

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.824 OF 2015

1. Anil s/o. Vishwanath Pathave,
Age : 34 years, Occ. ____,
r/o. Sawargaon Pat,
Tq. Akole,
Dist. Ahmednagar
 2. Savitrabai w/o. Vishwanath Pathave,
Age : 55 years, Occ. ____,
r/o. Sawargaon Pat,
Tq. Akole,
Dist. Ahmednagar
 3. Vishwanath s/o. Laxman Pathave,
Age : 56 years, Occ. ____,
r/o. Sawargaon Pat,
Tq. Akole,
Dist. Ahmednagar
- ..Appellants

Vs.

The State of Maharashtra,
Through Police Station,
Police Station, Akole
Taluka Akole, Dist. Ahmednagar

..Respondents

Mr. V.D.Sapkal, Advocate for appellants

Mr. S.B.Narwade, APP for respondent

**CORAM : S.S. SHINDE AND
R.G. AVACHAT, JJ.
DATE : FEBRUARY 02, 2019**

JUDGMENT (PER : R.G.AVACHAT, J.) :

The challenge in this appeal is to the judgment and order dated 17.01.2009 passed by learned Additional Sessions Judge, Sangamner, in Sessions Case No.6 of 2006. By the impugned judgment and order, the appellants herein (original accused nos.1 to 3) have been convicted for the offences punishable under Sections 302 and 201 read with Section 34 of the Indian Penal Code ("I.P.C.", for short) and sentenced to suffer life imprisonment and to pay a fine of Rs.1000/- each, for the offence under Section 302 of I.P.C., whereas, for offence under Section 201 of the I.P.C., they have been sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.500/- each. In case of default in payment of fine, they have been directed to undergo simple imprisonment for one month and fifteen days on each count. They have, however, been let-off the offence under Section 498-A r/w.34 of the I.P.C. The State did not prefer appeal against acquittal.

2. The facts, in brief, giving rise to the present appeal, are as follows :-

Sitabai (deceased) had married appellant No.1 in May, 2003. On her marriage, she started residing along with appellant No.1 and her parents-in-law (appellant Nos.2 and 3) at her matrimonial home, at village Sawargaon-Pat, Tq.Akole, Dist. Ahmednagar. On 13.11.2005 at about 07.00 a.m., the deceased went missing from her matrimonial home. On 16.11.2005, her dead body was found floating in a well at some distance from her matrimonial home. PW 2 - Gautam, Police Patil of village, gave report (Exh.31) in that regard to Akole Police Station. Based on that report, an accidental death case (A.D.) came to be registered vide No.58 of 2005. PW 7 - Inamdar, Assistant Sub-Inspector of Police, visited the spot. Parents of the deceased were informed. They came. In their presence, dead body was fished out of the well. Inquest panchanam (Exh.27) was

conducted at the spot itself with post-mortem examination as well, since the dead body was in highly decomposed state. PW 6 - Vedhe, Medical Officer, opined that Sitabai died of throttling. On 18.11.2005, PW 1 - Shantabai (mother of the deceased) lodged F.I.R. (Exh.29), alleging the appellants to have ill-treated the deceased and ultimately, eliminated her, as she did not conceive.

3. Based on the FIR, Crime vide (I-113 of 2005) was registered. PW 7 - Inamdar did investigation of the crime. He drew scene of offence panchnama (Exh.33) and examined the persons acquainted with the facts and circumstances of the case. On completion of the investigation, the appellants were proceeded against. Charge-sheet was filed before the Court of Judicial Magistrate, First Class, Akole. Learned Judicial Magistrate, First Class, Akole committed the case to the Court of learned Additional Sessions Judge, Sangamner, for trial in accordance with law. The Trial Court framed Charge (Exh.16). The

appellants pleaded not guilty. Their defence was of false implication.

4. The Trial Court, by its first judgment and order dated 05.09.2006, convicted the appellants for the offences punishable under Section 302 and 201 read with Section 34 of the I.P.C. The appellants were acquitted of the offence under Section 498-A read with Section 34 of the I.P.C. It appears that the appellants preferred appeal there-against. It further appears that this Court allowed the appeal by setting aside the judgment and order dated 05.09.2006, and remanded the matter for recording of evidence of the Medical Officers, who conducted post-mortem examination. The Trial Court did said exercise and on appreciation of the entire evidence in the case, found the appellants guilty of the offences punishable under Sections 302 and 201 read with Section 34 of the I.P.C. The Trial Court acquitted the appellants of the offence punishable under Section 498-A read with Section 34 of the I.P.C.

In fact, the appellants should not have been tried again for the offence under Section 498-A read with 34 of the I.P.C. when they had already been acquitted of the said charge pursuant to the judgment and order dated 05.09.2006. The State had not preferred appeal against acquittal. Be that as it may.

5. In order to bring home the guilt of the appellants/accused, the prosecution examined nine witnesses. Dr.Shirsath was examined as Court witness after remand of the matter.

6. Mr.Sapkal, learned Counsel for the appellants, would submit that the case was based on circumstantial evidence. There is no clinching evidence to indicate that the deceased met with homicidal death. According to learned Counsel, the impugned judgment and order is inconsistent with the evidence in the case. The appellants ought not to have been convicted. Learned Counsel, ultimately, urged for allowing the appeal.

7. Learned A.P.P. would, on the other hand, submit that though the case was based on circumstantial evidence, each and every circumstance pointing towards guilt of the appellants, has been established. In view of Section 106 of the Evidence Act, the appellants owed explanation as to how the deceased met with homicidal death. The deceased died at her matrimonial home. Her dead body was found in a well situated nearby her matrimonial home. No missing person's report was lodged by the appellants. The relations of the deceased were informed that she was not keeping well. The conduct of the appellants was inconsistent with their innocence. Learned A.P.P. has supported the impugned judgment.

8. As has been observed in **Sharad Birdhichand Sarda Vs. State of Maharashtra, 1984 SC 1622**, the following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established:-

(i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(iii) the circumstances should be of a conclusive nature and tendency.

(iv) they should exclude every possible hypothesis except the one to be proved, and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

9. The deceased married accused no.1 on 27.05.2003. After her marriage, she started residing

along with the appellants, at her matrimonial home. The deceased did not conceive. On 16.11.2005, her dead body was found floating in the well. The village Police Patil lodged the report regarding finding of the dead body. Based on the report, A.D. was registered. On arrival of the appellants and other relations of the deceased, the dead body was fished out of the well. Inquest panchnama (Exh.27) was conducted. No external injuries were noticed on the person of the deceased, might be due to highly decomposed mortal remains. Post mortem examination was also conducted in the field itself by PW 6 - Dr.Vedhe and Dr.Shirsath (Court witness no.1). Admittedly, no advance cause of death certificate was issued. Two days after the post-mortem examination, report thereof was issued. Post mortem report (Exh.40) recorded the cause of death - "due to asphyxia due to throttling". However, Viscera was preserved for chemical analysis. Both the Doctors had prepared rough notes of the post-mortem examination. In rough

note (Exh.61), Dr.Vedhe did not give any opinion, whereas, Dr.Shirsath, in his rough note (Exh.67), gave opinion that death was due to drowning. They appeared to have come to the conclusion that it was a case of throttling. Both these witnesses were subjected to searching cross-examination. We need not refer to the replies given by them to the questions put to them during cross-examination. Suffice it to say that both of them appeared to have been confused as to the cause of death. A carbon copy of the post-mortem report was also produced before the Trial Court. In column 20 thereof, the contents regarding fracture of laryngeal cartilage are written in ink (interpolation).

10. The Trial Court concluded that the medical evidence in the case was dubious. The Medical Officers did their job in perfunctory manner. The Trial Court, however, went on to observe "question is whether unreliable medical evidence can be allowed to obliterate. The same undoubtedly indicates the Trial

Court to have found the expert evidence to be unreliable one. In our view, in the facts and circumstances of the case, the Trial Court ought not to have observed it to be a case of homicide. Perusal of the impugned judgment would indicate that the Trial Court made its observation based on conjectures and surmises. The Trial Court ruled it out to be a case of suicide merely on the ground that it was not the case of the prosecution and the defence as well. In view of the Trial Court, the deceased went missing on 13.11.2005. The appellant did not lodge missing person's report. The dead body was found in a well, situate at a distance of 250 ft. from her matrimonial home. Even after finding of the dead body, none of the appellants gave intimation to the police. The deceased could swim well. The Trial Court, therefore, found it to be a case of homicidal death.

11. We are not at one with the findings recorded by the Trial Court. The Trial Court did not rely on

the evidence of the Medical Officers, who conducted the post mortem examination. We too do not propose to rely on the evidence of the Medical Officers, since they are found to have not been firm about their opinion as regards the cause of death. The dead body was not found in matrimonial home. The appellants, therefore, could not be called upon to state the circumstances in which the deceased met with death.

12. PW 1 – Shantabai, mother of the deceased, testified that the appellants would illtreat the deceased since she did not conceive. It is, however, in her evidence that they belong to *Thaker* community. In their community, if a wife does not conceive, it is routine for the husband to contract another marriage without snapping his matrimonial tie with his first wife. PW 1 – Shantabai lodged the FIR two days after the dead body was found in the well. The report appears to have been lodged after the Medical Officers opined it to be a case of throttling. There is, therefore, every reason to observe that the

report might have been lodged so as to be consistent with the post mortem report. True, PW 1 – Shantabai has testified that the deceased had been to her parental house on account of *Bhaubeej (Diwali)*. It was a case of few days before the death of Sitabai. Appellant no.1 had also accompanied her. It is in her evidence that appellant no.1 had quarreled with the parents of the deceased and gave threats to her (deceased) life. The F.I.R. therefore appears to have been lodged making said threats to be the basis. We are at loss for reasons as to why PW 1 – Shantabai did not lodge the F.I.R. soon after the dead body of her daughter was found.

13. It is true that the appellants did not approach the Police Station to register a missing person's report. There is, however, evidence (PW 2 – Gautam) to the effect that on earlier two-three occasions, the deceased had left her matrimonial home and returned 2-3 days thereafter. Learned Counsel for the appellants was right in submitting that in the

given circumstances, no husband would like to report that his wife went missing. The same also brings ignominy to the husband. There is also evidence (PW 1 – Shantabai, mother of deceased, Exh.28) which undoubtedly indicate that soon after the deceased went missing, accused no.1 had been to PW 1's house to inform that his wife had left the house and since then, was missing. This conduct of the appellants could not be said to be inconsistent with their innocence. There is no other evidence to point towards guilt of the appellants. The Trial Court, therefore, ought not to have convicted the appellants. Interference in the impugned judgment and order is, therefore, called for.

14. In the result, we pass the following order :-

O R D E R

(I) Criminal Appeal No.824 of 2015 is hereby allowed.

(II) The Judgment and Order dated 17th January, 2009, passed by the Additional Sessions Judge, Sangamner in Sessions Case No.6 of 2006, thereby convicting and sentencing Accused/Appellants – Anil Vishwanath Pathave, Savitrabai Vishwanath Pathave and Vishwanath Laxman Pathave for the offence punishable under Section 302 read with 34 of the Indian Penal Code and for the offence punishable under Section 201 read with 34 of the Indian Penal Code, is quashed and set aside.

(III) Accused/Appellants – Anil Vishwanath Pathave, Savitrabai Vishwanath Pathave and Vishwanath Laxman Pathave are acquitted for the offence punishable under Section 302 read with 34 of the Indian Penal Code and Section 201 read with 34 of the Indian Penal Code. Fine amount, if deposited as per the impugned Judgment and Order, be refunded to Appellants/accused.

(IV) Appellant No.2 – Savitrabai W/o Vishwanath Pathave and Appellant No.3 – Vishwanath S/o Laxman Pathave have been released on bail during the pendency of the

Appeal. Their bail bonds shall stand cancelled.

(V) Appellant No.1 – Anil Vishwanath Pathave is in jail, he be set at liberty forthwith, if not required in any other case.

(VI) All the Appellants shall furnish Personal Bond of Rs.15,000/- each and surety in the like amount each, under Section 437-A of the Code of Criminal Procedure, before the concerned Trial Court at Sangamner.

[R.G. AVACHAT, J.]

[S.S. SHINDE, J.]

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