

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

CRIMINAL APPEAL NO. 39 OF 2008

1. Suresh s/o. Shahurao Jare,
Age 41 years, Occu. Labour,
R/o. Maharana Pratap Society,
Gadodra, Surat, Gujrath
(At present in Jail).
2. Smt. Anusayabai w/o. Suresh Jare,
Age 36 years, Occu. Household,
R/o. As above.
(At present in Jail).
3. Sanjay s/o. Suresh Jare,
Age 23 years, Occu. Labour,
R/o. As above.
(At present in Jail).

....Appellants.

Versus

1. The State of Maharashtra
Through the Police Inspector,
Ashti Police Station,
Ashti, District Beed.

....Respondent.

Mr. M.A. Tandale, Advocate for appellants.

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

**CORAM : T.V. NALAWADE AND
SUNIL K. KOTWAL, JJ.
DATED : FEBRUARY 28, 2018.**

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

1) The appeal is filed against the judgment and order of Sessions Case No. 22/2007, which was pending in the Court of learned Adhoc Additional Sessions Judge-I, Beed. The Trial Court has convicted accused Nos. 1 and 3 for the offence punishable under

section 302 r/w. 34 of Indian Penal Code (hereinafter referred to as 'IPC' for short) and accused No. 1 to 3 are convicted for the offence punishable under section 498-A r/w. 34 of IPC. The sentence of imprisonment of life is given to accused Nos. 1 and 3 for the offence punishable under section 302 r/w. 34 of IPC and for the offence punishable under section 498-A of IPC, rigorous imprisonment for three years is given and fine amount is also imposed. Both the sides are heard.

2) Deceased Suvarna was daughter of first informant Pandurang Pawar. Pandurang is resident of Pimpalwandi, Tahsil Patoda, District Beed. The deceased was given in marriage about six months prior to the date of incident to accused No. 3. Accused No. 1 is father of accused No. 3 and accused No. 2 is mother of accused No. 3. Accused persons hail from Mutkuli, District Beed. It is the case of prosecution that accused Nos. 1 and 3 were plying auto-rickshaw in Surat and accused No. 2 was selling vegetables in Surat and for earning livelihood, they were living in Surat for about 15 years at the time of marriage. It is the case of prosecution that after the marriage, the deceased was immediately taken to Surat where she was cohabiting with accused No. 3.

3) It is the case of prosecution that after three months of

marriage, Suvarna informed on phone to her parents and relatives from parent's side that accused were asking her to bring Rs.20,000/- from her parents as they wanted to purchase new auto-rickshaw. Pandurang had promised to do something. Then maternal uncle of Suvarna gave amount of Rs.10,000/- to the accused. After few days, accused again demanded remaining amount. Then Pandurang gave amount of Rs.10,000/- by taking it from his other relative Dattu Bhavar.

4) On the occasion of Diwali festival, when the deceased returned to the house of parents, she disclosed that accused were asking her to bring Rs.20,000/- more. She disclosed that accused husband was not cooperating with her and he was harassing her. After Diwali festival, Pandurang and Vithal Choure, maternal uncle of the deceased went to Surat to convince the accused to behave well.

5) On Saturday, accused No. 2 visited the house of Pandurang and informed that Suvarna had left the matrimonial house without informing anything to anybody after her quarrel with her husband and she was missing. Pandurang passed this news to other relatives and they started searching for Suvarna. The dead body of Suvarna was found in the well from village Amalner. Pandurang and his relatives visited the place and they identified the

dead body. Already Police Patil had given A.D. report in respect of the said incident. Some chits were found with the dead body, but they were not in the hand writing of Suvarna. P.M. was conducted on the dead body and doctor, who conducted P.M. examination, gave opinion that the death had taken place due to pulmonary oedema and drowning. Pandurang gave report on 30.11.2006 and the crime came to be registered for aforesaid offences in Ashti Police Station against all the three accused.

6) During the course of investigation, statements of some witnesses from Jamkhed and also from village of accused came to be recorded. Two ladies came forward to inform that they had seen accused Nos. 1 and 3 in the company of deceased and they were proceeding towards Mutkuli from Jamkhed S.T. stand side. Statements of relatives of deceased on parent's side came to be recorded. The statement of even father of accused No. 1 came to be recorded. Opinion of the doctor was obtained regarding time of death and he gave opinion that death had taken place within 3 to 7 days prior to the date of P.M. examination. P.M. was conducted on 28.11.2006.

7) During the course of investigation, aforesaid maternal uncle of deceased viz. Vithal Choure produced a note book which

was containing hand writing of deceased. Specimen hand writing of accused persons were collected and they were sent along with note book and chits to Hand Writing Expert. Hand Writing Expert gave opinion that it was not possible to give definite opinion as the hand writing was not matching with the hand writing of accused and also hand writing appearing in the note book. Chargesheet came to be filed for aforesaid offences. Charge was framed and the accused pleaded not guilty.

8) Prosecution examined in all 14 witnesses. The accused persons took the defence of total denial. No defence evidence is given. The Trial Court has believed the witnesses including the two ladies, who have deposed that they had seen accused Nos. 1 and 3 in the company of deceased. The Trial Court has held that accused Nos. 1 and 3 must have pushed the deceased into the well to finish her and conviction is given accordingly.

9) The submissions made and the record show that when the dead body was found on 28.11.2006, the F.I.R. was given on 30.11.2006. Prosecution witness Chaya (PW 1) had given statement before police on 1.12.2006 and other witness Sakharbai (PW 4) had given statement before police on 8.12.2006. Even after finding of the dead body on 28.11.2006, the F.I.R. was not given by Pandurang

immediately and it was given on 30.11.2006. In view of these circumstances, the evidence of all the prosecution witnesses needs close scrutiny.

10) The evidence of Dr. Kalkute (PW 3) and the opinion given by him show that there was pulmonary oedema, which was primary cause of death and second cause of death was drowning. No injury was found on the dead body. The dead body was in highly decomposed condition. Viscera was preserved, but no poison was detected. As the opinion is given that death had taken place between 3 to 7 days prior to 28.11.2006, it can be said that there is no definite opinion about the exact time of death. This circumstance needs to be kept in mind as the prosecution has heavily relied on the evidence of Chaya (PW 1) and Sakharabai (PW 4) to show that they had seen the deceased in the company of accused Nos. 1 and 3 at the relevant time.

11) The evidence on the record shows that police did not make an attempt to prepare map of scene of offence. When the prosecution wants to lead evidence on the circumstance of 'last seen' and there are circumstances of aforesaid nature, it was necessary for the prosecution to have map of scene of offence on record. It was necessary to have information about the distance between the

well and the road. Only through some witnesses, even defence made an attempt to ascertain that distance, but there is no convincing evidence on the distance between the well and the road and also the well and the residential place of accused persons from the village. There is no material to show the exact distance between the place where the accused were seen lastly in the company of deceased and the well. Evidence on the record shows that there is regular road, which is used by auto vehicles between Jamkhed and village of the accused and the distance between the two places is around 7 to 8 k.m. Even the distance by using short cut foot path is more than 5 k.m. These circumstances need to be kept in mind while appreciating the evidence given by aforesaid two ladies.

12) Chaya (PW 1) has deposed that accused Nos. 1 and 3 are from her Bhavki and so, she knew them. Sakharbai (PW 4) was also known to Chaya and Sakharbai is resident of Tapneshwar Galli of village Mutkuli.

13) Chaya (PW 1) has deposed that after 5-6 months of the marriage, she had seen deceased, accused No. 1 and accused No. 3 on the road which leads to Bazar. She is resident of Jamkhed where the Bazar is held. She has deposed that she had invited them for tea, but they said that they wanted to go ahead. She has deposed

that after two days, father of the deceased had made inquiry with her and she had informed that she had seen these persons on aforesaid road, the road leading to Jamkhed Bazar. It was Friday. The evidence does not show that she had seen the accused persons proceeding towards their field. This circumstance needs to be kept in mind. She has deposed that there are two roads available for going to Mutkuli from Jamkhed and one road is short cut. However, that evidence also does not show that she had seen the accused persons on short cut road. On the contrary, in the cross examination, she has deposed that when she used to go to Matkuli, she used to go by taking conveyance by main road.

14) In the cross examination, Chaya (PW 1) has admitted that she had not attended the marriage between the deceased and accused No. 3. She has not given any occasion due to which she had an opportunity to see the deceased. These circumstances have created doubt about her version that she has seen the deceased in the company of accused Nos. 1 and 3 on road leading to Bazar of Jamkhed.

15) In the cross examination, Chaya (PW 1) has stated that the distance between Tapaneshwar lane and Jamkhed bus stand is less than half k.m. Jamkhed road is situated towards north side of

bus stand Jamkhed and the river is situated towards western side of bus stand. The bus stand is situated towards western side of Bazar of Jamkhed. All these circumstances appearing in the cross examination have created doubt about the exact location where Chaya (PW 1) had seen the accused persons with deceased. If the distance between the bus stand and Tapaneshwar lane was less than half k.m., then it does not look probable that between these two points, there was the well in which the dead body was found.

16) In the cross examination of Chaya (PW 1), it is brought on the record that the land of her father in law was given for cultivation to accused No. 1. Suggestion is given that they want their land back and due to that, the relation of their family is strained with accused. Though this suggestion is denied, this circumstance is there. Further, there is one more circumstance. Father of accused No. 1 is still residing in the same village and he has dispute with accused No. 1 as accused No. 1 was demanding partition of the land. In the present matter, father of accused No. 1 has given evidence though to some extent against him.

17) Sakharbai (PW 4) has given evidence that on that day, which was 3-4 days prior to the date of recovery of dead body, she was washing the clothes at Vincherna river and at that time, accused

Nos. 1 and 3 passed by her side with the deceased. She has given evidence that she had asked them as to why they were using foot path, when they could have used conveyance and upon that accused No. 1 had informed they were using the short cut. She has given evidence that on her inquiry, accused No. 1 had disclosed that the lady who was in their company was the wife of accused No. 3. Her evidence in cross examination shows that she had no occasion to see the deceased prior to that day. This circumstance is important as Chaya (PW 1) had not attended the marriage and she had also not seen the deceased.

18) Sakharbai (PW 4) has given evidence that she is resident of Tapneshwar Galli, Jamkhed. In spite of that, she has not given evidence that she had occasion to see the deceased at Tapneshwar Galli prior to that day. Her evidence on the distance between the place where she was washing clothes and the bus stand Jamkhed is not consistent with the evidence given by Chaya (PW 1). She has tried to say that bus stand is situated at the walking distance of 15-20 minutes from this spot when Chaya (PW 1) has given evidence that the distance between Tapneshwar Galli and bus stand is hardly half k.m. Her statement was recorded by police on 8.12.2006. It is already observed that in the F.I.R., the names of these two ladies were not given specifically, though it was informed that one lady had

informed that she had seen accused Nos. 1 and 3 in the company of deceased. The evidence of these two ladies is not on exact time when they had seen accused Nos. 1 and 3 in the company of deceased.

19) Prosecution has examined Nanasaheb (PW 2), who is working as bus driver in Maharashtra State Road Transport Corporation. He has given evidence that after 7.15 p.m. of 24.11.2006 accused No. 1 approached him at Ahmednagar bus stand and he made inquiry about bus available for Surat. His evidence does not show that he had seen accused No. 3 in the company of accused No. 1. He has given evidence that he saw that accused No. 1 boarded Pandharpur - Surat bus at Ahmednagar bus stand. This evidence again creates suspicion about the evidence given by aforesaid two ladies.

20) Pandurang (PW 9), father of the deceased has given evidence that accused No. 2 had approached him to inform that the deceased was missing and she had left the house 2-3 days back as there was quarrel between her and accused No. 3. The evidence of Pandurang (PW 9) shows that for going to Surat, he is required to go to Jamkhed. If accused No. 2 was available in that locality, it was possible for Chaya (PW 1) and Sakharbai (PW 4) to notice her, but

their evidence does not show that they had noticed accused No. 2 in village Mutkuli. Vithal Choure (PW 11), maternal uncle of the deceased and who happens to be brother in law of Pandurang (PW 9) has given evidence that he learnt about missing of the deceased from Pandurang. There is some inconsistency in the evidence of these two witnesses. Pandurang has tried to say that they had gone to Surat, to convince the accused and accused No. 2 had approached him 15 days thereafter, but Vithal Choure (PW 11) has stated in evidence that accused No. 2 approached Pandurang to inform about missing of the deceased 7-8 days after their visit to Surat. Vithal Choure (PW 11) has specifically stated that it was Saturday when accused No. 2 approached Pandurang and it was informed that she was missing for two days. Chaya (PW 1) has tried to say that she has seen the deceased on Friday. Thus, the evidence of Vithal Choure (PW 11) and aforesaid two ladies is not consistent with each other. These circumstances are important as exact day of death is not ascertained and there is possibility that the death had taken place even 7 days prior to 28.11.2006. Thus, the evidence on 'last seen' is highly suspicious in nature and there is circumstance of belated disclosures of both these ladies. There is clear probability that they had never seen the deceased.

21) Sahurao (PW 12), father of accused No. 1 has given

evidence that whenever accused persons used to visit village, they used to stay with him. His evidence does not show that on Saturday or on Friday accused had come to him. He has admitted in the cross examination that he has dispute with accused No. 1 as accused No. 1 was asking for partition of the ancestral property and he has not given share to accused No.1. Accused No. 1 had also filed suit for partition. His evidence shows that he has good relations with Chaya and Sakharbai. He has tried to say that Chaya had informed him that she had seen accused Nos. 1 and 3 with deceased in Jamkhed market. Such evidence is not given by Chaya, but the evidence of this witness that Chaya had seen them in market and they were proceeding ahead, towards market is already mentioned which is not consistent with the case of prosecution. He has given evidence that Sakharbai had also informed him about the aforesaid incident. Thus, indirectly he has tried to give evidence against accused Nos. 1 and 3 and there is aforesaid reason for the same. Though he is father of accused No. 1 due to aforesaid circumstances he can be called as interested witness.

22) The learned counsel for appellants placed reliance on the observations made by the Apex Court in the case reported as **AIR 1976 SC 917 [Chandmal and Anr. Vs. State of Rajasthan]**. The Apex Court has given tests which need to be satisfied for placing

reliance on circumstantial evidence. The Apex Court has also discussed as to how the evidence under section 3 of the Evidence Act needs to be appreciated. The observations with regard to circumstantial evidence are as follows :-

"It is well settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Secondly, those circumstances should be of a definite tendency unerringly pointing towards the guilt the accused. Thirdly, the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. That is to say the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt."

23) This Court holds that the aforesaid observations need to be used in the present matter. The present matter entirely rests on circumstantial evidence. The circumstance of 'last seen' is not cogent and firmly established. The circumstances like motive which are brought on the record are also not cogent and convincingly established. Admittedly, the accused were having two auto-rickshaws on the date of marriage and so, versions of Pandurang

(PW 9) and Vithal Choure (PW 11) that they wanted Rs.20,000/- more for purchasing new auto-rickshaw does not appear to be probable in nature. If there was really such grievance, they would have approached police immediately on Saturday when they learnt about missing of Suvarna from accused No. 2. They would have atleast given report to police on 28.11.2006 when they found the dead body. This did not happen and so, their evidence does not appear to be convincing in nature.

24) The Trial Court has inferred that accused Nos. 1 and 3 must have pushed the deceased into the well. It is already observed that there is no map of scene of offence. There are aforesaid circumstances with regard to the possibility of existence of the said well on the way leading to the residential place of accused persons from the village. Thus, the evidence is not sufficient to draw inference that they were taking the deceased to the well where the dead body was found. Further, the prosecution wanted to prove that two chits found with the dead body were planted by the accused. When the dead body was found in the well which was having sufficient water, firstly it does not look probable that the documents did not become wet due to the water of the well. Further, the possibility that before pushing her into the well, they had placed the chits in to the packet and it was then tied with her cannot be

inferred. These circumstances are not pointing finger to the accused. On the contrary, the investigation was not made fairly. The hand writing of the deceased which could not have been disputed, could have been collected from school, but that was not done and the note book was collected from Vithal Choure (PW 11), one interested witness.

25) Only few circumstances are there and they are not cogent and firmly established. Basically, there is no convincing evidence to prove that it is homicide. The possibility of suicide also cannot be ruled out. If the accused were interested in getting money and they had already received Rs. 20,000/- from Pandurang (PW 9) and Vithal Choure (PW 11), there was no reason for them to finish the deceased. The evidence on the record does not show that the witnesses had informed to accused that they would not meet the new demand. On the other hand, Pandurang (PW 9) and Vithal Choure (PW 11) have given evidence that accused were to return the amount which was already given to the accused by them. Thus, the evidence given on motive is also weak. The evidence on illtreatment is mainly based on the so called disclosures made by the deceased to Pandurang (PW 9) and Vithal Choure (PW 11). If the prosecution fails to prove that it is homicide, the evidence on such disclosures cannot be used under section 32 of the Evidence Act.

26) The delay caused in giving of the F.I.R. is not sufficiently explained and it has created serious doubt about the entire case of the prosecution. This Court has no hesitation to observe that the entire evidence of prosecution is not convincing and the circumstances are not firmly established. The conviction cannot be given on the basis of such evidence for the offence of murder. It is already observed that the evidence for the offence punishable under section 498-A of IPC is also not sufficient and if the accused get acquittal for the first offence, they can get acquittal for other offence also. In view of these circumstances, this Court holds that the decision given by the Trial Court cannot sustain in law. In the result, following order is made :-

ORDER

(I) Appeal is allowed. The judgment and order of Trial Court convicting accused Nos. 1 and 3 for the offence punishable under section 302 r/w. 34 of IPC and sentencing them to life imprisonment is hereby set aside and they stand acquitted of this offence.

(II) Appellant Nos. 1 to 3 also stand acquitted of the offence punishable under section 498-A r/w. 34 of IPC and the decision of the Trial Court in that regard is also set aside. Fine amount, if any, deposited is to be returned to them.

(III) They are to execute the bond under section 437-A of Cr.P.C. of the period prescribed.

[SUNIL K. KOTWAL, J.]

[T.V. NALAWADE, J.]

SSC/