

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 2 OF 2006

The State of Maharashtra
Through : Police Station Officer,
Chikalthana, Dist. Aurangabad.

....Appellant.

Versus

Ramnath s/o. Dhondiram Dandge,
Age 30 years, Occu. Agril.,
R/o. Warud-Kaji, Tq. and District
Aurangabad.

....Respondent.

Mr. M.M. Nerlikar, APP for appellant/State.

Mr. S.G. Ladda, Advocate for respondent.

**CORAM : T.V. NALAWADE AND
SUNIL K. KOTWAL, JJ.
RESERVED ON : 12/01/2018
PRONOUNCED ON : 18/01/2018**

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

1) The appeal is filed against judgment and order of Sessions Case No. 108/2005, which was pending in the Court of learned Additional Sessions Judge, Aurangabad. The Trial Court has acquitted all the accused of the offences punishable under sections 498-A, 302 r/w. 34 of Indian Penal Code (hereinafter referred to as 'IPC' for short). The present appeal is filed only against accused No. 1 Ramnath s/. Dhondiram Dandge. Both the sides are heard.

2) In short, the facts leading to the institution of the

present proceeding can be stated as follows :-

Deceased Chandrakala was sister of first informant Vaijinath Palaskar. Vaijinath is resident of village Palsi, Tahsil and District Aurangabad. Chandrakala was given in marriage to accused No. 1 Ramnath Dandge about seven years prior to the incident in question. Ramnath hails from village Warud Kazi, Tahsil and District Aurangabad. Lilabai, another sister of Vaijinath was also given in marriage in the same village i.e. Warud Kazi and the house of Lilabai is situated at some distance from the house of accused persons. Accused No. 3 is mother of accused No. 1, accused No. 2 is real brother of accused No. 1 and accused No. 4 is wife of accused No. 2. Two issues were born to the deceased from accused No. 1.

3) From about two years prior to the date of incident, the deceased had started disclosing to her relatives on parent's side that all the accused were giving illtreatment to her. The deceased had disclosed that there was illicit relation between accused No. 1 and accused No. 4. She had disclosed that accused had suspicion that the deceased was disclosing about this relationship to persons from outside and due to that, they were giving illtreatment to her. On petty counts, accused were quarreling with deceased and they were even giving beating to the deceased. On the day of Dasara festival of the year 2004, accused No. 4 had given beating to deceased for the

same reason and that was also disclosed by the deceased to first informant and other relatives.

4) The incident in question took place on the night between 1.12.2004 and 2.12.2004. Chandrakala was murdered on that night in the house where she was cohabiting with accused No. 1. On 2.12.2004 at about 7.00 to 7.30 a.m. Lilabai sister of deceased heard hue and cry and so she rushed towards the house of accused and then she learnt that Chandrakala was murdered. Information was received by the first informant and other relatives of the deceased from parent's side and they also rushed to village Warud-Kazi from Palshi. Prior to that, A.D. report was given by Police Patil of village Warud Kazi on the basis of information given by cousin of accused No. 1 and A.D. was registered.

5) A.P.I. Indal Bahure of Chikalthana Police Station had started making inquiry in to the A.D. report prior to arrival of first informant. He prepared the spot panchanama, inquest panchanama and he referred the dead body for P.M. examination to Government Hospital. Doctor, who conducted P.M. examination on the dead body, gave opinion that the death took place due to throttling. After that, the first informant gave report to Chikalthana Police Station and the crime came to be registered at 7.45 p.m. on 2.12.2004. The dead

body of Chandrakala was taken in custody by the first informant and the relatives on parent's side did the funeral on the dead body. The accused persons were not available on that day. Accused Nos. 2 to 4 came to be arrested on 3.12.2004 and accused No. 1 came to be arrested on 4.12.2004. Allegations were made against all the four accused by the first informant of aforesaid nature and he had expressed that as the deceased was proving to be an obstacle in illicit relationship of accused Nos. 1 and 4, the murder was committed.

6) During the course of investigation, the statements of witnesses, some of whom are residents of village of accused and some of whom are residents of village of first informant came to be recorded. After completion of investigation, the chargesheet came to be filed against all the four accused persons for the aforesaid offences.

7) The charge was framed for aforesaid offences. The accused pleaded not guilty. The prosecution examined in all seven witnesses. All the accused took the defence of total denial. In the statement given under section 313 of Criminal Procedure Code (hereinafter referred to as 'Cr.P.C.' for short), accused Nos. 2 to 4 said that the dead body was lying in construction situated on the

backside (where accused No. 1 was living with deceased). Accused No. 1 gave statement under section 313 of Cr.P.C. that three days prior to the date of incident he had left Warud Kazi for Alandi and he learnt about the death of deceased on 3.12.2004 and he returned to Warud Kazi on 4.12.2004.

8) The Trial Court has held that accused No. 1 and the deceased were living separate from other accused and they were living in the backside rooms where the incident took place. The Trial Court has held that it is homicide. But the Trial Court has held that there is no evidence to show that accused No. 1 was present in the house on that night. The Trial Court has held that the explanation offered by accused No. 1 that he had gone to Alandi one day prior to the date of incident needs to be accepted. (In statement given under section 313 of Cr.P.C. accused No. 1 has stated that he had left the station three days prior to the date of incident for Alandi).

9) The Trial Court has used some observations made by the Apex Court while deciding some criminal appeals and on that basis, the Trial Court has held that the prosecution has failed to prove the offences as against all the four accused.

10) The arguments advanced in the present proceeding show

that accused have not seriously disputed that Chandrakala died homicidal death. The Trial Court has also given finding that she died homicidal death. In view of the circumstance that the murder took place at the residential place of accused No. 1, the medical evidence needs to be considered as in some cases the medical evidence creates some probability due to the circumstance that the incident had taken place when the deceased was in the custody of the accused.

11) Dr. Lamb (PW 4) conducted P.M. examination on the dead body of Chandrakala on 2.12.2004 between 2.30 p.m. and 4.30 p.m. The evidence of doctor shows that fairly pulpy material of 50 C.C. of semi-digested food was found in stomach. The A.D. report was given by Police Patil of the village which is proved in the evidence of Investigating Officer Indal Bahure (PW 7) as Exh. 27. It shows that the death took place on the night between 1.12.2004 and 2.12.2004. Exh. 27 is not much disputed by the defence. One Digamber, cousin of accused Nos. 1 and 2 had informed to Police Patil about the death and this report is relevant under section 6 of Evidence Act. This evidence is sufficient to prove that the murder took place on the night between 1.12.2004 and 2.12.2004. In the cross examination, doctor has admitted that the death took place within 24 hours prior to 2.30 p.m. of 2.12.2014. But, that opinion is

given on the basis of rigor mortis. For determining the time of death the contents of stomach need to be considered as relevant circumstance and on that basis, it can be said that the death had taken place within few hours of taking last meal by the deceased.

12) Dr. Lamb (PW 4) found following external injuries on the dead body.

(1) Multiple abraded contusions over left lateral aspect of the neck.

(i) Situated 6.5 c.m. below the left mastoid process having size .5 x .5 cm.

(ii) Situated 6.5 to 7 c.m. below the mastoid process having size 0.5 x 0.5 c.m. of irregular shape.

(iii) Situated below the mastoid by 7 to 7.7 c.m. having size .6 x .5 cm.

(iv) Situated 8.5 x 9 c.m. from mastoid process having size .3 x 1 c.m. respectively.

The above injury Nos. (i) to (iv) were away from the middle line of the neck at the distance of (1) 6.5 c.m. (2) 7 c.m. (3) 7.5 to 8 c.m. and (4) 6.5 to 7.5 c.m. respectively on anterior surface of the neck. All these injuries were reddish in colour and situated in an area of 3.5 x 2 c.m.

(v) Abraded contusion on deltoid region of left side 1.8

c.m. It was reddish in colour.

(vi) There was evidence of tear on mucosal surface of lower lip. There were two tears, situated .5 to 1 c.m. from the middle line having the size of sesame seed with blood oozing and contused, corresponding to the central lateral incisor tooth of upper jaw.

Dr. Lamb (PW 4) has given evidence that all the aforesaid injuries were ante-mortem in nature.

13) Dr. Lamb (PW 4) found petichial haemorrhage on white matter of brain on internal examination. Following more internal injuries were found by the doctor and they are as under :-

(i) On dissection of neck haemorrhagic contusions in the sterno cleido mastoid on right side at middle part anterior with anterior border of 1.5 x 0.5 cm was noticed. They were vertically placed on left side of the neck. There was haemorrhagic contusion in platysma having size 1.5 x 1.5 cm. It was reddish in colour.

(ii) On dissection of thorax no injuries were noticed on the walls and pleura. In larynx there was evidence of hyperaemic zone in epiglottic region and petichiae in pyriform fossa. Both the lungs were congested and

oedematous.

14) The evidence of Dr. Lamb (PW 4) shows that the deceased was pregnant. Doctor has given evidence that the death took place due to throttling and this opinion is given on the basis of aforesaid injuries noted by him. The P.M. report is proved as Exh. 20 in the evidence of Dr. Lamb (PW 4). In the cross examination, it is brought on the record that such injuries could not have been caused by the deceased herself.

15) The evidence of A.D. report is already quoted. In the evidence of panch witness Babasaheb Dandge (PW 3), who is resident of Warud Kazi, the spot panchanama is proved as Exh. 18. The evidence shows that there is some open space between two constructions. One construction is towards north side towards road and other construction is towards south side. In the cross examination of Dandge (PW 3), the defence has brought on the record that accused No. 1 and deceased were living in backside room where incident took place. The evidence of other panch witness Sudam (PW 2), who is examined to prove the inquest panchanama (Exh. 16) shows that the dead body was present in backside room where accused No. 1 was living with the deceased.

16) The issues of the deceased were kids. Accused No. 1 was the only elder member other than the deceased living in that room. In view of provisions of section 114 of Evidence Act, Court may presume existence of certain facts. Section 114 of evidence Act runs as under :-

"114. Court may presume existence of certain facts.- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

17) In the case reported as **AIR 1979 SUPREME COURT 1848 [Syed Akbar Vs. State of Karnataka]**, the Apex Court has laid down that the Court has discretion to draw presumption of facts and the Court needs to decide as to whether the discretionary power given under section 114 of Evidence Act needs to be used. That decision needs to be taken on the basis of facts of that case. It is laid down that the presumption of facts available in this section i.e. the inference available needs to be drawn from experience and observation of the human mind, springs of human action, the usages and habits of society and ordinary course of human affairs.

18) In the case reported as **AIR 1986 SUPREME COURT 1099 [M/s. Sodhi Transport Co. and Anr. Vs. State of U.P. and Anr.]**, the Apex Court has laid down that the presumption available under section 114 of Evidence Act can make out prima facie case for a party in whose favour the presumption exists. It is observed that as it is a rule concerning evidence, it becomes necessary for opposite party to rebut it by giving evidence.

19) The evidence of the present matter shows that accused No. 1 was living in the room with the deceased where the murder took place. Accused No. 1 is an agriculturist. The evidence on the record does not show that accused has any relative at Alandi and there was any reason for him for going to Alandi and staying there for such a long time, for about six days. In ordinary course, a male member of family where there is only one adult male member does not leave station for days together. The male member stays at home in the night time and he leaves home in the day time for work. Though the Trial Court has held that explanation is given by accused No. 1 that he was out of station one day prior to the date of incident, the statement given by accused No. 1 under section 313 of Cr.P.C. shows that accused No. 1 contended that he had left home three days prior to the date of incident. In the statement under section 313 of Cr.P.C., accused No. 1 has further contended that he returned

to his village Warud Kazi on 4.12.2004 and he had learnt first time on 3.12.2004 about the incident. Thus, he admits that he was able to keep contact with his family if he was at Alandi and he admits that he was not at station up to 4.12.2004. In view of provision of section 114 of Evidence Act, it was necessary for accused No. 1 to give particulars as to where he was living in Alandi for the period given by him, for about six days. He could have examined witnesses and he could have produced some record if such record was created to create a probability that on the night between 1.12.2004 and 2.12.2004 he was not at Warud Kazi. That is not done by accused No. 1.

20) In view of aforesaid facts and circumstances of the case, this Court holds that the presumption of fact that accused No. 1 was present at his residential place on the night between 1.12.2004 and 2.12.2004 needs to be drawn. This presumption of fact and aforesaid circumstances create a prima facie case in favour of prosecution and that discharges the initial burden of prosecution to show that accused No. 1 was present at the place of his residence where the murder took place.

21) As soon as the aforesaid inference is drawn, the case becomes the case of custodial death. In such a case, the provision of

section 106 of Evidence Act, which makes available legal presumption and which creates burden of proof becomes available against accused No. 1. The provision of section 106 of Evidence Act runs as under :-

"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."

22) Accused No. 1 has taken the defence of total denial and he has not offered any explanation about the circumstances leading to death of Chandrakala. These circumstances were especially within the knowledge of accused No. 1. Due to these circumstances, the provision of section 114, illustration (g) of Evidence Act becomes available against accused No. 1 and the illustration is as under :-

"(g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;"

This provision again enables the Court to draw inference of the fact that it is accused No. 1 who committed the murder. In view of the facts and circumstances of the present case, this Court holds that this presumption also needs to be drawn against accused No. 1.

23) There is more than sufficient circumstantial evidence on record as against accused No. 1. In the present matter, A.D. report ought to have been given by accused No. 1, but he did not give such report. The evidence about A.D. report shows that cousin of accused No. 1 was required to give information about the death to Police Patil. Even accused Nos. 2 to 4 did not inform anything to Police Patil and they were not available to police on 2.12.2004 and they came to be arrested on 3.12.2004 as per the evidence given by Investigating Officer Indal Bahure (PW 7). Evidence is given by Investigating Officer Bahure (PW 7) and other witnesses like Vaijinath (PW 1), Sudam (PW 2) and also Lilabai (PW 5) that accused No. 1 was absconding. Bahure (PW 7), Investigating Officer has given specific evidence that accused No. 1 was absconding till 4.12.2004. Accused No. 1 has also admitted that he became available to police on 4.12.2004. It does not look probable that accused No.1 did not know about the incident till 4.12.2004 and he learnt about it when he made inquiry on telephone on 3.12.2004. F.I.R. was given on 2.12.2004 itself by brother of the deceased and in that F.I.R., all the accused persons were named. It does not look probable that accused No. 1 did not learn anything. The aforesaid conduct of accused No. 1, of his absconding and avoiding to give report about the unnatural death of Chandrakala is relevant under section 8 of Evidence Act. These circumstances need to be used in the present

matter as incriminating circumstances against accused No. 1.

24) It is not trite law that in every criminal case based on circumstantial evidence, prosecution needs to prove motive for the crime. When it is a case of custodial death, only accused can tell as to what happened exactly at the relevant time and what was the reason for the offence. This Court has already observed that nature of injuries found on the dead body also helps the Court in ascertaining as to who must have been involved in the offence. The evidence on the record shows that there was virtually no opportunity, scope to the deceased to offer resistance on that night. Further, it was night time and if husband was not at home, she would not have opened the door of house at night time for anybody. The nature of injuries and the time of incident shows that only the person from the family of deceased could have committed this murder.

25) Vaijinath (PW 1), brother of the deceased, Sudam (PW 2), Lilabai (PW 5) and Kashinath (PW 6) have given evidence on motive. They have given evidence that from about two years prior to the date of incident, the deceased was disclosing that accused No. 1 had illicit relation with accused No. 4 and due to that, there was illtreatment to her. The evidence given on motive by these witnesses

is consistent with each other. As the prosecution has proved that it is murder and it is accused No. 1, who has committed murder, the evidence on disclosure of deceased becomes available under section 32 of Evidence Act. Considering the nature of allegations made in the disclosure and the circumstance like absence of any explanation from accused No. 1, this Court holds that the evidence given by these witnesses on motive needs to be used atleast as against accused No. 1, present respondent. This evidence is also relevant under section 8 of Evidence Act. Thus, there is more than sufficient evidence on record to prove that it is accused No. 1, who committed murder of Chandrakala. The learned Judge of the Trial Court has not considered the aforesaid circumstances and the aforesaid provisions of law are also not touched by the learned Judge of the Trial Court. The learned Judge of the Trial Court has only considered some observations made by the Apex Court in some reported cases which were made in view of the facts of those cases.

26) The discussion made above shows that the evidence is mainly as against accused No. 1. Other accused were living separate from the family for accused No. 1. If at all there was grievance against the deceased for any relative of accused No. 1, that person can be accused No. 4 in view of the nature of allegations made by the prosecution witnesses. But, as against accused No. 4 also there

was only the evidence of disclosure made by the deceased to the witnesses. This Court holds that on the basis of such disclosure evidence, which can be used as motive, it was not possible to convict accused No. 4 for the offence punishable under section 498-A of IPC. Though the incident took place at some distance from the place where accused were living, there is clear possibility that accused No. 1 had taken the decision separately without consulting others to finish the deceased and other accused had no knowledge about this act. The evidence of Lilabai (PW 5) also shows that she learnt about the incident on the morning of 2.12.2004 when she heard hue and cry coming from the side of the house of accused. The evidence of Lilabai (PW 5) has created a probability that accused Nos. 2 to 4 realised about the incident on the morning of 2.12.2004, though there is circumstance that they were also not available to police on 2.12.2004 and they came to be arrested on 3.12.2004. Due to these circumstances, it is not possible to draw the inference that they were party to aforesaid incident. The main circumstance in their favour is the admission of the witnesses to the effect that accused No. 1 was living separate with his wife in backside room and this circumstance has created a probability in favour of other accused that they had no reason or opportunity to commit the offence. Thus the nature of evidence available against accused No. 1 is different from the evidence available against accused Nos. 2 to 4.

27) The evidence of Lilabai (PW 5) given on presence of the accused at Warud Kazi on 2.12.2004 is hit by omissions in statement given to police. Further, the police statement was recorded on 8.12.2004 when the incident took place on 2.12.2004. The Trial Court has not believed Lilabai (PW 5) on this part of evidence. This Court is also not inclined to believe Lilabai on that part of evidence and so, that part of evidence is not discussed in detail.

28) The learned counsel for respondent, accused No. 1 placed reliance on some observations made by the Apex Court in some reported cases. In the case reported as **AIR 2004 SUPREME COURT 4408 [Rajkumar Vs. State of M.P.]**, the Apex Court held that the circumstance that the incident took place in noon time in the bed room of the accused cannot connect the accused with the crime as there was long time gap between the incident of last seen and the time of murder. The learned counsel drew the attention of this Court to para Nos. 8, 9 and 13 wherein some observations are made by the Apex Court. Assault was made on the deceased and it was also the case of prosecution that the deceased had given dying declaration against her husband, accused. Thus, the facts were different and apparently, the provisions of sections 114 and 106 of Evidence Act were not available. The Trial Court has considered the

observations made by the Apex Court in the reported case cited supra for giving decision of acquittal. Criminal cases cannot be decided on the basis of observations which are made in criminal case by High Court or Supreme Court as they are on the basis of facts of that case. One circumstance here and there in criminal case can change the fate of the matter. Relevant facts and circumstances of the present matter are already quoted by this Court.

29) Reliance was placed by the learned counsel for respondent, accused No. 1 on the observation made by the Apex Court in the case reported as **AIR 2001 SUPREME COURT 2124 [Arvind Singh Vs. State of Bihar]**. In that case, the death had taken place due to burn injuries and case was filed for the offence punishable under section 304-B of IPC. There was dying declaration allegedly made to the mother of the deceased just before few minutes of her death. The evidence on dying declaration was found to be suspicious and there were other circumstances creating suspicion about the case of prosecution. In view of the facts of that case, the Apex Court gave decision of acquittal in favour of accused. The facts of this reported case were altogether different.

30) The learned counsel for respondent, accused No. 1 placed reliance on some observations made by the Apex Court in the

case reported as **AIR 1981 SUPREME COURT 765 [Shankarala Gyarasilal Dixit Vs. State of Maharashtra]**. He took this Court through the observations made at para Nos. 31 and 32. In view of the facts of that case, the Apex Court held that the accused was entitled to acquittal. This Court has already observed that the facts and circumstances of each and every criminal case are always different and the Courts are expected to decide the criminal cases on the basis of facts of that case and law needs to be applied to the relevant facts of that case.

31) In view of the facts and circumstances of the present case, this Court has no hesitation to observe that the Trial Court has committed error in acquitting accused No. 1, husband of the deceased. Though the husband cannot be convicted for the offence punishable under section 498-A of IPC, he cannot escape the conviction for the offence of murder. In the result, following order is made.

ORDER

- (I) The appeal is partly allowed.
- (II) Accused No. 1 Ramnath s/o. Dhondiram Dandge stands convicted for the offence punishable under section 302 of IPC and he is sentenced to suffer imprisonment for life. He is also sentenced to pay fine of Rs.1,000/- (Rupees one thousand). In default of payment

of fine, he is to further undergo rigorous imprisonment of one month.

(III) Accused No. 1 is entitled to set off in respect of the period for which he was behind bars as under trial prisoner in the present matter.

(IV) He is to surrender to his bail bonds for undergoing the sentence.

[SUNIL K. KOTWAL, J.]

[T.V. NALAWADE, J.]

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