

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

CRIMINAL APPEAL NO.800 OF 2014

Asheli Edward Rodriguez	]	
C-5884, Kolhapur Central Prison	]	
Kalamba, Kolhapur	]	...Appellant
vs.		
The State of Maharashtra	]	
(Through Dahisar Police Station in	]	
C.R. No.168/2011)	]	...Respondent

Mrs. Farhana Shah (Appointed) for Appellant .
Mr. Arpan Sait, APP for Respondent/State.

**CORAM : SMT. V.K. TAHILRAMANI
ACTING CHIEF JUSTICE, &
P. N. DESHMUKH, J.
DATE : 8th MAY, 2018
(SPECIAL VACATION BENCH)**

JUDGMENT [Per : P. N. DESHMUKH)

. This judgment challenges the judgment of learned Additional Sessions Judge, Dindoshi, Mumbai dated 20/4/2013 by which appellant came to be convicted for the offence punishable under section 302 of IPC and is sentenced to suffer RI for life and fine of Rs.5,000/- in default to suffer RI for 6 months.

2. Briefly stated the case of prosecution is as under:

i) Appellant was married to Dipti in the year 2009. Their's was love marriage performed against the wish of their parents. After marriage deceased resided with her parents for 8 months and then

joined the appellant who was staying with his parents at Mira Road, Mumbai. After staying for one month deceased and appellant went to Surat. On 8/6/2010 she had come to Mumbai for engagement of her sister Preeti and again in May 2011 she visited Mumbai and went to her parental home on 24/5/2011 and after staying there for the whole day left to her matrimonial home as she received phone call from appellant. Thus it is case of prosecution that at the time of incident deceased was with the appellant in his room.

ii) On 25/5/2011 PW-1 Preeti called deceased at 10.00 a.m., 12.30 p.m, however there was no response. When she called at 4.45 p.m., call was attended by her mother-in-law informing that she was not aware of her whereabouts. At 5.30 p.m. Preeti again called, however same was not responded. She therefore visited the house of her sister at Mumbai and knocked the door and as there was no response, she on pushing the door entered in the room and saw that her sister Dipti was lying motionless on the mattress on the floor in a pool of blood. Preeti noted nail marks around her neck and one dupatta was found tied to the angle of the roof, two pillows were lying near her body. Preeti called PW-3-Ritesh, her brother, who on arriving called Doctor, who on examining Dipti declared Dipti as dead.

iii) On the basis of report by Preeti, offence came to be registered vide C.R. No.168/2011 at Dahisar Police Station. During the course of investigation spot panchanama came to be drawn and articles such as bedsheet etc were seized from the spot. Dead body was forwarded for post mortem and seized articles were also

forwarded to Chemical Analyzer. Post mortem report revealed that deceased died of asphyxia due to throttling.

iv) On recording statements of witnesses and on completion of investigating charge-sheet is filed in the Court of learned Metropolitan Magistrate at Borivali.

v) In the course of time case came to be committed to the Court of Session's for trial. Charge is framed against accused for the offence punishable under section 302 of IPC to which he pleaded not guilty and came to be tried.

vi) In order to establish charge prosecution examined in all 7 witnesses including PW-1-Preeti Vashishth Jani, Complainant; PW-2 Riteshkumar Narendrabhai Jani, brother of deceased; PW-4-Manish Ramshankar Tripathi on circumstance, PW-5-Dr. Sunil Adhar Birhade, who performed post mortem.

vii) Defence of accused is of total denial and false implication. According to him on the day of incident he was not present in Mumbai and as such had pressed into service his defence of alibi, however has not examined any witness in support of his case. Learned Trial Judge on considering evidence on record convicted accused as aforesaid. Hence this appeal.

3. Learned counsel for appellant contended that case of prosecution is based on circumstantial evidence and therefore burden is on the prosecution to prove all the circumstances which unerringly

pointed toward the guilt of accused and has submitted that in the present appeal there is no evidence establishing involvement of appellant to have committed murder of his wife when in fact their relations were cordial and thus, contended that abscondance of accused or his having been last seen in the company of deceased are not sufficient circumstance to warrant conviction.

4. Learned APP supported the judgment of the Trial Court and contended that admittedly incident took place in a room where deceased was present with the appellant on the material night and as such appellant has to explain as to how she died. It is further contended that if deceased was found dead in the house of accused where he was not found present after the incident and was absconding till he came to be arrested on 27/10/2011 i.e almost after 5 months from the incident for which no explanation is put forth by the defence, appeal is therefore prayed to be dismissed.

5. In the background of submissions advanced as aforesaid, evidence of PW-1-Peeti would reveal that deceased was married to appellant in the year 2009 which was a registered love marriage and initially as this marriage was not declared by them she was residing with her parents. However, 8 months thereafter she was residing with appellant at Mira Road wherefrom they shifted to Surat and were residing together. On 8/6/2010 she had come for the engagement of her sister and stayed for 5-6 days. Then again on 23/5/2011 she came to attend marriage of her brother at Gujrat. On 23/5/2011 all of them returned back to Mumbai and at 7.00 p.m. she went to the house of appellant at Dahisar. On the following day again she came in the

afternoon and left in the evening as she had received phone call from appellant.

6. On 25/5/2011 when Preeti called Dipti on her mobile she did not respond the phone, she again called at 12.30 p.m. however nobody picked the phone. At 4.45 p.m. Preeti called on the mobile phone of appellant which was picked by her mother-in-law who informed that she was not aware of whereabouts of Dipti. Again at about 5.00 p.m. to 5.30 p.m. Peeti called deceased, however there was no response from her therefore she visited the house of appellant at Dahisar. On knocking the door there was no response she therefore pushed the door and entered the room and found that her sister was lying motionless on the mattress on the floor, blood was oozing from her nose. She also found nail mark around her neck and one dupatta was found tied to the angle of the roof, two pillows were lying next to her. Preeti therefore called her bother Ritesh, who on arriving at the spot called one Doctor who on examining Dipti declared her dead. Thereafter report is lodged as per Exh.17.

7. In her cross examination it has come on record that marriage between deceased and appellant was not accepted and that her parents were desirous of Dipti marrying with the person of their caste and admitted that for this reason all family members disliked their marriage as appellant belonged to Chritian community. She further admitted that her family members were not in favour of her marriage and as such were not in favour of Dipti continuing with the said marriage. She also admits that till the day of incident she had never visited house of appellant and that she tried to convince the

deceased to break the marriage. However deceased denied for the same. From the evidence of complainant as above thus it is found that marriage of appellant with the deceased was not accepted by her family members as they belonged to different caste and for this reason she further admits that during family celebrations or functions appellant was never invited. She admits that one day prior to the incident when deceased was with them in her paternal home appellant had phoned and called her back to his house and denied that there was no reason for appellant to cause her murder. As such from her evidence as aforesaid since marriage between the appellant and deceased was not accepted by her family members and for that reason appellant was not invited for any family functions, she suspected appellant behind the murder of deceased.

8. Evidence of PW-2-Riteshkumar Narendrabhai Jani, brother of deceased is on the same line like that of her sister PW-1-Preeti who visited the spot on receiving message from complainant and noted deceased lying dead in the room of appellant.

9. Evidence of PW-4-Manish Ramshankar Tripathi establish fact of appellant being present in the locality on 25/5/2011 between 7.00 a.m. to 7.30 a.m. as he saw appellant at that time near his house proceeding towards the road and later on the same day learnt that his wife was dead. Nothing material could be brought in his cross examination. In fact it has come on record that distance between his house and house of appellant is of 5 minutes and has denied that his statement was recorded after 5 days of the incident which fact is further found substantiated from the evidence of PW-7-Gautam

Shivram Randive, Investigating Officer, who has deposed that he has recorded statement of PW-4-Manish Tripathi on the day of incident. From the evidence of Preeti, Ritesh it has come on record that incident took place in a room in the house which even otherwise appears to be the case of prosecution and from the evidence of PW-4-Manish Tripathi it has come on record that he has seen appellant proceeding near from his house situated in Ganesh Nagar. In view of facts as aforesaid, case of prosecution, which is admittedly based on circumstance of last seen requires to be considered along with non explanation of appellant about death of deceased while in his company and his remaining absconding after the incident for a period of 5 months as he is arrested on 27/10/20011.

10. In the light of above circumstances, we find it useful to rely upon the decision of the Apex Court in the case of ***Rishi Pal vs. State of Uttarakhan*** (2013 Cri.L.J. 1534) wherein reference is made to the case of ***Bodh Raj alias Bodha and others vs. State of Jammu and Kashmir*** {(2002) 8 SCC 45} wherein Apex Court held as under:

“The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.”

11. In the present appeal even according to the case of

prosecution deceased was in the house till she was found dead at 5.30 p.m. and thus theory of last seen come into play in said set of facts which is further found substantiated from the evidence of PW-4-Manish who had seen appellant proceeding from his house towards the road in the morning at 7.00 a.m. In the given circumstances, possibility of somebody else committing murder of Dipti is totally impossible. In fact it is found that to create a false case of deceased committing suicide appellant before coming out of the room tied *dupatta* over the angle of roof just to make out scene as deceased died of suicide by hanging. However, such false case and scene of offence stand totally disproved from the medical evidence of PW-5-Dr.Sunil Adhar Birhade, who had noted nail marks on the neck of deceased along with three contusions over the left side of neck and has opined that cause of death was asphyxia due to throttling and has further opined that throttling is possible by pressing the neck and in such cases blood oozes through the nose/mouth. Evidence of PW-1-Preeti as already referred above states of oozing of blood from the nose of deceased. Same fact is stated in spot panchanama. In that view of the matter it can only be stated that death of deceased was due to throttling by pressing her neck which in this case appears to be by hand as nail marks are found over both sides of neck of deceased. In that view of the matter appellant's attempt to hang *dupatta* to the wooden log of the ceiling to create impression that deceased committed suicide does not stand for any reason.

12. In the given set of circumstances, we also find it necessary to refer to the provisions of section 106 of the Indian Evidence Act

“Section 106 of the Indian Evidence Act, 1872 provides

that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In several recent decisions, the Supreme Court has held that the principles, which underlie Section 106 of the Indian Evidence Act, 1872 can be applied in cases where certain facts are especially within the knowledge of a person. In the case of State of Rajasthan vs. Kashi Ram ((2006) 12 SCC 254), the Supreme Court has observed that if the accused fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Indian Evidence Act, 1872. In a case resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation as an additional link which completes the chain.”

In view of above stated law and fact of non explanation of any such circumstances by appellant, it can only be said that it is appellant who is guilty of murder of deceased.

13. Similarly, no explanation is put forth by accused for being absconding for a long period of 5 months which cannot be accepted for the reason when admittedly appellant is husband of deceased with whom she was in contact till the previous day and in fact after the incident appellant was found proceeding from out of his house towards the road side. Such conduct of appellant remaining

absconding for a period of 5 months after the death of wife is also a strong circumstance for which no explanation is offered by the appellant.

14. We are conscious of the fact that in a criminal trial is not an enquiry for any purpose other than to determine his guilt. The piece of conduct which is not connected with the guilt of the accused is not relevant. But at the same time, however, unnatural, abnormal or unusual behaviour of the accused after the offence may be relevant circumstance against him. Such conduct is inconsistent with his innocence. So the conduct which destroys the presumption of innocence can be considered as relevant and material. In view of the evidence and legal pronouncement as aforesaid, we find that prosecution has established guilt of appellant beyond reasonable doubt. Appeal is therefore dismissed.

Sd/-
(P.N. DESHMUKH, J)

Sd/-
(ACTING CHIEF JUSTICE)