

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 270 OF 2012

Vivek Maruti Nale,
Age 32 years,
residing at Kulkarni Wasti, Malshiras,
District Solapur Appellant

Versus

1. The State of Maharashtra
2. Shri. Dnyaneshwar Dattatraya Parkhe,
Age adult, residing at Navi Sanghvi,
Samarth Nagar,Pune. ... Respondents

WITH
CRIMINAL APPEAL NO. 271 OF 2012

1. Maruti Ganpat Nale,
Age 73 years,
2. Smt. Shantabai Maruti Nale,
Age 67 years,

Both residing at Kulkarni Wasti, Malshiras,
District Solapur Appellants

Versus

1. The State of Maharashtra
2. Shri. Dnyaneshwar Dattatraya Parkhe,
Age adult, residing at Navi Sanghvi,
Samarth Nagar,Pune. ... Respondents

Mr. Tapan Thatte with Mr. Siddharth R. Rongue for the appellants.

Mr. Arfan Sait, APP for the State.

**CORAM : B.P. DHARMADHIKARI &
MRS.SWAPNA JOSHI, JJ.
RESERVED ON : 19/07/2019
PRONOUNCED ON : 31/07/2019**

ORAL JUDGMENT (Per Dharmadhikari,J.):

The appellant in Appeal No. 270 of 2012 Vivek happened to be husband of deceased Smita. Two appellants in Appeal No. 271 of 2012 are his parents. Appellant no.1 in Appeal No. 271 of 2012 filed by the parents is no more. Accordingly by separate order passed on 19/7/2019 we have treated the appeal at his instance abated. So Appeal No. 271 of 2012 survives only at the instance of mother of Vivek and mother in law of deceased Smita.

2. The Ad Hoc Additional Sessions Judge, Malshiras has by judgment and order dated 25/1/2012 in S.C. No.54 of 2010 convicted the husband for the offence punishable under section 498A read with section 34 IPC as also under sections 3 and 4 of Dowry Prohibition Act. He is also convicted under section 302 IPC and sentenced to suffer life imprisonment for murder of deceased Smita. He has been punished with rigorous

imprisonment of 5 years and with a fine of Rs. 15,000/- for offence under section 3 of the Dowry Prohibition Act for R.I. for 1 month and to pay fine of Rs. 1,000/- under section 4 of the Dowry Prohibition Act.

3. Accused nos.2 and 3 (parents of accused no. 1) are acquitted of the offence punishable under section 302 read with 34 IPC, however, they are convicted for the offence under section 498A read with 34 IPC, for offence under section 304-B read with 34 IPC and under section 3 and 4 of Dowry Prohibition Act.

4. Rs.25,000/- out of the total fine amount is directed to be paid to complainant towards compensation under section 357(c) Cr.P.C.

5. Along with these accused persons, sisters of accused no. 1, their husbands and brother of accused no.1 were also joined as accused. Trial court has acquitted accused nos.4 to 10 of all the offences.

6. We have heard Advocate Thatte with Advocate Rongue for the appellants and learned APP Mr. Sait for the State Government.

7. We may at the outset point out the circumstances relied upon by learned APP to oppose the appeal. Learned APP has pointed out that the death has taken place in the matrimonial house. Accused no.1 husband and accused no.3 mother in law were then present in the house. They have not explained the death in any way but have given false explanation under section 313 Cr.P.C. Their contention that Smita committed suicide is not borne out from the records and Smita admittedly has not left behind any suicide note. Her conduct or behaviour was normal and does not support any intention to commit suicide. Accused no.1 wanted to re-marry and therefore, he has done this.

8. Marriage between accused no.1 and deceased had taken place on 1/5/2005 and the incident in question occurred in the night between 23rd and 24th May, 2010.

9. Mr. Thatte, learned counsel for the appellants submits that the complaint to police is lodged by PW 4 Dnyaneshwar father of

Smita. The story of ill-treatment, demand of money are all false. He has fabricated the instances to somehow trouble the accused persons and their family members. Therefore, only the first information report was lodged almost after three days and still important part of demand is found to be an omission. Without prejudice, he adds that efforts made by accused no. 1 to obtain the employment or sale of ornaments of his wife for that purpose, does not amount to cruelty at all. His cross examination is heavily relied upon with the argument that he left blank papers signed with police and permitted the police to develop a story against the accused persons. He left it to police to choose the accused to be implicated and also to choose the witnesses.

10. The Judgment of Apex Court in the case of Vipin Jaiswal Vs. State of A.P. : 2013 AIR (SC) 1567¹ paragraph 6 is relied upon to submit that facts narrated in deposition by PW 4 do not constitute “demand” in the eyes of law.

11. He also points out how the mother of Smita i.e. PW 6 has attempted to support PW 4.

1 2013 AIR (SC) 1567

12. He relies upon the evidence of Raziya PW 5 neighbour who was declared hostile. He argues that the police did not record her statement under section 161 Cr.P.C. at all and she was contradicted with not her own but the statement of one Taslim Salim Shaikh under section 161 Cr.P.C.

13. Recovery under section 27 of the Evidence Act from accused is also seriously challenged. He submits that handing over of the ornaments of his deceased wife by accused no.1 to police does not imply that he has any connection with the crime. He also points out by referring to inquest and deposition of PW 1 that the then ornaments on the person of the deceased were handed over to relatives of the accused. He also states that when the informant PW 4 reached the residence of accused persons, the body of Smita was already sent for post mortem and inquest was already over.

14. The evidence of PW 7 Dr. Dixit is criticized by pointing out that his inference of throttling is not supported by the facts noticed by him. The second injury shows only one impression on one side of the neck and as such the throttling stands overruled.

In case of throttling there has to be prints/injuries on both the sides of the neck and PW 7 in cross examination in paragraph 9 accepted that there were no such injuries on the neck of deceased. He further points out that nothing was found in the nail clippings of the accused.

15. He relies upon the judgment of the Apex Court in the case of State of U.P. Vs. Dr. Ravindra Prakash Mittal : 1992 AIR (SC) 2045² particularly paragraph 21 for the proposition that in the cases based upon circumstantial evidence, the prosecution has to also exclude the possibility of involvement or guilt of any other person. As there is no such investigation, the accused no.1 husband is liable to be acquitted. According to him, the case of the husband as also the case of the parents in so far as section 302 IPC is concerned, does not stand on different footing and hence, the husband also ought to have been acquitted by the trial court.

16. Learned APP has relied upon the circumstances mentioned by us at the beginning of the judgment to demonstrate that the complete chain has been brought on record. This chain and

² 1992 AIR (SC) 2045

section 106 of the Evidence Act, indicate accused no.1 husband as the offender under section 302 IPC. The evidence of other witnesses show involvement of accused nos. 1 to 3 in other offences.

17. He states that the evidence of PW 7 Doctor who has conducted post mortem is very clear. It shows that the Doctor found impressions on both sides thereby indicating the cause of death as throttling only. Doctor has categorically stated that it was not the case of hanging. The accused persons have only generally cross examined the doctor and have not given him any specific suggestions.

18. Inviting attention to spot panchanama Exh. 70, learned APP argues that the incident has taken place on two different spots i.e. in two different rooms of the house. In room adjacent to kitchen the deceased was throttled while in other room the show of her committing suicide was staged by tying saree to the hook in ceiling.

19. He relies upon the long portion of saree hanging down below the hook to state that nobody could have hanged himself

to death with it as there is no distance left from the floor.

20. Learned counsel states that it is in these circumstances that the hiding of ornaments of deceased becomes relevant and therefore, section 27 recovery thereof is used as one of the circumstances.

21. To explain the scope and use of section 106 of Evidence Act and the burden put upon the accused, learned APP relies upon the judgment of the Apex Court in the case of Trimukh Maroti Kirkan Vs. State of Maharashtra : (2006) 10 SCC 681³ and the judgment in the case of Mulakh Raj and Others Vs. Satish Kumar and Others : (1992) 3 SCC 43⁴ for that purpose. He therefore, prays for dismissal of the appeal.

22. As against this, counsel for the appellants in reply arguments says that the symptoms of asphyxia disclosed by PW 7 are absent in the present matter. He draws attention to the post mortem report at Exh. 61, particularly paragraph 13 thereof for this. He requests the Court to allow both the appeals.

³ (2006) 10 SCC 681

⁴ (1992) 3 SCC 43

23. The first question before this court is whether the death of Smita in the night between 23rd and 24th May, 2010 is homicidal or not. Post mortem report Exh. 61 mentions the death due to asphyxia due to throttling as the cause thereof. PW 7 Dr. Dixit has conducted this post mortem. Injury no.2 found by him is as under :

“Bruise of size 2 x 1 cm, Oval disc shaped on right sub mandibular region.”

The corresponding injury to it is mentioned as injury no. 3 which is as under :

“Bruise of size 1 cm x 1 cm disc shaped on left sub mandibular region, lateral and just lower to bruise mentioned at injury no. 2.”

24. The appellants while advancing arguments have overlooked the co-relations between these two injuries. Submission that there is only impression of thumb or finger impression on one side of the neck and there is no such impression on the other side is therefore, erroneous and unsustainable.

25. This witness has specifically stated that all injuries of the

deceased were ante mortem. Those injuries are :

- “1. Multiple redish band of abrasions at anterior neck of size 7 cm x 2.5 cm extending from carotid region on right side to left mandibular angle below thyroid level.*
- 2. Bruise of size 2 x 1 cm, Oval disc shaped on right sub mandibular region.*
- 3. Bruise of size 1 cm x 1 cm disc shaped on left sub mandibular region, lateral and just lower to bruise mentioned at injury no. 2.*
- 4. Bruise of size 2.5 cm x 1.5 cm oval, disc shaped on right side of neck above the level of right thyroid cartilage.*
- 5. Abrasions of size 1 cm x 2 cm, 4-5 in numbers on right side of neck near the injury mentioned at serial no. 1.*
- 6. Fracture of hyoid bone.”*

26. Doctor has supported his conclusion by stating that the injuries mentioned in column 17 and 18 of the post mortem report are possible by throttling with hands. He also mentioned that he found thumb impression on the neck of the deceased.

27. His cross examination shows that he has not mentioned the age or cause of injuries in the post mortem report. He accepted that at 6.15 am on 24/5/2010 accused no. 1 brought the body of

Smita to Rural Hospital and he examined it. He also identified accused no. 1 in the Court. Accused no.1 told him that deceased Smita has committed suicide by hanging herself with a saree to the ceiling fan. He accepted that accused no.1 was continuously requesting him to explore the possibility of saving the life of Smita but he communicated his helplessness since she had already died. PW 7 states that ultimately he communicated the death of Smita to the parents. He also proved the written communication sent by police as Exh. 67.

28. Perusal of Exh.67 shows intimation to police of the body being brought dead by accused no. 1 in the name of the deceased. This intimation is received by the police at 6.30 am.

29. Cross examination of this doctor further reveals that his attention was drawn to the Commentary by Dr. Modi. He denies that the swelling of tissues due to decomposition can be misunderstood as bruises. He accepted that in case of deceased Smita, the process of decomposition had started. He further accepted that there was no mortuary in Malshiras Hospital and also there was no facility of cold storage. The dead body was lying open before the post mortem. In summer the

decomposition starts early.

30. He also accepted that in case of violent asphyxia the face will be pale and edimetous, the pupils will be dilated and the eyes will be prominent. He accepted that in case of violent asphyxia there will be bleeding from mouth, nostrils and ears and tongue protrudes out. He denied that the symptoms mentioned by him in post mortem report are possible in case of hanging by saree. He denied that in the hanging, there is possibility of fracture of hyoid bone. He accepted that in case of throttling, finger marks or pressure of thumb and finger tips appear on both sides of wind pipe. He accepted that bruises will appear on front side as well as on back side of neck and there is possibility of abrasions and bruises on mouth, nose, cheeks, forehead, lower jaw and face. He accepted when the victim struggles for life and there is possibility of injuries on other part of the body.

31. His cross examination however, does not wipe out the impact of symptoms like fracture of hyoid bone and injury nos. 2 and 3 mentioned supra. We find the conclusion that it was the case of throttling by hands, is justified by medical evidence.

32. The spot panchanama Exh. 70 also reveals the same. This panchanama Exh. 70 shows that the spot is in the room which is shown as a kitchen in the map but then in the spot panchanama it is mentioned that in the said room, chairs of Nilkamal company were stored. The blue colour saree was tied to the hook meant for ceiling fan and her husband (accused no. 1) told that with the said saree the deceased had hanged herself. The height of roof from the floor was 9 ft 7 inches and the saree is seen hanging below below the hook and thus the length of that portion from the hook towards the floor was 7 ft 5 inches. On eastern side of the said saree, 7 fiber chairs of Nilkamal company were arranged and its height was 2 ft 7 inches. On western side near the wall, 11 chairs were stored and the height of that was 3 ft 4 inches. There were about 85 Nilkamal chairs in the room. The western wall of that room had black *kadappa* platform on which 6 iron gas stoves with regulator were seen. Police have seized that saree. Similarly, they have also seized double bed sheet which was on mattresses in the adjoining room.

33. In so far as this double bedsheet is concerned, the prosecution has not explained its relevance and there is no report

of Chemical Analyzer about it. Learned APP however, urged that after throttling the deceased there, she was hanged. But then prosecution does not establish any saliva or other secretion to support this version.

34. The height of the deceased has not come anywhere on record but then considering the fact that the roof was at the distance of 9 ft 7 inches and the portion of saree hanging down was about 7 ft and 5 inches, it follows that hardly distance of 2 ft and 7 inches was left between the lower end of saree and the floor. The panchanama does not mention that the tied saree had any knots or wrinkles which could support the theory that the deceased committed suicide by hanging by it. Saree was also shown to PW 7 and PW 7 has denied that the said saree Article A was of rough cloth.

35. The spot panchanama therefore does not show that the deceased reached the roof by using some chair or table and after hanging herself, kicked the same aside. The panchanama also does not mention similar material used by the accused no. 1 to bring down the allegedly hanging body.

36. This material therefore, conclusively rules out any suicide

by deceased Smita.

37. This brings us to consideration of the material in support of the conviction of accused persons under section 498A, 304-B IPC or under Dowry Prohibition Act.

38. Mr. Dnyaneshwar Parkhe, father of deceased Smita has been examined as PW 4. He points out that after the marriage, for about one year the accused persons offered nice treatment to his daughter. Vivek was jobless and he started demanding Smita Rs. 25000/- and to get it from PW 4 for employment. He withdrew that amount from his bank, went to Malshiras and handed over the amount to accused no. 3. As the total amount was still falling short, golden ornaments weighing 5 tolas given by him to Smita in the marriage were disposed of by accused no. 1 and he got employment as peon in a school. Smita was then subjected to illtreatment and torture. Whenever, she fell ill, she was sent to her parental home for medical treatment. Smita delivered female child. After the delivery, accused no.1 took Smita and new born to matrimonial house. Accused no. 3 had in the meanwhile brought back her daughter (accused No. 10) Manisha from her matrimonial house. Manisha and accused no. 2 used to curse

Smita on cooking and other household issues. Smita was also falling ill frequently because of this and accused no. 1 reached Smita and her daughter to PW 4. Smita stayed for about three months. PW 4 called accused nos. 1, 2, 3, 6, 7, 8 and 9 at his house and then accused no. 1 Vivek agreed to cohabit with Smita but rest of the accused persons walked out of his house. Accused no.1 then arranged separate accommodation on rent where he, Smita and the child stayed for about 4 months. Accused no.1 however, started asking Smita to get rent from PW 4. The marriage of his other daughter was performed at Pune and though all accused persons attended, accused no. 1 did not attend that marriage. In the marriage, sisters of accused no. 1 scolded Smita for wearing costly saree though her husband was admitted in the hospital. He then reached Smita at her matrimonial house at Malshiras and then accused persons started asking Smita to bring Rs. 6 lacs for purchasing a flat. PW 4 expressed his inability. Accused persons therefore, accelerated the illtreatment and torture. In FIR this demand is of Rs. 5 lacs & for purchasing a plot.

39. On 24/5/2010 he was present at home when on telephone he was informed that Smita had hanged herself by neck. Hence,

with wife and relatives, he came to Malshiras. Only accused no. 2 was present at the house and she informed that Smita was taken to Government Hospital. They went to Malshiras Police Station and found that accused nos. 1 and 3 were already present there and the body of Smita was sent for post mortem. They got the body at about 8.30 in the evening and brought it to Pune where the last rites were performed. They saw two abrasions on the neck of Smita and funeral was not attended to by her inlaws. After 3 days, he went to Malshiras police station and lodged the FIR. In paragraph 4 of his deposition, he has stated that the accused persons used to insist upon the accused no. 1 to perform second marriage.

40. His cross examination shows that he cannot disclose the exact date on which the amount of Rs.25,000/- was withdrawn by him from the bank account. He stated that the amount was withdrawn from Cosmos Bank at Pune eight months after the marriage and Vivek got employment on 13/08/2005. He was on temporary basis at the time of marriage. He denied that he did not pay Rs.25,000/- to accused no. 3. He denied that the gold ornaments were sold for securing the employment. He accepted the suggestion that the accused no. 4 to 10 were present at

Malshiras at the time of incident. He accepted that Smita was suffering from psoriasis and in that disease there is burning sensation and some times bleeding. Smita was experiencing the bodily pain. He denied that Smita was therefore, displeased with her life. He accepted that accused no. 9 Madhuri had Children Home at Pune and his daughter Smita was working in it at Pune. Therefore, she was acquainted with Madhuri who took initiative in settling the marriage. Smita and Vivek both were SSC. He accepted that accused no. 5 was an Engineering graduate. He also accepted that the other accused persons were rich and placed happily in their lives. He accepted that accused no.3 had constructed his bungalow at Malshiras with an intent to accommodate the families of his two sons in a posh locality at Malshiras. He accepted that Smita was good looking and of good nature and therefore, accused persons agreed for marriage.

41. In paragraph 13 of his cross examination, certain omissions are brought on record. He could not explain why the fact of withdrawal of Rs.25,000/- from Cosmos Bank did not find mention in his FIR or then why the fact that Smita was being treated and after being cured, was reached at her matrimonial house did not appear there. Similarly accused nos. 2 and 8 cursing Smita for

not cooking the food properly, for her frequent illness, sending of Smita to home by accused no. 1 after getting disgusted did not appear in his FIR. He accepted that he did not tell the police that accused nos. 2 to 10 used to pressurize accused no.1 for giving divorce. He added that he disclosed to police that on refusal by Smita to give divorce, rest of the accused persons staged walk out from his house. He could not explain why this fact did not appear in his FIR. He also could not explain why the fact that accused no.1 pressurized Smita to shift to his parent's bungalow or accused no.1 asking Smita to bring the rent amount or otherwise asking Smita to reside alone, did not figure in his FIR. He also could not explain why the fact that all sisters of accused no.1 used to come to Malshiras in Summer vacation and used to curse Smita for not performing household work properly or accused asking why she had worn costly saree when her husband was admitted in hospital or then all accused persons asking Smita to bring amount of Rs. 6 lacs from her parents to purchase a flat or then accelerating the ill-treatment, were not mentioned in the FIR.

44. In Paragraph 16 of his cross examination he accepted that on 24/5/2010, he had disclosed the names of accused persons to

police. He also disclosed the name of his wife, his wife's sister, her husband, his two daughters, their husbands etc. to police. He accepted that he told police to find out who should be made accused and which person should be made witnesses and signed on a blank paper and left for Pune. However, in the next breath, he added that he did not sign on a blank paper.

45. The FIR Exh. 51 shows that in the FIR, it is mentioned that after one year of marriage, an amount of Rs. 5 lacs was demanded for purchasing a plot and she was made to starve and beaten.

46. Mother of Smita has been explained as PW 6. Her evidence is almost on the same lines as that of her husband. She however, states that at the time of settlement of marriage, it was agreed to give 5 *tolas* of gold ornaments to accused no. 1 Vivek along with expenditure of 'to and fro' journey for the guests of accused. She states that accordingly the marriage was performed. She has deposed that Vivek had asked Smita to bring Rs. 5 lacs to purchase a flat and as she could not pay, accused Vivek along with Smita started residing with joint family in his parent's house. Smita thereafter did not make any phone call for

the period of 1.1/2 years.

47. The prosecution has also examined neighbour by name Raziya Salim Shaikh as PW 5. She was declared hostile. Initially in her chief, she has deposed that she was not on talking terms with Smita and there were no contacts with accused persons. She did not hear accused persons subjecting Smita to any illtreatment or torture for dowry or on any other count. In the cross examination by learned APP, she has submitted that her statement was not recorded by police during the investigation. Portion marked "A" and "B" in her statement were read out to her and she deposed that the same were not correct. It appears that these portions "A" and "B" appear in the statement given by a lady whose name is recorded as Taslim Salim Shaikh. Counsel for the accused persons in the cross examination has brought on record fact that Taslim is not the name of PW 5.

48. The evidence discussed supra, therefore, does not show that any amount was demanded as dowry and PW 6 mother has stated that the terms and conditions of marriage as agreed to were acted upon. The developments thereafter show that at the most for some employment, the parents might have paid the

amount of Rs.25,000/- but then it also becomes doubtful because PW 4 at one stage claims that accused no. 1 was jobless and little later, states that he was in temporary employment. The illtreatment to Smita is also not brought on record specifically with reference to any particular incident. The alleged walk out from the house of the parents by accused nos. 2 to 10 is not substantiated. The omissions in this respect are already noted by us supra. The very fact that PW 4 claims that he gave names of all accused persons and also names of his relatives and left it to police to draft a complaint creates serious doubt. He has accepted initially that he signed on a blank paper and gave it to the police. However, in the next breath, he has withdrawn from that statement.

49. The material on record therefore, does not meet the ingredients of section 498-A IPC or then of section 3 and 4 of Dowry Prohibition Act. The conviction of accused persons under section 498-A read with section 34 IPC or under sections 3 and 4 of Dowry Prohibition Act is not proper by bringing on record the cogent and consistent evidence. The fact that the trial court itself has acquitted accused nos. 4 to 10 of all these offences speaks for itself. We find that accused no. 2 (mother) is also entitled to

similar relief.

50. The prosecution has also relied upon the recovery of ornaments of Smita under section 27 of the Evidence Act. They have examined PW 1 Lata Patil for this purpose. Her cross examination shows that while preparing the inquest panchanama of body, police removed the golden rings and golden '*mangalsutra*' from the person of Smita and handed it over to the relatives of the deceased. She has also stated that she found cracks of psoriasis on right palm of the body. She has also stated that in examination in chief, she has referred to those cracks as bruise injuries.

51. In any case, husband producing the ornaments of his deceased wife, cannot by itself be seen as an incriminating circumstance.

52. The incident has taken place in the house of accused no. 1. He claims that the family was sleeping on open terrace and in the morning hours when his mother came down into the house for the exercise from terrace, Smita was seen hanging. She was taken down and rushed to hospital.

53. The evidence of PW 7 mentioned supra does not support death by hanging. Fracture of hyoid bone and injury nos.2 and 3 mentioned supra clearly show the cause of death as throttling. In the light of this material and the provisions of section 106 of Evidence Act, the burden was heavy upon the accused no.1 to explain the situation. Except for saree hanging from the hook from ceiling, he has not brought on record anything. He did not point out to Investigating Officer the chair or table used by the deceased to climb up and tie a knot to the hook or around her neck so that her legs would not reach the floor. He has not also pointed out how the body if hanging at some height from the floor, was taken down by untying the knots.

54. Learned counsel for the appellant accused has relied upon the judgment of Apex Court in the case of Vipin Jaiswal Vs. State of A.P. (supra) to point out how the word “dowry” needs to be construed. In the light of the discussion supra, we find that the prosecution in the present case has failed to demonstrate the demand of dowry or its payment.

55. The judgment of Apex Court in the case of State of U.P. Vs.

Dr. Ravindra Prakash Mittal (supra) has been pressed into service to show that as observed there in paragraph 21, the conviction on circumstantial evidence must be on the basis of evidence which prove such circumstances conclusively and the facts established should be consistent only with the hypothesis of guilt and inconsistent with innocence. The circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the accused. In the facts before us, the prosecution as also the accused persons have not pointed out the possibility of involvement of any other person. On the contrary defence of accused no.1 Vivek is of suicide by his wife.

56. Learned APP has relied upon the judgment of the Apex Court in the case of Mulakh Raj and Others Vs. Satish Kumar and Others (supra) to submit how the injuries brought on record by PW 7 doctor negate the hanging and support throttling. We have perused paragraph 7, 9, 12 in the said judgment. We have already noted that the injury nos. 2 and 3 are placed on either side of windpipe of deceased.

57. Learned APP has also invited our attention to the judgment of Apex Court in the case of Trimukh Maroti Kirkan Vs. State of

Maharashtra (supra). There defence was of snake bite while the prosecution claimed the death due to asphyxia as a result of compression of neck. There were no eye witnesses. In paragraph 13 Hon'ble Apex Court has pointed out the phenomenal increase in the dowry cases and has also stated that these crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No member of the family even if he is a witness of the crime, would come forward to depose against another family member. It is therefore, extremely difficult for the prosecution to establish the guilt of accused if strict compliance of circumstantial evidence is insisted upon by the Courts. Hon'ble Apex Court has pointed out that the Judge has also to see that a guilty man does go unpunished. The law does not expect the prosecution to lead evidence of such a character which is almost impossible to be led or at any rate extremely difficult to be led. Hon'ble Apex Court has observed that the duty of the prosecution in such matters is to bring on record such evidence which it is capable of. Thus where prosecution does not get evidence because of impossibility to procure it, section 106 of Evidence Act comes into play and the burden shifts to accused to explain the situation. The inmates of the house cannot get away by

remaining silent and offering no explanation.

58. In the present facts, we have found that accused no.1 Vivek who claims to have taken down the body, cannot explain the position. His narration as contained in spot panchanama Exh. 70 which shows that his mother (accused No. 2) came down for some exercise and shouted loudly. Hence all of them came down and found Smita hanging. He also accepts that four of them brought her down and immediately took her to Government Hospital.

59. In the light of this discussion, we find that the prosecution has established the homicidal death of his wife Smita by accused no. 1 Vivek.

60. Though we acquit accused no. 1 of the offence punishable under section 3 and 4 of the Dowry Prohibition Act or under section 498-A of IPC, we uphold his conviction under section 302 IPC by the trial court. His sentence as inflicted by trial court on that count is also maintained.

61. In the result, we pass the following order :

(a) Criminal Appeal No. 271 of 2012 is allowed and the appellant therein is acquitted of the offences punishable under section 498-A, 304-B read with S. 34 IPC and section 3 and 4 of Dowry Prohibition Act.

(b) Applicant in Criminal Appeal No. 271 of 2012 is already on bail. Hence, her bail bonds or sureties furnished by her are discharged and cancelled.

(c) Criminal Appeal No. 270 of 2012 is partly allowed. The conviction of appellant Vivek under section 498-A IPC read with 34 thereof and under section 3 and 4 of Dowry Prohibition Act is quashed and set aside.

(d) His conviction and sentence for the offence under section 302 IPC is maintained.

(e) The direction to pay compensation to complainant under section 357(c) Cr.P.C. is also maintained.

(f) Muddemal property be dealt with as directed by trial court after the appeal period is over.

(MRS.SWAPNA JOSHI, J.)

(B.P. DHARMADHIKARI, J.)