

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

CRIMINAL APPEAL NO.384 OF 2014

Dagadu s/o. Vishvanath Gaikwad,
Age : 41 years, Occu : Labour,
R/o. Bhatangali, Tq. Lohara,
Dist. Osmanabad

.. Appellant
(Orig. Accused)

Versus

The State of Maharashtra

.. Respondent

...

Mr Ajinkya Reddy, Advocate (appointed) for the appellant
Mr M.M. Nerlikar, APP for the respondent / State.

....

**CORAM : RAVINDRA V. GHUGE
AND
B. U. DEBADWAR, JJ.**

**Reserved on : 26-11-2020
Pronounced on : 17-12-2020**

JUDGMENT (PER: B.U. DEBADWAR, J.) :-

1. This appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.') has been directed against the Judgment and order dated 26-09-2013 passed by the learned Additional Sessions Judge, Omerga, Dist. Osmanabad in Sessions Case No.18 of 2012 whereby convicted the appellant under Section 302 of the Indian Penal Code, 1860 (hereinafter in short 'I.P.C.') and sentenced him to suffer imprisonment for life and to pay

fine of Rs.2,000/- and in default of payment of fine, further rigorous imprisonment for six months.

2. The case of the prosecution, in brief, is as under:

a) Deceased Sunita was the sister of Ramakant Ambadas Kambale, resident of village Hipparga (Kavli), Tal. Ausa, Dist. Latur.

b) She was given in marriage to the appellant permanent resident of Bhatagali, Tq. Lohara, Dist. Osmanabad about 20 years prior to the incident.

c) From the wedlock with the appellant, Sunita gave birth to three daughters and a son by name Sagar.

d) Matrimonial life of Sunita was normal for about 5 to 6 years after marriage. However, thereafter the appellant started harassing and ill-treating her after suspecting her fidelity / character.

e) Sunita used to proceed to her parental house situated at village Hipparga (Kavli) along with children whenever harassment becomes intolerable.

f) Though the appellant was permanent resident of village Bhatagali, Tq. Lohara, Dist. Osmanabad, he used to stay either at Latur or Pune for earning livelihood. He was mason by profession. He used to do masonry work at aforesaid places.

g) Sunita, as usual, due to ill-treatment meted out by the appellant in August – 2011, left the house of the appellant at village Bhatagali and proceeded to her parental house situated at Hipparga (Kavli) along with children.

h) She returned back to Bhatagali with son Sagar, 10 to 12 days prior to the incident, as the Diwali festival was approaching. After 4 to 5 days of Sunita's arrival, the appellant also came to Bhatagali from Pune.

i) On 23-10-2011 at about 08:00 p.m. the appellant picked up quarrel with wife Sunita and son Sagar. During the quarrel, he hurled abuses to both of them. Narayan Yeshwanta Gaikwad, cousin of the appellant intervened and pacified the quarrel after giving understanding to the appellant and Sunita, both.

j) Upon that, Sagar, who had got frightened, left the house and went to the house of Sambha Gaikwad for staying there during the night, whereas the appellant and Sunita went inside the house and slept.

k) On 24-10-2011 early in the morning when Sunita was asleep, the appellant gave massive blow of blunt side of the axe on the head of the Sunita. Consequently, she suffered severe crush injury and died instantly.

l) Soon after causing the death of wife Sunita, the appellant left the house and fled away.

m) When Sagar returned back to his house at about 07:00 to 07:30 a.m. from the house of Sambha Gaikwad, he found his mother Sunita lying in the house in a pool of blood.

n) Looking to mother in such a horrible condition, he rushed to the house of Narayan Yeshwanta Gaikwad - his cousin uncle, informed him about the mother Sunita lying alone in the house in a pool of blood.

o) Consequently, Narayan Gaikwad along with his wife rushed to the house of the appellant. Many people from neighbouring houses had already gathered there before his reaching. After his noticing that Sunita was no more in this world, he informed the same to Ramakant Kambale (brother of Sunita) on phone.

p) Thereupon, Ramakant Kambale along with family members and relatives rushed to the Bhatagali, saw sister Sunita lying in her house in dead condition in a pool of blood, therefore, he immediately went to Police Station Lohara, Tal. Omerga, Dist. Osmanabad and lodged the report.

q) Police Station Officer on duty reduced his report into writing as per his version, obtained his signature on the same and then treating that report as FIR registered Crime No.69 of 2011 for

the offence punishable under Section 302 of I.P.C. against the appellant.

3. Investigation of the said crime commenced as usual. During the course of investigation, Inquest Panchanama of the dead body of Sunita was drawn. Then dead body of Sunita was shifted to Rural Hospital, Lohara with requisition along with copy of inquest panchanama for conducting post-mortem. The clothes of the deceased handed over, after post-mortem were seized. Then in presence of the panchas carried inspection and drew the spot panchanama of the spot i.e. house of the appellant where incident took place. Thereafter, the appellant – accused was apprehended on 25-10-2011. While the appellant was in police custody, at his instance crime weapon i.e. axe and his clothes were discovered and recovered under Section 27 of the Indian Evidence Act, 1872 (hereinafter ‘Evidence Act’). Then material witnesses were recorded. Muddemal articles were forwarded to Forensic Lab for chemical analysis with requisition letter, collected post-mortem report and chemical analysis report. After completion of investigation, the appellant was charge-sheeted before Judicial Magistrate First Class, Lohara, who in turn committed the case to the Court of Additional Sessions Judge, Omerga as offence under Section 302 of I.P.C. is

exclusively triable by the Court of Sessions, by passing committal order dated 04-09-2012.

4. Considering the record and having heard Additional Public Prosecutor and defence Counsel, the learned Additional Sessions Judge, Omerga on 01-01-2013 framed charge under Section 302 of I.P.C. at Exh.8. When so framed charge was read-over and explained to the accused in vernacular, he pleaded not guilty and claimed to be tried, therefore, trial was conducted. After conducting the trial, learned Additional Sessions Judge, Omerga under impugned Judgment and order held the appellant guilty for the offence under Section 302 of the I.P.C. and sentenced him to life imprisonment and fine, as stated above, holding that it is none other than the appellant, who committed murder of his wife Sunita, as he had suspicion about her character / fidelity.

5. Heard Mr Ajinkya Reddy, learned Advocate representing the appellant and Mr M.M. Nerlikar, learned Additional Public Prosecutor representing the State.

6. To prove its case, the prosecution has examined as many as 11 material witnesses viz Dr. Sunil Mandale (PW-1), the autopsy surgeon, who conducted post-mortem on the dead body of Sunita

and issued memorandum of post-mortem examination (Exh.14), Ramakant Kambale (PW-2) - real brother of Sunita and first informant, Dhananjay Kadam (PW-3) - a panch witness of Spot Panchanama (Exh.18) and Inquest Panchanama (Exh.19), Murlidhar Waghmare (PW-4) - a witness on the point of matrimonial relations between the appellant and the deceased Sunita and who visited to the house of accused immediately after knowing about the incident, Sushilabai Chavan (PW-5) - a witness of Inquest Panchanama (Exh.19), Nana Khandagale (PW-6) - a witness of spot panchamana (Exh.18), Shrihari Kambale (PW-7) - a witness of the panchanama (Exh.29) under which the clothes removed from the dead body of Sunita were at the time of conducting the post-mortem seized, Narayan Gaikwad (PW-8) - a witness who had seen the appellant and deceased Sunita lastly together, Sagar Gaikwad (PW-9) a minor son of the appellant and deceased Sunita, Fulabai Gaikwad (PW-10) - a witness on the point of matrimonial relations between the appellant and deceased Sunita and Ajij Mohammad Husen Andoorkar (PW-11), Investigating Officer, who carried out the investigation and charge-sheeted the accused. In addition to the documents proved in the evidence of aforesaid witnesses, the prosecution also placed its reliance on CA reports (Exhs.45 & 46).

7. Mr Ajinkya Reddy, the learned Advocate representing the appellant vehemently argued that, the case of the prosecution is based on circumstantial evidence only. There is no eye witness. The impugned judgment is incorrect and against the record. The evidence adduced and relied upon by the prosecution is highly insufficient to complete the chain of circumstances. Post-mortem Report (Exh.14) is doubtful. Columns pertaining to nature of injuries (whether ante-mortem or post-mortem) is blank. The evidence of Dr Sunil Mandale (PW-1), autopsy surgeon, on this material aspect is baseless and afterthought. In the absence of dimensions and direction of temporal bone alleged to have been fractured, it would be difficult to decide the nature of death. The contention of Dr Sunil Mandale (PW-1) that there is no necessity of the dimensions and direction of fractured temporal bone for arriving at conclusion of nature of death is against the medical jurisprudence. Post-mortem Report (Exh.14) is also silent about age of injury suffered by Sunita, which is important for determination of time when death of Sunita occurred. The statement of Dr Sunil Mandale (PW-1) that there is no necessity to determine age of injury for ascertaining time when victim died is also against the medical jurisprudence. Dr Sunil Mandale (PW-1) conducted the post-mortem very casually and issued incomplete post-mortem report, therefore, it would not be proper and

legal to rely on the opinion as to the cause of death of deceased Sunita given by Dr Sunil Mandale (PW-1). Learned Additional Sessions Court, Omerga relying on his evidence, wrongly held that Sunita died a homicidal death.

8. Mr Ajinkya Reddy, the learned Advocate representing the appellant further argued that, material witnesses examined by the prosecution are interested witnesses, therefore, their evidence as far as matrimonial relations and marital life of Sunita cannot be considered as it is not supported by any cogent evidence. The story of harassment of Sunita by the appellant after suspecting her fidelity / character is false and afterthought story. Ramakant Kambale (PW-2), the author of FIR., being real brother of Sunita, it would not be proper and legal to rely on his testimony viz-a-viz FIR (Exh.-16) lodged by him. Dhananjay Kadam (PW-3), the panch witness of Spot Panchanama (Exh.18) and Inquest Panchanama (Exh.19) has not supported the prosecution. Nothing is brought on record through his cross-examination, which would help the prosecution in establishing contents of Spot Panchanama (Exh.18) and Inquest Panchanama (Exh.19), which are very important documents in a murder case.

9. He further submits that, the evidence of Murlidhar Waghmare (PW-4) is not at all worthy of credence as he is closely related with Sunita. The testimony of Sushilabai Chavan (PW-5) cannot be considered in view of testimony of Dhananjay Kadam (PW-3). The testimony of Nana Khandagale (PW-6) being contrary to the testimony of Dhananjay Kadam (PW-3) is not worthy of credence. As like the evidence of Dhananjay Kadam (PW-3) and Sushilabai Chavan (PW-5), the evidence of Shrihari Kambale (PW-7) needs to be discarded as he is closely related with deceased Sunita. No doubt, Narayan Gaikwad (PW-8) has deposed about his lastly seeing the appellant and deceased Sunita together at their house, but it would be risky to rely upon his solitary evidence as he was having inimical terms with the appellant. Neither Narayan Gaikwad had occasion to see the appellant and Sunita together on 23-10-2011 at about 08:00 p.m., nor he saw them together at that time.

10. Sagar Gaikwad (PW-9) a son of the appellant and deceased Sunita, clearly deposed that on fateful night after dinner the appellant left the house and after the appellant's leaving the house one Ramrao Pawar had been to their house. This substantive evidence of Sagar demolishes the case of prosecution that, during

intervening night of 23-10-2011 and 24-10-2011 except the appellant and deceased Sunita nobody was present in the house. The evidence of Sagar (PW-9) as to the presence of third person in their house negatives the evidence of Narayan Gaikwad (PW-8) on last seen together theory. There was no reason for Sagar (PW-9) to depose false. Fulabai Gaikwad (PW-10) turned hostile and not supported to the prosecution, therefore, it would not be proper to consider her evidence on any aspect.

11. He then submits that, the evidence adduced by the prosecution reveals that, Fulabai w/o Vishvanath Gaikwad was the mother of the appellant. She used to reside with the appellant and deceased Sunita at their house at village Bhatagali. On fateful day also she was at their house at Bhatagali. Fulabai Vishvanath Gaikwad was the best witness to throw light as to what happened on fateful night. The prosecution has not examined her. Her none examination goes to the root and creates every doubt about the complicity of the appellant in the crime.

12. The appellant has taken defence of alibi. In his statement recorded under Section 313 (1)(b) of the Cr.PC., he has specifically stated that, on 23-10-2011 at evening time he had been to the field of

one Pandit Jagtap for operating bore well and irrigating crop standing in his field. Since pipe carrying water of bore well was insufficient, during night, he had moved to the field of Daji Lobhe for fetching required piece of pipe. He stayed in the field of Daji Lobhe during that night. On next day morning, he went to the field of Pandit Jagtap, kept a piece of pipe fetched from the field of Daji Lobhe there and while returning to the house from the field of Pandit Jagtap, on the way to the house, police caught hold him.

13. According to learned Advocate Mr Ajinkya Reddy, the aforesaid defence raised by the appellant is highly probable. Having regard to the totality of evidence and defence raised by the appellant, the learned Additional Sessions Judge, Omerga ought to have acquitted the appellant holding that, the evidence on record is insufficient to complete the chain of circumstances and defence is probable. The impugned Judgment being incorrect for the reasons stated at length, the appeal deserves to be allowed.

14. Per contra, Mr M.M. Nerlikar, the learned APP representing the State vehemently argued that, the case of the prosecution is based on following six material circumstances :-

(i) Nature of death of Sunita i.e. homicidal,

- (ii) Motive i.e. suspicion in the mind of the appellant about the character / fidelity of wife Sunita,
- (iii) theory of last seen together,
- (iv) recovery of crime weapon and blood stained clothes at the instance of the appellant under Section 27 of the Evidence Act,
- (v) CA report disclosing that blood found on the clothes of the appellant and crime weapon i.e. axe is human blood, and
- (vi) abscondence of the appellant after commission of crime.

15. The evidence adduced by the prosecution is clear, cogent and sufficient to prove all these circumstances beyond reasonable doubt.

16. According to learned APP Mr M.M. Nerlikar, the testimony of Dr. Sunil Mandale (PW-1), who conducted autopsy on the dead body of Sunita and issued post-mortem examination Report (Exh.14), is clear enough to show that deceased Sunita had suffered two external and one internal injuries. Out of two external injuries, one was crush wound on left temporal region above left eye and another was fracture of left temporal bone. Crush injury to left temporal region which was deep in nature was corresponding to

internal injury. Having regard to aforesaid external and internal injuries, Dr Sunil Mandale (PW-1) formed an opinion that, hemorrhage shock due to head injury was probable cause of death of Sunita. He has ruled out the possibility of the death of Sunita being either suicidal or accidental. The appellant neither said the same in his statement recorded under Section 313 (1)(b) of the Cr.P.C. nor gave suggestions to the material witnesses during their cross-examination on this aspect. Merely for the reason that some of the columns of the Post-mortem Report (Exh.14) have not been filled up, the opinion as to cause of death of Sunita given by Dr Sunil Mandale (PW-1) cannot be discarded or disbelieved. Since it is proved that Sunita died up homicidal death, the further evidence adduced by the prosecution clearly establishes that it was the appellant and the appellant only committed murder of his wife.

17. It is further argued by the APP that, the testimony of Ramakant Kambale (PW-2), author of FIR (Exh.16) and brother of Sunita, throws light on attitude and conduct of the appellant towards wife Sunita including his suspecting about her character and fidelity. Besides, his evidence establishes that about two weeks prior to incident Sunita along with son Sagar had left his house Hipparga (Kavli) and proceeded to her house at Bhatagali, whereas the

appellant had come to Bhatagali from Pune about one week prior to the incident. The evidence of Ramakant Kambale (PW-2) on aforesaid aspect is corroborated by the evidence of Murlidhar Waghmare (PW-4), Narayan Gaikwad (PW-8) and Sagar Gaikwad (PW-9) to some extent.

18. It is also argued by the APP that, the testimony of Narayan Gaikwad (PW-8) on the aspect of his seeing the appellant and deceased Sunita lastly together near their house at Bhatagali is not at all shaken in cross-examination. Spot Panchanama (Exh.18) proved in the evidence of Nana Khandagale (PW-6) makes it clear that, the house of the appellant situated at Bhatagali consists of two rooms. Both the rooms were distinct and separate, but adjacent to each other. The ocular evidence of Dr Sunil Mandale (PW-1), Murlidhar Waghmare (PW-4) and Shrihari Kambale (PW-7) and Spot Panchanama (Exh.18) and Inquest Panchanama (Exh.19) proved in the evidence of Sushilabai Chavan (PW-5) prove that the incident of murder of Sunita took place in eastern room. During fateful night, except the appellant and Sunita, nobody was present in their house. Admittedly, son Sagar Gaikwad (PW-9) after dinner had gone to the house of Sambha Gaikwad and he stayed there during night of 23-10-

2011 and 24-10-2011, whereas Fulabai mother of the appellant had slept in western room.

19. The defence of the appellant that, during fateful night he had slept in the field of Daji Lobhe cannot be accepted as it is not supported by any cogent evidence. The evidence of Sagar (PW-9), that on 23-10-2011 at about 08:30 p.m. after dinner his father (the appellant) left the house and thereafter one Ramrao Pawar came to their house, being false and afterthought cannot be accepted. Sagar (PW-9), when incident took place and his evidence recorded, was 14 years old tender age boy. After the incident in the span of about two years, the appellant won him over. As such, he has improved his version so as to enable the appellant to go scot-free. When it is proved that, at the time of incident deceased Sunita was in the custody of the appellant and his defence that during the fateful night he was not in the house, but in the field of Daji Lobhe, discarded for the reason that it is false, afterthought and not supported by any evidence, blame of murder of Sunita only goes to the appellant – accused. Looking to the fact that Sunita was killed by giving forceful blow of the blunt side of the axe, which was recovered at the instance of the appellant, while she was asleep early in the morning on 24-10-2011 and that blow resulted in her instant death, Sunita did not get

opportunity to scream or make hue and cry. As such, Fulabai, mother of the appellant, who had slept in western side room could not know about the incident till Sagar came to the house. In such circumstances, adverse inference cannot be drawn for none examination of Fulabai, mother of the appellant. After killing wife Sunita, the appellant absconded. The prosecution has proved all the circumstances, referred above, beyond doubt, which completes chain connecting the appellant with the murder of wife Sunita. According to learned APP Mr M.M. Nerlikar, the impugned judgment is correct, proper and legal in all respects, therefore, no interference therein is called for.

20. In the light of aforesaid submissions made at bar by the learned Advocate for the appellant and the learned APP, now we turn towards the evidence on record.

(I) Whether Sunita suffered a homicidal death :-

21. To prove the cause of death and nature of death, the prosecution has placed its reliance on Inquest Panchanama (Exh.19) proved in the evidence of Sushilabai Chavan (PW-5) and memorandum of post-mortem examination (Post-mortem Report (Exh.14) proved in the evidence of Dr. Sunil Mandale (PW-1).

Inquest Panchanama (Exh.19) drawn on 24-10-2011 during 11:30 a.m. to 12:30 p.m. demonstrates that, deceased Sunita had suffered severe injury on left side of her head.

22. Post-mortem Report (Exh.14) proved in the evidence of Dr. Sunil Mandale (PW-1), autopsy surgeon, evidences that hemorrhage shock due to head injury was probable cause of death of Sunita. Dr. Sunil Mandale (PW-1) vide his deposition at Exh.13 deposed that on 24-10-2011 he was attached to Rural Hospital, Lohara as a Medical Officer. On that day dead body of Sunita Dagadu Gaikwad was brought to Rural Hospital, Lohara by Police Head Constable B.No.415 attached to Lohara Police Station for post-mortem along with requisition letter and Inquest Panchanama (Exh.19). He commenced the post-mortem on dead body of Sunita at about 01:25 p.m. after identifying the same by Narayan Gaikwad (PW-8). During the post-mortem he noticed following surface injuries/wounds (i) to (iii).

- (i) Crushed wound on left temporal region above left eye; 6cmx6cmx3cm,
- (ii) Fracture of temporal bone;
- (iii) Incised wound on left cheek, lateral to left eye

23. On internal examination, he noticed crushed injury to left temporal region, which was deep in nature. Besides, he noticed free blood in the brain matter. Dr. Sunil Mandale (PW-1) also deposed that, during post-mortem rigor mortis found developed in upper and lower limb. Dead body was not swollen. Eyes were closed. Tongue was within mouth. Blood was oozing from nostrils. Post-mortem lividity was present on buttocks and loins. Thorax was congested. Stomach had food material. Semi liquid food material found in small intestine. Semi solid faecal matter found in large intestine. Liver, pancreas, spleen and kidneys were found congested. The external and internal injuries, referred above, were ante-mortem in nature. Internal injury, referred above, were corresponding to external injuries. After looking at axe (Article-7), which was shown to him during the recording of evidence, he opined that, the injuries mentioned in column no.17 of the Post-mortem Report are possible by blunt side of the said axe. According to him, hemorrhage shock due to head injury was the probable cause of death of Sunita.

24. Dr. Sunil Mandale (PW-1) was cross-examined by defence counsel extensively. During the course of cross-examination, he has admitted that incise wounds and crush wounds are different types of wounds. Admittedly, in column no.17 of the post-mortem

report while describing injury no.1 word 'incised' was scored and at that place word 'crushed' was written. But, only for that reason his consistent evidence as to the description of injury no.1 mentioned in column no.17 cannot be discarded. In further cross-examination, he has very clearly denied that, injury no.2 mentioned in column no.17 is not corresponding with injury nos.1 and 3 mentioned in the same column. It is the matter of record that, dimensions of external injury nos.2 and 3 mentioned in Post-mortem Report (Exh.14) have not been given, but dimensions of injury no.1 have been given. In further cross-examination, he has denied the suggestion that the dimensions of the fracture helps in deciding nature of death. So also, he has denied suggestion that in the absence of dimensions of fracture of temporal bone, the opinion as to the cause of death cannot be given. Post-mortem Report (Exh.14) does not reflect age of external injuries mentioned in column no.17. In cross-examination Dr. Sunil Mandale (PW-1) has denied that mentioning of the age of external injuries in post-mortem is necessary. Column no.18-A of the Post-mortem Report is blank. In his evidence Dr. Sunil Mandale (PW-1) has clearly deposed that, the injuries suffered by Sunita were ante-mortem in nature. Merely for the reason that the column no.18-A left blank, substantive evidence of Dr. Sunil Mandale (PW-1) that the injuries suffered by Sunita were ante-mortem in nature cannot be discarded,

when no material is brought on record showing that external injuries shown in Post-mortem Report may have been caused after the death of Sunita.

25. It is true that, Post-mortem Report (Exh.14) and evidence of Dr. Sunil Mandale (PW-1) (Exh.13), both are silent as to the tentative time of death of Sunita, but column no.11 of the Post-mortem Report (Exh.14) speaks volumes that rigor mortis partly developed in upper and lower limb. Modi's Medical Jurisprudence and Toxicology indicates that, in general, rigor mortis sets in 1 to 2 hours after death, is well developed from head to foot in about 12 hours, is maintained for about 12 hours and passes off in about 12 hours.

26. It is not in dispute that, post-mortem on the dead body of Sunita was conducted on 24-10-2011 between 01:30 p.m. to 02:45 p.m.

27. Having regard to the process of development of rigor mortis given in Modi's Medical Jurisprudence and the timings during which post-mortem on the dead body of Sunita was conducted on 24-10-2011, it can safely be inferred that, the death of Sunita had

taken place during intervening night of 23-10-2011 and 24-10-2011 or early in the morning of 24-10-2011.

28. It is pertinent to note that though defence has criticized the evidence of Dr. Sunil Mandale (PW-1), autopsy surgeon, but during his cross-examination he was not suggested that the injuries suffered by Sunita were either self-inflicted injury or injury caused in accident. Therefore, merely on the basis of some irregularities occurred in writing Post-mortem Report (Exh.14) and the answers given by Dr. Sunil Mandale (PW-1) pertaining to mentioning of dimensions of injuries and keeping column no.18-A blank, Post-mortem Report (Exh.14) cannot be discarded.

29. Thus, having regard to the totality of facts and circumstances discussed above, we have no hesitation to hold that, Sunita suffered a homicidal death during intervening night of 23-10-2011 and 24-10-2011 or early in the morning of 24-10-2011.

(II) Motive :-

30. Ramakant Kambale (PW-2) is the real brother of deceased Sunita and first informant of the case. Vide his deposition at Exh.15, he deposed that, after 5 to 6 years of marriage, the appellant

started suspecting character of wife Sunita and harassing her on that count. He used to beat Sunita, therefore, Sunita along with Children used to come to their house. Two months prior to the incident, Sunita along with her children had been to his house at Hipparga (Kavli) and only 10 to 12 days prior to the incident she had returned back to her matrimonial house at Bhatagali along with son Sagar. This evidence of Ramakant Kambale (PW-2) is corroborated by FIR (Exh.16) of which he is the author. Nothing could be brought on record through his cross-examination which would create doubt about his version pertaining to the appellant's harassing deceased Sunita on suspicion of her character. The evidence of Ramakant Kambale (PW-2) on this material aspect is corroborated by evidence of Murlidhar Waghmare (PW-4). It is he, who in his deposition at Exh.21 clearly deposed that on his visit to Hipparga (Kavli) Sunita had disclosed to him about the conduct of the appellant towards her and the appellant's harassing her alleging that her behaviour is not proper and he killed Sunita on suspicion.

31. Admittedly, Murlidhar Waghmare (PW-4) is the maternal uncle of Sunita (mother's cousin), but merely for that reason the evidence of Murlidhar Waghmare (PW-4) as to the overall conduct of the appellant towards his wife Sunita including suspecting her character cannot be discarded. In normal course, married woman

shares her grievances against the husband only to the kith and kin of the paternal family and not to the others. He withstood in cross-examination on this material aspect. He has denied the suggestion that he had grudge against the appellant since the appellant was not ready to give his daughter to his son (Murlidhar PW-4) though Sunita very much interested for the same. Therefore, the aforesaid substantive evidence of Murlidhar Waghmare (PW-4) which lends full support to the evidence of Ramakant Kambale (PW-2) on the aspect of motive, is worthy of credence and needs to be accepted.

32. It is pertinent to note that, the appellant has not disputed the fact of his suspecting character of wife Sunita, on the contrary in his statement recorded under Section 313 (1)(b) of Cr.P.C. while answering question no.65 stated that his wife Sunita had illicit relations with Ramrao Apparao Pawar, resident of village Hipparga (Kavli). When the appellant himself in his statement under Section 313(1)(b) of Cr.P.C. makes wild allegation against the wife Sunita about her character and chastity, in any angle, case of the prosecution about motive of the appellant behind commission of crime cannot be discarded. Thus, having regard to the substantive evidence of two material witnesses viz. Dr. Sunil Mandale (PW-1) and Murlidhar Waghmare (PW-4) and defence of the accused disclosed from his

statement recorded under Section 313 (1)(b) of the Cr.P.C. discussed at length in para supra, we have no hesitation to hold that, the appellant had strong suspicion about character of his wife Sunita i.e. her having illicit relations with third person and that was the motive behind the crime.

(III) Theory of last seen together :-

33. To prove the material circumstance of last seen together, the prosecution has relied upon evidence of Narayan Gaikwad (PW-8). It is evident from his testimony that, he is not only cousin brother of the appellant, but also resident of village Bhatagali, where the appellant used to reside with his wife Sunita. According to Narayan Gaikwad (PW-8) on 23-10-2011 at about 08:00 p.m. while he was proceeding towards his house he saw the appellant quarreling with his wife Sunita in front of their house. At that time Sagar (PW-9), their son, was also present there. He intervened and pacified the quarrel and then went to his house. On next day morning Sagar came to his house and informed him that his father (the appellant) killed his mother (Sunita) and went away. Except suggestions denying everything, nothing is brought on record through his cross-examination. Narayan Gaikwad (PW-8) has clearly denied the suggestion that he did not see the appellant on 23-10-2011 at about

08:00 p.m. in front of his house quarreling with wife Sunita and his intervening and pacifying the said quarrel. Therefore, there is no reason to discard the aforesaid evidence of Narayan Gaikwad (PW-8). Being cousin brother of the appellant, he had no reason to speak lie against him. It is true that during further cross-examination, suggestion was given to Narayan Gaikwad (PW-8) that the relations between him and the appellant were not cordial since 10 to 15 years and therefore, he deposed false against the appellant and Narayan Gaikwad (PW-8) has denied the said suggestion. In the absence of evidence as to the nature of dispute and the reason behind the dispute / quarrel, merely on the basis of vague suggestions about strained relations, since 10 to 15 years, which Narayan Gaikwad (PW-8) has clearly denied, his evidence on the material aspect of his seeing the appellant and Sunita lastly together at about 08:00 p.m. on 23-10-2011 cannot be discarded. Therefore, on the basis of clear and cogent evidence of Narayan Gaikwad (PW-8), discussed in para supra, we hold that the prosecution has proved one more circumstance of last seen together.

34. In the case of *Niranjan Panja Vs. State of West Bengal*, [2010 (4) Mh.L.J. (Cri.) 102], it is held that, when the prosecution

invokes the theory of last seen together, it is always necessary on its part to establish the time of death.

35. The facts of the case at hand are quite different than the facts of *Niranjan Panja's* case, wherein the Hon'ble Supreme Court ruled as above. In the case at hand, Narayan Gaikwad (PW-8) has very clearly deposed that on 23-10-2011 at about 08:00 p.m. he saw the appellant and deceased Sunita together near their house and early in the morning on next day i.e. 24-10-2011 Sunita was found dead in her house and at that time appellant was not present there. Ramakant Kambale (PW-2) and Murlidhar Waghmare (PW-4) have also deposed that on 24-10-2011 in pursuance of the information received from Narayan Gaikwad (PW-8) they rushed to Bhatagali at morning hours and saw Sunita lying dead in her house and at that time the appellant was not present there.

36. Sagar Gaikwad (PW-9) though turned hostile, in his cross-examination conducted by the APP, has admitted aforesaid facts. Therefore, it is clear enough that homicidal death of Sunita took place at her house at Bhatagali where she used to reside with the appellant, during intervening night of 23-10-2011 and 24-10-2011 or early in the morning of 24-10-2011. Medical evidence, discussed in

para supra, also says so. Therefore, in our considered view the evidence of Narayan Gaikwad (PW-8) on the aspect of theory of last seen together cannot be discarded holding that the prosecution has failed to establish specific time of death of Sunita.

(IV) Discovery and recovery of the crime weapon and blood stained clothes under Section 27 of the Evidence Act :-

37. Ajj Andoorkar (PW-11), Investigating Officer, in his deposition at Exh.40 deposed that, during the course of investigation on 25-10-2011 he arrested the appellant after searching him out. The appellant has not cross-examined him on the aforesaid aspect. Arrest panchanama reveals that the appellant was arrested on 25-10-2011 at about 10 a.m. at Lohara Police Station, Lohara. Thus, from the evidence of Ajj Andoorkar (PW-11), and arrest panchanama, it is clear that the appellant – accused was arrested on next day of incident as he was not available at his house when in pursuance of the FIR at Exh.16 lodged by Ramakant Kambale (PW-2), spot panchanama (Exh.18) and inquest panchanama (Exh.19) were drawn and dead body of Sunita was shifted to rural hospital, Lohara for conducting post-mortem.

38. Aij Andoorkar (PW-11), in his evidence at Exh.40 has also made clear that, after arrest the appellant was produced before learned Judicial Magistrate First Class, Lohara, and his police custody was obtained and during the police custody, in presence of panchas, the appellant made a statement leading to discovery and recovery of crime weapon i.e. axe and the clothes which were worn by him at relevant time.

39. Murlidhar Waghmare (PW-4), the panch witness of the said discovery and recovery, in his deposition at Exh.21, has deposed that, on 26-10-2011 police officials of Lohara Police Station, Lohara, Dist. Osmanabad called him and one Vitthal Gulab Kambale to the Police Station to act as a panch witness. They reached to the police station at about 03:30 p.m. At that time the appellant was present in the police station. In their presence, appellant made a statement to the police about the place where he had concealed axe and clothes and expressed his readiness to show said place and handover both the articles. Accordingly, police official prepared memorandum (Exh.22) of the statement made by the appellant. Murlidhar Waghmare (PW-4) has identified his signature and signature of another panch witness Vitthal Kambale appearing on the said memorandum and also admitted truthfulness of the contents thereof.

40. Murlidhar Waghmare (PW-4) further deposed that, after recording memorandum of the aforesaid statement of appellant at Exh.22, they along with the appellant and police officials left the police station. Then as per the instruction given by appellant they proceeded towards village Bhatagali in a police jeep. On reaching to village Bhatagali, on the instructions given by the appellant, jeep driver stopped the jeep near one plot. Upon that they all got down from the jeep. Thereafter, the appellant proceeded further and took out muddemal property i.e. axe and clothes from the heap of *Parati* (dried uprooted plant of pigeon pea) where they were concealed and produced the same before the police. Police seized both the articles in their presence under the recovery panchanama (Exh.23). Murlidhar Waghmare (PW-4) identified his signature and signature of another panch on the same and also has admitted contents therein. Thereafter, he has identified both the muddemal articles present before the Court. In his evidence Murlidhar Waghmare (PW-4) has specifically deposed that, muddemal axe and muddemal clothes discovered and recovered at the instance of the appellant were stained with blood. He stood firm in cross-examination.

41. Testimony of Ajij Andoorkar (PW-11), Investigating Officer corroborates to the testimony of Murlidhar Waghmare (PW-

4). Nothing is brought on record by the appellant, on the basis of which, substantive evidence of Murlidhar Waghmare (PW-4) regarding discovery and recovery of crime weapon i.e. axe and blood stained clothes of the appellant at his instance can be viewed with suspicion and discarded. It is true that, Murlidhar Waghmare (PW-4) is relative of deceased from her parental side, but that itself would not be a ground to discard his clear, cogent and consistent testimony about recovery of crime weapon i.e. axe and blood stained clothes of the appellant at his instance under Section 27 of the Evidence Act.

42. Recovery panchanama (Exh.23) shows that, appellant had concealed crime weapon i.e. axe and blood stained clothes in the heap of *Parati* arranged in a plot, which was near to his house. Having regard to the disclosure statement (Exh.22), recovery panchanama (Exh.23), testimony of Murlidahr Waghmare (PW-4) (Exh.21) and testimony of Ajij Andoorkar (PW-11) (Exh.40), Investigating Officer, we have no hesitation to hold that, crime weapon and blood stained clothes of the appellant were discovered and recovered at the instance of appellant on 26-10-2011 i.e. after two days of incident and after one day of arrest of the appellant and the said articles were stained with blood.

43. It has also come on record through the evidence of Ajij Andoorkar (PW-11), Investigating Officer that, during the investigation he sent crime weapon i.e. axe, clothes of the accused along with other muddemal articles seized from the spot and blood sample of the appellant, collected by Medical Officer, to the Forensic Lab for examination and report. C.A. report at Exh.45 discloses that crime weapon axe and clothes of the appellant discovered and recovered at his instance were stained with human blood of 'B' group.

44. It is true that blood group of the appellant could not be determined as results of analysis were inconclusive (as per CA report Exh.46) and blood of deceased Sunita was not collected and sent to Forensic Lab. Since appellant had not sustained any injury, one and only inference can be drawn that blood found on the muddemal articles including axe and clothes of appellant was the blood of deceased Sunita. This is one of the clinching circumstance which points out finger towards the appellant.

(V) Whether deceased Sunita was in exclusive custody of appellant, when died of homicidal death?

45. Dhananjay Kadam (PW-3) and Nana Khandagale (PW-6) are the panch witnesses of the spot panchanama (Exh.18). Though

Dhananjay Kadam (PW-3) has not supported as far as the contents of the spot panchanama (Exh.18), however Nana Khandagale (PW-6) has proved not only execution but also contents of the same.

46. Narayan Khandagale (PW-6) has testified that on 24-10-2011 at about 11:00 a.m. in his presence and in presence of Dhananjay Kadam (PW-3), spot panchanama of the spot of incident shown by Narayan Gaikwad (PW-8) was drawn and simple soil, blood mixed soil and plastic gunny bag lying on the spot were seized. Nothing could be brought on record through his cross-examination, which would create doubt about genuineness of the spot panchanama (Exh.18). Therefore, there is no reason to discard spot panchanama (Exh.18), which clearly demonstrates that, incident had taken place in the house belonging to the appellant situated at village Bhatagali.

47. The description of the said house finds place in spot panchamana. Though at its outset, on the basis of description given in spot panchanama (Exh.18) it appears that the said house was consisting of only one room admeasuring 30 ft x 10 ft having roof of 16 corrugated tins with two doors, both facing towards north, but upon considering the material brought on record from the cross-examination of Nana Khandagale (PW-6) and Murlidhar

Waghmare (PW-4), it becomes clear that, the said house was not consisting only one room having 30 feet length, but it was consisting of two rooms one on eastern side and another on western side with separate doors. This material fact brought on record through the cross-examination of two important witnesses speaks volumes that, the house belonging to the appellant, where incident took place, was consisting of two rooms and not one room and dead body of Sunita found in eastern side room.

48. Through the evidence of Nana Khandagale (PW6) and Narayan Gaikwad (PW8) it has come on record that, Fulabai Vishwanath Gaikwad - mother of the appellant used to reside with the appellant and deceased Sunita at their house at Bhatagali.

49. Though it is clear that in the relevant period appellant used to reside in his house at Bhatagali, Tq. Lohara, Dist. Osmanabad, along with wife Sunita, son Sagar and mother Fulabai, the question is, whether during the fateful night they all were present in the house or only appellant and his wife Sunita were present.

50. Sagar (PW9), though turned hostile, however in cross examination conducted by learned APP, has admitted that during the

fateful night he was not present in the house and he had slept in the house of Navnath Gaikwad (husband of Fulabai Gaikwad PW10) and on his returning back to the house in morning hours he noticed mother Sunita lying in the pool of blood. Looking at his mother in such a condition he became frightened and rushed to the house of uncle Narayan Gaikwad (PW8) and informed him about the incident. This, clear cut admission given by Sagar, gets corroboration from the evidence of Narayan Gaikwad (PW8).

51. It is true that Fulabai Gaikwad (PW10), who happens to be the wife of Navnath Gaikwad, turned hostile. However, portion marked Exhibit-42 in her previous statement under Section 161 (1) of Cr.PC. proved in the evidence of Ajij Mohammad Husen Andoorkar (PW-11), I.O., who recorded the same and admissible under proviso to said section, inspires confidence about the fact that during the fateful night Sagar was not in the company of his parents i.e. appellant and deceased Sunita in their house. The ratio laid down by the Hon'ble Supreme Court in the case of **Bhagwan Dass V/s. State (NCT of Delhi), (2011) 6 SCC 396** runs as under:

“15. The mother of the accused, Smt. Dhilllo Devi stated before the police that her son (the accused) had told her that he had killed Seema. No doubt a statement to the police is ordinarily not admissible in evidence in view of Section 162 (1) Cr.PC, but as mentioned in the proviso to Section 162 (1) Cr.PC it can be used to contradict the testimony of a witness.

Smt. Dhillo Devi also appeared as a witness before the trial court, and in her cross examination, she was confronted with her statement to the police to whom she had stated that her son (the accused) had told her that he had killed Seema. On being so confronted with her statement to the police she denied that she had made such a statement.

16. We are of the opinion that the statement of Smt. Dhillo Devi to the police can be taken into consideration in view of the proviso to Section 162 (1) Cr.PC, and her subsequent denial in court is not believable because she obviously had afterthoughts and wanted to save her son (the accused) from punishment. In fact in her statement to the police she had stated that the dead body of Seema was removed from the bed and placed on the floor. When she was confronted with this statement in court she denied that she had made such a statement before the police. We are of the opinion that her statement to the police can be taken into consideration in view of the proviso to Section 162 (1) Cr.PC.”

52. In view of the evidence discussed above, the only question remains about the presence of Fulabai (mother of appellant and mother-in-law of deceased Sunita). We have already discussed in paragraph supra that Fulabai was living with appellant and Sagar in the house where incident took place. After considering the spot panchanama and ocular evidences of Murlidhar Tukaram Waghmare (PW4) and Nana Khandagale (PW6), it is clear that house where the incident took place was consisting of two rooms having separate doors facing to north. One was on eastern side whereas another was on western side. Incident took place in the eastern side room. Having regard to the fact that appellant and deceased were husband and wife and Fulabai was mother of appellant and mother-in-law of deceased Sunita, absolutely there is no possibility of Fulabai's

sleeping with appellant and deceased Sunita in eastern side room and she must have slept in western side room.

53. Medical evidence discussed in paragraph supra demonstrates severity of axe blow received by Sunita which resulted in her death. Deceased Sunita was asleep, when she received forceful blow of blunt side of the axe on her head which resulted in her instant death, as such she did not get a chance to wake-up and scream and soon after finishing Sunita appellant left the house and disappeared. Therefore, Fulabai who was asleep in western room could not even know about the incident till she woke up in the morning hours of 24-10-2011.

54. In view of the above, it becomes clear that when incident of murder of Sunita took place, she was in exclusive custody of her husband – appellant. Therefore, under Section 106 of the Evidence Act it was incumbent on his part to explain the incident. It is true that appellant came with the defence of alibi and to prove the said defence in his statement recorded under Section 313(1)(b) of Cr.P.C. stated that,

“his wife Sunita had illicit relations with one Ramrao Pawar, resident of Village Hipparga (Kavli), Tq. Ausa, Dist. Latur. Quarrels never used to take place between him and his wife Sunita. On 23-10-2011 at evening time,

he had been to the field of one Pandit Jagtap for operating bore well and supplying water to the crops, since pipe supplying water to the crops was falling short he rushed to the field of Daji Lobhe to fetch requisite piece of pipe and stayed there during the night. On the next day morning while returning back to the house after keeping the piece of pipe fetched from the field of Daji Lobhe at the field of Pandit, police caught hold of him.”

55. In the case of **Jayantibhai Bhenkarbhai Vs. State of Gujarat, 2002 AIR (SC) 3569**, the Hon’ble Supreme Court held that,

“The plea of alibi taken by the accused needs to be considered only when the burden which lies on the prosecution has failed in discharging its burden of proving the commission of crime by the accused beyond any reasonable doubt, it may not be necessary to go into the question whether the accused has succeeded in proving the defence of alibi. But once the prosecution succeeds in discharging its burden then it is incumbent on the accused taking the plea of alibi to prove it with certainty so as to exclude the possibility of his presence at the place and time of occurrence. An obligation is cast on the Court to weigh in scales the evidence adduced by the prosecution in proving the guilt of the accused and the evidence adduced by the accused in proving his defence of alibi. If the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the place and time of occurrence, the Court would evaluate the prosecution evidence to see if the evidence adduced on behalf of the prosecution leaves any slot available to fit therein the defence of alibi. The burden of the accused is undoubtedly heavy. This flows from Section 103 of the Evidence Act which provides that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence. However, while weighing the prosecution case and the defence case, pitted against each other, if the balance tilts in favour of the accused, the prosecution would fail and the accused would be entitled to benefit of that reasonable doubt which would emerge in the mind of the Court.”

56. Appellant neither examined himself nor examined witness including Pandit and Daji Lobhe to prove the aforesaid

defence. In the absence of any evidence merely on the basis of false and afterthought statement made during the course of statement recorded under Section 313(1)(b) of Cr.P.C., clear and cogent evidence adduced by the prosecution connecting appellant with the incident of murder of Sunita cannot be discarded.

57. Thus the aforesaid evidence proves beyond doubt that Sunita died while in exclusive custody of appellant and appellant failed to prove his defence of alibi.

(VI) Conduct of appellant after incident :-

58. We have discussed in paragraph supra that after causing murder of wife Sunita, appellant went away from house. Evidence adduced by the prosecution makes it clear that appellant was not present in the house. On 24-10-2011 deceased Sunita found lying in dead condition. He did not return to the house at any time on 24-10-2011. Even he did not attend funeral of Sunita that took place at her parental village at evening time on 24-10-2011. He was arrested by police on 25-10-2011 i.e. next day of incident after searching him out. This conduct of the appellant inspires full confidence about his complexity in the crime.

59. We have carefully gone through the judgment delivered by co-ordinate bench of this Court in the matter of ***Champak Balu Patel Vs. State [2013 (2) Mh.L.J.(Cri) 458] (Coram : Smt. V. K. Tahilramani and Smt. Sadhana S. Jadhav, J.J.)***. The facts of the said case, in brief, are that, first informant - Ganpat Halpati and appellant – accused Champak Balu Patel were residing in one and the same locality at Bhandarwad, Ambawadi, Moti daman. They were at cross terms with each other. On fateful night, Ganpat had slept inside his house, whereas his two sons namely Rajesh and Mahesh along with one Davlu and Manu had slept in the open space opposite to the said house. In the early hours at about 02:00 a.m., Ganpat woke up to answer the nature's call and suddenly noticed that Mahesh had sustained a cut injury on his neck and blood was oozing from the said injury. Ganpat woke up Rajesh, Davlu and others. Mahesh had died. On the basis of the FIR lodged by Ganpat against the Champak, crime was registered against the accused - Champak for offence punishable under Section 302 of Indian Penal Code. The case was based on two circumstantial evidence viz. enmity and recovery of blood stained crime weapon at the instance of accused Champak. In an appeal against conviction preferred by accused Champak, the co-ordinate Bench of this Court set aside the conviction holding that,

. “Though four other persons were sleeping near the deceased on fateful night, the prosecution

has not examined anyone of those persons, who were sleeping near the deceased Mahesh. Therefore, it cannot be believed that accused – Champak would silently go there and cause such grievous injury of cutting neck and yet people would not know. Therefore, only on the basis of the recovery of blood stained axe at the instance of appellant – Champak, it would not be safe for convicting him (Champak) of a serious offence of murder i.e. offence under Section 302 of I.P.C.”

60. The facts of the present case are quite different than the facts of the Champak’s case (supra). In case at hand prosecution has proved all the six circumstances including theory of last seen together, motive, recovery of crime weapon and clothes of the accused stained with blood under Section 27 of the Evidence Act, previous and subsequent conduct of the appellant – accused. Therefore, merely for the reason that prosecution had not examined Fulabai, benefit of doubt cannot be given to the appellant when he failed to establish his defence of alibi.

61. In the matter of ***Wakkar and Another Vs. State of Uttar Pradesh [(2011) 3 Supreme Court Cases 306]***, Hon’ble Supreme Court in paragraph 12 of the judgment held as under :

“It is well settled and needs no restatement at our hands that the principle for basing a conviction on the basis of circumstantial evidence is that

“each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt

of the accused can be safely drawn and no other hypothesis against the guilt is possible.”

It is also well settled as held by this Court in more than one decision that the courts have to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof, for sometime, unconsciously it may happen to be a short step between moral certainty and legal proof.

“45. that there is a long mental distance between ‘may be true’ and ‘must be true’ and the same divides conjectures from sure conclusions.” (emphasis in original) (See Tanviben Pankajkumar Divetia V. State of Gujarat, SCC p. 185, para 45.)”

62. In case at hand, prosecution has succeeded in proving each and every incriminating circumstance by adducing clear and cogent evidence. Proved circumstances, form of complete chain of the events from which only irresistible conclusion about the guilt of the appellant can safely be drawn.

63. Thus, after assessing the evidence on record in totality, we have arrived at the conclusion that prosecution has proved, by adducing cogent evidence, the nexus between homicidal death of victims and the appellant – accused and vague defence of alibi raised by accused is afterthought and not worthy of credence.

64. In view of the above discussion, we have come to the conclusion that the impugned judgment and order convicting the appellant-accused passed by the learned Additional Sessions Judge, Omerga, in Sessions Case No.18 of 2012, dated 26-09-2013 is correct, proper and legal. Therefore, no interference is called for.

65. Accordingly, the criminal appeal is dismissed.

66. We had appointed learned Advocate Mr Ajinkya Reddy to represent the appellant in this case. We are, therefore, quantifying his fees at Rs.15,000/- (Rs.Fifteen Thousand) which shall be paid to him through the High Court Legal Services Authority, Sub-committee, Aurangabad.

(B. U. DEBADWAR)
JUDGE

(RAVINDRA V. GHUGE)
JUDGE

Gajanan Punde, PA