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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 116 OF 2003

The State of Maharashtra
Through Police Station Officer,
Police Station, Patoda,
Taluka – Patoda, District – Beed

APPELLANT

VERSUS

Vasant Bhagwan Avale
Age – 38 years, Occ – Agriculture
R/o Kumbhephal, Taluka – Paranda
District - Osmanabad

RESPONDENT

.....
Mr. S. J. Salgare, APP for appellant – State
Mr. Ajinkya Kale h/f Mr. S. B. Talekar, Advocate for respondent
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[CORAM : SUNIL P. DESHMUKH &
P. R. BORA, J.J.]

DATE : 11th JANUARY, 2018

ORAL JUDGMENT (PER SUNIL P. DESHMUKH, J.) :

1. This is an appeal preferred by the State challenging judgment and order dated 21st October, 2002 passed by First Ad-hoc Additional Sessions Judge, Beed, in Sessions Case No. 94 of 2001, thereunder acquitting the respondent – accused.
2. First Information Report was lodged by Chandrakant Raosaheb Kolhe (PW-8), Police Head Constable, Police Station, Patoda on 20th March, 2001 informing that on 19th March, 2001

Shamrao Baburao Shekte, Police Patil, Pachangri had intimated that two agriculturists, namely, Manik Vishwanath Katwate and Tukaram Tatyaba Chavan had been to him around 10.00 a.m. informing that in a well in a field known as Bori, corpse of unknown woman had been seen. On verification it had been seen that corpse of unknown woman aged about 35 years had been lying in the well water in prostrate condition. Thereupon, action had been solicited and police station officer, Assistant Sub Inspector Namdas had registered Accidental Death No. 9 of 2001 pursuant to section 174 of the Criminal Procedure Code and had directed investigation. Accordingly, along with constable Dongare and Police Patil, spot of incident had been visited and dead body had been taken out of the well with the help of Police Patil, Manohar Rajaram Mundhe, Manik Vishwanath Katwate, Navnath Devrao Sonawane and others. Police Patil Shamrao Shekte had then informed that on 17th March, 2001 around 1.30 p.m. a person was beating a woman at Manjuri square of Pachangri and on asking he had told his name as Vasant Bhagwan Avale, resident of Kumbhephal, Taluka-Paranda, District – Osmanabad and had told that the woman was his wife Palanka. The woman had complained that the man did not allow her to go to her parents at Malewadi and beats her. Then, the man – her husband

had told that he wants to go to Daskhed to see Bajibaba. Thereafter, both of them were sent to Daskhed in the tractor of Subhash Rajendra Mundhe. He had recognized that the dead body was of said woman. Thereafter police constable Dongare had been directed to bring parents of the woman from Malewadi (Bharnyachi), Taluka and District – Beed. Accordingly, the police constable had brought them on the spot of incident. Upon seeing they recognized that the dead body was of their daughter Palanka, wife of Vasant Avale, aged 32 years, resident of Kumphephal. Thereafter inquest panchanama was drawn in their presence and the body was sent for post mortem to government hospital, Patoda, around 9 p.m. and had been kept in mortuary on 20th March, 2001 around 5.00 p.m. Medical Officers, M. K. Kakad and N. V. Yeole had carried out the post mortem and had issued provisional certificate referring to that the person had been killed by strangulating and throwing in water. As such, offence at Crime No. 33 of 2001 came to be registered, with Patoda Police Station against Vasant Bhagwan Avale accusing him of killing his wife Palanka by strangulating and throwing her in the well in field Bori and trying to destroy evidence, between the period from 1.30 p.m. of 17th March, 2001 to 10.00 a.m. on 19th March, 2001, for the offences punishable under sections 302

and 201 of the Indian Penal Code.

3. Prosecution has examined in all 15 witnesses. PW-1 Navnath Deorao Sonawane and PW-2 Manohar Rajaram Mundhe who had been examined at Exhibit-10 and Exhibit-12 respectively are the *Panch* witnesses in respect of scene of offence.

4. PW-3 Shamrao Bapurao Shekte, who had been examined at Exhibit-13 is Police Patil of village Pachangri. He has stated in his deposition that on being informed by Manik Katwate and Tukaram Chavan of Bodkhewadi, he had been to the well in their field and had seen dead body floating in the well and had thereafter proceeded to police station Patoda along with said two persons informing the police about the same under his report dated 19th March, 2001. Thereupon, police constables Mr. Kolhe and Mr. Dongre had accompanied him to the field and had caused dead body to be removed out of the well and inquest *panchanama* had been drawn and the dead body was sent for post mortem.

5. PW-3 Shamrao has further stated that on 19th March, 2001 around 1.30 p.m. while he had been standing near Manzari corner, he had seen the woman and the accused, who were

quarreling and that time Shahaji Oval and Vishvanath Mundhe among others were present there. The couple was asked by him as to why they were quarreling and from where they had come. The man had told him that he is Vasant Avale and further that the woman was his wife. The woman had told him that she is Palanka. She was also asked about her parents and the residence and she had told him that her parents are from Bharnyachi Malewadi. Her father's name being Manik Barane. He had noted down their names. The woman had told him that the accused had not been allowing her to go to her parental house and that he beats her. They were taken to a proximate hotel and water had been offered to them. Having told by accused that he wanted to go to Daskhed along with wife to visit Bajibaba, they were sent to Daskhed in a tractor belonging to a person from his village.

6. In cross examination of PW-3 Shamrao, however, an omission had emerged about noting down of names of the two persons. It has further been elicited that the police Patil has to maintain a daily diary and that in the daily diary, names of said two persons had not been taken. Extract of diary of third month of 2001 had been submitted to the police, which does not contain reference to notings which had been at Exhibit-15.

7. PW-4 Subhash Rajendra Mundhe has been examined at Exhibit-20. He is stated to be driver of the tractor and claims to have taken the accused and deceased in his tractor. He refers to in his deposition that Palanka had been wearing a yellow colour saree on her person while she travelled in the tractor. He also refers to that Police Patil had asked him to drop the couple at Daskhed and that he had dropped them at Malewadi corner, 1 k.m. before Daskhed and that there was one more person in the tractor. In cross examination of PW-4 Subhash it has been elicited that he had no talks with the persons and he was not in a position to state about passengers, who had travelled in his tractor / trolley on earlier two days and subsequent two days after 17th March, 2001 and that he cannot state who were the persons who had travelled in the trolley on 17th, other than the man and the woman and one more person.

8. PW-5 Manik Baburao Barne, father of deceased Palanka has been examined at Exhibit-21. He, in his deposition, refers to that marriage of deceased Palanka and the accused had taken place about 15 years before the incident. She had been to him two months before the incident telling that the accused had been demanding Rs.15,000/- for laying down pipeline in his field. He

further refers to that around 4.30 p.m. police had been to him telling that a girl from Malewadi had fallen into well at Bodkhewadi and then he had arrived at the scene and identified dead body as that of Palanka and inquest *panchanama* was drawn and the dead body was taken to police station for sending it to post mortem and thereafter had informed about death of Palanka to his wife. While they were at Patoda, they came to know that Palanka having been strangulated to death. In his cross examination it has come forth that him, his wife Lochanbai, son Vinayak and two others were prosecuted in the court at Paranda in 1994 by the accused. It had been alleged that they were not allowing Palanka to stay with the accused and that they used to beat him. PW-5 was examined on the third day after the incident.

9. Lochanbai, mother of deceased is PW-6 who had been examined at Exhibit-22. She purportedly has referred to in her cross examination that accused has been looking after his sons from Palanka and that they have not done anything for the sons of Palanka and further that there is enmity between the accused and them, since he had initiated prosecution against them.

10. PW-8 Police Head Constable Chandrakant Raosaheb Kolhe

is the investigating officer who had been examined at Exhibit-25. He has stated that upon being informed by Police Patil about quarrel having taken place between husband and wife at Manzari Corner that the dead body was of that woman, he had sent police constable Dongare to Malewadi to her parents and that her father had come with the police within an hour and father of the deceased had identified her body and inquest *panchana*, scene of offence *panchanama* had been prepared. Thereafter dead body was sent to medical officer Patoda for post mortem, which had been carried out on 20th March, 2001 stating further that Police Patil had produced a small piece of paper, Exhibit-15.

11. PW-9 Dr. Narayan Vasudeorao Yeole is medical officer, Primary Health Center, Dongarkinhi, Taluka – Patoda, who had been examined at Exhibit-27. He has stated that he had been working on deputation on 20th March, 2001 at Primary Health Center, Patoda. He had opined that the probable cause of death was cardio respiratory failure due to asphyxia, secondary to strangulation. PW-9 in his cross examination has stated that asphyxia is also there in case of drowning as well as failure of the heart i.e. cardio respiratory failure. He also in his cross examination states that strangulation can be detected by external injuries and that there must be internal injuries

corresponding to external injuries and had also stated that there was no internal injuries to the tissues of the deceased and had also referred to that injuries in column No.17 of the post mortem report were superficial.

12. PW-10 Pandurang Baburao Mundhe, who runs a hotel near Manzari corner, has been examined at Exhibit-30. He states that Iswar Mundhe, Shahaji Waval and Shekte Patil were in his hotel while the accused had been beating the deceased, who was trying to run away. In the cross examination an omission has been elicited about accused and his wife having been brought in hotel and were offered tea and water and that he had dithered over the identity of the dead body and the woman he had seen.

13. PW-11 Vishvanath Shridhar Mundhe had been examined at Exhibit-31. He refers to in his deposition that he had been in the hotel of Pandurang while Bandu (PW4), Pandurang and Shekte Patil i.e. PW-3 were present. He had been declared hostile.

14. PW-12 Ramesh Vasant Avale who has been examined at Exhibit-32 is a child witness – elder son of the accused and the deceased. He has stated that his father had told him about mother being at Daskhed while he had come back alone. He

states that his mother was lunatic and people were afraid of her and that sometimes she never used to come home. Manik Barne, his maternal grand father, did not use to come to them. He has further stated that his mother used to go to Daskhed on full dark night every month and that his maternal grand father used to come to Wadvad on full dark night every month and that at the time of incident grand father Manik had taken his mother to Daskhed.

15. PW-13, Umesh Vasant Avale, who has been examined at Exhibit-33 is also a child witness and younger son of the accused and the deceased. He has deposed to the effect that his mother – deceased had been lunatic and father had not treated her badly. While he had been declared hostile, prosecution in cross examination could not bring any variation in his statements. He too, in his cross examination by the defence has stated that his grand father used to come to take their mother to Daskhed and that before the incident had taken place, Manik had taken their mother to Daskhed. This witness appears to have narrated to the police that on 17th March, 2001 him and his parents had been to Wadvad by bullock cart where his parents got down and he had returned home and on 19th March, 2001, father alone had returned telling that mother had been at Malewadi and thereafter

while the police had been to their house, he became aware about death of his mother.

16. PW-14 is Sudam Baburao Kotule, who has been examined at Exhibit-38/C. He is neighbourer of the accused. He had been declared hostile and had been cross examined by the prosecution.

17. PW-15 is Dinkar Bhima Gaidhane, he has been examined at Exhibit-39/C. He had been Police Inspector, Beed City Police Station. It has been elicited from his cross examination that investigation in respect of Palanka's visit to Daskhed had been made recording statement of Vijay Kolhe, a priest of Daskhed. However, same had not been submitted along with charge sheet and had not recorded statement of the third person who had been sitting in the tractor along with the accused and the deceased.

18. Learned APP contends that evidence pointedly makes it clear that deceased had been last seen by quite a few persons in the company of the accused husband. Further, the conduct of the accused is also material, since he did not appear to have enquired about whereabouts of his wife from 17th March, 2001 till first information report had been lodged. No plausible

explanation is coming forth for his omission to enquire about his wife during this period. Medical report establishes that wife of the accused has died of strangulation and in the light of such evidence, acquittal by the trial court is not proper. He submits that the circumstantial evidence is sufficient to lead to definitive conclusion about unnatural death having been caused and the cause in the absence of plausible explanation coming from the accused, is an unequivocal pointer to the accused alone. He submits that may be there is no eye witness, but the circumstances in the absence of explanation from the accused ought to have been properly considered by the trial court coupled with surrounding circumstantial evidence in which every link in the chain has been established.

19. On the other had learned advocate appearing for the respondent – accused Mr. Ajinkya Kale vehemently submits that while a person is being accused of heinous offence like murder of wife, the law requires that evidence against accused has to be established absolutely and the standard of measure is beyond reasonable doubt. He submits that even otherwise it has come on record that the accused and the deceased had been married for over 15 years and had begotten two children who were taking education. He further submits that as a matter of fact it is

the case other way round. It has emerged on record that the accused had to complain against parents of deceased for not letting him have her company after marriage. He submits that the evidence by parents of the deceased is absolutely unreliable, purporting to cook up the theory of demand of money for laying down pipeline in the filed, fifteen year after marriage, that too after death of their daughter. He submits that the parents of the deceased have once again stooped too low against the accused. He submits, it appears that the parents of the deceased had been entertaining a kind of grudge against the accused – their son in law. He submits that the evidence does establish that even if it is assumed that the deceased had been lunatic and the accused had not been maintaining her properly, yet, it emerges on record that he had been maintaining his children well, letting them educate and further that parents of the deceased were not at all taking any care of the children or their daughter, nor were concerned in any way with them. On the contrary, he submits that the evidence to quite a large extent is indicative of that it is the father of the deceased, who used to take Palanka his daughter to Daskhed on every new moon night for treatment and that even before the incident he had taken Palanka along to Daskhed. He submits that the evidence of the persons, who

purport to have seen the accused and the deceased on 17th March, 2001 at Manzari corner, is absolutely unreliable, for it emerges on record that proper transport facilities were not available and the distance was of only one or two kilometer from there. The evidence further shows that it was her father, who used to take her to Daskhed and only on the day of the incident her husband was taking her to Daskhed is unreliable version put forth on behalf of the prosecution. He further submits that last person who had seen the couple, who contends to have left them at Malewadi corner had also stated that there was a third person along with the couple in the tractor who had also alighted at Malewadi corner along with them. He submits that who was the third person, his identity has not been disclosed nor he has been examined. He submits that possibility that third person could be father of the deceased cannot be ruled out, for he was the person who used to take deceased to Daskhed. While further it can be seen that statement of priest of Daskhed had been recorded by the police, however, he was not examined. Thus, according to him, having regard to aforesaid, appreciation of evidence by the trial court cannot be faulted with and that when a possible view has been taken by the trial court, only for another view is possible, it is not a case wherein acquittal

deserves to be meddled with and reversed.

20. Evidence, particularly of the persons who are supposed to have seen the accused and the deceased last together, particularly, the one of Police Patil Mr. Shekte, does not inspire confidence. The Police Patil has stated that he is expected to maintain a diary and take down notes in the same. Whereas, it is his case that he had wrote down names of the accused and the deceased on a chit on 17th March, 2001, yet his evidence shows that the diary maintained by him for the purpose does not find noting about the incident. He had handed over said noting of 17th March, 2001 to the police subsequently and had not recorded the incident in his diary on the relevant date. This chit – Exhibit-15 is stated to have been of 17th March, 2001 whereas the same had been given to the police during police statement on 20th March, 2001. In his statement to the police on 19th March, 2001, he does not refer to such kind of a chit and that on 19th March, 2001 while dead body was found and had been identified as that of Palanka, the police had been directly sent to the residence of Manik Barne, is an indication of that the Police Patil as suggested on behalf of the defence had not been unwary of Manik Barne.

21. Apart from that the evidence of tractor driver and the

hotelier also does not inspire confidence. The tractor appears to have been used for transport of people and that the driver had not been keeping note of and remembering the persons travelling in the tractor as would emerge from the deposition of tractor driver that he did not remember persons who had travelled in the tractor before and after 17th March, 2001. He further has not referred to as to who was the third person who was travelling in the tractor along with the deceased and the accused on 17th March, 2001. So is the case of the hotelier, who could not be certain about that the corpse was of the woman to whom he had offered tea and water on 17th March, 2001. The other persons who purported to have seen last the couple had no previous acquaintance with the accused and the deceased and had been passers by. Nor it appears that they could know their names and it emerges they claim only once they had seen them before. Sons of the deceased themselves have referred to that their mother had not been of normal disposition and that she used to be away from home quite often and that the people were afraid of her. Further, there is evidence by parents of the deceased that they had not been taking care of children of the deceased, but they were under the care of their father – the accused. Most importantly, the medical evidence shows that

when strangulation is detected by external injuries, it necessarily has to have internal injuries and that corresponding internal injuries had been absent while post mortem on the corpse of Palanka had been performed.

22. Learned APP has relied on a decision of the Supreme Court in the case of “*Ashok V/s State of Maharashtra*” reported in (2015) 4 SCC 393 to impress upon that last seen together by itself may not be a conclusive proof but along with surrounding circumstances, particularly relations between accused and deceased, it would lead to a presumption of guilt to the accused. Although this has been so submitted, paragraph No. 12 of said judgment reads thus -

“ 12. From the study of abovestated judgments and many others delivered by this Court over a period of years, the rule can be summarised as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of the accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of the Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused etc. non – explanation of death of the deceased, may lead to a presumption of guilt. ”

23. In the present matter, it is not the case that the deceased and the accused had enmity between them or there was previous hostility which has been brought on record. As such, the citation may not be able to hold the present case. For similar purpose, learned APP has also referred to and relied on another judgment of the Supreme Court in the case of “*Trimukh Maroti Kirkan V/s State of Maharashtra*” reported in (2006) 10 SCC 681. This case, as well, in present facts of the case, would not be able to tilt the scale in favour of the prosecution.

24. Having regard to aforesaid position, it would not be said that the prosecution has been able to bring guilt to the accused conclusively, coupled with that based on the evidence, the trial court has already taken a view which is a possible view and having regard to the circumstances, it would not be appropriate to meddle with the same and reverse the decision of the trial court. Appeal, therefore, is dismissed.

[P. R. BORA, J.]

[SUNIL P. DESHMUKH, J.]