

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

**CRIMINAL APPEAL NO.1344 OF 2011
ALONGWITH
CRIMINAL APPLICATION NO.1332 OF 2017**

Asgar Sharif Khan]
Aged about 32 years,]
Residing at Room No.202, Pirdaushaha]
Marg, Near Haji Compound,]
Khairnagaon, Navi Mumbai]
At present undergoing the sentence]
imposed upon him at Thane]
Central Prison]..Appellant
(Accused No.1)

Versus

State of Maharashtra]
(at the instance of Senior Inspector of]
Police, Turbhe Police Station vide their]
C. R. No. I-238 of 2007)]..Respondent

Mr. Rahul Arote, Advocate for the Appellant.
Mrs. M. M. Deshmukh, APP for the Respondent - State.

**AND
CRIMINAL APPEAL NO.1604 OF 2011**

Mohammed Hussain Shahabuddin Patel,]
Age: 49 years, Occ: Cattle Feeder,]
Residing at Ova, Post Kharghar,]
Taluka Panvel, District Raigad.]...Appellant
(Org. Complainant)

Versus

1] Liyakat Sharif Khan,]
Age: 39 years, Occ: Business,]
2] Shoukat Sharif Khan,]
Age: 35 years, Occ: Business,]

3] Haider Sharif Khan,]
Age: 33 years, Occ: Business,]
All residing at Khairnagaon,]
Pirdaushaha Marg, Room No.232,]
Near Haji Compound, Navi Mumbai.]

4] The State of Maharashtra]..Respondents

None for the Appellant.

Mr. N. S. Bobade, Advocate for Respondent Nos.1 to 3 in Appeal No.1604 of 2011.

Mrs. M. M. Deshmukh, APP for the Respondent No.4 – State.

**CORAM : B. R. GAVAI &
SARANG V. KOTWAL, JJ.
DATE : 28th JUNE, 2018**

ORAL JUDGMENT (Per B. R. Gavai, J)

1] The Appellant/Accused No.1 has approached this Court being aggrieved by the judgment and order passed by the learned 1st Ad-hoc Additional Sessions Judge, Thane in Sessions Case No.390 of 2007, thereby convicting the Appellant for the offence punishable under Section 302 of the Indian Penal Code (“IPC” for short) and sentencing him to suffer imprisonment for life and to pay a fine of Rs.1000/- and in default to suffer simple imprisonment for one month. The Appellant/Accused No.1 has also been convicted for the offence punishable under Section 498-A of the IPC and sentencing him to suffer rigorous imprisonment for one year and to pay a fine of Rs.250/- and in default simple imprisonment for one week.

BGP.

2] The prosecution case in brief as could be gathered from the material placed on record is thus :-

The deceased Nazima was married to the Appellant/Accused No.1 – Asgar Khan on 15th April 2007. It is the prosecution case that Accused No.1 – used to demand deceased Nazima to get an amount of Rs.2,00,000/- from her parents. It is the prosecution case that when deceased had come to the house, 14 days after the marriage, she disclosed this fact to her father.

3] It is further the prosecution case that on 16th May 2017 at about 9.00 to 9.30 a.m., father of Nazima came to know from his neighbour that he had received a telephonic call from the matrimonial home of Nazima that she was serious. He further went to the house of Nazima, where he was informed that she was shifted to Mahatma Gandhi Mission Hospital Vashi, Navi Mumbai. When he rushed to the hospital, he came to know that Nazima was dead. After noticing certain injuries on the person of the deceased Nazima, he made enquiry with accused. However, the accused did not give any information and left the hospital. Therefore the complainant lodged oral report with Turbhe Police Station

on 16th May 2017 below Exh.58. On the basis of the oral report, a Crime No.238 of 2017 came to be registered for the offence punishable under Section 302 r/w 34 of the IPC. In the meantime, the Accused – Asgar had gone to Turbhe Police Station and informed that his wife had complained that she was not feeling well. When he gave water to her, upon asking she told him that she was feeling better. Thereafter he went to sleep. In the morning, after having bath when he tried to awake her, she did not wake up. He therefore took her to the hospital at Vashi, where she was declared to be dead. API Suresh Mallav – PW-13 recorded the statement of the accused, on the basis of which initially Accidental Death came to be registered under Section 174 of the Criminal Procedure Code.

4] On receipt of the information, PW-13 – Suresh Mallav went to the hospital. He noticed that there were certain injuries on the person of the deceased. Since in the meanwhile, on the basis of report of PW-1 – Mohd. Hussain Shahabuddin Patel, the crime was already registered, the investigation was done. The dead body of the deceased was sent for autopsy. After the completion of investigation, a charge-sheet came to be filed against four accused for the offence punishable under Section 302, 304-B and 498-A of the IPC. At the conclusion of the trial, learned Trial Judge passed an order of conviction as aforesaid. However, he acquitted

all the accused for the offence punishable under Section 304-B r/w 34 of the IPC. In so far as accused Nos.2 to 4 are concerned, they had been acquitted of all the charges, charged with. Being aggrieved by the order of conviction, the Accused No.1 has preferred Appeal No.1344 of 2011, whereas against the order of acquittal of accused Nos.2 to 4, original complainant has preferred an Appeal being No.1604 of 2011.

5] PW-12 – Dr. Bhushan Jain has conducted the autopsy. The postmortem report would reveal that the deceased has sustained following injuries.

“[I] Two Centric Abrasion seen over left ala of nose of length 0.5 cm. And 1.2 cm, reddish in colour.

[ii] Contusion over left cheek near angle of mouth 4x3 cm, reddish in colour.

[iii] Abraded contusion seen over buccal mucosa of upper and lower lip on left side of size 1.5 x 0.5 cm and 1.5 x 1 cm respectively reddish in colour.

[iv] Linear abrasion over lower lip anteriorly of length 0.7 cm, reddish in colour.

[v] Crescentic abrasion over right forehead above eyebrow of length 0.7 cm, reddish in colour.

[vi] Crescentic abrasion over right side of the nose medial to eye of length 0.7 cm, reddish in colour.

[vii] Four tiny abrasion seen over right ala of nose, reddish

in colour.

[viii] Contusion over right side of the face over maxillary region 3x2 cm. Reddish in colour.

[ix] Contusion over right chest of size 3x3 cm. reddish in colour situated at the distance of 16 cm from sternal notch and 4 cm lateral of midline.

[x] Abrasion seen over right forearm posteriorly near wrist joint of length 0.5 cm, reddish in colour.

[xi] Contusion over left arm 4x3 cm, reddish in colour.

[xii] Abrasion over left forearm laterally of length 0.7 cm. reddish in colour.

[xiii] Contusion over right angle medially 2.5x2 cm reddish in colour.

[xiv] Linear abrasion seen over right leg posterior to above injury of length 1 cm. reddish in colour.

4. All injuries were ante-mortem in nature. On external appearance age of the injury was within 24 hours of death.

5. On internal examination column no.19 of the postmortem report showed meninges congested, brain matter was congested, and oedematous on cut section petechial haemorrhages seen over white matter.

6. In column No.20 of the postmortem report Trachea showed minimal reddish froth. Both lungs were congested and oedematous with petechial haemorrhages. Cavity contains dark fluid blood.

7. column No.21 of postmortem report stomach contains 100 C.C. yellowish watery fluid. No abnormal smell present. Mucosa normal. All external organs were congested.”

The cause of death given by the medical expertise was asphyxial death due to smothering. It will be relevant to refer to following part of the deposition of this witness.

“.....The abrasions mentioned in column No.17 are possible due to nails. The smothering is possible by obstruction of air passages by pressing mouth and nose. The injuries mentioned in column No.17 of postmortem report are possible during struggle. The instant death can occurred due to smothering. In this case instant death might have been occurred due to smothering. It is true to say that in the case of smothering three to five minutes are sufficient to cause death. The death due to smothering is homicidal.”

“.....It is true that if mouth and nose are pressed or compressed with the help of pillow then smothering may occur and instant death is possible. The injures mentioned in the postmortem report are sufficient in the ordinary course of nature to cause death.”

Though he has been cross-examined at length on the technical aspect, nothing damaging has come in his evidence.

6] It would further be relevant to refer to the evidence of PW-4 – Dr. Abdul Kalam. Perusal of the evidence would reveal that on 16th May 2007 at about 8.30 a.m. accused No.4 Hyderkhan had come to his clinic and informed him that wife of Accused No.1 – Asgar was lying unconscious in their house. Hyderkhan requested him to accompany with him to his house. Accordingly, he went to his house situated at Khairne

village, Daud Sha Marg. After he went in the room of Accused No.1 – Asgar which was on the first floor, he noticed that wife of Asgar was lying on the bed. He checked her pulse and heart beats and they were not working. Her body was totally cold. Her eyes were closed. After that he came down from that room. He then informed accused Hyderkhan and his one of the relative namely Siddique Fakki that wife of Asgar was dead. The evidence of PW-7 – Ramji Yadav would reveal that on memorandum of the accused under Section 27, pillow alongwith cover, which was used in the crime came to be recovered.

7] It could thus be seen that the death of the deceased has occurred in a room, wherein only accused and the deceased were residing. The death is homicidal and has occurred in unnatural circumstances. In that view of the matter, in view of Section 106 of the Evidence Act, the burden shifted upon the accused. It would be relevant to refer to the following observations of the Hon'ble Apex Court in the case of Trimukh Maroti Kirkan Vs. State of Maharashtra reported in

2007 CRI.L.J. 20 :-

“12. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence,

as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecution* 1944 AC 315 – quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh* (2003) 11 SCC 271). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads :

(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.”

Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.”

8] In the present case, it could thus be seen that though the death of the deceased has occurred in unnatural circumstances and though burden shifted upon accused under Section 106 of the Evidence

Act in the statement under Section 313 except denial no explanation is coming forward from the accused.

9] Apart from that as could be seen from the evidence of PW-13 – Suresh Mallav that the accused came to police station and gave a false explanation. As held by the Hon'ble Apex Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra** reported in **AIR 1984 SC 1622**, a false explanation or non-explanation can be taken into consideration as an additional circumstance to fortify the guilt of the accused. We are therefore of the considered view that the accused has utterly failed to discharge burden under Section 106 and as such his conviction under Section 302 would be tenable.

10] In so far as conviction of the accused under Section 498-A of the IPC is concerned, the learned Trial Judge on the same set of evidence of the witnesses, who are relatives of the deceased has acquitted the accused Nos.2 to 4. We find that the conviction of the Appellant on the same set of evidence for the offence punishable under Section 498-A would not be sustainable. In that view of the matter, we are of the view that the Appeal of the Accused No.1 deserves to be partly allowed.

11] In so far as the Appeal filed by the complainant is concerned, the learned Trial Judge has given sound and cogent reasons for acquitting the accused. By now, it is settled principle of law that unless the view taken by the learned Trial Judge of the acquittal is found to be perverse or impossible, it will not be appropriate for this Court to interfere with the same. It is equally settled that only because another probable view is possible, this Court cannot interfere with the judgment and order of Trial Court. Accordingly, the Appeal of the complainant deserves to be dismissed.

12] In the result, we pass the following order.

ORDER

- I) The Criminal Appeal No.1344 of 2011 is partly allowed.
- II) The conviction under Section 302 of the IPC and the sentence for the same is confirmed.
- III) The conviction and sentence for the offence punishable under Section 498-A of the IPC is set aside.
- IV) The Appellant is acquitted under Section 498-A of the IPC.
- V) The Criminal Appeal No.1604 of 2011 is dismissed.

[SARANG V. KOTWAL, J.]

[B. R. GAVAI, J.]