

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

CRIMINAL APPEAL NO. 412 OF 2016

Jitendra Motilal Nirmal,
Age : 27 years, Occu. Convict No. 8130,
R/o. Kadrabad, Tq. & Dist. Aurangabad,
At Present in Central Prison, Aurangabad.

...Appellant

Versus

The State of Maharashtra

...Respondent

.....
Smt. Bharati B. Gunjal, Advocate for the appellant
Shri. K. S. Patil, APP for respondent/State
.....

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

DATED : Friday, the 9TH OCTOBER, 2020

ORAL JUDGMENT [Per Ravindra V. Ghuge, J.] : -

1. We have heard the extensive submissions of the learned advocate on behalf of the appellant and the learned APP on behalf of the State. With their assistance, we have gone through the record and proceedings, threadbare and we have perused the impugned Judgment dated 24.05.2016 delivered by the learned Additional Sessions Judge, Aurangabad in Sessions Case No. 267 of 2014, vide which the appellant/accused Jitendra Motilal Nirmal has been

convicted for committing the offence punishable under Section 302 of the Indian Penal Code (hereinafter referred to as "IPC").

2. The prosecution has succeeded in seeking the conviction of the appellant Jitendra by putting forth the following case : -

- a] Jitendra and his deceased wife Savitribai originally hail from Navgaon, Tq. Dhamga, Dist. Durg, Chhattisgarh. Both of them, along with their girl child of 18 months had reached Aurangabad in search of work. One Amrutkumar Fateram Banjare, hailing from Chhattisgarh, was instrumental in securing an employment for Jitendra with one Shaikh Juman Shaikh Mohammad, Kadrabad, Aurangabad.
- b] On 15.05.2014 at about 00:15 hrs., Shaikh Juman received a call from Amrutkumar informing him that Savitribai was serious and he was requested to come to the residence of Jitendra. After reaching the place, Shaikh Juman noticed that Jitendra was present in the house and Savitribai was lying on a mat and was motionless. Shaikh Juman called Shaikh Kasam, an auto-rickshaw driver. Jitendra, Amrutkumar and Shaikh Juman carried Savitribai in the said auto-rickshaw to Adul, a nearby place. As the doctor was not available at Adul, they carried her to the GHATI Hospital, Aurangabad. On reaching the hospital, the doctor

examined Savitribai at 03:45 a.m., and pronounced her as being dead on arrival. The body was sent to the Mortuary and the Police was informed.

- c] A case of Accidental Death No. 31 of 2014 was registered. The Police Sub-Inspector lodged a report on behalf of the State and CR No. 98/2014 was registered u/s 302 of the IPC. The Police Sub-Inspector of the Chikalthana Police Station namely, Kalpana Premsingh Rathod has drawn the inquest panchanama (Exh.16) and has issued a letter to the Medical Officer requesting for post-mortem, Exh.26. The provisional death certificate (Exh.27) was obtained. The spot-panchanama (Exh.13) was drawn and the photographs were clicked, Exh.28 to 31. Ms. Rathod lodged a report at Exh. 33 after reaching the Police Station.
- d] Ms. Priya Thorat, Incharge of the Chikalthana Police Station, received the investigation papers. The accused Jitendra was arrested. The statement of Police Naik Sandeep Jadhav was recorded. A letter to the Chemical Analyst was issued along with the blood sample and nail clippings of the accused. The statement of Shaikh Juman, Jitendra and the father of the accused, were recorded.
- e] The prosecution has examined four witnesses, namely Ms. Rathod, Exh. 24, Shaikh Juman, Exh. 35, Dr. Balaji Gyanoba Falke, Exh.42, and Ms. Thorat, Exh. 45. The

accused neither examined himself nor any witness on his behalf. After considering the evidence and keeping in view that the case was entirely based on circumstantial evidence, the trial Court has held Jitendra guilty of committing the murder of his wife punishable u/s 302 IPC. At the same time, the learned Sessions Judge has expressed his displeasure on the failure of the prosecution in examining Amrutkumar and his wife who were the first persons to reach the residence of Jitendra.

3. The learned Advocate for the appellant has strenuously criticized the impugned Judgment and has raised several grounds. The 11 grounds tendered by her are reproduced verbatim along with the other grounds, as under : -

- i) The judgment and order passed by the Additional Sessions Judge, Aurangabad on 24-05-2016 in Sessions Case No. 267/2014, is wrong, erroneous against the principles of law, justices, equity, good conscience and merits of the record in the file.
- ii) The learned Additional Sessions Judge, Aurangabad has not appreciated the evidence brought on record on behalf of the prosecution in its proper perspective and therefore, it has resulted in the miscarriage of justice.

- iii) The learned lower court has committed the mistake on the point of confessional statement and memorandum panchanama while accepting that though it is not reliable the appellant is guilty u/s 302 of I.P.C.
- iv) The learned lower court out have consider that there is not reliance placed on alleged confessional statement and the important witness Amrutkumar and his wife had also not been examined by the prosecution.
- v) The learned lower court ought to have considered that, the persecution has failed to prove the intention and motive of alleged incident.
- vi) The learned lower court has erroneously convicted the appellant and has sentenced to suffer life imprisonment as the entire case is based on the circumstantial evidence and extra judicial confession.
- vii) The learned lower court has not consider that the chain of circumstances was not established the prosecution beyond doubt.
- viii) The learned lower court has not taken into consideration the contradictions and omissions

appearing in the depositions of the prosecution witness.

- ix) The learned lower court ought to have consider that only on the extra judicial confession the appellant has deliberately implicated in the in the offence.
- x) The learned lower court ought to have consider that the extra judicial confession is a weak type of evidence and has no wattage in the eye of law.
- xi) Entire evidence of prosecution is not trustworthy. The learned Additional Session Judge, Aurangabad Dist. Aurangabad has ignored the cardinal principles of Criminal Jurisprudence and arrived at wrong conclusion of punishing an innocent person.
- xii) No independent witness was examined by the prosecution.
- xiii) Whether the accused was along with his wife in his house or was away on the fateful night, has also not been established.
- xiv) Material for invoking Section 106 of the Evidence Act, has also not been placed before the Court.
- xv) Reliance is placed on the Judgment delivered by this Court in the matter of **Sachin Bhaskarrao**

Bobde Vs. The State of Maharashtra reported in
2019 ALL M.R. (Cri) 2970.

4. The learned APP has supported the impugned Judgment by contending that the spot panchanama was admitted by Jitendra before the trial Court. Jitendra was living along with his wife and their girl child in a house built with brick-walls, tin sheets, and having fixtures like a fan. The said small house was located in a farm at Kadrabad in Gut No. 53. The MLC report dated 15.05.2014, Exh. 25 would indicate that Jitendra had made a statement before the police that his girl child started crying in the middle of the night. He woke up and tried to wake up Savitribai. As she did not respond, he called his neighbours (meaning Amrutkumar and his wife). Savitribai was then taken to the GHATI Hospital and the CMO examined her and pronounced her dead at 03:45 a.m. This would indicate that the accused was with his wife along with their girl child in the house.

5. He then relies upon the accidental death report dated 15.05.2014. He points out that Jitendra had made a statement before the CMO which is recorded in Exh. 25 wherein Jitendra concedes that he was along with his wife and their girl child on the fateful night.

6. He points out from the ADR, the types of injuries suffered by Savitribai and contends that it would establish that Savitribai was strangled by Jitendra. He further points out that, there was hardly any cross-examination of the prosecution witnesses. The statement of the accused u/s 313 of the Cr.P.C. would clearly establish that she was in the house of the accused Jitendra at the time of her death and hence, Section 106 of the Evidence Act would be squarely attracted. He relies upon the judgments delivered by the Hon'ble Apex Court in the matters of **Rajinder Singh Versus State of Haryana** reported in 2013 AIR (SC) 2529 and **State of Rajasthan Versus Thakur Singh** reported in 2014 AIR SCW 4479.

7. It is undisputed that this case solely rests upon the circumstantial evidence and the effect of Section 106 of the Evidence Act.

WHETHER SAVITRIBAI'S DEATH IS HOMICIDAL?

8. It is nobody's case that Savitribai has committed suicide or has died a natural or accidental death. The inquest panchanama indicates that there were strangulation marks on the neck of Savitribai, abrasions on the right hand and the left leg. The post-mortem report, Exh.43 indicates the following at Sr. No. 13, surface

wounds and injuries at Sr. No. 17 and head injury at Sr. No. 19 : -

13.	Features - Whether natural or swollen, State of eyes Position of tongue Nature of fluid (if any) oozing from mouth, nostrils or ears.	Congested Eyes-closed, pupils dilated, Subconjunctival hemorrhages present Tongue inside oral cavity No oozing from mouth, nostrils and ears.
17	Surface wounds and injuries – Their nature position, dimensions (measured) and directions to be accurately stated – their probable age and causes to be noted. If bruises are present what is the condition of the subcutaneous tissues? (N.B.-(When injuries are numerous and cannot be mentioned within the space available they should be mentioned on a separate paper which should be signed).	1) Crescentic scratch abrasion of size 1.5 cm present over front of neck, lower part in the midline. It is 8cm below chin and 4 cm above suprasternal notch. 2) Two scratch abrasions, measuring 2.5 cm and 1 cm present over left lateral aspect of neck and 3 cm below angle of mandible. 3) Contusion of size 3 x 1 cm over lateral aspect of little finger of left hand. 4) Scratch abrasion of size 3 cm over dorsal aspect of right hand. 5) Scratch abrasion of size 4 cm over left side of back, lumbar region. 6) Multiple abrasions, with sizes varying from 1x0.5cm to 0.5x0.5cm present over dorsal aspect of both feet. 7) Contusion of size 2x1 cm present over mucosal surface of Lower lip, right side. All the above injuries are reddish in colour. On neck dissection- Contusion of subcutaneous tissue of left side of neck of size 3x2 cm is seen underneath injury no.2, dark reddish in color. Hemorrhages seen in mucosa of larynx in an area of 3x2 cm, dark reddish in colour.
19.	Head- i) Injuries under the scalp, their nature.	Underscalp contusion of size 6x4 cm present extending over bilateral parietal region, Reddish.
	ii) Skull-Vault and base- Describe fractures, their site, dimensions, directions, etc.	Intact, No fracture of skull vault
	iii) Brain- The appearance of its coverings, size, weight and general condition of the organ itself and any abnormality found in its examination to be carefully noted. (weight M1300 grams F-1275 grams).	Meninges- congested Brain: congested and edematous e/o petechial hemorrhages seen in white matter of brain

9. The opinion of the Asst. Professor Dr. Mandar R. Sane and the Autopsy Surgeon Dr. B. G. Falke, Department of Forensic Science, establishes “Manual strangulation with head injury”.

10. In his deposition at Exh. 42, Dr. Falke has perused the post-mortem report and has narrated the various injuries found on the body of Savitribai, which have been noted herein above. He has analyzed the injuries caused and has concluded that there was no possibility of strangulation by an odhani while turning to feed the baby and has reiterated the cause of death being manual strangulation with head injury. In the light of these facts, we have no hesitation in concluding that Savitribai has suffered a homicidal death.

WHETHER JITENDRA WAS INSIDE THE HOUSE WHEN HIS WIFE WAS STRANGULATED?

11. The MLC records that Jitendra, Savitribai and their daughter were living together. They were inside the house on the fateful night. Jitendra had called Amrutkumar for help on the pretext that Savitribai was not waking up. Amrutkumar, after reaching the residence of Jitendra, called Shaikh Juman for help. Shaikh Juman, after reaching, noticed that Jitendra was inside the house along with

the child and the body of Savitribai. In his deposition, Shaikh Juman has narrated these aspects and as recorded above, he had called Shaikh Kasam after noticing that Savitribai was lying motionless. Along with Jitendra, Amrutkumar and his wife, he had accompanied Jitendra to Adul. After noticing that there was no medical assistance, they carried Savitribai to the GHATI Hospital at Aurangabad. A single sentence cross-examination was conducted on behalf of the accused.

12. In the statement of the appellant Jitendra recorded u/s 313, he has admitted while answering question no. 4 that he was residing with his wife at Kadrabad shivar. He admitted while answering question no. 8 that Amrutkumar telephoned Shaikh Juman at 00.15 hrs., and called him. He also conceded while answering question no. 9 that he was inside his house when Savitribai was lying on the mat and Amrutkumar and Shaikh Juman were present in his house along with him. While answering question no. 10, he denied that he accompanied Savitribai to the hospital at Adul. However, while answering question no. 11 he admits that as the doctor was not available at Adul, Savitribai was carried by him to GHATI Hospital, thereby proving that his answer to question no. 10 was false. He further conceded that the examining doctor had pronounced Savitribai dead after examining her t 03:45 a.m.

13. In the testimony of Shaikh Juman Exh. 35, he reiterates that he had gone to the house of Jitendra since he received a phone call from Amrutkumar. Savitribai was lying on the mat motionless. Jitendra was present in the house.

14. Ms. Rathod has stated in her testimony at Exh. 24 that she had drawn the inquest panchanama at the GHATI Hospital. She had filled in a police report to be forwarded to the Civil Surgeon with the dead body, Exh. 15. Nowhere has it been brought on record by Jitendra that he was not inside the house when his wife was murdered.

15. It is thus obvious from the analysis of the testimony and the statements of admission of the accused u/s 313 that the appellant Jitendra was inside his house along with Savitribai and their girl child on the fateful night. Only after she became still, that he called Amrutkumar and his wife. Amrutkumar called Shaikh Juman and Savitribai was taken to Adul and then to the GHATI Hospital.

16. Circumstantially and considering the answers offered by the appellant to question no. 9 and 11 that Jitendra was inside his

house and Savitribai's body was lying on the mat when Shaikh Juman arrived and that, as there was no doctor available at Adul, Jitendra had carried Savitribai to the GHATI Hospital along with Shaikh Juman and Amrutkumar. While answering question no. 12, he admitted that Savitribai was declared dead upon her medical examination and Jitendra had carried her to the hospital. The cumulative effect of these pieces of evidence is that the appellant was along with Savitribai and the child inside his house. Besides these three, in the dead of the night, there was nobody else within the four walls of Jitendra's house. It is not his stand that somebody strangled Savitribai when he was not at home.

CIRCUMSTANTIAL EVIDENCE AND
WHETHER SECTION 106 OF EVIDENCE ACT WOULD BE
ATTRACTED?

17. In the above backdrop of the evidence led by the prosecution and its failure in examining Amrutkumar and his wife, it will have to be analyzed as to whether Jitendra was legally obliged to explain the circumstances in which Savitribai had died, u/s 106 of the Evidence Act, which reads as under:-

106. Burden of proving fact especially within knowledge. -
When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

18. We have perused the statement made by Amrutkumar on 17.05.2014, u/s 161 of the Cr.P.C. Considering the said statement and on analyzing the testimony of Shaikh Juman, we do not find that the failure of the prosecution in not examining Amrutkumar or his wife could be fatal to the investigation since Amrutkumar had called Shaikh Juman on his cell phone, which is not denied by Shaikh Juman and this fact is admitted by Jitendra while answering question no. 8 u/s 313 that Amrutkumar had phoned Shaikh Juman and called him. While answering question no. 9, Jitendra admitted that when Shaikh Juman came to his house, Savitribai was lying motionless on the mat and Amrutkumar along with Jitendra were present in the house. It is further admitted while answering question no. 11 and 12 that Jitendra along with Shaikh Juman and Amrutkumar had carried Savitribai from Adul to GHATI Hospital and that she was declared dead on arrival at the GHATI Hospital. As such, since Jitendra has admitted that Amrutkumar had come to his house and immediately had called Shaikh Juman, we do not find that the failure of the prosecution in examining Amrutkumar, would dent it's case. Surely, had Amrutkumar been examined, it would have been an additional factor as the prosecution has established that Savitribai was lying motionless in the house and with the assistance of Amrutkumar and

Shaikh Juman, Jitendra had carried Savitribai along with Amrutkumar to the GHATI Hospital.

19. In **Sachin Bhaskarrao Bobde** (supra), this Court had noted several factors like chilly powder found in the eyes of the accused, the arrest of the accused on 30.08.2007 after 28 days of the occurrence of the crime though the Dog Squad had smelt the wooden log (alleged murder weapon) and had reached the accused and had started barking at him on the same day i.e. 02.08.2007. Though there was a seizure of clothes on 30.08.2007, it was not under a memorandum u/s 27 of the Evidence Act and the testimony of witnesses did not bring forth any material evidence against the accused. While placing reliance upon **Sharad Birdhichand Sarda Versus State of Maharashtra** reported in (1984) 4 SCC 116, this Court in Sachin Bobde (supra) considered the principles laid down therein and found that there were many missing links in the chain of circumstantial evidence.

20. In **Hanuman Govind Nargundkar and anr vs. State of M.P.** reported in AIR 1952 SC 343, delivered by the Hon'ble Apex Court (three Judges Bench), it was observed that, while dealing with circumstantial evidence, the rules specifically applicable to such

evidence must be kept in focus. A case in which only circumstantial evidence is available, always gives rise to the danger that "conjecture or suspicion may take the place of legal proof". In cases based on only circumstantial evidence, the entire circumstances from which the conclusion of guilt is to be drawn should, in the first place, be clearly established and all facts so established should be consistent only with the hypothesis of the guilt of the accused.

21. It would be apposite to reproduce paragraph 10 of the judgment in **Hanuman** (supra) as under:

"10. Assuming that the accused Nargundkar had taken the tenders to his house, the prosecution, in order to bring the guilt home to the accused, has yet to prove the other facts referred to above. No direct evidence was adduced in proof of those facts. Reliance was placed by the prosecution and by the courts below on certain circumstances, and intrinsic evidence contained in the impugned document, Ex.P-3A. In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore it is right to recall the warning addressed by Baron Alderson, to the jury in *Reg. v. Hodge*, ((1838) 2 Lewil 227), where he said :-

"The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters to overreach and mislead, itself to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable

ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. In spite of the forceful arguments addressed to us by the learned Advocate-General on behalf of the State we have not been able to discover any such evidence either intrinsic within Ex. P-3A or outside and we are constrained to observe that the courts below have just fallen into the error against which, warning was uttered by Baron Alderson in the above mentioned case.”

22. In **Gagan Kanojia & Anr. Versus State of Punjab** reported in 2006(13) SCC 516, the Hon’ble Apex Court was dealing with a case of kidnapping and murder of two children for ransom, based purely on circumstantial evidence. While concluding on the point of appreciation of circumstantial evidence, the Hon’ble Apex Court observed in paragraph no. 9 and 10 as under;

“9. The prosecution case is based on circumstantial evidence. Indisputably, charges can be proved on the basis of the circumstantial evidence, when direct evidence is not available. It is well-settled that in a case based on a circumstantial evidence, the prosecution must prove that within all human probabilities, the act must have been done by the accused. It is, however, necessary for the courts to remember that there is a long gap between 'may be true' and 'must be true'. Prosecution case is required to be covered by leading cogent, believable and credible evidence. Whereas the court must raise a presumption that the accused is innocent and in the event two views are possible, one indicating to his guilt of the accused and the other to his innocence, the defence available to the accused should be accepted, but at the same time, the court must not reject the evidence of the prosecution, proceeding on the basis that they are false, not trustworthy, unreliable and made on flimsy grounds or only on the basis of surmises and conjectures. The prosecution case, thus, must be judged in its entirety having regard to the totality of the circumstances. The approach of the court should be an integrated one and not truncated or isolated. The court should use the yardstick of probability and appreciate the intrinsic value of the evidence brought on records and analyze and assess the same objectively.

10. We would proceed on the well-known principles in regard to appreciation of the circumstantial evidence which were noticed by the High Court in the following terms :

"1) There must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within

all human probability the act must have been done by the accused.

2) Circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt.

3) There should be no missing links but it is not that everyone of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts.

4) On the availability of two inferences, the one in favour of the accused must be accepted.

5) It cannot be said that prosecution must meet any and every hypothesis put forwarded by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise."

23. The Hon'ble Apex Court had an occasion to deal with yet another case of **Krishnan v. State represented by Inspector of Police** reported in (2008) 15 SCC 430, in which the issue of conviction on circumstantial evidence was considered. After appreciating the evidence of the witnesses and the medical record, it was observed in paragraph 15, 16, 17 and 18 as under:

"15. Before advertent to the above stated arguments advanced by the learned counsel for the parties, we shall at the threshold point out that in the present case there is no direct evidence to connect the accused with the commission of the offences and the prosecution case entirely rests on circumstantial evidence. This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:-

- (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 definite tendency unerringly pointing towards guilt of the accused;
- (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

- (iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. [See *Gambhir v. State of Maharashtra* (1982) 2 SCC 351 : 1982 SCC (Cri) 431 : AIR 1982 SC 1157.

See also *Rama Nand v. State of Himachal Pradesh* (1981) 1 SCC 511 : 1981 SCC (Cri) 197 : AIR 1981 SC 738, *Prem Thakur v. State of Punjab*, (1982) 3 SCC 462 : 1983 SCC (Cri) 88 : AIR 1983 SC 61, *Earabhadrapa v. State of Karnataka*, (1983) 2 SCC 330 : 1983 SCC (Cri) 447 : AIR 1983 SC 446, *Gian Singh v. State of Punjab*, 1986 Supp. SCC 676 : 1987 SCC (Cri) 223 : AIR 1987 SC 1921 and *Balvinder Singh v. State of Punjab* (1987) 1 SCC 1 : 1987 SCC (Cri) 27 : AIR 1987 SC 350.

- 16. As far back as in 1952 in *Hanumant Govind Nargundkar v. State of M.P.* [AIR 1952 SC 343], it was observed thus: (AIR pp. 345-46, para 10)

“10.It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

- 17. A reference may be made to a later decision in *Sharad Birdhichand Sarda v. State of Maharashtra* (1984) 4 SCC 116 : 1984 SCC (Cri) 487 : AIR 1984 SC 1622. Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are (SCC p. 185, para 153) :

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

- (ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
- (iii) the circumstances should be of a conclusive nature and tendency;
- (iv) they should exclude every possible hypothesis except the one to be proved; and
- (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

18. We may also make a reference to a decision of this Court in *C. Chenga Reddy v. State of A.P.*, (1996) 10 SCC 193 : 1996 SCC (Cri) 1205, wherein it has been observed thus: (SCC pp. 206-07, para 21)

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

In *Sashi Jena v. Khadal Swain*, (2004) 4 SCC 236 : 2004 SCC (Cri) 1077, this Court again reiterated the well-settled principle of law on circumstantial evidence.

24. In the instant case, the appellant Jitendra has not denied that Shaikh Juman had arrived at his house after Amrutkumar had called him telephonically. This establishes the story of the prosecution that Jitendra had called Amrutkumar being his neighbour and as Jitendra and Amrutkumar were employees of Shaikh Juman, they found it appropriate to take the help of Shaikh Juman in taking Savitribai to the hospital. The chain of circumstantial evidence as

regards Jitendra being in the house when Shaikh Juman and Amrutkumar had reached and Savitribai was lying on the floor, till Savitribai being declared dead on arrival at the GHATI Hospital, leaves no missing link in such a chain of circumstantial evidence.

25. The learned Advocate for the appellant has strenuously canvassed that there was no motive for Jitendra in killing his wife. Without any motive and when the case rests solely on circumstantial evidence, the chain would not be complete. If the motive is absent, the benefit of doubt has to go to the accused and he deserves to be acquitted.

26. **Suresh Chandra Bahri v. State of Bihar, Gurbachan Singh v. State of Bihar and Raj Pal Sharma v. State of Bihar**, AIR 1994 SC 2420, is an answer to the point raised by the learned Advocate for the appellant. In paragraph 21, the Hon'ble Apex Court concluded that motive does play an important role and becomes a compelling force to commit a crime. Motive, in given facts and circumstances of the case can be a relevant factor behind the commission of the crime. However, when the pieces of evidence available before the court conclusively prove that it is the accused and the accused alone who has committed the crime, lack of motive would not be an impediment

for the court to arrive at a conclusion that the accused has committed the crime and, therefore, convict him. It would be apposite to reproduce paragraph 21 hereunder.

21. At the very outset we may mention that sometimes motive plays an important role and becomes a compelling force to commit a crime and therefore motive behind the crime is a relevant factor for which evidence may be adduced. A motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act but with illegal means with a view to achieve that intention. In a case where there is clear proof of motive for the commission of the crime it affords added support to the finding of the court that the accused was guilty for the offence charged with. But it has to be remembered that the absence of proof of motive does not render the evidence bearing on the guilt of the accused nonetheless untrustworthy or unreliable because most often it is only the perpetrator of the crime alone who knows as to what circumstances prompted him to a certain course of action leading to the commission of the crime. In the present case before us the prosecution has adduced evidence that the appellant Suresh Bahri had a strong motive to eliminate his wife and two children from his way which evidence has been accepted by both the courts below. We shall, therefore, have a look to the said evidence to see whether the two courts are justified or not in taking the view that the appellant Suresh Bahri had a strong motive to hatch a conspiracy with the assistance of the other two appellants, namely, Raj Pal Sharma and Gurbachan Singh to commit the murder of his wife and the two children.

27. In **Rajinder Singh** (supra), the Hon'ble Apex Court has held that when the prosecution succeeds in establishing that the wife was in the company/custody of her husband and has died under unnatural circumstances, the reasons or circumstances causing her death can only be explained by the husband since she has died in his company and in the absence of any outsider. Paragraph 15 reads thus:

15. Section 106 of the Evidence Act does not relieve the burden of

prosecution to prove guilt of the accused beyond reasonable doubt but where the prosecution has succeeded to prove the facts from which a reasonable inference can be drawn regarding the existence of certain other facts and the accused by virtue of special knowledge regarding such facts fail to offer any explanation then the Court can draw a different inference.

28. In the case of **Thakur Singh** (supra), the Hon'ble Apex Court arrived at a view that the trial Court was justified in holding the accused guilty as she had died while being in his company in unnatural circumstances. Section 106 cannot be overlooked by the High Court while considering such circumstances wherein the wife is murdered while being in the custody of the husband. The High Court of Rajasthan had overturned the conviction handed down by the trial Court, which decision was set aside by the Hon'ble Apex Court. We find it appropriate to reproduce paragraph nos. 15 to 26 as under.

“15. We find that the High Court has not at all considered the provisions of Section 106 of the Evidence Act, 1872.¹ This section provides, inter alia, that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him.

16. Way back in **Shambhu Nath Mehra v. State of Ajmer** 1956 SCR 199 : (AIR 1956 SC 404), this Court dealt with the interpretation of Section 106 of the Evidence Act and held that the section is not intended to shift the burden of proof (in respect of a crime) on the accused but to take care of a situation where a fact is known only to the accused and it is well nigh impossible or extremely difficult for the prosecution to prove that fact. It was said:

“This [Section 101] lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty

or inconvenience. The word “especially” stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.”

17. In a specific instance in **Trimukh Maroti Kirkan v. State of Maharashtra (2006) 10 SCC 681 : (2006 AIR SCW 5300)**, this Court held that when the wife is injured in the dwelling home where the husband ordinarily resides, and the husband offers no explanation for the injuries to his wife, then the circumstances would indicate that the husband is responsible for the injuries. It was said:

“Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.”

18. Reliance was placed by this Court on **Ganeshlal v. State of Maharashtra (1992) 3 SCC 106 : (1992 AIR SCW 1175)**, in which case the appellant was prosecuted for the murder of his wife inside his house. Since the death had occurred in his custody, it was held that the appellant was under an obligation to give an explanation for the cause of death in his statement under Section 313 of the Code of Criminal Procedure. A denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant was a prime accused in the commission of murder of his wife.

19. Similarly, in **Dnyaneshwar v. State of Maharashtra (2007) 10 SCC 445 : (AIR 2007 SC (Supp) 686)**, this Court observed that since the deceased was murdered in her matrimonial home and the appellant had not set up a case that the offence was committed by somebody else or that there was a possibility of an outsider committing the offence, it was for the husband to explain the grounds for the unnatural death of his wife.

20. In **Jagdish v. State of Madhya Pradesh (2009) 9 SCC 495 : (AIR 2010 SC (Supp) 373)**, this Court observed as follows:

“It bears repetition that the appellant and the deceased family members were the only occupants of the room and

it was therefore incumbent on the appellant to have tendered some explanation in order to avoid any suspicion as to his guilt.”

21. More recently, in **Gian Chand v. State of Haryana** (2013) 14 SCC 420 : (AIR 2013 SC 3395), a large number of decisions of this Court were referred to and the interpretation given to Section 106 of the Evidence Act in Shambhu Nath Mehra was reiterated. One of the decisions cited in Gian Chand is that of **State of West Bengal v. Mir Mohammad Omar** (2008) 8 SCC 382 : (AIR 2000 SC 2988), which gives a rather telling example explaining the principle behind Section 106 of the Evidence Act in the following words:

“During arguments we put a question to learned Senior Counsel for the respondents based on a hypothetical illustration. If a boy is kidnapped from the lawful custody of his guardian in the sight of his people and the kidnappers disappeared with the prey, what would be the normal inference if the mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was made whether upon proof of the above facts an inference could be drawn that the kidnappers would have killed the boy. Learned Senior Counsel finally conceded that in such a case the inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise.”

22. The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts.

23. Applying this principle to the facts of the case, since Dhapu Kunwar died an unnatural death in the room occupied by her and Thakur Singh, the cause of the unnatural death was known to Thakur Singh. There is no evidence that anybody else had entered their room or could have entered their room. Thakur Singh did not set up any case that he was not in their room or not in the vicinity of their room while the incident occurred nor did he set up any case that some other person entered the room and caused the unnatural death of his wife. The facts relevant to the cause of Dhapu Kunwar's death being known only to Thakur Singh, yet he chose not to disclose them or to explain them. The principle laid down in Section 106 of the Evidence Act is clearly applicable to the facts of the case and there is, therefore, a very strong presumption that Dhapu Kunwar was murdered by Thakur Singh.

24. It is not that Thakur Singh was obliged to prove his innocence or prove that he had not committed any offence. All that was required of Thakur Singh was to explain the unusual situation, namely, of the unnatural death of his wife in their room, but he made no attempt to do this.

25. Learned counsel for Thakur Singh referred to **Mahendra Pratap Singh v. State of Uttar Pradesh** (2009) 11 SCC 334 : (2009 AIR SCW 2849), to contend that where two views are possible, one held by the Trial Court for acquitting the accused and the other held by the High Court for convicting the accused, the rule of prudence should guide the High Court not to disturb the order of acquittal made by the Trial Court. This decision is not at all apposite.

26. In our opinion, the High Court has very cursorily dealt with the evidence on record and has upset a finding of guilt by the trial Court in a situation where Thakur Singh failed to give any explanation whatsoever for the death of his wife by Asphyxia in his room. Moreover, the very fact that all the relatives of Thakur Singh turned hostile clearly gives room for suspicion and an impression that there is much more to the case than meets the eye. Even the complainant, Himmat Singh who squarely blamed the Thakur Singh (in the FIR) for the murder of his wife, turned hostile to the extent of denying his relationship with Thakur Singh.”

29. It is therefore *writ large* before us on the basis of the material and testimony of witnesses discussed above that Jitendra could have explained the circumstances surrounding the death of his wife. His narration to the CMO and Shaikh Juman that he tried to wake up his wife and she was motionless, is apparently a blatant lie in the face of the post-mortem report indicating the death of Savitribai on account of strangulation. While strangulating her, she had suffered injuries to her head. Circumstantially, Jitendra was the sole adult person who strangulated his wife inside the small house wherein Savitribai died, the conduct of Jitendra would clearly attract Section 106 of the Evidence Act.

30. In view of the above, we do not find any merit in this appeal and the same is therefore dismissed. We are, however, directing the Commissioner of Police, Aurangabad, to initiate appropriate steps, as may be legally permissible, with regard to the conduct of the Investigating Officer in not examining Amrutkumar as a prosecution witness in this case.

31. We had appointed Smt. Bharati B. Gunjal to represent the appellant in this appeal. We are therefore quantifying her fees at Rs.15,000/- (Rupees Fifteen Thousand) which shall be paid to her through the High Court Legal Services Authority, Sub-Committee, Aurangabad.

[B. U. DEBADWAR]
JUDGE

[RAVINDRA V. GHUGE]
JUDGE