced for the offence punishable under

Section 302 of the IPC as stated in the introductory para (supra) by the impugned judgment and order dated 02.08.2013.

I. Being aggrieved by the aforesaid conviction and sentence the accused has preferred this appeal on the grounds that there is no eye witness to the incident. Without there being cogent evidence, the trial Court convicted her. The trial Court ought to have considered the aspect that how it is possible to a thin lady to murder heavy built person. When it has considered, probability of death due to hanging, it has convicted the accused only on the ground that death of the deceased was homicidal and it has nowhere concluded that death was caused by the accused. On the above grounds the accused has claimed to allow the appeal and to set aside the impugned judgment and order of conviction and sentence recorded against her.

3. On notice Learned APP appeared for the

respondent/State.

4. Learned counsel appearing for the appellant/accused made submissions in the light of aforesaid grounds of appeal and the defence of the accused. Learned counsel further submits that no conviction can be sustained merely because deceased was the husband of the accused, who died homicidal death and his dead body was found in the house of accused where the deceased was residing. Learned counsel requested to allow the appeal and to set aside the impugned judgment and order.

5. To support his submissions learned counsel appearing for the appellant /accused has relied upon the following decisions.

A] In the case of Sayed Aslam Syed Abdul Vs State of Maharashtra 2008 B.C.I. 68 (Bombay High Court) the deceased was wife of the appellant/accused. Dead body of the deceased was

found in the house of accused. The accused and the deceased were alone residing in the room. Incident was alleged to have occurred between 03.00 to 3.30 pm. There was no evidence that deceased was last seen alive in company of accused. No injuries were noticed on accused, particularly when the prosecution alleged that the deceased was throttled to death. Relevance of seizure of odhani has not been established by the prosecution. It was held that in absence of any other evidence which would establish that it was accused and accused alone who had committed offence, no conviction can be sustained merely because the deceased who was wife of the appellant, died a homicidal death and her body was found in the house of the accused where she was residing. The accused was held entitled to benefit of doubt.

B] In the case of **Subhash Gorakh Khankal Vs State of Maharashtra 2015 All M.R. (Cri.)2481, (Bombay High Court)** it was held that presence of appellant at the scene of incident at the time of offence is not established. Merely because dead body of the deceased was found in the house of appellant and the deceased died

homicidal death would not be sufficient to hold appellant guilty. The appellant was held entitled to benefit of doubt.

C] In the case of Mukhtiar Ahmed Ansari Vs State (N.C.T. of Delhi)2005 All M.R. (Cri)1775 (S.C.) it was held that the prosecution witness did not support the prosecution case. Prosecution never declared him "hostile". His evidence did not support the prosecution. Instead it supported the defence. The accused can rely on that evidence and it was binding on prosecution.

6. On the other hand learned APP appearing for the respondent/State has supported the impugned judgment and order.

7. We have carefully considered the submissions made by the learned counsel appearing for the accused and the learned APP appearing for the respondent/State. With their able assistance we have carefully perused the evidence adduced by the prosecution.

8. Case of the prosecution is that death of the deceased is homicidal while as per the case of the defence death of the deceased is suicidal. Before considering the aspect whether death is homicidal or suicidal, it is necessary to see the following difference between the hanging and strangulation.

Sr. No.	Trait	Hanging	Strangulation by ligature
1	Ligature Mark:	It is oblique, does not completely encircle the neck: usually seen high up in the neck between the chin and larynx. The base is pale, hard and parchment-like.	It is transverse, completely encircling the neck below the thyroid cartilage. The base is soft and reddish.
2	Abrasion and ecchymoses:	About the edges of ligature mark not common.	About the edges of the ligature mark are common
3	Bruising:	of the Neck muscles less common.	Of the neck muscles more common.
4	Neck:	Stretched and elongated.	Not stretched or elongated.
5	Subcutaneous tissues:	White, hard and glistening under	Ecchymosed under the mark.

		the mark.	
6	Hyoid bone:	Fracture may occur.	Fracture is uncommon
7	Thyroid cartilage:	Fracture is less common.	Fracture is more common.
8	Larynx and trachea:	Fracture rare.	Fracture may be found.
9	Emphysematous bullae:	Not present on the surface of the lungs.	Very common on the surface of the lungs.
10	Carotid arteries:	Damage may be seen.	Damage is rare.
11	Face:	Usually pale and petechiae are not common.	Congested, livid and marked with petechiae.
12	Signs of Asphyxia:	External signs less marked.	External signs well-marked with petechiae.
13	Tongue:	Swelling and protrusion is less marked.	Swelling and protrusion is more marked.
14	Saliva:	Often runs out of mouth.	Absent.
15	Bleeding:	From the nose, mouth and ears not common.	From the nose, mouth and ears common.
16	Involuntary discharge:	Of faeces and urine less common.	of faeces and urine more common.
17	Seminal Fluid:	At glans is more common.	At glans is less common.

9. To prove the homicidal death the prosecution has

relied upon the evidence of Dr. Pawar (PW-1), provisional postmortem report-cum-death certificate (Exh.15) and postmortem report (Exh.16). Dr. Pawar has deposed that on 29.07.2011 he was on duty at SRTRM College, Ambejogai. Dead body of Rajabhau was referred for postmortem. He conducted postmortem during 11.20 am to 12.20 pm. On that day body was averagely built and nourished. Rigor mortis well marked present all over the body. No signs of decomposition. Eyes closed, pupils fixed and dilated, mouth closed, tongue inside the cavity, reddish colour blood oozing from left ear, sub-conjunctival hemorrhage present, whitish coloured froth oozing from both nostrils. Nail beds cyanosed. Purging of semen present. Supine position all four limbs straight. Further he deposed that he noticed following injuries on the body:-

1] Contusion present over right side of neck 4 x 1 cm in size, vertical in direction, 6 cm below to the right mastoid process, bluish in colour.

2] Contusion present over chin 2 cm x 0.5

cm in size, circular in direction bluish in colour.

3] Contusion present over right and left cheek 1x0.5 cm to 0.5 cm to 0.3 cm varying in direction, bluish in colour.

4] No ligature mark seen along with no sub-mucosal hemorrhage seen.

. Dr. Pawar (PW-1) stated that above injuries in column No.17 were ante-mortem. No injury seen under scalp. No fracture at vault and base of skull seen. Brain matter, edematous. No hemorrhage seen. Small petechial hemorrhage seen on white matter. Weight 1150 gms. No tracheal rings tearing seen. Fracture of hyoid bone present. Stomach contains 70 cc of digested food with strong alcoholic smell present [1 cc = 100 gms] Mucosa congested. All other organs were congested. Viscera have been preserved, sealed, labeled and handed over to police. Further he stated that after conducting the postmortem summary of this case is as under:-

1] 35 years averagely built, male.

2] External injuries are ante-mortem in nature, leads to compression of neck with hyoid bone fracture.

3] No ligature mark seen on neck.

4] Petechial hemorrhage, cyanosed lungs, fracture of hyoid bone, suggestive of manual strangulation.

5] For evidence of poisoning viscera preserved.

6] No natural disease condition can contribute to death.

. As regards cause of death Dr. Pawar (PW-1) has stated that it was due to throttling (manual strangulation), however viscera preserved for Chemical Analyzer. He stated that injuries are possible if somebody pressed throat and mouth by sitting on his chest. He stated that he issued postmortem provisional certificate (Exh.15) and postmortem report (Exh.16). Exh. 15 and 16 show cause of death as deposed by Dr. Pawar.

. In the cross-examination Dr.Pawar stated that injury No.1 mentioned in column No.17 is possible in

partial hanging. He again says that only contusion is possible in partial hanging. Vertical direction is not possible. Injury Nos.2 and 3 mentioned in column No.17 may possible by self struggling in the case of hanging. He admitted that in general incident defence injuries may possible in case of manual strangulation. He denied that injuries mentioned in column No.17 may possible, if a person sit on chest and press the throat and mouth. He denied that he has given false cause of death. Thus nothing is found in favoaur of the accused in the cross-examination of Dr. Pawar to suggest that the deceased sustained injuries mentioned in column No.17 of Postmortem report due to hanging.

10. It is clear from the above medical evidence that there was no ligature mark seen on neck of the deceased. So also, eyes were closed, pupils were fixed and dilated, mouth was closed, tongue was inside the cavity, reddish colour blood was oozing from left ear, sub-conjunctival hemorrhage was present, whitish coloured

froth was oozing from both nostrils. Moreover, it is seen from the medical evidence that fracture of Hyoid bone was suggestive of manual strangulation. All the above symptoms are suggesting strangulation. Whereas in the case of hanging ligature mark is always there on the neck and usually it is seen high up in the neck between chin and larynx as noted above in the deference between hanging and strangulation. So also, as said earlier, Dr. Pawar has stated that cause of the death of the deceased was due to throttling (manual strangulation) and when it is not the case of the defence that death of the deceased was natural we hold that death of the deceased was homicidal.

11. On the background of the above evidence regarding homicidal death of the deceased the evidence of PW-4 father of the deceased that the deceased has committed suicide by hanging himself in the house due to burden of loan and the evidence of PW-5-Rohan and PW-6 Nikita son and daughter of the deceased that when they

entered the house they saw their father was hanging to the roof, is not sufficient to infer that the death of the deceased was suicidal. Another reason to hold this, is that PW-4 father of the deceased has stated that the accused and her children told him that they taken down the deceased with the hope that he might be alive. But PWs.5 and 6 children of the deceased have not stated so or the accused has not stated so in her statement under section 313 of the Code of Criminal Procedure. In fact, if the accused and her children PWs.5 and 6 would have taken down the deceased when he was seen in hanging condition she as well as her children would have definitely stated so. Therefore, there is no substance in the defence of the accused that death of the deceased was suicidal. For the above reasons we find no fault in the finding recorded by the trial Court that the death of the deceased was homicidal.

12. Now it is to be seen whether the accused is responsible for death of the deceased. As said earlier

case of the prosecution is that, the accused caused death of the deceased by throttling. To prove this, the prosecution has mainly relied upon the evidence of eye witnesses PWs.5 and 6. PW-5 Rohan son of the deceased has stated that on the day of incident his father the deceased was at home at 04.00 p.m.. His mother (accused) came to home at about 06.00 p.m. His father had consumed liquor and he was demanding money to his mother (accused). The accused was saying that she would pay money after going in side the house. His father (deceased) was beating his mother by sickle. When he (witness) intervened, he sustained injury on his little finger. Thereafter, he, his mother (accused) and his sister went to hospital for his treatment. When they returned from the hospital at about 07.30 p.m. the door of the house was pushed and they entered the house. They saw that his father was hanging to the roof. On the basis of above evidence of PW-5 it can be said that on the day of incident at about 06.00 p.m. there was quarrel between accused and the deceased as the deceased was demanding

money from the accused. So also, it appears that PW-5 has denied suggestion given to him by learned APP without declaring him hostile that the accused killed the deceased by throttling.

13. Similarly PW-6 Nikita daughter of the deceased deposed that on the day of incident her mother (accused) came to house at 06.00 p.m. Her father the deceased came late. Her father raised quarrel with her mother on account of amount of Bachat Gat. Her father was demanding money from her mother. Her mother was asking him that she would pay after entering the house. Her father started beating her mother. She stated that her father had consumed liquor and due to assault of her father, her mother was injured. Her father was assaulting her mother by sickle and when her brother intervened he sustained injury to his little finger. Thereafter, she, her mother and her brother went to hospital for her Brother's treatment. She stated that they returned from the hospital at about 07.00 to 08.00 p.m. and door of the

house was pushed. When they entered the house they saw her father was hanging to the roof. Thus, on the basis of above evidence of PW-6 it can be said that on the day of incident the deceased assaulted the accused at about 06.00 p.m. and in the said assault PW-5 sustained injury to his little finger. Therefore, PWs.5 and 6 and the accused went to the hospital for treatment of PW-5 and after they returned from the hospital they saw deceased in hanging condition in the house. PW-6 has denied suggestions given by learned APP to her that the accused killed the deceased by throttling without declaring the said witness hostile.

14. Thus, both PWs.5 and 6 have not supported the prosecution case on material particulars of the incident i.e. regarding throttling the deceased by accused at about 06.00 to 08.00 p.m. in her house as alleged by the prosecution. It appears that statements of both these witnesses under section 164 of the Code of Criminal Procedure were recorded by the Judicial Magistrate, First

Class, Ambajogai on 06.08.2011 after 10 days of the incident wherein they had claimed that their mother accused caused death of the deceased their father by throttling and they had seen the same through the gap in the plank of the door. But when they have not supported the prosecution case as observed earlier the prosecution should have examined the learned JMFC who recorded their statements under section 164 of Code of Criminal Procedure and straight way said statements cannot be exhibited and read in evidence. So also, both these witnesses were not confronted with their above said statements by the learned APP after declaring them hostile. Therefore, when said statements recorded by the JMFC cannot be used as substantive evidence of truth of the facts stated therein, but the same may be used for the purpose of contradiction or corroboration of the witness who made it, as per the provisions of sections 145 and 157 of the Evidence Act the said statements as well as the evidence of both PWs.5 and 6 are of no use to the prosecution to hold that the accused caused death of

the deceased by throttling so as to hold her responsible for death of the deceased. Except the evidence of these two witnesses there is no other evidence relied upon by the prosecution to connect the accused with the death of the deceased.

15. The trial Court in paragraph No.20 of the judgment observed that there was threshing between accused and deceased. PWs-5 and 6 have stated in that respect. The accused has admitted the same in her statement under Section 313 of the Code of Criminal Procedure. The deceased was in drunken condition. There was smell of liquor in digested food contains as per the postmortem notes. There was no injury marks on the neck and cheek of deceased. His hyoid bone was fracture. Medical evidence and circumstances leads to the irresistible conclusion that it is homicidal death due to throttling and accused has committed the same and therefore accused was guilty for the offence punishable under section 302 of the IPC. The trial Court has not

noted the circumstances which according to it lead to the irresistible conclusion that the accused has caused death of the deceased by throttling. When as observed earlier it is seen from evidence of PWs.5 and 6 that they had gone to hospital with accused after 6.00 pm. till 07.00 pm to 08.00 pm and when they came back to house saw the deceased in hanging condition, it is obvious that accused was not present in the house at the time of incident. Therefore, the above reasons given by the trial Court to hold accused guilty for the offence punishable under Section 302 of the IPC are not at all sustainable. Therefore, the findings recorded by the trial Court holding the accused guilty for the offence punishable under Section 302 of the IPC is not correct. We therefore, hold that the prosecution has failed to prove the offence under Section 302 of the IPC against the accused beyond reasonable doubt. Merely because the deceased was found dead in his house or in the house of his wife (accused) and that death of the deceased is homicidal the same is not sufficient to hold the accused

responsible for the death of the deceased in view of the law laid down by this Court in the case of Sayyad Aslam Syed Abdul (Supra) and Subhash Gorakh Khankal (Supra) relied upon by the learned counsel appearing for the appellant/accused. Therefore, the accused deserves to be acquitted of the offence punishable under section 302 of the IPC.

16. For the forgoing reasons we hold that the impugned judgment and order is liable to be quashed and set aside by allowing the appeal. In the result, following order is passed.

ORDER

(I) Criminal appeal is allowed.

(II) The impugned judgment and order dated 2nd, August, 2013, passed by the Additional Sessions Judge, Ambajogai in Sessions Case No. 102 of 2011 convicting and sentencing Appellant-Jaishree W/o Rajabhau Devkar for the offence

punishable under Section 302 of the Indian Penal Code, is quashed and set aside.

(III) The Appellant-Jaishree W/o Rajabhau Devkar is acquitted of the offence punishable under Section 302 of the Indian Penal Code. Fine amount, if deposited as per the impugned Judgment and order, be refunded to the Appellant.

(IV) The Appellant-Jaishree W/o. Rajabhau Devkar is in jail, she be set at liberty forthwith, if not required in any other case.

(V) The Appellant- Jaishree W/o. Rajabhau Devkar shall furnish the bail bonds of Rs. 15,000/- and surety of like amount under Section 437-A of the Code of Criminal Procedure, before the concerned trial Court at Ambajogai.

[S.M. GAVHANE, J.]

[S.S. SHINDE, J.]