

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

**CRIMINAL APPEAL NO.246 OF 2010**

Shivaji Harishchandra Kunte  
Age 37 years, residing at Kunte Vasti,  
Bhade, Taluka Khandala,  
District Satara,  
(presently lodge at the  
Kalbapur Central Prison)

... Appellant/  
Orig. Accused

versus

The State of Maharashtra  
(At the instance of  
Khandala Police Station)

... Respondent

.....

- Mr.Sanghraj Rupwate, Advocate for the Appellant.
- Ms.R.M. Gadhvi, APP for the State/Respondent.

**CORAM : A.A. SAYED &  
SARANG V. KOTWAL, JJ.  
RESERVED ON : 12<sup>th</sup> SEPTEMBER, 2017  
PRONOUNCED ON : 10<sup>th</sup> OCTOBER, 2017**

**JUDGMENT (PER : SARANG V. KOTWAL, J.) :**

1. The present Appeal is preferred by the Appellant challenging the Judgment and Order dated 20/07/2009 passed by the Additional Sessions Judge, Satara, in Sessions Case No.122/08, whereby the Appellant was convicted for the offence

punishable u/s 302 of the Indian Penal Code and was sentenced to suffer imprisonment for life and to pay a fine of Rs.1,000/- and in default of payment of fine to undergo simple imprisonment for six months. The Appellant was also convicted for the offence punishable u/s 316 of IPC and was sentenced to suffer rigorous imprisonment for five years and to pay fine of Rs.200/- and in default of payment of fine to suffer further simple imprisonment for one month. Substantive sentences were directed to run concurrently. The Appellant was given set off u/s 428 of Cr.P.C. for the period. The Appellant was acquitted from the offence punishable u/s 498-A r/w 34 of the Indian Penal Code.

2. The Appellant had faced the trial alongwith parents and sister who were accused Nos.2 to 4. These accused Nos.2 to 4 were charged for the offences punishable u/s 468 r/w 34 of IPC. The charge u/s 302 was framed against the present Appellant. Though there was no separate charge for the offence punishable u/s 316 of IPC, the Appellant was convicted under the said section as mentioned earlier at the conclusion of the trial.

3. According to the prosecution case, the Appellant had married one Priyanka on 26/05/2003. It was alleged that she was ill-treated by all the accused. On 14/09/2007 at about 04.00 a.m. the Appellant committed her murder by assaulting her with a big stone on her head. The FIR was lodged by the father of the Appellant Harishchandra Khunte, who himself faced the trial as Accused No.2. The FIR was lodged on 14/09/2007 vide C.R.No.113/07 at Khandala Police Station, District Satara u/s 302, 498-A, 323, 504 r/w 34 of IPC.
4. It is alleged that the motive was that the Appellant suspected her character. The investigation was carried out. The panchanama of the spot of incident was conducted. The big grinding stone was recovered from the spot. The Appellant was arrested at 07.10 p.m. on 14/09/2007. At the conclusion of the investigation, the charge-sheet was filed before the J.M.F.C., Khandala, District Satara. The case was committed to the Court of Sessions.

5. During the trial the prosecution examined six witnesses. As per the evidence of P.W.5 Dr. Deepak Nathuram Mane, who had conducted the post-mortem examination, he had observed 'Haematoma of 7 cm x 6 cm. at left temporo parital region. The skull was fractured. There was subdural haemorrhage on the left hemisphere of the brain and the death was caused due to this head injury'. This witness P.W.5 Dr. Deepak Mane also found that the deceased was pregnant with six months old child, who had also died. Therefore at the conclusion of the trial, the Appellant was convicted u/s 316 of IPC.

6. Besides the medical evidence, the prosecution examined P.W.1 Shankar Kondiba Bansode who was the father of the deceased. P.W.2 Pramod Shankar Bansode was the brother of the deceased. P.W.3 Manisha Lala Gaikwad was the maternal Aunt of the deceased. P.W.4 P.H.C. Dharamsingh Gunya Pavara, had received the first information report and P.W.6 API Avinash Shankarrao Shilimkar was the Investigating Officer.

7. First three witnesses are the close relatives of the deceased. They have more or less deposed on the same lines. According to these witnesses, the deceased Priyanka got married to the accused on 26/05/2003. The couple had two daughters. According to them, she was ill-treated by the accused Nos.2, 3 and 4, who used to quarrel with her on flimsy grounds and also because, according to them, she could not deliver a male child. It is their case that, the Appellant was addicted to liquor and he used to doubt character of the deceased. The deceased Priyanka used to complain about these facts to her parents, who used to reside 25 kms away from her matrimonial house. It is deposed by P.W.1 that, on 14/09/2007, he received an anonymous call on his phone that Priyanka was dead and he should reach there immediately. Therefore he went to village Bhade, where he came to know that Priyanka was removed to Government Hospital at Khandala and she was already dead. According to P.W.1, the father of the Appellant i.e. accused No.2 Harishchandra told him that the Appellant had committed murder of Priyanka

by throwing a big stone on her head. According to P.W.1 the Appellant was having illicit relations with the Appellant's cousin who was residing at Mumbai.

8. P.W.2 Pramod Bansode deposed before the Court that Priyanka co-habited with the Appellant and other in-laws. The accused before the Court were residing together. Thereafter he narrated about the illtreatment. P.W.3 Manisha Gaikwad deposed that Priyanka had told her that the Appellant was doubting her character and that the Appellant had assaulted Priyanka in the presence of this witness and at that time Priyanka was pregnant.

9. P.W.4 P.H.C Dharamsingh Pavara has deposed that on 14/09/2008 at 07.45 a.m., the accused No.2 Harishchandra i.e. father of the Appellant approached him and lodged his report. He had mentioned that about 04.00 a.m. he heard shouts of his grand children and therefore the accused No.3 went inside the room and saw that Priyanka was lying in a pool of blood and

that her head was smashed by a big stone. He also stated that the Appellant was standing there and that Appellant stated that he himself had inflicted blow on Priyanka's head with a big stone. The FIR was registered vide C.R.No.113/07 at Khandala Police Station.

10. P.W.6 API Avinash Shilimkar had conducted the investigation and had arrested the Appellant at 06.40 p.m. at 14/09/2017. He had explained that he could not arrest the Appellant earlier, because, he was busy in the investigation and in recording statements of witnesses.

11. We have heard learned counsel Mr.Sanghraj Rupwate, for the Appellant and Ms.R.M. Gadhvi, APP for the State. With their assistance we have gone through the Record and we have read the evidence.

12. The learned counsel Mr.Rupwate submitted that the prosecution has miserably failed to prove the basic facts of this case. He has submitted that, the FIR in this case was not

admissible in evidence and not properly proved. He has submitted that, the Appellant was not the lone resident of the house. There is no record to show that the Appellant was in the house when the incident had taken place. Therefore it was not open for the prosecution to allege that the Appellant had committed the said offence. He has further submitted that since the prosecution has not discharged, the burden of proving the basic facts, the burden of proof never shifted to the Appellant to prove his innocence. He has further submitted that the Appellant was not shown to be in the village and therefore there was no proof that the Appellant had any connection with the murder. He has further submitted that the Appellant was arrested at 06.40 p.m. on 14/09/2007 and that the Appellant in fact was not in the village. Otherwise the police would not have failed to arrest him immediately since his name was disclosed as per the prosecution case at around 07.00 a.m. itself.

13. While it is true that the FIR lodged by the accused No.2 cannot be said to be proved because its contents could not be

proved through the accused No.2, the accused No.2 obviously could not enter the witness box as a prosecution witness to prove contents of FIR. Therefore, the only the fact of registration of FIR at the instance of accused No.2, is proved by the prosecution through the evidence of P.W.4. The averments in the FIR in respect of confession made by the Appellant to the accused No.2 are inadmissible on that count and therefore, we are not taking into account the contents of FIR. However, the fact remains that the accused No.2 approached the police station at 07.00 a.m. in the morning and gave some complaint, which was treated as FIR and the offence was registered vide C.R.No.113/07 at Khandala Police Station.

14. Though all the accused were charged for the offence punishable u/s 498-A r/w 34 of IPC, the learned trial Judge has already acquitted all the accused including present Appellant from these charges and in any case, we find that the evidence led by the prosecution is lacking to prove the ingredients of section 498-A of IPC.

15. The crucial question remains as to whether the Appellant can be convicted for the offence u/s 302 of IPC. According to the learned counsel Mr. Rupwate, the prosecution has not brought on record any evidence to show that the Appellant was present in the house at that time. In this context, the reference can be made to the evidence of the prosecution witnesses and in particular the witness No.2 Pramod Bansode. He has clearly stated that all the accused cohabited together and the deceased was residing with them in her matrimonial house with them. There is no cross-examination to this deposition in respect of staying together in the house. There is no reason to infer otherwise and therefore there is no reason to hold that the Appellant was not at home at 04.00 a.m. on 14/09/07, when the incident had taken place. Considering the odd hours, early in the morning, there is no reason to presume that the Appellant may not be at home. In such circumstances, it was the duty of the Appellant to have proved that he was not at home, because the burden was clearly on him u/s 106 of the Evidence Act, which reads thus;

*“106. Burden of proving fact especially within knowledge.  
—When any fact is especially within the knowledge  
of any person, the burden of proving that fact is  
upon him.*

16. Therefore, what occurred within four walls of their house was within the exclusive knowledge of the Appellant and he has not discharged that burden.

17. The learned counsel Mr.Rupwate further submitted that there were other inmates in the house including the parents of the Appellant. Therefore it cannot be said that the burden was only on the Appellant to explain the circumstances. In this connection, the learned prosecutor submitted that the while the husband and wife were residing in the house, the burden was clearly on the Appellant himself. Even assuming the other accused did not explain the circumstances, still the present Appellant cannot escape from his responsibility to discharge the burden u/s 106 of the Evidence Act and to explain the facts. In any case, the accused No.2 i.e. father of the Appellant had

approached the police station in the morning. The Appellant had not even done that. He had not even tried to provide any medical help. Therefore we hold that the burden of providing u/s 106 of the Evidence Act was clearly on the Appellant which he has not discharged and therefore we are inclined to hold that the Appellant had committed murder of his wife.

18. The learned Counsel Mr.Rupamate submitted that the Appellant was not immediately arrested though his name was disclosed at 07.00 a.m. in the morning. In this connection, the Investigating Officer has explained that, he was busy in the other investigation and therefore he did not arrest him till 06.40 p.m. Though this explanation is not entirely acceptable, that by itself will not show that, the accused was not in the village. The Appellant in his statement u/s 313 of Cr.P.C. has not explained as to where he was at that time, when the incident had taken place and he has not even taken a specific defence that he was at a particular spot or in a different city when the incident had taken place. Therefore, there is no force in the submissions of

learned counsel Mr.Rupamate that the Appellant was not the village or in the house and therefore it was not for him to explain the circumstances in which the deceased met with her death.

19. The prosecution through the evidence of P.W.1, P.W.2 and P.W.3 has already sufficiently established the motive behind the murder. The prosecution witnesses have stated that the Appellant was doubting her character and that he was addicted to liquor and that had led to commission of murder. Here again, there is no serious challenge to such deposition and therefore we hold that even the motive is proved by the prosecution.

20. Learned counsel Mr.Rupwate has relied on the judgment of *Joes alias Pappachan Vs. Sub-Inspector of Police, Koyilandy & Anr., reported in AIR 2016 SCC 5481*. In the said case it was held that the alleged motive, that the accused therein had developed extramarital relationship and wanted to kill his wife, was not proved in that case. There was no evidence to show that at relevant time, the accused was present in the house and therefore burden of proving u/s 106 of the Evidence Act

was not directed against the accused therein. In that case, the incident had taken place between 06.30 p.m. to 08.30 p.m. This time is not such when the accused has to be at home. But in the present case, the incident had taken place at 04.00 a.m. in the early morning and therefore it was for the Appellant to have explained the circumstances, which were within his exclusive knowledge. Mr.Rupwate thereafter relied on the judgment in the case of *Tomaso Bruno and Anr. Vs. State of UP, reported in 2015 Cri.L.J. 1690*. In the said case, the piece of valuable evidence in the form of CCTV footage was not produced and therefore benefit was given to the Appellant. In the said case there were more than one inmates in the hotel where the murder was committed and the accused has taken a specific defence that they had gone out at the time when the offence was committed. In the said case, the best possible evidence in the form of CCTV footage was not produced on record and therefore the accused were given benefit of doubt. Such is not the case before us in the present case and therefore this judgment is not helpful to Mr.Rupwate.

21. Mr.Rupwate thereafter relied on the judgment in the case of *Nagaraj Vs. State represented by Inspector of Police, Salem Town, reported in (2015) 4 Supreme Court Cases 739*, wherein it was held that unsatisfactory answers in the examination u/s 313 of Cr.P.C. cannot be the basis of conviction. In the present case, we are not upholding conviction on the basis of unsatisfactory answers given in the examination u/s 313 of Cr.P.C. We have assessed the prosecution evidence to arrive at our finding.

22. Though, the Appellant was also convicted u/s 316 of the Indian Penal Code, there was no charge framed under such section. In this context, we are relying on the judgment of Hon'ble Supreme Court, in the case of *Dalbir Singh Vs. State of UP, reported in (2002) 5 Supreme Court Cases 334*. In this case, it was held that, though a particular charge was not framed during the trial, after the evidence led during the trial if it gives sufficient notice of the allegations against the accused, the conviction can be recorded in respect of such charge.

23. In the present case, there was sufficient evidence on record to show that the deceased was pregnant and in the same transaction even the child had died. Therefore the Appellant had sufficient knowledge about such allegation and therefore there was no prohibition for recording conviction u/s 316 of IPC.

24. With the result we find that there is no merit in the Appeal. Hence order :

**ORDER**

The Appeal is dismissed.

(SARANG V. KOTWAL, J.)

(A. A. SAYED, J.)