

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.395 OF 2013

Subhash alias Chabu Mahsuji Nikalje,
Age-40 years, R/o-Chinchkheda,
Khandobache, Tq-Ambad,
Dist-Aurangabad

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr.G.D. Kale Advocate appointed for Appellant.
Mr.S.Y. Mahajan, Additional Public Prosecutor
for Respondent.

...

**CORAM: S.S. SHINDE AND
V.K. JADHAV, JJ.**

DATE : 18TH JUNE, 2018.

JUDGMENT [PER S.S. SHINDE, J.] :

1. This Appeal is directed against the Judgment and order dated 18th May, 2012, passed by the Additional Session Judge-2, Aurangabad in

Sessions Case No.3 of 2011 thereby convicting the accused-Appellant for the offence of punishable under Section 302 of the Indian Penal Code (for short "I.P. Code") and sentencing him to suffer rigorous imprisonment for life and to pay fine of Rs.1,000/-, and in default of payment of fine, to suffer further simple imprisonment for three months. The trial Court also convicted accused for the offence punishable under Section 498-A of the I.P. Code and sentenced him to suffer rigorous imprisonment for the period of three years and in default of payment of fine, to suffer further simple imprisonment for one and half months. The trial Court directed that both the sentences shall run concurrently.

2. The Prosecution case, in brief, is as under:

A) The accused is husband of deceased Anita. Yogita is a minor daughter of deceased, Sachin and Ganesh are minor sons of deceased. The accused

was residing along with his wife and children in rented room situated at Indira Nagar, Aurangabad. The accused was doing mason work. The accused was in habit of drinking liquor. The accused used to take doubt upon the chastity of his wife Anita. The accused used to demand money from his wife for consuming liquor and on that count he used to quarrel with her. The complainant is the husband of sister of deceased Anita. Deceased Anita used to tell about her ill-treatment to the complainant and his wife. The complainant has tried to convince the accused about the same but he did not listen.

B) On 4th October, 2009, at evening time the accused came at his house under the influence of liquor and he started giving abuses to his wife Anita. The deceased was cooking food in kitchen room. However, the accused was giving abuses to her due to which the deceased and her daughter Yogita had not taken dinner during night time. The accused has given threats by saying that he

will kill his wife during night time. Thereafter, the deceased had slept in the house. The daughter of the deceased namely Yogita had also slept in the house. During night time at about 1.30 a.m., accused assaulted the deceased on her head by means of wooden log due to which the deceased has sustained Contused Lacerated Wound [for short 'CLW'] over right mostroid region scalp, CLW over right ear tinna and contused abrasion over inner side of lower lip. The daughter of deceased namely Yogita heard noise due to which she has awoken. She had seen her father i.e. accused standing near cot of the deceased having wooden log in his hand. The accused has thrown the said wooden log and he fled away from the spot. Yogita had seen the injuries caused to her mother due to which she started shouting by uttering words 'MAMMICHA KAN TUTLARE - KAN TUTLARE'. Immediately thereafter, the land lady of the deceased namely Kaushalyabai Jadhav and one Saralabai came in the house of the deceased. Yogita told them that her father i.e. accused, had killed her mother by

causing injury by means of wooden log and he fled away. Thereafter, Yogita and landlady Kaushalyabai went towards the house of Kerubhan Bhima Kedare situated at Garkheda. Yogita has narrated the said incident to Kerubhan Kedare. Thereafter Yogita, landlady Kaushalyabai and Kerubhan came at the house of the deceased during night time. At that time, the accused was not in his house. Thereafter Yogita and Kerubhan Kedare had taken the injured Anita to GHATI Hospital during the night time. Anita died at about 3.30 a.m. during that night while taking treatment in the Hospital. Thereafter, Kerubhan Kedare has lodged report about the incident on 5th October, 2009 against the accused.

C) On the basis of the report lodged by the complainant, crime No.I-165/2009 has been registered against the accused for the offence punishable under Section 302 of the I.P.Code. The spot panchnama of offence has been prepared. At the relevant time, wooden log having blood stains

thereon, pieces of bangles, one bed sheet [godhadi] and one plastic bag having blood stains thereon have been seized from the spot of offence while preparing the spot panchnama. The inquest panchnama over the dead body of deceased has been prepared. The statement of the witnesses have been recorded by the concerned Investigating Officer. The clothes of the deceased have been seized under seizure panchnama. The accused has been arrested on 6th September, 2010. The clothes of the accused have been seized under seizure panchnama on the basis of his statement recorded under Section 27 of the Evidence Act. The seized muddemal property has been sent to the C.A. After completion of the investigation, the charge sheet came to be filed against the accused.

D) A charge for an offence punishable under Section 498-A and 302 of the I.P. Code has been framed against the accused and the same was read over and explained to him. Accused pleaded not guilty and claimed to be tried. The defence of the

accused is of total denial. It is the defence of the accused that he has quarreled with deceased and he pushed the deceased due to which she sustained injuries.

3. After recording the evidence and conducting full fledged trial, the trial Court convicted the accused for the offence punishable under Section 302 and 498-A of the I.P. Code and sentenced him to suffer imprisonment as afore-stated and to pay fine, and in default of payment of fine, to suffer further imprisonment as afore-stated.

4. Learned counsel appearing for the Appellant submits that the learned Additional Sessions Judge has not appreciated the evidence and given undue weightage to the evidence of child witness PW-1 Yogita, daughter of the deceased, who is not an eye witness to the incident. The conduct of PW-1 Yogita is not natural one. Learned counsel further submits that admittedly in the present

case there is no eye witness to the incident and the entire case is based upon circumstantial evidence. He submits that when the case is based upon circumstantial evidence, all circumstances proved must be consistent only with hypothesis of guilt of the accused. Learned counsel further submitted that the prosecution has failed to prove the offence under Section 498-A of the I.P. Code. Learned counsel therefore submitted that the Appeal may be allowed.

5. On the other hand, learned Additional Public Prosecutor appearing for the State submitted that though the case of the prosecution is based upon the circumstantial evidence, the chain of circumstances on which reliance placed by the prosecution has been established beyond reasonable doubt by the prosecution. He further invites our attention to the evidence of PW-1 Yogita and submits that she is natural witness who has seen the accused immediately after the incident, at the spot of incident, and at that

time the accused was holding wooden log in his hand. He further submits that after considering the entire evidence on record the trial Court has convicted the accused and the findings recorded by the trial Court are in consonance with the evidence brought on record. He, therefore submits that the Appeal may be dismissed.

6. We have carefully considered the submissions of the learned counsel appearing for the Appellant and learned Additional Public Prosecutor appearing for the State. With their able assistance, we have carefully perused the entire notes of evidence so as to find out whether the findings recorded by the trial Court are in consonance with the evidence brought on record or otherwise.

7. The prosecution has examined PW-4 Dr. Vinod Patiram Bhalerao. He deposed that on 5th October, 2009, he was working as Medical Officer in Ghati hospital in Forensic department. He has

carried out postmortem examination over the dead body of Anita. He has recorded history of assault at Para No.5 in postmortem notes. He has carried out postmortem examination in between 12.30 p.m. to 1.30 p.m. on 5th October, 2009. He found following injuries on the person of deceased:

"1) Contused lacerated wound over right mostoid region scalp - size 4X1X5 cms. Margin irregular. Contused and reddish.

2) CLW over right ear tinna - size 3X1 cm., reddish.

3) Contused abrasion over inner side of lower lip - size 3X1 cm. reddish."

. PW-4 Dr. Vinod Bhalerao further deposed that all the injuries were ante-mortem. There was also depressed fracture scalp on right temporal region comminated on palpation size 6X6 cms. He has also noted internal injuries and he has mentioned the same in Para No.19 of postmortem notes. Viscera has been sent to Chemical Analyzer.

According to his opinion the cause of death of deceased was head injury, which was homicidal death. He further deposed that postmortem notes Exhibit-23 are in his handwriting, it bears his signature, and contents of the same are correct. He further deposed that head injury caused to the deceased could be possible by means of Article-A i.e. wooden log, which was shown to him.

. During the course of cross-examination, PW-4 Dr. Vinod Bhalerao stated that the injuries mentioned in postmortem notes could be possible on account of pushing the person on iron cot.

8. Thus, from the perusal of the evidence of PW-4 Dr. Vinod Bhalerao, it is clear that there was contused lacerated wound over right mostoid region scalp, contused lacerated wound over right ear, contused abrasion over inner side of lower lip. All the above referred injuries were ante-mortem. The medical officer has noted that there was also depressed fracture to the scalp on right

temporo region and further there were also internal injuries. Thus, the prosecution has proved that the death of Anita was homicidal.

9. Now we will consider the oral evidence of other prosecution witnesses. The prosecution has examined PW-1 Yogita Subhash Nikalje, aged about 11 years. Before recording evidence of PW-1 Yogita, the trial Court has noted that, the witness is a child witness. The trial Court has further recorded that it has asked material questions about her education, her family members and she has given rational answers. The trial Court has noted that the witness was knowing the sanctity of oath and she was capable for giving evidence. The trial Court has observed capacity of child witness by asking questions and thereafter oath was administered to the witness.

10. PW-1 Yogita deposed that the accused Subhash is her father. At the time of incident she was residing at Aurangabad. She herself, her

father and mother were residing at Aurangabad. Sachin and Ganesh are her brothers, who were residing at the house of her maternal uncle. She was residing in Indira Nagar at Aurangabad along with her father and mother. Her father was doing mason work and her mother was doing labour work. Her father was quarreling with her mother after consuming liquor. Her father was demanding money from her mother for liquor. Her mother was giving money to her father and thereafter her father used to consume liquor and beat her mother under the influence of liquor. Her father was giving threats to her mother.

. PW-1 Yogita further deposed that on 4th October, 2009, she herself and her mother were in the house. Her two brothers were at the village of her maternal uncle. Her mother had been for the work since morning and her father was in the house. At evening time her mother came at the house. Her father was at the house when her mother came there. Her father went outside of the house

and came back in the house under the influence of liquor. At the relevant time her father has given threats to her mother that he would kill her. At that time her mother was cooking the chatni of eggs. Her father was giving abuses to her mother. PW-1 Yogita further deposed that she herself and her mother had not taken dinner as her father had given abuses to her mother. Her mother had slept on the cot and she also slept near her mother. Her father has given threats to her mother that he will kill her during night time.

. Regarding the incident, PW-1 Yogita deposed that, she was lying on the cot and she had not slept. Her father assaulted her mother by means of wooden log and he was standing there near the cot. At about 1.30 a.m. she heard noise and therefore she woke up. She saw that her father was standing near the cot. Immediately after noticing that her daughter Yogita had woke up, her father thrown wooden log and ran away. She had seen her mother, the ear of her mother was cut and Godhadi

was blood stained. Blood was oozing from ear and nose of her mother. Pieces of bangles were lying on the spot having blood stains thereon. Their landlady came there. She has told the said landlady that her father had killed to her mother by means of wooden logs and ran away. PW-1 Yogita has further deposed that she has also told to the landlady that they would go towards her uncle who was residing at Garkheda. She herself and the said landlady went at the house of her uncle and she told her uncle that her father had killed her mother and ran away. Thereafter she along with her uncle came to her house. Thereafter she herself and her uncle had taken her mother to Ghati hospital by rickshaw. While taking treatment in the hospital, her mother died during that night itself.

. During the course of cross-examination, PW-1 Yogita has stated that they were residing at Indira Nagar since 3-4 years. She was taking education in 4th standard. The name of her uncle

is Sachin Kedare. One requires half an hour for reaching to the house of her uncle by walk. Her uncle is also doing mason work. Her father was doing mason work at Aurangabad. Her mother used to go for labour work. Her uncle Sachin is also known at Kerubhan. Her father used to come at the house after 5.30 p.m. Some time her father used to come later at the house after 5.30 p.m. Their house is rented house in which there is only one room. She further stated that the quarrel between her mother and father was not started immediately after arrival of her father but the quarrel between them started in evening hours. As her father was consuming liquor, there used to be quarrel between her mother and father. Her father was demanding money from her mother and some times her mother was giving money to him but on her failure to pay money, her father used to quarrel with her mother on that count.

. During the course of further cross-examination, PW-1 Yogita has stated that, it was

Sunday when the incident occurred. On the day of incident at about 6.00 p.m. her mother had come at their house. Her father was in the house but after arrival of her mother, he went outside the house. At about 6.30 p.m. her father came back to the house. At that time her mother was cooking food. When her father came in the house then immediately he started giving abuses to her mother. At the relevant time she was in the house. Her father had consumed liquor, therefore, he was quarreling with her mother. She herself and her mother had not taken dinner but her father had taken dinner. After taking dinner in the house, her father did not go outside the house and he was in the house.

. PW-1 Yogita further stated that there was one cot in their room, upon which wood and instruments for mason work were lying. On the day of incident at about 9.30 p.m. she had slept in the house. Her mother had slept at about 9.00 p.m. on that day. After 9.30 p.m. her father also slept in the house. She woke up at about 1.30 a.m., and

seen the accused while standing and wooden log was in his hand. She denied the suggestion that, at the relevant time her father had pushed to her mother due to which her mother had sustained injuries. She denied the suggestion that the accused and said wooden log had no concern with the alleged crime. She volunteered that her father had assaulted her mother by means of wooden log. She had shouted loudly, due to which her landlady came there. The medical officer has treated to her mother. At about 3.00 a.m. during night time her mother died while taking treatment in the hospital.

11. Admittedly, PW-1 Yogita is a child witness, aged about 11 years. As observed earlier, before recording her evidence the trial Court has asked some questions to her to ascertain whether she was capable to give oral evidence and after satisfaction, the trial Court has administered her oath and her evidence was recorded. PW-1 Yogita had specifically stated that her father always

used to demand money from her mother for consuming liquor, and after consuming liquor he used to quarrel with her mother. About the day of incident, she has stated that, when her mother returned from work her father went out of the house and came back by consuming liquor and started abusing her mother. She has deposed that since at about 6.30 p.m. her father was abusing her mother. She further deposed that her father had threatened her mother that he will kill her during the night time. She further deposed that at about 1.30 p.m. she heard noise and therefore she woke up. She further deposed that she had seen that her father was standing near the cot, holding wooden log in his hand, and thereafter he ran away from the house. She further deposed that she had seen that her mother was lying on the cot in injured condition. The ear of her mother was cut and blood was oozing from the ears and nose of her mother. Thus, though PW-1 Yogita is not eye witness to the actual incident, but immediately after the incident she had seen her father

standing near her injured mother, holding wooden log in his hands. PW-1 Yogita is daughter of the accused and her presence in the house was natural. Therefore, the evidence of PW-1 Yogita is trustworthy and reliable. She was extensively cross-examined by the defence but her evidence was not at all shattered in the cross-examination. During the course of cross-examination also, she has specifically stated that during the relevant night she woke up at about 1.30 a.m. and had seen that her father was standing near the cot holding wooden log in his hands, and her mother was lying on the cot in injured condition. She further deposed that thereafter her mother was shifted to Ghati hospital, Aurangabad where she died while receiving treatment.

12. The prosecution has examined PW-2 Kaushallya Lala Jadhav, who was landlady of the accused at the relevant time. She deposed that she is residing at Indira Nagar, Aurangabad. Her house is consisting of three rooms. She alone was

residing in one room and she had rented two rooms. One Sakharam was residing as a tenant in one room and accused Subhash was residing as a tenant in another room. Accused Subhash, his wife and daughter were residing in that room together. Accused Subhash was doing work of mason. The wife of accused Subhash was also working under mason. Accused Subhash was in the habit of consuming liquor. The accused Subhash was beating to his wife under the influence of liquor and he was also demanding money from her wife. Accused Subhash was taking doubt about the character of his wife.

. PW-2 Kaushallya further deposed that the incident had occurred 8 to 9 months prior to recording her evidence in the Court. There was quarrel between accused and his wife at about 11.00 to 11.30 p.m. during the night, on account of dinner and therefore she tried to convince the accused. At that time accused Subhash was under the influence of liquor. She came to her house and went to sleep. About one and half hours thereafter

she heard shouts of daughter of accused. Then she went in the room of accused Subhash. Mother of Yogita was lying there in unconscious condition. Blood was oozing from her ear and head. Thereafter she herself and Yogita went towards the house of uncle of Yogita. They have narrated the said incident to the uncle of Yogita. Including uncle of Yogita and her aunt came to the house of Yogita. Thereafter uncle of Yogita and her aunt had taken the injured lady to the hospital by rickshaw. When she went in the house of Yogita after hearing her shouts, Yogita told her that her father killed her mother by means of wooden logs and ran away. When she went in the house of accused for convincing him at about 11.00 to 11.30 p.m., at that time the wife of accused told her that her husband was demanding money and he was making allegations against her.

. During the course of cross-examination PW-2 Kaushallya has stated that at the time of incident the accused, his wife and Yogita were

only residing in that room. Accused was suspecting about the chastity of his wife. The accused used to quarrel with his wife under the influence of liquor.

13. Thus, upon careful perusal of the evidence of PW-2 Kaushallya, it is clear that she has corroborated the evidence of PW-1 Yogita. PW-2 Kaushallya deposed that accused, his wife and daughter Yogita were residing in her house as tenant. She further deposed that accused used to consume liquor and quarrel with her wife. Accused was suspecting about the chastity of her wife. Immediately after the incident she visited the house of accused. Yogita had told her about the incident. At that time wife of the accused was lying in unconscious condition. The evidence of PW-2 Kaushallya is trustworthy and reliable and there is no reason to doubt her oral testimony.

14. PW-3 Kerubhan Bhimrao Kedare is uncle of Yogita. He deposed that the accused is husband of

deceased Anita. Deceased Anita was sister of his wife. At the time of incident, accused, his wife and daughter Yogita were residing together. Anita was doing labour work and accused was doing mason work. Accused was in the habit of drinking liquor. Accused used to give abuses to his wife under the influence of liquor. Accused was demanding money from his wife for consuming liquor. The accused was taking doubt regarding the character of his wife and on that count there used to be quarrel between the couple. PW-3 Kerubhan further deposed that on 4th October, 2009, he had slept in his house. At about 1.30 to 1.45 a.m. during night time, Yogita and her landlady came at his house. Yogita told him that her father assaulted her mother by means of wooden log due to which ear of her mother was cut. Thereafter he himself, his wife, Yogita and said landlady went to the house of accused. The wife of accused was lying in unconscious condition in the house. The blood was oozing from her ear and head. They have shifted her to Ghati hospital. The wife of accused died in

the hospital at about 3.30 a.m. Thereafter he has lodged complaint Exhibit-14 at Jawaharnagar police station.

. During the course of cross-examination, PW-3 Kerubhan has stated that at the relevant time accused was doing mason work and he was doing painting work. They were not on visiting terms. He further stated that within 15 minutes they reached at the house of accused. At that time wife of accused was unconscious. There was cot under which instruments of construction were lying in the room. Yogita told him that her father beat her mother.

15. We have carefully perused the evidence of PW-1 Yogita, PW-2 Kaushallya and PW-3 Kerubhan. The evidence of these three witnesses is corroborating with each other. PW-1 Yogita has stated that immediately after the incident, her landlady came there and she narrated the incident to her and then they both went to the house of

PW-3 Kerubhan, she told the incident to PW-3, and thereafter they all came to the house of accused and shifted Anita to Ghati hospital. PW-2 Kaushallya has stated that immediately after the incident she has visited the spot and PW-1 Yogita told her that her father inflicted injuries on the head of her mother by means of wooden log. Similarly PW-3 Kerubhan has supported the version of PW-1 Yogita and PW-2 Kaushallya. The evidence of all these three witnesses is consistent, trustworthy and reliable. There is no reason to disbelieve the oral testimony of these three witnesses as they have no reason to depose against the accused.

16. PW-5 Trimbak Sanduji Bankar is a panch witness to the spot panchnama Exhibit-25. PW-6 Parvatabai Gangadhar Nagne is the neighbour of the accused. She deposed that accused Subhash was tenant of Kaushallyabai. Deceased Anita was the wife of accused. She further deposed that accused used to quarrel with his wife under the influence

of liquor. On the day of incident there was quarrel between accused and his wife and she has heard the same. PW-7 Manikrao Sheshrao Warade is an investigating officer. He deposed about the manner in which he has carried out the investigation of the crime.

17. We have carefully perused the C.A. reports. As per C.A. report Exhibit-44, the blood group of deceased Anita was Group-A. Exhibit-36 is another C.A. report regarding the samples which were sent for chemical analysis. Exhibit-1 is plastic gunny clot, Exhibit-2 is quilt, Exhibit-3 is wooden plank, Exhibit-4 is bangle pieces, Exhibit-5, 6 and 7 are saree, blouse and Petticoat of deceased Anita. It is stated in the C.A. report that Exhibit-1, 2 and 5 have considerable number of blood stains, Exhibit-3 and 4 have stained with blood, Exhibit-6 has moderate number of blood stains, Exhibit-7 has few blood stains. It is further stated in the C.A. report that blood detected on Exhibits-1, 2, 3, 4, 5, 6 and 7 was

human and the same were stained with blood of group "A". Thus, it is clear that C.A. reports lend support to the prosecution case.

18. The accused had inflicted blows of wooden log on the head of the deceased Anita, which is vital part of the body. Thus, it is clear that the accused had an intention to kill her wife. The conduct of the accused after the incident assumes much importance. When PW-1 Yogita woke up and seen the accused standing near the cot of deceased holding wooden log in his hand, he ran away from the spot of incident and thereafter he was absconding. The incident took place in the night of 4th October, 2009, and investigating officer has stated that he has arrested the accused on 6th September, 2010. Thus, it is clear that after the incident the Appellant was absconding for more than ten months. The Appellant has not given any plausible explanation why he was absconding for such long period.

19. PW-2 Kaushallya, landlady of the accused, PW-3 Kerubhan, relative of the accused had specifically stated that accused was taking doubt upon the chastity of Anita and abusing her under the influence of alcohol. Further, PW-1 Yogita, daughter of accused and PW-6 Parvatabai, neighbour of the accused, have specifically stated that under the influence of alcohol, accused used to quarrel with Anita. Thus, prosecution has proved that the accused was subjecting the deceased to cruelty by taking doubt upon her chastity.

20. It is true that the child witness PW-1 Yogita has not witnessed the incident of actual assault and there is no eye witness to the actual incident. However, immediately after the incident PW-1 Yogita has seen that accused was standing near the cot of the accused, holding wooden log in his hands. The subsequent conduct of the Appellant-accused after commission of offence to run away/ abscond from the house i.e. scene of offence is additional circumstance, which can be

added as one of the circumstance in the chain of circumstances, in view of Section 8 of the Evidence Act. In the given facts and circumstances, and the evidence brought on record by the prosecution, the only possible view was guilt of the accused. Though there is no eye witness to the incident and the prosecution case is based on circumstantial evidence, the chain of circumstances has been established beyond reasonable doubt by the prosecution, and all the facts established are so consistent with only hypothesis of the guilt of the accused.

21. The trial Court has considered all the evidence brought on record in its proper perspective and recorded the findings which are in consonance with the evidence on record and convicted the Appellant-accused. The conclusions reached by the trial Court are in consonance with the evidence brought on record by the prosecution. There is no perversity as such.

22. It is alternatively argued by the learned counsel appearing for the Appellant that there was no intention on the part of the Appellant to kill his wife, and therefore the offence would fall under Section 304 Part II of the I.P. Code. The said submission deserves no consideration for the simple reason that in absence of any explanation offered by the Appellant under which circumstances Anita died, it is not possible to read the mitigating circumstances in favour of the Appellant. On the contrary, the conduct of the Appellant to run away from the house after commission of the offence, clearly shows his involvement and intention in the commission of offence. There are no mitigating circumstances to accept the submission of the counsel appearing for the Appellant that the Appellant had no intention to kill his wife. The assault is on the head of Anita, which is vital part of the body. Further, evidence on record shows that since evening hours, for considerable period, the accused was abusing his wife and at that time itself he has threatened

her wife that during the night hours he will kill her.

23. In the light of discussion herein above, we are of the opinion that there is no merit in the Appeal. The Criminal Appeal stands dismissed. The Appellant be given the benefit of set off under Section 428 of the Code of Criminal Procedure.

24. We appreciate the sincere efforts taken by learned counsel Mr. G.D. Kale (appointed), appearing for the Appellant, and we quantify Rs.5,000/- (Rupees Five Thousand) towards his fees and expenses.

[V.K. JADHAV, J.]

asb/JUN18

[S.S. SHINDE, J.]