

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.40 OF 2012

Sachin Babulal Suryavanshi
Resident of 'C' Block,
Satyadev Nagar, Ulhasnagar No.3,
District Thane
(presently lodged at Prison) ... Appellant

vs.

The State of Maharashtra ... Respondent

Mr. Amin Solkar for the Appellant.
Mr. Y.M. Nakhwa, APP for the Respondent/State.

Coram : **A.A. Sayed &
Sarang V. Kotwal, JJ.**

Date : 18 August 2017.

ORAL JUDGMENT: (Per A.A.Sayed,J.)

1 The above Appeal is preferred against the judgment and order dated 10 November 2011 passed by the Additional Sessions Judge, Kalyan, convicting the Appellant/original Accused No.1 for the offence punishable under section 302 IPC and sentencing him to life imprisonment. The Appellant was also convicted for the offences under sections 304-B IPC and 498-A IPC for which he was sentenced for seven years and for two years respectively. The other accused persons namely, Accused Nos.2, 3 and 4 who are the father, mother and sister

respectively of the Appellant were acquitted of all the aforementioned charges. The Appellant and the other accused persons were acquitted of the offences under sections 202 IPC and 203 IPC read with section 34 IPC.

2 The case of the prosecution in nutshell is as follows - the victim Bhavana (hereinafter referred to as 'the deceased') and the Appellant were wife and husband. Their marriage was performed in Bharatpur in the State of Rajasthan on 2 December 2007. After marriage the deceased started residing with the Appellant at Ulhasnagar at their matrimonial home. The Appellant was not working. The Appellant and other accused persons used to ill-treat the deceased and demanded money from her. The deceased was subjected to physical and mental cruelty. On 28 December 2008 Tuna (PW1) who is the sister of the deceased, received a call at about 12.30 pm from the Appellant who informed her that the deceased was in an unconscious state and was admitted to Sridevi Hospital at Kalyan. The Appellant thereafter again contacted Tuna on phone and informed her that the deceased was no more and that she should come to Central Hospital, Ulhasnagar. When Tuna reached the Hospital at 3.30 p.m. she saw the corpus of the deceased and found that there were blackish marks on her neck and abrasions on the right cheek. Tuna lodged the FIR (Exhibit 42) in the Central Police Station, Ulhasnagar at about 1.15 a.m. on 29 December

2008. On her FIR, CR No.I 274 of 2008 was registered in the Police Station for offences under sections 498A, 302 and 304B read with section 34 of IPC against the Appellant and other accused persons.

3 The Investigating Officer (PW11) attached to the Central Police Station, Ulhasnagar, started investigation. He prepared inquest panchanama (Exhibit 67), and also collected the postmortem notes (Exhibit 46) as also the advance cause of death Certificate (Exhibit 47). Spot panchanama (Exhibit 63) and panchanama of seizure of clothes of the deceased (Exhibit 78) were also prepared. The clothes of the Appellant were seized during the arrest panchanama (Exhibit 80). The gold ornaments of the deceased were recovered from the cupboard in the house of the Appellant under Panchanama (Exhibit 83) pursuant to his disclosure statement (Exhibit 82). The CA Reports (Exhibits 50, 51 and 52) were also collected. On completion of the investigation, (PW11) Investigating Officer filed charge-sheet against the Appellant and other accused persons in the Court of Judicial Magistrate, First Class, Ulhasnagar on 18 March 2009. The Judicial Magistrate, First Class, by an order dated 23 March 2009 committed the case to the Sessions Court. The Charge (Exhibit 35) dated 11 February 2011 was framed against the Appellant and other accused persons. The Appellant and other accused persons denied the charges and claimed to be tried. The defence of the Appellant and other accused persons

was that of denial and false implication. The Prosecution examined 11 witnesses to bring home the guilt of the Appellant and other accused persons. After hearing the parties, the impugned judgment and order was passed by the Trial Court as indicated in paragraph 1 hereinabove.

4 We have heard learned Counsel for the Appellant and the learned APP.

5 Learned Counsel for the Appellant submitted that the charges for the offence of dowry death under section 304B IPC and for the offence of cruelty under section 498-A IPC are not proved. He submitted the offence of murder punishable under section 302 has also not been established. He submitted the Appellant has been wrongly convicted by the Trial Court for the aforesaid offences. He pointed out that the Appellant has been in jail since 29-12-2008 and has thus now been incarcerated for more than eight and a half years and has already served his sentence of seven years for the offence of dowry death under section 304B IPC and sentence of two years for the offence of cruelty under section 498-A IPC (concurrently), pursuant to his conviction by the Trial Court. He submitted that even otherwise, at the highest it was a case of suicide and not murder and the Court can even at this stage alter the charge and the Appellant be convicted only for the offence under section 306 IPC for abetment of suicide for which the

maximum punishment is ten years of imprisonment. He submitted that though there was no charge framed for the offence under section 306 IPC, it is open for this Court to convict the Appellant under section 306 IPC. He has placed reliance on the judgment of the 3-Judge Bench of the Supreme Court in **Dalbir Singh v. State of U.P., (2002) 5 SCC 334** to support this contention. The learned Counsel for the Appellant urged that since the Appellant has already undergone sentence of about eight and a half years, he may be set free by altering the conviction and sentence accordingly.

6 The learned APP on the other hand supported the impugned judgment and order of the Trial Court. He submitted that all the offences including the offence of murder punishable under section 302 IPC have been proved and no interference is warranted with the impugned judgment and order.

7 With the assistance of the learned Counsel for the Appellant we have perused the entire evidence. PW1-Tuna who is the Complainant and the sister of the deceased had deposed before the Trial Court. She has stated that the deceased and the Appellant had got married on 02-12-2007 at Bharatpur in the State of Rajasthan. At the time of marriage, the deceased was given four tolas of gold ornaments i.e. two bangles, one chain and one locket of matarani. She has stated that

after one month of marriage she had received a call from the deceased and the deceased had told her that Appellant was not doing any work and that she should bring money for domestic expenses which the deceased refused. The Appellant was ill-treating the deceased physically and mentally. On 27 December 2008 she had contacted the deceased on her mobile phone and the deceased had informed her that the Appellant does not work and that the Accused Meenakshi and Accused Priya used to torture her. On 28 December 2008 at about 12.30 pm, she had received a telephone call from the Appellant that the deceased is unconscious and he had admitted her in Sridevi Hospital, Kalyan. Therefore, she alongwith her husband, brother Sagar (PW7), and one relative Pawan started to come to Kalyan. The Appellant again contacted her on phone and told her that the deceased died and instructed them to come to Central Hospital, Ulhasnagar. On reaching the hospital at 3.30 pm she saw the dead body of the deceased. She saw marks on her cheek. She also saw blackish mark on her throat upto ear on both the sides. PW1-Tuna has stated that the Appellant has committed the murder of the deceased by strangulation with the help of odhani. She has stated that she was the panch witness for inquest panchnama. She has stated that her supplementary Statement was recorded on 3 January 2009, wherein she has stated that they had also given one pair of diamond ear-tops and one gold ring. She has deposed that the Fixed Deposit Receipts of Rs.40,000/- were given to

her by the deceased as the Appellant was telling the deceased to encash those receipts. The gold ornaments are with the Appellant.

8 The prosecution has also examined Sagarkumar Ramprasad Singh (PW7) who is the younger brother of the deceased. He used to ply a rikshaw. He has stated he used to talk with the deceased on phone. She told him after about one month of marriage that her husband, mother-in-law, father-in-law and sister-in-law Priya used to ill-treat her physically and mentally on account of money and ornaments. In the month of October 2008 the deceased called him on phone and told him that her mother-in-law, father-in-law and Priya used to beat her and abused her. When he went at the door of the house of the Appellant, he heard abuses. The mother-in-law of the deceased was abusing her. When he rang the door-bell, the deceased opened the door and mother-in-law and father-in-law of the deceased went to the bedroom on seeing him. The Appellant was not in the house. The deceased took him to her bedroom and told him that her mother-in-law, father-in-law used to beat her and that Accused Priya also used to assault her and abuse her on some occasions. He thereupon told the deceased to accompany him to his house, however, the deceased told him that the Appellant is not in the house and after talking to him he should take her to his house. The deceased asked him to take a halt in the house. When the Appellant came at night, he told the Appellant that

his parents and sister used to beat the deceased and he would take the deceased with him. The Appellant apologized and said that it would not happen in future. The next day when he went to his house the deceased told him on phone that Accused Priya had assaulted her. In the month of December 2008, the deceased again told him that her mother-in-law, father-in-law and sister-in-law used to beat her and told him to take her to his house. When he went to the house of the deceased he saw marks of assaults on her cheek. He later took deceased to his house. He told the Appellant that three to four persons from the community will sit together and would take a decision. He took the deceased to the house of Tuna at Malad. He then came to know that the deceased went back to her matrimonial house at Ulahasnagar. On 28 December 2008 when he was driving his rikshaw, he received a phone call from his sister Tuna and she called him immediately at Malad. His sister Tuna told him that the deceased had died. He, Tuna, her husband and one Pawankumar went to Ulhasnagar Central Hospital and he saw the dead body of the deceased and he saw marks of assault on her cheeks and blackish mark on her neck. The Appellant used to tell the deceased to encash fixed deposit receipts of Rs.40,000/- for which the deceased was not ready. The Appellant, Babulal, Meenakshi and Priya committed the murder of deceased by strangulation with the help of odhani. In his cross-examination, he had denied the suggestion that the deceased committed suicide.

9 The prosecution has examined PW4 who was the maid. She has deposed that on 28-12-2008 at 8.30 am the father of the Appellant opened the door and she heard quarrel of Appellant and the deceased when she was washing vessels. The Appellant came to the kitchen and told her to go and come subsequently. She has deposed that when she was going she saw in the bedroom that the deceased was lying on the bed.

10 It is seen that the deceased died within 1 year and 26 days of marriage. In our view, there is sufficient evidence on record to conclude that the ingredients of offences under sections 304-B and 498-A IPC are made out. In the circumstances, no interference is warranted in the convictions and sentences of the Appellant insofar as the offences under sections 304-B and 498-A are concerned. The Appellant has already undergone sentences of seven years and two years for the aforesaid offences for which he was convicted by the Trial Court.

11 The question that remains is whether the death of the deceased, who was the wife of the Appellant, was suicidal or whether it was a case of murder of his wife by the Appellant. Since this is a case of circumstantial evidence, the evidence of PW2 Dr. Yashwant Tulsiram Sadavarte, who had conducted the postmortem of the body of the deceased alongwith one Dr. Leena Hande, would be crucial. PW2 was

at the relevant time attached to the Central Hospital, Ulhasnagar. He has produced the postmortem Report before the Trial Court. He has deposed that he found the following injuries on the body of the deceased:

“Abrasion over right cheek, Zygomatic bone, 1 cm X 0.5 cm

Ligature mark:

4 ligature marks found well defined in front of neck and depressed. Marks completely encircling the neck, ill defined bilaterally except back of neck below occipital region where marks were absent.

Total neck circumference – 28 cm,

Total length of mark - 20 cm,

width of mark 3.5 cm,

on cut section:

underline the ligature mark, petechial haemorrhage and ecchymosis seen. Deeply congested musculature, fracture of thyroid cartilage seen.”

In his cross-examination he has stated that before conducting postmortem, he has perused the inquest panchnama and he did not find any difference in the inquest panchnama and his observations in respect of the dead body. He has stated that he agrees with the contents of inquest panchnama that it is death due to hanging.

12 The evidence of the Doctor (PW2), who conducted the postmortem, discloses that the death was asphyxia due to ‘hanging’. It

is pertinent to note that as per the postmortem report, the total neck circumference of the deceased was 28 cm and the total length of ligature mark was 20 cm. There was thus a gap of about 8 cms behind the neck of the deceased where there was no ligature mark. This circumstance points to the fact that the probable cause of death was hanging as opposed to strangulation. Pertinently, there is not even a suggestion in the cross-examination of the Doctor (PW2) whether it could be a case of strangulation and not hanging. To that extent, the evidence of the Doctor (PW2) has gone unchallenged. In our opinion, it would be reasonable to infer that the deceased had committed suicide.

13 The postmortem report specifically states in clause 13 that there was no oozing of any fluid from the mouth and nostrils of the deceased. The Trial Court recorded a finding in paragraph 17 of the impugned judgment that at the time of strangulation with the odhni there must be some bleeding from the mouth or nostrils and it was found on the handkerchief and banian of the Appellant. This observation is not supported by the medical evidence. The learned Counsel for the Appellant would be right in his submission that even assuming there was some blood, it could be caused by ligature marks and it cannot be ruled out that since the Appellant himself had taken the deceased to the hospital his handkerchief and banian may have been stained with some blood of the deceased. He

pointed out that the Appellant has specifically stated at the time of sentencing that he loved his wife and that she had committed suicide and the Trial Court has recorded this in the impugned judgment and order. In absence of any oral evidence by any of the witnesses on behalf of the prosecution as regards the condition of the fan in the bedroom, we are of the view that the Trial Court was not right in arriving at a conclusion that the deceased did not commit suicide by hanging with the help of ceiling fan since there was dust gathered on the fan and there were no marks on the fan.

14 So far as the injury on the finger of the Appellant is concerned, in paragraph 7 of his cross-examination, PW11, the IO, has specifically stated that he had sent the Appellant to the Medical Officer so as to determine the age of an injury and the doctor had opined that it was an old injury. The nature of injury on the chest of the deceased mentioned in the postmortem report viz. abrasion, 1 cm x 0.5 cm, in our view, does not point to the fact that there was any struggle.

15 The evidence of PW4 maid does bring out that on the day of the incident there was a quarrel between the Appellant and the deceased. However, that does not in any manner advance the case of the prosecution that it was a case of murder. Her statement that the deceased was lying on the bed is neither here nor there. It was not an

unnatural conduct on part of the Appellant in asking the maid to leave and come subsequently if there was a quarrel in the household. Moreover, had there been anything for the Appellant to hide, the natural conduct would be for the Appellant to have closed the door of the bedroom and not leave it open for the maid to look into the bedroom.

16 We find that the prosecution has not produced the medical papers of the Central Hospital, Ulhasnagar, or for that matter the medical papers of Sridevi Hospital, Kalyan, if any, nor has the prosecution produced the statement of the Appellant which was recorded before a Judicial Magistrate, FC, under section 164 of CrPC referred to in paragraph 5 of the examination-in-chief of PW11 who is the Investigation Officer. In these circumstances, the learned Counsel for the Appellant would be right in contending that it would not be safe in assuming that the deceased had already died before admission in the Hospitals as the time of the death has not been established. As indicated earlier, the case of the prosecution is based entirely on circumstantial evidence. Having regard to the aforementioned facts and the finding of the Doctor (PW2), who had conducted the postmortem, that it was a case of hanging which has gone unchallenged, in our view, there are missing links and the chain of circumstances is not complete to come to an irresistible conclusion that the Appellant was the perpetrator of the crime of committing murder of his wife. In our

opinion, the prosecution has not been able to prove its case beyond reasonable doubt and the conviction of the Appellant by the Trial Court for the offence under section 302 IPC cannot be sustained.

17 It is an admitted position that there is no charge framed for offence of abetment of suicide under section 306 IPC. The question is whether in absence of any charge being framed under section 306 IPC, would it be permissible for the Court to convict the Appellant under section 306 IPC. In **Dalbir Singh** (supra), relied upon by the learned Counsel for the Appellant, a 3-Judge Bench of the Supreme Court has considered this issue after the Allahabad High Court had noticed a conflict of opinions in the decisions of the Supreme Court in **Lakhjit Singh v. State of Punjab, 1994 Supp (1) SCC 173** and **Sangaraboina Sreenu v. State of AP, 1997 SCC (Cri) 690**. In **Dalbir Singh** (supra) also there were charges framed for offences under sections 302, 498-A and 304-B IPC. There was no charge under section 306 IPC. In paragraph 17, the 3-Judge Bench adverted to section 464 CrPC and held as follows:

“17. ... Therefore, in view of section 464 CrPC, it is possible for the appellate or revisional court to convict an Accused for an offence for which no charge was framed unless the court is of the opinion that a failure of justice would in fact occasion... . We are, therefore, of the opinion that Sanraboina Sreenu, was not correctly decided as

it purports to lay down as a principle of law and where the Accused is charged under Section 302 IPC, he cannot be convicted for the offence under Section 306 IPC.”

18 As held by the Supreme Court, in an appropriate case, it is permissible for the Court to convict the Accused under section 306 IPC even if a charge of the said offence had not been framed against him. In the facts and circumstances of the present case, we are satisfied that the Appellant can be convicted under section 306 IPC.

19 In light of what we have discussed above, we partly allow the Appeal. The conviction of the Appellant under section 302 IPC and sentence of life imprisonment is set aside. Instead, the Appellant is convicted under section 306 IPC and sentenced to undergo rigorous imprisonment for the period already undergone by him.

20 Subject to the above modification the Appeal is disposed of. The Appellant who is presently in prison, shall be released, if not required in any other case.

(Sarang V. Kotwal, J.)

(A.A. Sayed, J.)