

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

CRIMINAL APPEAL NO. 343 OF 2015

Bhima @ Bhimrao Baburao Deshmukh

Age : 33 years, Occu : Business

R/o Line Galli, Degloor,

Dist : Nanded.

... Appellant
(Original Accused No.1)

Vs.

State of Maharashtra

Through Police Station officer,

Degloor Police Station, Tal. Degloor,

Dist. Nanded.

... Respondent

...

Advocate for the Appellant : Mr. Satyajit S. Bora

APP for Respondent – State : Mr. A. S. Shinde

...

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

DATE OF RESERVE : 23rd NOVEMBER, 2020

DATE OF PRONOUNCEMENT : 09th DECEMBER, 2020

JUDGMENT [PER B. U. DEBADWAR, J.] :

1. This appeal is directed against the judgment and order dated 26-02-2015 passed by learned Additional Sessions Judge, Biloli, District Nanded, in Sessions Case No.38 of 2013, whereby convicted the appellant – accused No.1 under Section 302 of the Indian Penal Code, 1872 (hereinafter referred as “IPC”) and sentenced him to suffer life imprisonment.

2. Facts giving rise to the appeal in nutshell are as under :-

a) Deceased Rekha was the daughter of Devidas Dattatray Bhutale (PW1), resident of Village Kanthali, Tal. Jukkal, Dist. Nizamabad (A.P). Her marriage with Bhima @ Bhimrao Baburao Deshmukh, appellant – accused No.1, was solemnized in the year 2007. Dowry of Rs.1,51,000/- (Rupees One Lakh and Fifty One Thousand Only) was given to the husband and in-laws of Rekha. After marriage, Rekha started living with husband and in-laws (co-accused) in their joint family home at Line Galli, Degloor, Dist. Nanded. From the wedlock with husband Bhima, Rekha gave birth to daughter Ashwini @ Vaishnavi.

b) After birth of Vaishnavi, husband and in-laws of Rekha started demanding Rs.1,00,000/- (Rupees One Lakh Only) for repaying the loan taken for construction of house and commencing jewellery business and harassing her physically and mentally on that count. Husband of Rekha, Bhimrao was having illicit relations with Asha w/o Ram Deshmukh – accused No.5. In-laws of Rekha were aware about such relationship. Husband and in-laws continued to harass and ill-treat Rekha constantly for fulfillment of the aforesaid monetary demand. Though after meeting of the relatives were arranged for giving understanding and partial demand of money was fulfilled, no change

took place in the attitude and conduct of husband and in-laws of Rekha. They continued to harass and ill-treat her. Rekha used to disclose the aforesaid conduct of husband and in-laws to her father and other family members from her parental side.

c) On 23-07-2013, Hariba Pandurang Suryawanshi (PW3), maternal uncle of Rekha, at about 10.00 a.m. called Devidas Dattatray Bhutale (PW1) on phone and informed him that he visited maternal house of Rekha situated in Line Galli, Degloor, Nanded at about 08.30 a.m. in pursuance of the whispering being made by the inhabitants of the Line Galli, Degloor and saw that lock was applied to the house and except Rekha and Vaishnavi nobody was in the house and they both are not responding to the call given to them. Accordingly, Devidas Dattatray Bhutale (PW1) along with the relatives left his village Kanthali and reached to the house of accused at about 12.00 p.m. At that time, neighboring people and police had gathered there. Soon after his reaching, police broke open the lock. Thereafter, Rekha and Vaishnavi were found lying in a bed room in dead condition. Rekha was found lying on the floor whereas Vaishnavi was found lying on the cot. They both were found killed by throttling the neck.

d) Soon after breaking open the lock, police officials present there drew the spot panchanamas first, then did inquest panchanamas of

Rekha and Vaishnavi, one after another, shifted dead bodies of Rekha and Vaishnavi to the rural hospital, Degloor, for postmortem, along with requisition. Meanwhile, at about 03.25 p.m. Devidas Dattatray Bhutale (PW1), father of Rekha, lodged the report narrating aforesaid conduct and attitude of husband and in-laws of Rekha and stating that husband and in-laws of Rekha viz Bhima @ Bhimrao Baburao Deshmukh, Ram Baburao Deshmukh, Shamdarbai @ Sumitrabai w/o Baburao Deshmukh, Yogita d/o Baburao Deshmukh and Asha w/o Ram Deshmukh, in pursuance of their common object, committed murder of Rekha and Vaishnavi as their demand of money not satisfied and as deceased Rekha was opposing the illicit relation between her husband (appellant – accused No.1) and accused No.5 – Asha.

e) On the basis of aforesaid report, Crime bearing No. 143 of 2013 came to be registered against husband and in-laws of Rekha viz. Bhima @ Bhimrao Baburao Deshmukh, Ram Baburao Deshmukh, Shamdarbai @ Sumitrabai w/o Baburao Deshmukh, Yogita d/o Baburao Deshmukh and Asha w/o Ram Deshmukh at Police Station, Degloor.

f) The investigation of the said crime was carried by investigating officer, Hanuman Vitthalrao Parande (PW8), P.I. During the course of investigation, spot panchanamas and inquest panchanamas of both the deceased persons viz Rekha and Vaishnavi, drawn prior to

registration of crime, were collected. All the five accused were arrested after drawing arrest panchanamas, clothes worn by the accused persons were seized by drawing seizure panchamas. Statement of material witnesses were recorded. Motorcycle which was used by accused No.1 Bhima after commission of crime, was seized at his instance under Section 27 of the Indian Evidence Act, 1872. Postmortem reports of deceased Rekha and deceased Vaishnavi were collected. Written opinion of autopsy surgeon as to the period prior to the postmortem, when death of Rekha and Vaishnavi occurred, was obtained viscera and clothes of deceased and accused were sent to the forensic lab for examination and report.

g) After completion of investigation, charge-sheet of the offences punishable under Sections 143, 498-A, 302, 323, 504 and 506 read with Section 149 of IPC came to be submitted in the Court of J.M.F.C. Degloor, who in turn committed the case to the Additional Sessions Court, Biloli, as the offence under Section 302 of Indian Penal Code is exclusively triable by the Court of Sessions.

h) After hearing learned APP and defence counsel, on 21-07-2014 learned Additional Judge, Biloli, vide Exhibit-19 framed charges for the offences punishable under Sections 143, 498A, 302, 323, 504 and 506, read with Section 149 of IPC against all the five accused.

When the said charge-sheet was read over and explained to accused in vernacular they pleaded not guilty and claimed to be tried. The defence of the accused, as disclosed from trend of cross examination, written statement and oral evidence adduced by them, was that marriage of accused No.2 – Ram was solemnized with accused No.5 – Asha in the year 2003. At the time of their marriage accused No.1 – Bhima was 13 to 14 years old boy. Accused No.2 – Ram and accused No.5 – Asha used to treat him like their son.

i) Marriage of accused No.1 – Bhima was solemnized with deceased Rekha on 06-07-2007. After few months of marriage, accused No.1 – Bhima along with his wife Rekha separated from the joint family. Prior to the marriage of Bhima with Rekha joint family had constructed house consisting of seven rooms on the plot purchased in the name of accused No.5 – Asha, out of the amount received from her father. Few months prior to alleged incident, accused No.1 – Bhima and Rekha started residing in eastern three rooms, whereas accused Nos. 2 to 5 started residing in western four rooms together.

j) Accused No.1 – Bhima and accused No.2 – Ram had separate sources of income. Accused No.1 – Bhima was running jewelry shop independently, whereas accused No.2 – Ram was in service in MSRTC as a conductor. He got the job after death of his father Baburao

on compassionate ground. Out of two blocks one was occupied by accused No.1 – Bhima and his family and another block was occupied by accused Nos. 2 to 5. Both the blocks were separate and distinct.

k) On 22-07-2013 at about 07.00 to 07.30 p.m. accused No.1 Bhimrao had been to village Gojegaon at the house of sister Premala Shinde to attend the feast arranged on the eve of Akhadi Poornima. He left the house from back side door after closing the channel gate and front side door from outside and applying lock. He wanted to return back to his house after enjoying the feast. Therefore, he had not informed about his leaving house and going to Gojegaon to accused Nos. 2 to 5. Accused No.1 – Bhima was constrained to stay at the house of his sister Premala Shinde as after taking meals at about 09.00 p.m. suddenly rain started. Since, accused Nos. 2 to 5 found lock applied to the channel gate and no movement found inside the house of accused No.1 – Bhima, suspicion raised in their mind. Accordingly, they all (accused Nos. 2 to 5) at about 08.30 p.m. rushed to the Degaloor Police Station and informed the same to PI. Parande, who was present in the police station. He took the entry of the said information in the station diary vide Entry No. 23/2013 and then he along with accused Nos. 2 to 5 came to the spot and after coming to the spot, accused Nos. 2 to 5 along with others saw Rekha and Vaishnavi lying in dead condition in

their house. Accused No.1 – Bhima, after knowing about the incident at Gojegaon, rushed to Degloor along with sister Premala Shinda and others. Soon after his reaching to Degloor, police arrested all of them. They claimed to be innocent. They have not committed the crime of murder of Rekha and Vaishnavi, alleged by the police. Alleged recovery of motorcycle at the instance of accused No.1 – Bhima is false and fabricated recovery. They are innocent and are falsely implicated.

1) Having considered the evidence adduced by the prosecution and defence witnesses examined by the accused, learned Additional Sessions Judge, Biloli, acquitted accused Nos. 2 to 5 of all charges. However, convicted accused No.1 – Bhima for the offence punishable under Section 302 of Indian Penal Code and sentenced him as above and acquitted him for the offences punishable under Sections 143, 498-A, 323, 504, 506 read with Section 149 of IPC.

3. Being aggrieved by the impugned judgment and order, accused No.1 – Bhima preferred present appeal on various grounds mentioned in appeal memo.

4. State has not preferred appeal against the acquittal of accused Nos. 2 to 5 of all charges and acquittal of accused No.1 – Bhima for the charges other than 302 of IPC.

5. Heard Mr. Satyajit S. Bora, learned advocate representing appellant – accused No.1 and Mr. A. S. Shinde, learned APP for State.

6. The case of the prosecution is based on circumstantial evidence. To prove its case, the prosecution has examined in all eight witnesses. Devidas Dattatray Bhutale (PW1) was the first informant and father of deceased Rekha. Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) was a maternal aunt of deceased Rekha. Hariba Pandurang Suryawanshi (PW3) was another maternal uncle of deceased Rekha. Sandeep @ Raju Wamanrao Thadke (PW4) is the panch witness of spot panchanama and cousin uncle of deceased Rekha. Shankar Sangam Sasure (PW5) was the panch witness of disclosure statement and recovery panchanama under which the motorcycle used in crime was seized. Uttam Pandurang Suryawanshi (PW6) was one more maternal uncle of deceased Rekha. Dr. Awanti Dilip Ghodeswar (PW7), was autopsy surgeon who conducted autopsy on the dead body of deceased Rekha and Vaishnavi along with other autopsy surgeons and investigating officer, Hanuman Vitthalrao Parande (PW8), PI, was the investigating officer who investigated the crime and charge-sheeted the appellant and other accused.

7. In addition to aforesaid oral evidence, prosecution has

placed its reliance on FIR at Exhibit-28 and inquest panchanama of deceased Rekha at Exhibit-35. Inquest panchanama of deceased Vaishnavi is at Exhibit-36. Query report at Exhibit-37. Panchanamas regarding seizure of the clothes of accused is at Exhibit-38. Panchanama regarding seizure of the clothes of deceased Rekha and Vaishnavi is at Exhibit-39. Arrest panchanamas of all the accused at Exhibits 41 to 45. So also, prosecution has placed its reliance on spot panchanama at Exhibit-50. Postmortem report of deceased Rekha and Vaishnavi is at Exhibit-59 and Exhibit-60. Preliminary cause of death certification of deceased Rekha and Vaishnavi proved in the evidence of Dr. Awanti Dilip Ghodeswar (PW7), autopsy surgeon at Exhibit-61 and Exhibit-62 and CA reports at Exhibits 7, 8, 46, 47.

8. While taking us through the evidence adduced by the prosecution in its entirety, Mr. Satyajit S. Bora, learned advocate representing the appellant – accused No.1 vehemently argued that there is no eye witness of the incident. The case of the prosecution rests only on circumstantial evidence. When the case rests entirely on circumstantial evidence, prosecution has to prove the circumstances from which an inference of guilt is to be drawn and it must be cogent and firmly established. Those circumstances should be of definite tendency and clearly pointing towards the guilt of the accused and the

circumstances taken collectively should form a complete chain so that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.

9. The case at hand rests on five circumstances viz. motive, discovery and recovery of motorcycle alleged to have been used by the appellant – accused No.1 after committing crime, last seen together, hearing of cries from the house of the appellant – accused No.1 where deceased Rekha and Vaishnavi found dead and both the deceased were in custody of appellant – accused No.1, when they found dead. He contends that, having considered the evidence on record in its totality, it is difficult to come to definite conclusion that it was the appellant – accused No.1 alone who has committed murder of both the deceased Rekha and Vaishnavi. The circumstances brought on record by the prosecution are in the nature of “may be” and not “must be”. Appellant – accused No.1 has given sufficient explanation regarding his whereabouts during the intervening night of 22-07-2013 and 23-07-2013. To prove the defence of alibi, the appellant – accused No.1 has examined his real sister Premala Shinde (DW1). She has categorically stated that appellant – accused No.1 reached to her house on 22-07-2013 at about 08.00 p.m. for taking meals arranged on the occasion of Akhadi Poornima. Nothing could be brought on record through her

cross examination on the basis of which her aforesaid version can be doubted or discarded. The evidence adduced by the prosecution as to the presence of appellant – accused No.1 in the company of both the deceased at his house when the incident took place does not inspire confidence and it is not sufficient to complete the chain of circumstances connecting the appellant – accused No.1 with the incident i.e. murder of Rekha and Vaishnavi.

10. Mr. Satyajit S. Bora, learned advocate representing the appellant – accused No.1 further argued that according to the medical evidence, death of Rekha and Vaishnavi occurred during 02.30 a.m. to 06.30 a.m. on 23-07-2013. The evidence adduced by the prosecution is not at all clear, cogent and sufficient to prove that during the aforesaid period appellant – accused No.1 was present in his house at Degloor. The evidence on record is not credible and is doubtful on the material aspect of presence of appellant – accused No.1 in the house when the incident occurred. The defence of alibi taken by the appellant – accused No.1 and evidence adduced by him to prove the same assumes importance. Most of the portion of disclosure statement at Exhibit-53 is hit by Section 27 of the Evidence Act and inadmissible in nature. Therefore, after excluding inadmissible portion, what remains is only the discovery and recovery of motorcycle and that evidence not at all helps

the prosecution to prove the guilt of the appellant – accused No.1.

11. The appellant – accused No.1 has adduced sufficient evidence in defence that on 22-07-2013 he left Degloor and proceeded to the house of his sister DW1 Premala Shinde, situated at village Gojegaon for attending meals arranged on account of Akhadi Poornima. He reached there at about 08.00 p.m. After taking the meals and attending the pooja, since heavy rain started, on the request of sister Premala, instead of returning back to Degloor he stayed at her house during the intervening night of 22-07-2013 and 23-07-2013 and on next day in pursuance of information received from Degloor he along with Premala and other persons rushed to Degloor from Gojegaon, keeping motorcycle there only. Therefore, discovery and recovery of motorcycle under Section 27 of the Evidence Act in no way helps the prosecution to prove the guilt of the appellant – accused No.1. When evidence adduced by prosecution is not prima facie sufficient to connect the appellant – accused No.1 with the homicidal death of Rekha and Vaishnavi and appellant – accused No.1 has adduced cogent evidence in support of the defence of alibi raised by him, he cannot be held guilty by invoking provisions of Sections 11, 103 and 106 of the Evidence Act. If the appellant – accused No.1 had failed to adduce the evidence as to his

absence in the house when incident occurred, then by resorting to Section 11 and 106 of the Evidence Act, the appellant – accused No.1 could have held guilty. Since the appellant – accused No.1 has come with specific defence and adduced sufficient evidence to prove his defence, it cannot be held that both the deceased were in his custody and therefore, he alone is responsible for their murder.

12. Mr. Satyajit S. Bora, further argued that from one and the same set of evidence accused Nos.2 to 5 have been acquitted for all the charges including the charge under Section 302. The appellant – accused No.1 cannot be held guilty for the offence of murder of his wife Rekha and daughter Vaishnavi relying on the same evidence, when it is not at all sufficient to prove unbroken chain of circumstances leading only to the hypothesis about his guilt. Therefore, the appeal deserves to be allowed.

13. In support of his submissions Mr. Satyajit S. Bora, learned advocate, has placed his reliance on as many as five citations viz. :-

- 1) ***Reena Hazarika Vs. State of Assam [(2019) 13 SCC 289]***
- 2) ***Digamber Vaishnav and Ors. Vs. State of Chhattisgarh [(2019) 4 SCC 522]***
- 3) ***Gargi Vs. State of Haryana [(2019) 9 SCC 738]***
- 4) ***State of Rajasthan Vs. Mahesh Kumar & Ors. [(2019) 7 SCC 678]***
- 5) ***Kusal Toppo & Ors. Vs. State of Jharkhand [(2019) 13 SCC 676]***

14. Per contra Mr. A. S. Shinde, learned APP vehemently argued that the case of the prosecution is based on circumstantial evidence. The evidence adduced by the prosecution is very much clear, cogent and sufficient to prove all the circumstances viz. both the deceased were in custody of the appellant – accused, Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) had seen the appellant accused and deceased Vaishnavi together lastly on 22-07-2013 at about 04.00 to 04.30 p.m., on 22-07-2013 at about 10.00 to 10.30 p.m. Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) heard the sound of quarrel and cries from the house where Rekha and Vaishnavi used to reside with appellant – accused No.1, on next day morning at about 07.00 to 07.30 p.m. Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) and Hariba Pandurang Suryawanshi (PW3) noticed that house of appellant accused where he was residing along with wife Rekha and daughter Vaishnavi was locked from outside and no sound was coming from inside and Rekha was not responding to the call given, after broke opening the lock and entering in the house along with police, Rekha and Vaishnavi found lying in the bed room of their house in dead condition, appellant – accused No.1 was not found in the house, illicit relations of appellant – accused No.1 with accused No.5 – Asha who happens to be the wife of his real brother Ram.

15. Learned APP further submitted that the evidence of PW1 to PW8 inspires confidence as to the guilt of the appellant – accused No.1. It is clear from the testimony of Sandeep @ Raju Wamanrao Thadke (PW4) and DW1 Premala that the house belonging to the accused was consisting of seven rooms. Initially both the brothers i.e. Ram and Bhima along with their wives, mother and unmarried sister used to reside together. However, four to five months prior to the incident they started residing separately. Bhima i.e. appellant – accused No.1 used to reside with his wife and daughter in eastern three rooms whereas Ram along with his wife, mother and sister used to reside in western four rooms. When it is abundantly clear from the evidence adduced by the defence itself that the house where dead bodies of Rekha and Vaishnavi found was separate house of appellant – accused No.1 Bhima, burden lies on him to give proper explanation as to the death of his wife and daughter. The defence of appellant – accused No.1 that when incident took place, he was at Gozegaon, 30 km away from Degloor and thief might have entered in the house in the midnight and killed Rekha and Vaishnavi is not at all plausible and probable.

16. Circumstances are clear enough to establish that quarrel used to take place between the appellant – accused No.1 and deceased Rekha as appellant was having illicit relation with accused No.5 – Asha.

As usual on 22-07-2013 quarrel took place between husband and wife over the said issue. After the quarrel, during midnight, appellant accused first killed his wife Rekha by throttling her neck and then killed daughter Vaishnavi by throttling her neck so as to wipe out the evidence of his killing Rekha and then left the house, locked the same from outside and went to Gojegaon at his sister's house. Absolutely there is no evidence on record showing that somebody else has any grudge against Rekha and Vaishnavi. Therefore, question of causing death of Rekha and Vaishnavi by third person does not arise. When there is no evidence showing that something was stolen from the house, question of thief entering in the house during night and causing death of Rekha and Vaishnavi as they tried to catch hold of him, does not arise.

17. In the written statement submitted by the appellant – accused No.1, it is alleged that on 22-07-2013 appellant accused left the house from southern side door. After his leaving, Rekha bolted the said door from inside. Thereafter appellant – accused No.1 applied lock to the northern side main door, so also, to the channel gate and kept the keys near *Tulsi Vrundawan* and proceeded to Gojegaon on the motorcycle. When, after appellant accused left the house, Rekha chained door from inside, question of entering of third person in the house from the back side or southern side door does not arise, as such,

except the appellant – accused No.1, finger cannot be raised against anybody else.

18. He further submits that, whatever explanation given by the appellant – accused No.1 is not at all believable. The defence of alibi is false and after thought. DW1 Premala being real sister of appellant – accused No.1, it is not proper and legal to rely on her evidence and hold the appellant accused not guilty accepting the defence of alibi. The learned Additional Sessions Judge, Biloli, has appreciated the evidence on record in proper perspective and rightly held the appellant accused guilty for the murder of his wife and daughter Vaishnavi. Therefore, appeal is liable to be dismissed.

19. In support of his submission Mr. A. S. Shinde, learned APP has placed reliance on five citations as under :-

- 1) ***Ratnesh Kumar Pandey Vs. State of Uttar Pradesh [2015 DGLS (SC) 61]***
- 2) ***Trimukh Maroti Kirkan Vs. State of Maharashtra [2006 DGLS (SC) 849]***
- 3) ***State of Rajasthan Vs. Kashi Ram [2006 DGLS (SC) 957]***
- 4) ***Vijay Pal Vs. State (GNCT) of Delhi [2015 DGLS (SC) 270]***
- 5) ***Jayantibhai Bhenkarbhai Vs. State of Gujarat [2002 DGLS (SC) 790]***

20. In a murder case, first and foremost issue needs to be dealt with is pertaining to the nature of death of the deceased. According to

the prosecution, deceased Rekha and Vaishnavi died of homicidal death. To prove the same, prosecution has relied upon inquest panchanamas at Exhibit-35 and Exhibit-36 and postmortem reports at Exhibit-59 and Exhibit-60. Accused have not disputed genuineness of both the inquest panchanamas, and prosecution has proved postmortem reports by examining Dr. Awanti Ghodeswar, Medical Officer.

21. According to Dr. Awanti Ghodeswar (PW7) on 23-07-2013 at about 06.15 p.m. dead bodies of Rekha and Vaishnavi were brought to the Sub District Hospital, Degloor, where she was attached as Medical Officer, by constable Tidake along with requisition for conducting postmortem. She along with Dr. R. B. Borade conducted postmortem on both the dead bodies. During the postmortem conducted on the dead body of Rekha following surface wounds and injuries were found on her person :-

“Face : one pressure abrasion of 5x3 cm of reddish brown colour is present over the right cheek over zygomatic region.

On left cheek, two abrasions of cresintic shape of 0.5x1 cm, reddish colour, present just in front of left pinna. One cresintic shaped abrasion of 0.5x1 cm present over the left ear. Most probably of nail.

Neck : Multiple bruises of variable sizes are present over the front and back of neck of reddish purple colour. Subcutaneous tissues shows echomatic patches.

On left elbow, reddish colour scratch abrasion present.

On dorsal aspect of fingers of left hand, contusion present of reddish colour. Subcutaneous tissues shows echimuses ”

“ One pressure abrasion 5 x 3 cm. Reddish brown coloured is present over the right cheek over zygomatic region. On left side cheek, two abrasions of cresintic shape of size 0.5 x 1 cm. Reddish in colour, and in front of left pinna, there was one more cresintic shape abrasion 0.5 x 1 cm. On left ear. Most probably of nail, over neck, multiple bruises of variable sizes are present on front and back of neck, which are reddish, purple colour. On detection, subcutaneous tissues shows cresintic patches. On left elbow region, one reddish colour abrasion is present. On dorsal aspect of fingers of left hand, contusion present, which is of reddish colour. On detection, subcutaneous tissues shows echomatic patches.

These were the injuries found at the time of post-mortem. From the appearance and from detection, all the injuries mentioned above are ante-mortem. As per the post mortem examination, cause of death is “Cardeo Respiratory Arrest due to asphyxia most probably due to throttling”. The post mortem report now referred to me, it is in my handwriting. It bears my signature. Contents are true and correct. It is at Exh-59”

All the aforesaid injuries were ante-mortem in nature and cause of death was cardio respiratory arrest due to asphyxia most probably due to throttling.

22. During the postmortem conducted on the dead body of Vaishnavi, following surface wounds and injuries found on her person :-

“ On Right side of cheek, bruises (bluish) of variable sizes are present. Echimotic patches are seen in subcutaneous tissues. Bluish – purple bruises are present all over the neck and front side. On chest, on right side bluish purple coloured bruise is present. In right axilla, bruise is present of bluish purple coloured. On right thigh region in minor aspect of mid thigh bluish purple coloured bruise is present. There is a scratch abrasion present over the left calf region of red colour”

All the aforesaid injuries were ante-mortem in nature and probable cause of death of Vaishnavi was cardio respiratory arrest due to asphyxia due to throttling.

23. Aforesaid injuries/wounds on the dead bodies of Rekha and Vaishnavi, proved in the evidence of Dr. Awanti Dilip Ghodeswar (PW7), Autopsy surgeon, are corroborated by inquest panchanamas at Exhibit-35 and Exhibit-36 and postmortem report at Exhibit-59 and Exhibit-60 respectively. Dr. Awanti Dilip Ghodeswar (PW7) in her examination-in-chief itself clearly stated that death of both the victims is possible if neck is pressed.

24. No doubt, during the cross examination, Dr. Awanti Dilip Ghodeswar (PW7), autopsy surgeon has stated that if neck is pressed

sometimes, dark coloured liquid oozes from both the nostrils. Such a dark coloured liquid was not found oozing from the nostrils of both the dead persons, however, froth found oozing from the mouth of deceased Vaishnavi. Merely for the reason of dark coloured liquid not found oozing from the nostrils of dead persons, her consistent evidence as to the cause of death cannot be discarded, since she has made it clear that in every case of death due to throttling of neck, oozing of dark coloured liquid from the nostrils is not necessary.

25. It is true that during postmortem, Dr. Awanti Dilip Ghodeswar (PW7), autopsy surgeon did not preserve nail clipping and hyoid bones of both the deceased but that alone cannot be the ground to discard opinion about cause of death of deceased Rekha and deceased Vaishnavi, since scratch marks of nail were found on their neck and Dr. Awanti Dilip Ghodeswar (PW7) has stated the same in her cross examination and she has denied the suggestion that in the absence of report of anatomy expert and hysto-pathology expert, cause of death of Rekha and Vaishnavi cannot be ascertained. As there is a clear-cut medical evidence about starting of vase-vagal due to throttling, the contention of appellant – accused No.1 that vase-vagal started due to sever shock holds no water.

26. From the aforesaid evidence of Dr. Awanti Ghodeswar – autopsy surgeon coupled with inquest panchanamas at Exhibit-35 and Exhibit-36 and postmortem report at Exhibit-59 and Exhibit-60, it is clear that deceased Rekha and deceased Vaishnavi both suffered homicidal death.

27. It is a matter of record that in all five accused including appellant – accused No.1 were charged with and tried for offences punishable under Sections 143, 498A, 302, 323, 504 and 506 read with Section 149 of Indian Penal Code and after trial, accused Nos. 2 to 5 who are the brother, mother, sister and sister-in-law (wife of elder brother) of the appellant – accused No.1, have been acquitted of all the charges and appellant – accused No.1 alone is convicted for the offence punishable under Section 302 of IPC and acquitted of other charges. Admittedly, while framing the charge at Exhibit-19 for the aforesaid offences alternate charge under Section 302 read with Section 34 of IPC was not framed.

28. Appellant – accused No.1 has not raised any objection regarding irregularity or infirmity in the charge at Exhibit-19. During course of arguments, learned advocate Mr. S. S. Bora has not raised objection on the aspect of any prejudice being caused to the appellant – accused No.1 due to defective charge or due to not framing of alternate

charge under Section 302 read with Section 34 of IPC.

29. In a matter of State of ***Andhra Pradesh Vs. Thakkidiram Reddy, [1998 AIR (Supreme Court) 2702]***, Hon'ble Supreme Court held that when objections pertaining to infirmities in framing the charge was not raised in the trial Court and on the contrary material witness of prosecution were cross examined on all aspects, it cannot be said that prejudice was caused to the appellant accused by irregularities and infirmities caused in framing the charge.

30. In the matter of ***Mohan Singh Vs. State of Bihar [(2011) 9 Supreme Court Cases 272]***, Hon'ble Supreme Court held that when accused has clear notice and ample opportunities to defend himself and no grievance is raised by him at any earlier stage of proceeding regarding defect or omission in charge, he cannot be said to have caused prejudice due to omission in charge. In the matter of ***Chinnam Kameshwara Rao and Ors Vs. State of Andhra Pradesh [(2013) 12 Supreme Court Cases 689]***, Hon'ble Supreme Court held that it is only for the accused to plead and satisfactorily demonstrate that the prejudice had indeed resulted from the omission of charge under Section 34, in that case, any such omission may assume importance.

31. In the case at hand, appellant – accused No.1, during the

trial, neither pleaded nor satisfactorily demonstrated that prejudice was caused to him due to defective charge or due to non framing of alternate charge under Section 302 of IPC. Record speaks volumes that appellant accused was having clear notice of the fact that allegation of murder of wife Rekha and daughter Vaishnavi are made against him. Adequate opportunity was given to appellant – accused No.1 to defend himself. He has cross examined all the prosecution witnesses thoroughly on all aspects and also adduced oral evidence to substantiate his defence of alibi. Therefore, merely on the ground that there are irregularity and infirmities in charge at Exhibit-19 and no alternate charge under Section 302 read with Section 34 came to be framed, it cannot be said that charge at Exhibit-19 caused prejudice to the appellant – accused No.1 in any manner, when appellant – accused No.1 has not raised any objection pertaining to the same.

32. The case of the prosecution is based on circumstantial evidence only. The material circumstances relied upon by the prosecution are that :-

- 1) Both the deceased Rekha and Vaishnavi were in the exclusive custody of appellant – accused No.1.
- 2) On 22-07-2013 at about 4:00 to 4:30 p.m. appellant – accused No.1 and deceased Vaishnavi were lastly seen together.

3) On 22-07-2013 at about 10:00 to 10:30 p.m. sound of quarrel coming from the house of appellant – accused No.1 was heard by the witnesses.

4) Recovery of motorcycle at the instance of appellant – accused No.1.

5) Motive is that the appellant was having illicit relations with Asha (elder brother's wife).

6) The conduct of the appellant – Accused No.1 after the incident.

33. Prior to dealing with aforesaid circumstances, we would like to note down the facts which are not in dispute and they are as follows :

1) The marriage of deceased Rekha with appellant – accused No.1 Bhima was solemnized on 06-07-2007.

2) The house situated in Line Galli, Degloor was built prior to their marriage.

3) After two years of marriage, Rekha and her husband i.e. appellant were blessed with daughter Vaishnavi.

4) Dead bodies of Rekha and Vaishnavi were found in eastern portion of the house situated in Line Galli, Degloor.

34. In the light of aforesaid admitted facts and the submissions

made at length by the advocates representing both the sides, now we will take up aforesaid material circumstances one by one for consideration :-

Deceased Rekha and Vaishnavi Were In The Exclusive Custody Of Appellant – Accused No.1.

35. The trial, before the learned Additional Sessions Judge, Biloli was conducted against all five accused including appellant. After closure of the evidence by the prosecution, all the accused during the course of their statements recorded under Section 313 of Code of Criminal Procedure, 1973, have filed exhaustive common written statement at Exhibit-71. In the said written statement they have contended that marriage of accused No.5 – Asha with accused No.2 – Ram was solemnized in the year 2003. Prior to marriage of Asha with Ram, father of Asha by name Baliram Gopalrao Sorate had purchased the plot in Line Galli, Degloor, where accused built the house subsequently, under registered sale deed dated 24-12-2002 for Asha in her name. The house built on the said plot by the accused subsequently was consisting of seven rooms. After few months of marriage, appellant – accused No.1 along with wife Rekha started residing separately in eastern side three rooms of the aforesaid house and accused Nos. 2 to 5 continued to reside in western side four rooms.

36. Premala Shinde (DW1) in her evidence at Exhibit-75 deposed the same. The evidence of Premala Shinde DW1 on the aforesaid aspect has not been shattered during the course of cross examination. On the contrary, during the cross examination, she was suggested that after partition of joint family property house by name Anna Niwas situated in Line Galli, Degloor, was constructed and both the brothers i.e. Bhima and Ram started residing there separately and Premala Shinde (DW1) has admitted the said suggestion. This suggestion given to Premala Shinde (DW1) negatives the case, made out in FIR at Exhibit-28 that deceased Rekha and Vaishnavi, from beginning till last used to reside with husband and in-laws (accused Nos. 2 to 5) in their joint family.

37. Though Sandeep @ Raju Wamanrao Thadke (PW4) has not specifically deposed that since four to five months prior to the incident Ram and Bhima started residing separately, however, considering the relevant portion of his statement under Section 161 of Code of Criminal Procedure, which he has admitted in cross examination, it becomes clear that since last four to five months prior to the incident Ram and Bhima started residing separately. Sandeep @ Raju Wamanrao Thadke (PW4) being paternal uncle of Rekha, his aforesaid admission given in cross examination inspires confidence about separate living of appellant –

accused No.1 with his wife Rekha and daughter Vaishnavi when incident took place.

38. Like Sandeep @ Raju Wamanrao Thadke (PW4), Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) who happens to be the maternal aunt of Rekha has also stated the same to the police during the course of her statement recorded under Section 161. However, in her evidence at Exhibit-30, she has denied the same stating that she does not know how it appeared in her statement before police. Thus, from her conduct, it appears that, so as to make her evidence consistent with the case of prosecution that Rekha along with her daughter Vaishnavi used to reside with all the accused in their joint family, avoided to admit her aforesaid statement made before police.

39. Like Mrs. Abhishakta w/o Prakash Suryawanshi (PW2), Devidas Dattatray Bhutale (PW1), first informant and father of Rekha, also avoided to state on the aspect that appellant – Accused No.1 used to reside separately with his wife Rekha and daughter Vaishnavi from his mother, unmarried sister, brother and sister-in-law (brother's wife), in eastern portion of Anna Niwas where the incident took place, stating that he does not know anything about separate residence of appellant – accused No.1 with his family and Ram with his wife, mother and

unmarried sister in Anna Niwas. He has also avoided to answer the suggestion that appellant – accused No.1 along with his wife Rekha and daughter Vaishnavi started residing in eastern three rooms whereas Ram with his wife, mother and unmarried sister started residing in remaining western side rooms, saying that he does not know.

40. Spot panchanama at Exhibit-50 proved in the evidence of Sandeep @ Raju Wamanrao Thadke (PW4) demonstrates that the incident of homicidal death of Rekha and Vaishnavi took place in eastern part of Anna Niwas situated in Line Galli, Degloor. It is pertinent to note that in the hand sketch drawn at page No.4 of the spot panchanama, nothing is shown at western portion of the said house and while narrating the boundaries, instead of stating remaining part of the Anna Niwas, house of one Prakash Pandurang Suryawanshi has been shown on western side. In fact the said house appears to be adjacent to the western side of entire Anna Niwas. Upon going through the contents of spot panchanama and evidence of Sandeep @ Raju Wamanrao Thadke (PW4) in the evidence of which it has been proved, it can be gathered very well that the eastern three rooms of Anna Niwas, where the appellant along with wife Rekha and daughter Vaishnavi used to reside, was distinct and separate in all respect. The investigating officer, Hanuman Vitthalrao Parande (PW8), PI, during his cross examination

has admitted that spot shown in spot panchanama Exhibit-50 consists of three rooms. If all the accused along with deceased Rekha and Vaishnavi were residing together in Anna Niwas, then the entire Anna Niwas would have been shown as a spot of incident instead of showing eastern separate block of three rooms, in the hand sketch drawn at page No.4 of spot panchanama at Exhibit-50.

41. Thus, having regard to the totality of evidence discussed above, we have no hesitation to hold that about four to five months prior to the incident appellant Bhima and his brother Ram (accused No.2) divided the house Anna Niwas between them. In the said division, eastern three rooms were allotted to appellant – accused No.1 Bhima and western four rooms were allotted to Ram and since then appellant – accused No.1 Bhima along with his family i.e. wife Rekha and daughter Vaishnavi started living separately in eastern side of “Anna Niwas” a self contended block consisting of three rooms. Thus, it is proved tat deceased Rekha and Vaishnavi were in the custody of appellant – accused No.1.

Last Seen Together And Hearing Of Sound Of Quarrel From The House Of The Appellant – Accused No.1 :-

42. It is the case of the prosecution that, Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) had seen the appellant – accused No.1 and

deceased Vaishnavi together at about 04:00 p.m. to 04:30 p.m. on 22-07-2013 near their house and then on very day at about 10:00 p.m. to 10:30 p.m. heard the sound of quarrel from the house of the appellant – accused, whereas it is the defence of the accused that on 22-07-2013 at about 04:00 p.m. to 04:30 p.m. the appellant – accused No.1 carried deceased Vaishnavi (his daughter) to the house from school on motorcycle and then at about 07:00 p.m. to 07:30 p.m. left the house and proceeded to house of his sister Premala Shinde (DW1) situated at village Gojegaon for enjoying meals arranged on the occasion of Aakhadi Poornima in pursuance of the invitation given by sister Premla. Since it was night time, he left the house from back side door and closed the front door from outside and applied the lock. After his leaving the house from back side door, his wife Rekha closed and latched the said door from inside. The appellant – accused No.1 has contended the same in his written-statement at Exhibit-71.

43. Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) vide her deposition at Exh.30 clearly deposed as to her firstly seen the appellant – accused No.1 and deceased Vaishnavi together on 22-07-2013 near their house at about 04:00 p.m. to 04:30 p.m. and secondly on very day at about 10:00 p.m. to 10:30 p.m. heard the sound of quarrel from the house of the appellant – accused No.1. Since the appellant – accused in

his written statement at Exhibit-71 filed under Section 313 (1)(b) of the Code of Criminal Procedure, 1973, (hereinafter referred as “Cr.P.C.”) has admitted fact of his bringing daughter Vaishnavi to the house at about 04:00 p.m. to 04:30 p.m. from her school on motorcycle, the only question remains as to his presence in the house thereafter. If the substantive evidence of Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) is accepted, then the contention of the appellant – accused that on 22-07-2013 at about 07:00 p.m. to 07:30 p.m. he left the house for proceeding to Gojegaon, as stated above, is washed out. The testimony of Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) on aforesaid aspect is that, on 22-07-2013 there was a Aakhadi Poornima, therefore, at about 04:00 p.m. to 04:30 p.m. she was proceeding to the temple of God Hanuman for Darshan. On the way to the temple the appellant – accused No.1 and deceased Vaishnavi met her. They were on motorcycle. After returning from the temple took dinner and then at about 10:00 p.m. to 10:30 p.m. when she came outside to close the gate of her house she heard sound of quarrel being taken place in the house of the appellant – accused No.1. Admittedly, her house situates adjacent to the west of ‘Anna Niwas’ i.e. the house of the appellant- accused. This testimony of Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) is unshaken and consistent on the material aspect of her hearing the sound

of quarrel from the house of the appellant – accused No.1 at about 10:00 p.m. to 10:30 p.m. on 22-07-2013, where admittedly the appellant - accused used to reside only with wife Rekha and daughter Vaishnavi. The omission, which has been brought on record through her cross-examination, is only to the limited extent of her coming outside the house for closing the gate. It is pertinent to note that, after recording the statement under Section 161 of the Cr.P.C. on 31-07-2013 her statement under Section 164 of the Cr.P.C. was recorded by the learned Judicial Magistrate First Class, Billoli. It is at Exhibit-31. It has been proved in her evidence. That statement also corroborates to her version that on the day of Aakhadi Poornima i.e. on 22-07-2013 she heard the sound of quarrel and cries of deceased Rekha. It is true that the reason for Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) coming outside the house at about 10:00 p.m. on 22-07-2013 stated in Exhibit-31 is different than the reason stated by her in her testimony. In statement under Section 164 of Cr.P.C. at Exhibit-31 she states that at the aforesaid time she had come outside her house for proceeding to latrine, but in any way her version as to her hearing the sound of quarrel from the house of the appellant – accused No.1 at about 10:00 p.m. to 10:30 p.m. remains consistent.

44. The testimony of Mrs. Abhishakta w/o Prakash Suryawanshi

(PW2) on the aforesaid aspect of her hearing sound of quarrel and cries of Rekha from her house where she used to reside along with husband (appellant) and daughter Vaishnavi at about 10:00 p.m. on 22-07-2013 gets corroboration from the testimony of Hariba Pandurang Suryawanshi (PW3). In his deposition at Exh.32 he deposed that, on 23-07-2013 in the morning hours in pursuance of the phone call received from one Shivaji Patil he rushed to the house of the appellant- accused and on his coming there he learnt from Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) who happens to be the wife of his younger brother that yesterday she had heard the quarrel taking place between the appellant – accused and deceased Rekha. This statement of Hariba Pandurang Suryawanshi (PW3) inspires confidence of aforesaid testimony of Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) that she heard the sound of quarrel and cries of Rekha coming from the house of the appellant – accused No.1 on 22-07-2013 at about 10.00 p.m. to 10.30 p.m.

45. It is pertinent to note that, statements of Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) under Section 161 and 164 of the Cr.P.C. were recorded shortly after the incident and lodging FIR by Devidas Dattatray Bhutale (PW1) who happens to be the father of deceased Rekha, whereas written-statement at Exhibit-71 came to be filed at the time of recording statement of accused under Section 313 of

Cr.P.C. which came to be recorded after about 16 months of incident, therefore, it would be risky to place reliance on the defence version. Since the aforesaid version of Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) is consistent and confidence inspiring, no reason to discard the same by keeping reliance on the written-statement at Exhibit-71. The moment the aforesaid evidence of Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) is accepted, the defence of the appellant-accused that on 22-07-2013 after 07:00 p.m. to 07:30 p.m. he left the house holds no water and cannot be accepted.

46. In addition to filing written-statement at Exhibit-71 during the course of statements under Section 313 of Cr.P.C., the appellant – accused No.1 has examined his real sister Premala Shinde (DW1) as defence witness. Premala Shinde (DW1) vide her deposition at Exhibit-75 deposed that on the day of incident there was Aakhadi Poornima. On that day at about 08:00 p.m. the appellant – accused No.1 (her brother) came to her house situated at village Gojegaon on motorcycle for taking special meals arranged by her on the occasion of Aakhadi Poornima. After meals, due to heavy rains, on her request the appellant – accused No.1 stayed at her house during night. On next day at 12:00 noon mother Samundrabai @ Sumitrabai (accused no.3) made a telephone call and informed the appellant – accused that his wife and daughter are

no more. Accordingly, the appellant – accused No.1 along with 4 to 5 persons including she herself came to Degloor and directly proceeded to the police station and upon coming to the police station, police arrested all the accused.

47. Spot panchanama Exhibit-50 makes it clear that on 23-07-2013 at about 12.05 p.m. Investigating officer, Hanuman Vitthalrao Parande (PW8), PI in presence of panchas, accused Nos. 2 to 5 and Devidas Bhutale (PW1) broke open the lock applied to the house of appellant – accused No.1. Appellant – accused No.1 has not disputed the same seriously. Panch witness Sandeep @ Raju Wamanrao Thadke (PW4) was not cross examined on this aspect. Having regard to the totality of evidence discussed above it becomes clear that on 22-07-2013 till 10:00 p.m. to 10:30 p.m. appellant – accused No.1 was present in his house.

48. Dr. Awanti Ghodeswar (PW7), Autopsy Surgeon opined that death of victims i.e. Rekha and Vaishnavi caused either during midnight of 22-07-2013 and 23-07-2013 or early in the morning of 23-07-2013. By placing reliance on the said statement of autopsy surgeon, Mr. Bora, learned advocate, strenuously argued that the prosecution must prove the presence of the appellant – accused No.1 in the house at midnight or

early in the morning as stated above i.e. when incident of homicidal death of Rekha and Vaishnavi took place. It is true that the ocular evidence of Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) demonstrates presence of the appellant – accused No.1 till 10:00 p.m. to 10:30 p.m. of 22-07-2013 and not thereafter, but only on that count clean chit cannot be given to the appellant – accused No.1. Upon going through paragraph No.4 of the written statement at Exhibit-71, submitted by all the accused including appellant – accused No.1 with their signatures, during the course of statement recorded under Section 313 of Cr.P.C., it becomes clear that on 22-07-2013 after his leaving the house from southern back side door deceased Rekha closed and latched the same from inside. When appellant had locked the main front door of the house from outside and deceased Rekha closed the back side door and chained the same from inside, question of some third person entering the house after appellant's proceeding to Gojegaon, not at all arises. Thus, aforesaid fact pleaded in written statement falsifies the defence of the appellant – accused No.1 that during the intervening night of 22-07-2013 and 23-07-2013, he was at the house of his sister Premala Shinde (DW1) situated at Gojegaon and not at his house.

49. When it is clear enough on totality of evidence discussed above that appellant – accused No.1 was present in his house when

homicidal death of Rekha and Vaishnavi took place, then his defence that a thief or a third person committed the murder of Rekha and Vaishnavi becomes futile.

50. It is true that in panchnama Exhibit-50 nothing is stated about position of back side door (whether it was open or closed). The investigating officer, Hanuman Vitthalrao Parande (PW8), PI, has also not stated anything about the same but when appellant – accused No.1 himself in paragraph 4 of the written-statement Exhibit-71 clearly states that after his leaving Rekha closed backside door and latched the same from inside, in any angle defence of the appellant about committing murder of the Rekha and Vaishnavi by third person cannot be accepted.

51. Record and proceedings shows that during the course of investigation on 27-07-2013 statement of Premala Shinde (DW1) under Section 161 of Cr.PC. was recorded by I.O. Though she was material prosecution witness, learned APP did not examine her for the reason best known to him. Taking undue advantage of the same, accused have examined her as defence witness. Learned APP, while conducting the cross examination of Premala Shinde (DW1), ought to have confronted her previous statement, recorded under Section 161 of Cr.PC. and ought to have proved confronted portion by recalling investigating officer,

Hanuman Vitthalrao Parande (PW8), PI, the author of her statement recorded under Section 161 of Cr.P.C. The learned APP has erred in not doing so.

52. Had there been no written statement Exhibit-71 covering the fact that after leaving of appellant – accused No.1, Rekha closed backside door and chained the same from inside, then the testimony of Premala Shinde (DW1) would have helped the appellant – accused No.1 in establishing his defence of alibi on the yardstick of preponderance of probability, but when his own written statement at Exhibit-71 clearly demonstrates that after his leaving the house there was no scope for anybody to enter therein. Therefore, from any angle, defence of appellant – accused No.1 cannot be accepted.

Matrimonial Relations Between Appellant – Accused No.1 viz-a-viz Motive

53. According to the prosecution, matrimonial relations between appellant – accused No.1 and deceased Rekha were not cordial. Deceased Rekha was being harassed mentally not only on account of non-fulfillment of demand of money but also by way of developing illicit relations with brother's wife Asha (accused No.5). It is evident from record that marriage of deceased Rekha with appellant – accused No.1 was solemnized in the year 2007. After about two years of marriage, the

couple blessed with daughter Ashwini @ Vaishnavi. Ocular evidence of Devidas Dattatray Bhutale (PW1), Mrs. Abhishakta w/o Prakash Suryawanshi (PW2), Hariba Pandurang Suryawanshi (PW3), Sandeep @ Raju Wamanrao Thadke (PW4), who are father, wife of paternal uncle, paternal uncle and cousin paternal uncle respectively, clearly demonstrates about strained relations between appellant – accused No.1 and deceased Rekha for the reasons of non-fulfillment of demand of money and husband's developing illicit relations with brother's wife Asha – accused No.5.

54. Devidas Dattatray Bhutale (PW1) vide his deposition at Exhibit-27, in clear words, deposed that his wife died long back. He had arranged the stay of deceased Rekha at the house of his brother-in-law at Degloor for delivery. When he visited the house of brother-in-law at Line Galli, Degloor, at that time, after seeing him Rekha started weeping and on his asking the reason for weeping she told him about illicit relations between her husband (appellant – accused No.1) and his brother's wife Asha (accused No.5). On knowing the same, he along with his brother-in-law gave understanding to him. His evidence on the material aspect of illicit relations between appellant – accused No.1 and Asha (accused No.5) has not been shattered during the course of cross-examination conducted by appellant and other accused.

55. It is true that FIR at Exhibit-28 lodged by Devidas Dattatray Bhutale (PW1) shortly after reaching to the Degloor on knowing about the incident is silent on the aspect of illicit relations between appellant – accused No.1 and Asha (accused No.5). However, the same is depicted in his supplementary statement recorded on 29-07-2013. In cross-examination, Devidas Dattatray Bhutale (PW1) has stated that at the time of filing the complaint he was knowing about illicit relations between appellant – accused No.1 and Asha – accused No.5, however, he had forgotten the same. Therefore, it is missing in his complaint at Exhibit-28. This is a plausible explanation. Since he went in shock after seeing dead bodies of daughter and grand daughter, it was not expected on his part to recollect all the relevant facts and narrate the same. After coming out of shock he realised that the fact of illicit relationship between appellant – accused No.1 and Asha – accused No.5, which deceased Rekha has disclosed him, was not narrated to police while lodging the complaint / FIR and, therefore, by way of supplementary statement he informed the same to the police. It is pertinent to note that no suggestion was given to Devidas Dattatray Bhutale (PW1) during his cross examination stating that his aforesaid statement pertaining to illicit relations between appellant – accused No.1 and Asha – accused No.5 is concocted and after thought. In such circumstances, it would

not be proper and legal to discard substantive evidence of Devidas Dattatray Bhutale (PW1), on the aspect of illicit relations between appellant – accused No.1 and Asha – accused No.5 which he learned from deceased Rekha herself, for the reason that it appears in the supplementary statement and not in FIR.

56. It is true that prior to the incident of death of Rekha and Vaishnavi nobody from maternal side of Rekha lodged complaint against appellant – accused for his aforesaid conduct, but that cannot be the ground to discard the statement of Devidas Dattatray Bhutale (PW1) pertaining to illicit / adulterous relations between appellant – accused No.1 and Asha (accused No.5) and source of knowledge regarding the same. Father never wants that life of his daughter should become more miserable by taking matter, between daughter on one part and husband and in-laws of daughter on other part, to the police. He always tries to pacify such matter / dispute, by giving understanding. Therefore, in any angle evidence of Devidas Dattatray Bhutale (PW1) on the crucial aspect of illicit relations between appellant and Asha cannot be discarded.

57. Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) is also the important witness on the aspect of motive i.e. illicit relations between appellant – accused No.1 and Asha (accused No.5). Vide her

deposition at Exhibit-30 she has very clearly deposed that after two years of marriage Rekha gave birth to a female child. After delivery, Rekha told her that husband – appellant Bhima is having illicit relations with Asha (accused No.5) and due to the said illicit relations between appellant – accused No.1 and Asha (accused No.5) quarrels used to take place amongst her family members. This substantive evidence of Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) gets full corroboration from her statement at Exhibit-33, recorded under Section 164 of Code of Criminal Procedure, 1973, by the learned Judicial Magistrate, First Class, Biloli, on 31-07-2013 and also by her statement recorded by police under Section 161 of Code of Criminal Procedure, 1973. Nothing is brought on record on the basis of which aforesaid evidence of Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) can be discarded. Abhishakta being wife of maternal uncle, deceased Rekha's sharing worries with her cannot be said to be unnatural. Surprisingly, during the cross examination, suggestion was put to her that Rekha told her about the illicit relations between appellant – accused No.1 and Asha (accused No.5) after her delivery, and she has admitted the said suggestion. This piece of evidence which came on record through cross examination, inspires full confidence and truthfulness of aforesaid testimony of Abhishakta.

58. Like Mrs. Abhishakta w/o Prakash Suryawanshi (PW2), Hariba Pandurang Suryawanshi (PW3) and Sandeep @ Raju Wamanrao Thadke (PW4) have also deposed on the aspect of motive. Hariba Pandurang Suryawanshi (PW3) deposed that one month prior to the death, Rekha met her grandmother and disclosed her about illicit relations between her husband – accused No.1 and Asha (accused No.5). In addition to that Rekha told her grandmother about harassing by all the accused on account of demand of money and requested grandmother to convey the same to his father. Whereas Sandeep @ Raju Wamanrao Thadke (PW4) deposed that there was illicit relations between Bhima – accused No.1 and Asha – accused No.5 and Rekha was ill-treated by the accused on that count. The aforesaid testimony of Hariba Pandurang Suryawanshi (PW3) is corroborated by his statement (Exhibit-33) recorded under Section 164 of Code of Criminal Procedure, 1973, by learned Judicial Magistrate, First Class, Biloli, on 01-08-2013.

59. It is true that whatever Hariba Pandurang Suryawanshi (PW3) learnt about illicit relations between appellant – accused No.1 and Asha – accused No.5, learnt the same not from Rekha but from his mother. Therefore, his evidence to this extent is hearsay. Whereas, the

aforesaid evidence of Sandeep @ Raju Wamanrao Thadke (PW4) is silent as to how and from whom he learned about the illicit relations between appellant – accused No.1 and Asha – accused No.5. Therefore, much importance cannot be given to the evidence of Hariba Pandurang Suryawanshi (PW3) and Sandeep @ Raju Wamanrao Thadke (PW4) but on the basis of their evidence, firmly it can be said that evidence of Devidas Dattatray Bhutale (PW1) and Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) on the aspect of motive i.e illicit / adulterous relations between appellant – accused No.1 and Asha is trustworthy and worthy of credence. Therefore, merely relying on the case made out in the written statement at Exhibit-71 that when marriage of Ram – accused No.2 and Asha – accused No.5 solemnized, appellant was 13 to 14 years old boy, and that Ram – accused No.2 and Asha – accused No.5 used to treat him like their son, which is not supported by other evidence, clear, cogent and consistent evidence of Devidas Dattatray Bhutale (PW1) and Mrs. Abhishakta w/o Prakash Suryawanshi (PW2) cannot be discarded. Thus, relying on their evidence discussed at length, we have no hesitation to hold that prosecution has proved beyond doubts that illicit relations between appellant – accused No.1 and Asha (accused No.5) was the motive for committing murder of Rekha and Vaishnavi

Discovery And Recovery Of Motorcycle Under Section 27 Of The Evidence Act

60. It is not in dispute that after arrest on 23-07-2013, at about 04.00 p.m. in crime No. 143 of 2013 registered on the basis of FIR at Exhibit-28 lodged by Devidas Dattatray Bhutale (PW1) under arrest panchanama at Exhibit-41, appellant – accused No.1 was in police custody till 29-07-2013. According to the prosecution on 26-07-2013, while in police custody, appellant – accused No.1 disclosed about the incident as well as about the place where he had kept his motorcycle. Memorandum of the statement made of appellant – accused No.1 is at Exhibit-53 and panchanama under which motorcycle was discovered and recovered at the instance of appellant – accused No.1 is at Exhibit-54. Prosecution has proved disclosure statement and recovery panchanama both in the evidence of Shankar Sangam Sasure (PW5) who is one out of two panchas of the said discovery and recovery and also in the evidence of investigating officer, Hanuman Vitthalrao Parande (PW8), P.I. Shankar Sangam Sasure (PW5) being panch witness of the aforesaid discovery and recovery is a material witness.

61. In case of *Kausal Toppo and Ors. Vs. State of Jharkhand [(2019) 13 SCC 676]* the Hon'ble Supreme Court while discussing the provision of Section 27 of the Evidence Act in paragraphs No. 20 and 21

held as under :-

“ 20. The law under, Section 27, Indian Evidence Act is well settled now, wherein this court in *Geejaganda Somaiah v. State of Karnataka*, MANU/SC/7211/2007 : (2007) 9 SCC 315, has observed as under:

“As the section is alleged to be frequently misused by the police, the courts are required to be vigilant about its application. The court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the aforesaid section should be seen with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The court has to be cautious that no effort is made by the prosecution to make out a statement of the accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of Section 27 of the Evidence Act”

21. The basic premise of Section 27 is to only partially lift the ban against admissibility of inculpatory statements made before police, if a fact is actually discovered in consequence of the information received from the accused. Such condition would afford some guarantee. We may additionally note that, the courts need to be vigilant while considering such evidences. This Court in multiple cases has reiterated the aforesaid principles under Section 27 of Indian Evidence Act and only utilized Section 27 for limited aspect concerning recovery [refer *Pulukuri Kotayya v. King Emperor*, MANU/PR/0046/1947 : 76 I.A. 65; *Jaffar Hussain Dastagir v. State of Maharashtra*, MANU/SC/0106/1969 : AIR 1970 SC 1934]. As an additional safeguard we may note that reliance on certain observations made in certain precedents of this court without understanding the background of the case may not be sustainable. There is no gainsaying that it is only the ratio which has the precedential value and the same may not be extended to an obiter. As this Court being the final forum for appeal, we need to be cognizant of the

fact that this Court generally considers only legal aspects relevant to the facts and circumstances of that case, without elaborately discussing the minute hyper-technicalities and factual intricacies involved in the trial.”

62. In case at hand, in addition to the statement made by the appellant – accused No.1 pertaining to the discovery of place where he has concealed / kept motorcycle, the panch witness Shankar Sangam Sasure (PW5) has also deposed about confession made by appellant – accused No.1. However, in view of scope of the provision of Section 27 of the Evidence Act, laid down by the Hon’ble Supreme Court in case supra, substantive evidence of Shankar Sangam Sasure (PW5) and investigating officer, Hanuman Vitthalrao Parande (PW8), PI was considered only and only to the extent of discovery and recovery of motorcycle at the instance of appellant – accused No.1 and not at all considered confessional portion admitting the guilt which is hit by Section 25 of the Evidence Act.

63. Shankar Sangam Sasure (PW5) clearly deposed that in his presence and the presence of another panch, appellant – accused No.1 disclosed to the investigating officer, Hanuman Vitthalrao Parande (PW8), PI about the place where he has kept his motorcycle. After recording his disclosure statement appellant – accused No.1, carried them and police to Gojegaon, at the house of his sister and showed the

motorcycle which was kept inside the house and police seized the same by drawing seizure panchanama at Exhibit-54. He withstood the cross examination. Therefore, there is no reason to discard the evidence of Shankar Sangam Sasure (PW5) which is corroborated by the disclosure statement at Exhibit-53, recovery panchanama at Exhibit-54 and substantive evidence of investigating officer, Hanuman Vitthalrao Parande (PW8), PI., which proves beyond doubt that the motorcycle which appellant – accused No.1 had used after commission of crime was discovered and recovered at his instance.

Conduct Of The Appellant – Accused No.1 As To The Incident :-

64. It is clear from the evidence on record that appellant – accused No.1 came to Degloor on 23-07-2013 at about 02.00 p.m. from Gojegaon along with Premala Shinde (DW1) and others. His contention that at about 12.00 p.m. on 23-07-2013, first time he came to know about death of his wife Rekha and daughter Vaishnavi, on receiving call from his mother, cannot be believed and accepted. Record shows that he was running jewelry shop. In normal course shops at taluka place are opened at 09:00 to 09:30 a.m. Therefore, he would not have remained at Gojegaon till noon. Thus, his conduct of not returning back to the Degloor from Gojegaon till afternoon of 23-07-2013 amounts to unnatural conduct.

65. Having regard to the totality of evidence as discussed in paragraph supra at length, it is abundantly clear that matrimonial relations between appellant and his wife were incordial. Quarrels used to take place between them over the issue of his developing illicit relations with brother's wife Asha (accused No.5). On 22-07-2013 at about 10:00 p.m. to 10:30 p.m. quarrel as usual took place between them. After the quarrel, during midnight or early in the morning, appellant – accused No.1 first committed murder of wife Rekha by throttling her neck and in order to leave no evidence, he committed murder of daughter Vaishnavi by throttling her neck. He then left the house after locking the door and went to Gojegaon to his sister's house riding on his motorcycle. The evidence on record discussed at length proves the guilt of the accused beyond any reasonable doubt.

66. In the case of *Reena Hazarika Vs. State of Assam [(2019) 13 SCC 289]*, Hon'ble Supreme Court while dealing with law regarding circumstantial evidence held as under:

“ 8. The essentials of circumstantial evidence stand well established by precedents and we do not consider it necessary to reiterate the same and burden the order unnecessarily. Suffice it to observe that in a case of circumstantial evidence the prosecution is required to establish the continuity in the links of the chain of circumstances, so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent

or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. Mere invocation of the last seen theory, sans the facts and evidence in a case, will not suffice to shift the onus upon the accused under Section 106 of the Evidence Act, 1872 unless the prosecution first establishes a prima facie case. If the links in the chain of circumstances itself are not complete, and the prosecution is unable to establish a prima facie case, leaving open the possibility that the occurrence may have taken place in some other manner, the onus will not shift to the accused, and the benefit of doubt will have to be given.”

67. In addition to that while dealing with the aspect of defence raised by accused under Section 313 of Cr. P.C. in paragraph No. 17 of the said judgment, Hon’ble Supreme Court held as under:-

“ 17. Unfortunately neither Trial Court nor the High Court considered it necessary to take notice of, much less discuss or observe with regard to the aforesaid defence by the appellant under Section 313 Cr.P.C. to either accept or reject it. The defence taken cannot be said to be irrelevant, illogical or fanciful in the entirety of the facts and the nature of other evidence available as discussed hereinbefore. The complete non- consideration thereof has clearly caused prejudice to the appellant. Unlike the prosecution, the accused is not required to establish the defence beyond all reasonable doubt. The accused has only to raise doubts on a preponderance of probability as observed in *Hate Singh Bhagat Singh vs. State of Madhya Bharat*, MANU/SC/0073/1951 : AIR 1953 SC 468 observing as follows:-

“26. We have examined the evidence at length in this case, not because it is our desire to depart from our usual practice of declining to assess, the evidence in an appeal here, but because there has been in this case a departure from the rule that when an accused person but for the word a reasonable defence which is likely to be

true,..... then the burden on the other side becomes all the heavier because a reasonable and probable story likely to be true friend pitted against AV and vacillating case is bound to raise a reasonable doubts of which the accused must get the benefit....”

A similar view is expressed in *M. Abbas vs. State of Kerala*, MANU/SC/1174/2001 : (2001) 10 SCC 103 as follows:-

“10....On the other hand, the explanation given by the appellant both during the cross-examination of prosecution witnesses and in his own statement recorded under Section 313 Code of Criminal Procedure is quite plausible. Where an accused sets up a defence or offers an explanation, it is well settled that he is not required to prove his defence beyond a reasonable doubt but only by preponderance of probabilities....”

In case at hand, prosecution has established prima facie case against the appellant – accused No.1. All the links in the chain of circumstances are complete, leaving no possibility of committing murder of Rekha and Vaishnavi by third person. Evidence adduced by the appellant – accused No.1 in defence came to be discarded after discussing how it does not stand on the yardstick of probability.

68. Besides, in case of *Digamber Vaishnav and Ors. Vs. State of Chhattisgarh [(2019) 4 SCC 522]*, Hon’ble Supreme Court in paragraphs No. 15, 16, 17 and 19 held as under:-

“ 15. One of the fundamental principles of criminal jurisprudence is undeniably that the burden of proof squarely rests on the prosecution and that the general burden never shifts. There can be no conviction on the basis of surmises and conjectures or suspicion howsoever grave it may be. Strong suspicion, strong coincidences and

grave doubt cannot take the place of legal proof. The onus of the prosecution cannot be discharged by referring to very strong suspicion and existence of highly suspicious factors to inculcate the accused nor falsity of defence could take the place of proof which the prosecution has to establish in order to succeed, though a false plea by the defence at best, be considered as an additional circumstance, if other circumstances unfailingly point to the guilt.

16. This Court in *Jaharlal Das v. State of Orissa*, MANU/SC/0586/1991 : (1991) 3 SCC 27, has held that even if the offence is a shocking one, the gravity of offence cannot by itself overweigh as far as legal proof is concerned. In cases depending highly upon the circumstantial evidence, there is always a danger that the conjecture or suspicion may take the place of legal proof. The court has to be watchful and ensure that the conjecture and suspicion do not take the place of legal proof. The court must satisfy itself that various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. In order to sustain the conviction on the basis of circumstantial evidence, the following three conditions must be satisfied:

- i.) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- ii.) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and
- iii.) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

17. In *Varkey Joseph v. State of Kerala*, MANU/SC/0295/1993 : 1993 Suppl (3) SCC 745, this

Court has held that suspicion is not the substitute for proof. There is a long distance between 'may be true' and 'must be true' and the prosecution has to travel all the way to prove its case beyond reasonable doubt.

18.

19. It is also well-settled principle that in criminal cases, if two views are possible on evidence adduced in the case, one binding to the guilt of the accused and the other is to his innocence, the view which is favourable to the accused, should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence [See *Kali Ram v. State of Himachal Pradesh*, MANU/SC/O121/1973 : (1973) 2 SCC 808].”

In case at hand, defence raised by the appellant – accused No.1 has been discarded, since prosecution proved its case by adducing sufficient circumstantial evidence and the defence raised by him was not found probable, on the touch stone of preponderance of probability.

69. In the case of *Gargi Vs. State of Haryana [(2019) 9 SCC 738]* the Hon’ble Supreme Court while discussing about last seen theory held as under :-

“ 28. The prosecution has relied upon another circumstance that the deceased was lastly in the company of the appellant and she had failed to explain his whereabouts as also the circumstances leading to his death.

28.1. Insofar as the ‘last seen theory’ is concerned, there is no doubt that the appellant being none other than the wife of the deceased and staying under the same roof, was the last person the deceased was seen with. However, such

companionship of the deceased and the appellant, by itself, does not mean that a presumption of guilt of the appellant is to be drawn. The Trial Court and the High Court have proceeded on the assumption that Section 106 of the Indian Evidence Act directly operates against the appellant. In our view, such an approach has also not been free from error where it was omitted to be considered that Section 106 of the Indian Evidence Act does not absolve the prosecution of its primary burden. This Court has explained the principle in *Sawal Das* (supra) in the following:-

“10. Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a *prima facie* case, that the question arises of considering facts of which the burden of proof may lie upon the accused.....”

28.2. On the facts of the present case, it emerges that as per the version of PW-7, the deceased was lastly in his company on 28.04.1997 when he allegedly expressed his dejection and fear as also his plan to return with luggage. The appellant has pointed out that the deceased was with her in the morning of 29.04.1997 when he pointed out his tour programme commencing that day with scheduled return on 03.05.1997. It is not in dispute that the deceased was regularly on tour for longer durations of about two weeks in connection with his duties. The dead body was recovered on 01.05.1997 and as per post-mortem report, the probable time that had elapsed between death and post-mortem (on 02.05.1997 at 12.30 p.m.) was 24 to 72 hours. On the basis of this opinion, it cannot be assumed by way of arithmetical calculation that the deceased might have met with his end on 29.04.1997. The possibility of it being a day later is not ruled out.

28.3. In the given set of circumstances, the last seen theory cannot be operated against the appellant only

because she was the wife of the deceased and was living with him. The gap between the point of time when the appellant and deceased were last seen together and when the deceased was found dead had not been that small that possibility of any other person being the author of the crime is rendered totally improbable. In *SK. Yusuf (supra)*, this Court has said:-

“21. The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.””

In case at hand prosecution has discharged its prima facie case, to connect the appellant – accused No.1 with the incident of murder of his wife Rekha and daughter Vaishnavi. Therefore, the defence adduced by appellant was rejected as it was not worthy of acceptance on prudence of probability.

70. In the case of *State of Rajasthan Vs. Mahesh Kumar and Ors. [(2019) 7 SCC 678]* in paragraph No. 11 of the judgment, Hon’ble Supreme Court enunciated the law pertaining to circumstantial evidence as under: -

“11. The enunciation of law pertaining to circumstantial evidence, its relevance and decisiveness, as a proof of charge of a criminal offence, is amongst others traceable decision of this Court in *Sharad Birdhichand Sarda Vs. State of Maharashtra* MANU/SC/0111/1984 : 1984(4) SCC 116. The relevant excerpts from para 153 of the decision is assuredly apposite:-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in *Shivaji Sahabrao Bobade & Anr. Vs. State of Maharashtra* [MANU/SC/0167/1973 : (1973) 2 SCC 793 where the observations were made:

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.

(2) 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,

(3) the circumstances should be of a conclusive nature and tendency,

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

(5) 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.”

In case at hand, all the aforesaid conditions have been fulfilled.

71. In the case of *Ratnesh Kumar Pandey Vs. State of Uttar Pradesh [2015 DGLS(SC) 61]* the Hon'ble Supreme Court in paragraph 7, 8 and 9 of the judgment held as under:

“7. The question for consideration is whether the chain of circumstances noted and found proved against the appellant leads to the only hypothesis in respect of the guilt alleged against the appellant. With that perspective in mind, when we consider the circumstances noted by the trial court which we have in seriatum referred to in the earlier part of the judgment we find that when the appellant and the deceased were living together immediately before the death of the deceased the whole burden was upon the appellant to show as to who else was responsible for the killing of the deceased. Except the evidences relating to the prior grievances expressed on behalf of the deceased to P.W. 1 as regards the beatings inflicted on her by the in-laws of the deceased there was no other version placed before the Court for implicating anybody else to have any grievance as against the deceased. Keeping the said situation in mind when we consider the circumstances noted by the courts below which were duly supported by the legally acceptable evidence on record, it will have to be stated that the burden was heavily upon the appellant to show that he had nothing to do with the killing of the deceased.

8. The plea of the appellant that he was away from the spot on the intervening night of 30th and 31st January, 2001 was disbelieved by the trial court by rejecting the evidence of D.W. 1. When we examined the said conclusion of the trial court, we are convinced that the reasoning of the trial court for not accepting the version of D.W. 1 cannot be found fault with. The trial court has given more than one

reason why the version of D.W. 1 cannot be accepted and we do not find any flaw in the said reasons. Therefore, once the said plea of alibi put forth on behalf of the appellant is ruled out, then it will be for the appellant to satisfactorily show as to who else was responsible for the killing of the deceased. Though other co-accused including the co-accused who were related to the appellant were arrayed along with one other friend of the appellant by name Ramzan, it has come out in evidence that none of them were in any way responsible for the killing of the deceased. In the said background, the various circumstances narrated in the earlier part of the judgment found a complete chain without any break in its links and the said set of circumstances conclusively proved that it was the appellant and the appellant alone who alone could have committed the crime of the killing of the deceased as concluded by the trial court and as confirmed by the High Court in the impugned judgment. We have no reason to take a different view than what has been held by the trial court as well as by the High Court with regard to various circumstances which ultimately persuaded the courts below to find the appellant guilty of the alleged offence.

9. As far as the contention that the High Court found everything in order in the bedroom is concerned, the same will have to be taken in the sense that there was no indication of any attempt to steal or rob any of the valuables from the bedroom. When the deceased was found dead with as many as 20 injuries all over her body, the said observation of the High Court will have to be read objectively and not superficially. The contention by referring to a mere blood spot in Ex. 6 (Sweater) is concerned, when the F.S.L. Report, Ex. K 23 confirmed the similar blood group in Ex. 1 and 6, it is immaterial whether the blood content in Ex. 6 was less or more. The said contention also does not merit any consideration. The contention that the police foisted a case when he returned back home after his trip to Gonda at 9:00a.m. is concerned, when his plea of alibi was disbelieved, on that very ground that stand will fail. Except the ipsi dixit to claim that he was

arrested and the case was foisted against him, he did make any attempt to support the said version.”

72. The facts of the case at hand are quite similar with the facts of the case supra. In the case at hand the appellant – accused No.1 and deceased were leaving together immediately before the death. The appellant – accused No.1 failed to prove that he had nothing to do with the killing of deceased. Evidence adduced by him in defence found to be after thought. Admission given by the appellant – accused No.1 in his written statement discussed in para supra inspires full confidence of evidence adduced by prosecution that at the relevant time both the deceased were in his custody and none other than him committed their murder.

73. In the matter of *Trimukh Maroti Kirkan Vs. State of Maharashtra [2006 DGLS(SC) 849]* the Hon’ble Supreme Court in paragraph No.11 of the judgment held as under:-

“11. The demand for dowry or money from the parents of the bride has shown a phenomenal increase in last few years. Cases are frequently coming before the Courts, where the husband or in-laws have gone to the extent of killing the bride if the demand is not met. 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. The neighbours, whose evidence may be of some assistance, are generally reluctant to

depose in Court as they want to keep aloof and do not want to antagonize a neighbourhood family. The parents or other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculcate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy or inside the house should go unpunished.

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

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

Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature

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

74. In case at hand, the incident took place at midnight inside the house. The ocular and documentary evidence adduced by the prosecution is sufficient to complete the chain of circumstances. It is true that PW1 to PW4 are closely related with deceased from parental family. They consistently spoke about over all conduct of the appellant – accused No.1. It was natural on the part of deceased Rekha to disclose about harassment meted out to her by the husband and in-laws to her kith and kin from her parental family and not to outsiders. Therefore, evidence of PW1 to PW4 which is clear and cogent, cannot be discarded merely for the reason that they were closely related with the deceased from her parental family. The defence raised by the appellant – accused No.1 has been discarded after close scrutiny of the same.

75. In the case of *State of Rajasthan Vs. Kashi Ram [2006 DGLS(SC) 957]* the Hon’ble Supreme Court in paragraphs No. 17 and 18

of the judgment held as under:

“17. The most important circumstance that the respondent was last seen with the deceased on February 3, 1998 whereafter he had disappeared and his house was found locked and that he had offered no explanation whatsoever, was disposed of by the High Court in one short paragraph observing that there was nothing unusual if the accused was seen in the company of his own family members in his house. On such reasoning, the High Court held that the circumstantial evidence relied upon by the prosecution was not strong enough to sustain the conviction of the respondent. Accordingly, the High Court allowed the appeals preferred by the respondent and declined the death reference made by the trial court for confirmation of the sentence of death.

18. We have been taken through the entire evidence on record. The medical evidence on record clearly proves that the death of Kalawati and her two minor daughters was homicidal caused by strangulation. The cause of death was asphyxia. It is also established on record that the deceased was last seen alive in the company of respondent on February 3, 1998 at her house. The prosecution has also successfully established the fact that the house was found locked on the morning of February 4, 1998 and continued to remain locked till it was opened after removing the door on February 6, 1998. Throughout this period the respondent was not to be seen and he was arrested only on February 17, 1998. Neither at the time of his arrest, nor in the course of investigation, nor before the Court, has the respondent given any explanation in defence. He has not even furnished any explanation as to where he was between February 4, 1998 and February 17, 1998. It has been argued on behalf of the prosecution that this most important circumstance has been completely ignored by the High Court. The case of the prosecution substantially rested on this circumstance. The respondent was obliged to furnish some explanation in defence. He could have explained where he was during this period, or he could

have furnished any other explanation to prove his innocence. Counsel for the respondent on the other hand, contends that though the respondent furnished no explanation whatsoever, there is evidence on record to prove that he had gone to attend Suratgarh fair with his family members. A question, therefore, arises whether the presumption under Section 106 of the Evidence Act may be drawn against the respondent in the facts of the case, since the facts as to where he was during the relevant period and when he parted company with the deceased, were matters within his special knowledge the burden of proving which was cast upon him by law.”

76. In case at hand, appellant – accused No.1, after committing murder of wife and daughter left the house by applying lock to the door and proceeded to the house of his sister Premala Shinde (DW1) situated at Gojegaon which was at about 25 Km to 30 Km away from Degloor where his house was situated, without informing to anybody, remained there till 02.00 p.m. of 23-07-2013 and thereafter directly went to the police station. This post conduct of the appellant – accused No.1 is also one of the circumstances which connects him with the incident. In this case, after evaluating evidence on record i.e. evidence adduced by the prosecution and evidence adduced by the defence, we have satisfied that prosecution has proved beyond doubt that the appellant and appellant only committed murder of the deceased, therefore, he has been held guilty.

77. In the matter of *Jayantibhai Bhenkarbhai Vs. State of*

Gujarat [2002 DGLS(SC) 790] the Hon'ble Supreme Court discussed law of alibi contemplated in Section 11(a) of the Evidence Act, 1872, and person on whom burden to prove the same lies. The ratio laid down by the Hon'ble Supreme Court is as under:-

“ 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”

In case at hand, 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 death of victims and the appellant – accused No.1 and evidence adduced by the appellant to prove his defence of alibi is afterthought and not worthy of acceptance.

78. 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, Biloli, District Nanded, in Sessions Case No. 38 of 2013, dated 26-02-2015 is correct, proper and legal. Therefore, no interference is called for.

79. Accordingly, the criminal appeal is dismissed.

(B. U. DEBADWAR, J.)

(RAVINDRA V. GHUGE, J.)

SVH