

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.421 OF 2015

Mohd. Ismail Abdul Hadis Maniyar,
Aged 26 years. Occu.Service,
Indian in Habitant, Occ. Labour,
Resident of S.A Colony, Lane No.9,
Dahisar, Mumbai.

Permanent Resident of Village-
Gondihawa, Post-Misroliya,

Dist-Sidharth Nagar,
Uttar Pradesh (UP).

....Appellant/Orig.Accused

V/s.

The State of Maharashtra
(At the instance of Ghatkopar
Police Station vide C.R.No.222
of 2012)

....Respondent/Orig.Complainant

.....

Mr. Gaurav Bhawnani i/b Mr. Khan Abdul Wahab, Advocate for the
Appellant.

Ms. P. P. Shinde, APP for the Respondent- State.

**CORAM : PRASANNA. B. VARALE AND
PRAKASH D. NAIK, JJ.**

RESERVED ON : 26th AUGUST, 2020

PRONOUNCED ON : 15th SEPTEMBER, 2020

JUDGMENT : (PER: PRAKASH D. NAIK, J.)

1. The appellant and accused No.2 were prosecuted for the offence under Section 302, 201 r/w. 109 of Indian Penal Code (for short "IPC"). The First Information Report (for short "FIR") was registered vide C.R.No. 222 of 2012 registered with Ghatkopar Police Station.

2. The case of the prosecution is as under:

a) On 16th July 2012 message was received by Asst. Sub-Inspector Mr. Jagannath Maroti Shinde (PW-4) attached to Ghatkopar Police Station, from control room that one female was lying in a drainage near Balasaheb Desai Colony, Ghatkopar. He proceeded to the said spot. It was a gutter in front of Home Guard Training Center, Ghatkopar West Mumbai. Body of female was found in the drainage.

b) Fire Brigade was called and body of the female was taken out. It was taken to Rajawadi Hospital by mobile van of Ghatkopar Police Station. Medical Officer at Rajawadi Hospital examined the body and found that the female was brought dead.

c) Inquest Panchnama Exh.36 was prepared on 16th June 2012 in presence of two panch witnesses, one of whom was Salma Ayuf Khan (PW-9). There was green top and black salwar on the dead body. One metal finger ring, mangalsutra, ear ring and painjan was found on the person of deceased. These articles and the clothes were removed from dead body before sending it for post-mortem. Clothes and articles were seized by panchnama (Exh.24), prepared on 16th June 2012, in presence of two panch witnesses one of whom was Indrajit Azhad (PW-5).

d) Mr. Rajkumar Vishnu Kothmire P.I (PW-8) was attached to Ghatkopar Police Station at the relevant time. Photograph of the dead body were clicked before sending it for post-mortem since the body was not identified. He gave photograph of the body for publishing in newspaper. It was published in Gujarati, Daily "Metro Mirror" through Mr Jignesh Jagdish Pathak (Court Witness). Initially accidental death case No. 120 of 2012 was registered. Post-mortem report was received. Opinion was reserved. After receipt of report from Forensic Laboratory regarding viscera, cause of death was given as "Hemorrhagic shock due to head injury with skull bone fracture (un-natural)".

e) The photograph of dead body published in the newspaper was noticed by Mr. Allauddin Hafizullah Maniyar (P.W-1). He suspected that photograph is of his sister Jugara. He was working at Bhivandi, District-Thane. He went to Ghatkopar Police Station and met Mr. Kothmire. He was taken to mortuary. He identified the dead body to be that of his sister Jugara. After identification of the dead body, statement of P.W-1 was recorded and FIR was registered on 26th July 2012.

f) P.W-1 is the brother of deceased. According to him Jugara was married to accused No.1 (Appellant) six years prior to the incident and she was residing at Gaudi Bajar, Uttar Pradesh. The accused was suspecting that she was having relation with person named Mubarak. She was ill-treated. On 06th July 2012, accused No.1 left the native place along with deceased and their son. While leaving village, he informed that, he was leaving for Mumbai. On 17th July 2012, accused No.1 returned to village along with his son. On inquiry by family members of P.W-1, he informed that Jugara ran away.

g) Investigating team went to native place of accused at Gaudihawa, Misaroliya Janpad, District- Siddharth Nagar,

Uttar Pradesh. Accused No.2 is father of accused No.1. He aided and abetted accused No.1. Both were arrested and brought to Mumbai.

h) During investigation house of accused at Borivali was searched on 31st July 2012, in the presence of panch witnesses. Mr. Salim Mehmood Sayyed (PW-10) was one of the panch witness. One rexine bag containing clothes of deceased, other clothes and imitation jewellery was found. Photograph of deceased was also found. These articles were seized by panchnama (Exh.37). On 01st August 2012, accused No.1 made voluntary statement in the presence of two panch witnesses, Investigating Officer and expressed his desire to show the brick used in the crime and place where brick and the clothes on his person at a time of committing crime were kept. P.W-6 Munna Chowdhary is one of the panch witness to panchnama marked as Exh. 27 and 28. The accused, panchas and police went to the place where dead body was found. Brick was taken out by the accused from the bushes near the gutter. The accused took the police and panchas to the room of his friend Jaganu and took out shirt and pant which was handed over to the police.

i) The brother of accused produced mobile containing sim card of accused No.1, which was seized by Investigating Officer by panchnama Exh.38. Call details record of sim card was collected and it was found that, location of the accused at the relevant time of incident was near the place of incident and there was communication between accused No.1 and accused No.2 at around the time of incident. Statements of witnesses were recorded. On completing investigation chargesheet was filed on 22nd October 2012. The case was committed to the Court of Sessions by Committal Order dated 01st November 2012.

3. The charge was framed against accused Nos.1 and 2. The charge against accused No.1 is that, he being husband of deceased Jugara committed murder intentionally or knowingly causing death of Jugara on 15th July 2012, at about 1:00 midnight, at Azhad Nagar, Ghatkopar West and thereby committed offence under Section 302 of the I.P.C. On the aforesaid date, time and place knowing or having reason to believe that offence punishable with imprisonment have been committed, the accused caused evidence of said offence to disappear by disposing the body of deceased Jugara in gutter and thereby committed offence punishable under Section 201 of I.P.C.

Prior to 15th July 2012, the accused No.1 committed murder and accused No.2 father-in-law of Jugara, abetted accused No.1 in the commission of the offence of murder, which offence was committed in consequence of abetment. Thus, accused committed offence punishable under Section 302 r/w. Section 109 of IPC.

4. The prosecution examined eleven witnesses. One witness was examined as Court Witness. After recording the evidence, statement of the accused were recorded under Section 313 of Cr.P.C. The learned Additional Sessions Judge, Bombay by Judgment and Order dated 7th March 2015, convicted accused No.1 (Appellant) for the offence punishable under Section 302 of I.P.C and sentenced him to suffer imprisonment for life and to pay fine of Rs.5,000/- and in default to undergo simple imprisonment for three months. The accused No.1 was also convicted for the offence punishable under Section 201 of I.P.C and sentenced to suffer rigorous imprisonment for a period of seven years and pay fine of Rs.3,000/- in default to suffer simple imprisonment for one month. The accused No.2 was acquitted for the offence punishable under Section 302 r/w. 109 of I.P.C and was directed to be set at liberty if not required in any other case or crime.

5. The prosecution examined following witnesses:

1. PW-1. Allauddin Hafizullah Maniyar
2. PW-2. Ujwala Imran Eeiddrisi
3. PW-3. Dilip Gupta
4. PW-4. Mr. Jagannath Maroti Shinde, A.S.I
5. PW-5. Indrajit Azhad
6. PW-6. Munna Ismail Hussain Chowdhary
7. PW-7. Narendra Gangaram Shinde, Medical Officer.
8. PW-8. Mr. Rajkumar V. Kothmire, Investigating Officer.
9. PW-9. Salma Ayuf Shaikh
10. PW-10. Mr. Salim Mehmood Sayyed.
11. PW-11. Naresh Vishnu Chavan, A.P.I.
12. Court Witness - Jignesh Jagdish Pathak, Reporter.

6. The case is based on circumstantial evidence. We have scrutinized the evidence of witnesses. The case of the prosecution is based on circumstantial evidence and there is no eye witness of the incident. The prosecution has relied upon the circumstances, which have emanated from the evidence of the witnesses. Considering the principle of criminal jurisprudence relating to the circumstantial evidence, we have carefully assessed the testimonies of witnesses and the documentary evidence on record to make an endeavor whether the prosecution has been able to satisfy the test

that, the circumstance from which an inference of guilt is sought to be drawn are cogent and firmly established and that the circumstances are of definite tendency unerringly pointing to guilt of accused.

7. PW- 1. Allauddin Maniyar is the brother of deceased. He is the first informant. According to him his sister Jugara was married to accused No.1 about six years prior to the incident. She was staying at her matrimonial home at Gaudihawa along with her-in-laws. After two years of marriage, she was brought to Kandiwali, Mumbai. One year thereafter, she went to village. The accused No.1 and Jugara had come to Mumbai and then again returned to village. Jugara had stayed at her parental home for three months. She went to her matrimonial home on 3rd July 2012. PW-1 was at his village. Jugara had told him that, the accused was suspecting that she is in relationship with one Mubarak and on that count she was ill-treated. Both the accused used to ill-treat her. Accused No.2 is the father of accused No.1. Jugara had also stated to PW-1 that, the accused had threatened to kill her. On 06th July 2012 accused No.1, Jugara and their son left the village. Accused No.1 had stated that, they are going to Mumbai. PW-1 came to Mumbai two to three days thereafter. On 17th July 2012, accused No.1 went to village along

with his son. Family members of PW-1 inquired about Jugara with accused No.1. The accused told them that she had ran away. PW-1 searched his sister at Mumbai. He found picture of his sister in Gujarati Newspaper. He approached Ghatkopar Police Station. The police showed him photo. He identified the photograph it to be of his sister. He was taken to Rajawadi Hospital. Body was shown to him. He identified it to be of his sister. There were injuries on face and head. He lodged the complaint on 26th July 2012. It was marked as Exh.12. In cross examination he deposed that, the victim had stayed at her father's house for several days after her delivery. At the time of delivery of son, accused No.1 was at Mumbai. The accused was not taking Jugara back home after delivery and he was not happy with her. There was no quarrel between accused No.1 and the victim in his presence. She had gone to Mumbai voluntarily as she wanted to cohabit with her husband. No complaint was lodged against the accused in the village. He had never seen Mubarak. He do not know whether he exist or not. The victim had told him that Mubarak stays at Ghatkopar. The victim never stayed at Ghatkopar prior to delivery. She had resided at Ghatkopar at the time of incident for the first time in her life. Jugara had told him that accused is suspecting that she has relation with Mubarak at Ghatkopar. Prior to coming Ghatkopar, she had never been to Ghatkopar until then.

He had visited Ghatkopar Police Station on 24th June 2012. He did not state anything to the police about ill-treatment on that day. On 26th June 2012, when he had visited Ghatkopar Police Station, the police officer had kept his complaint ready in computer.

8. PW-2 Ujwala Imran Eeiddrisi is residing at Borivali, Mumbai. She stated that the premises occupied by her were hired on rental basis. Mr. Dilip Gupta is the owner of the premises. She is residing at Ganpat Patil Nagar, Galli No.9, New Link Road, Borivali West Mumbai. On 11th July 2012 Mohammad Ismail Abdul Hadis Maniyar and his wife along with son came in search of rental premises. She let out one adjacent room to them. The room belonging to Mr. Dilip Gupta. She contacted him on phone and informed him about the same. Mr. Gupta came there and premises was let out to Mr. Maniyar and Rs.500/- was paid to Mr. Gupta. The agreement was to be prepared within two days. Mr. Maniyar and his family started residing in the room. She supplied them food. They brought some utensils. On 14th July 2012, at about 06:00 p.m while leaving room they told the witness that, they would return during night. However, they did not return. On 19th July 2012 she called Mr. Dilip Gupta and informed him that the tenants did not return. On 31st July 2012, Police along with Maniyar came to her house but she was not at home. On 01st August 2012, she went to the Police Station and her

statement was recorded. She identified accused No.1 in the Court. In cross examination she stated that police did not show her photograph of anyone for identification. The police did not show her dead body in the hospital. Police did not show the clothes for the purpose of identification. In her statement she is stated that, Mr.Gupta came to the room and then the room was let out to Maniyar. She cannot assign any reason why it is not mentioned in the statement. She also stated that, Maniyar started residing in room from 11th July 2012. She cannot assign any reason why it is not mentioned in the statement. She stated before the police that the tenants had two to three pairs of clothes and they did not prepare meal. On fourth day, they brought some utensils. She cannot assign reason why it is not mentioned in the statement. The police made inquiry with adjacent residents in her presence. Police did not meet her. The search was not taken by the police in her presence. She did not hand over the agreement of her room to police. There was no agreement of her house. She do not have ration card, election card, telephone bill, electricity bill or any other documents to show that, she resides at the given address. While purchasing mobile, she gave her residential address proof to mobile company. The said address given to the mobile company is not the same address where she resides.

9. pw-3. Mr. Dilip Gupta deposed that, he is the owner of two rooms in Ganpat Patil Nagar, Galli No.9 New Link Road, Borivali West Mumbai. The accused No.1 and PW-2 occupied two different rooms. Accused No.1 was residing since 11th July 2012 to 14th July 2012. He paid Rs.500/- towards rent. Agreement was not effected. Accused did not return back since 14th July 2012. PW-2 informed him about it. Police opened the lock of the room. In cross examination he stated that, he cannot assign any reason why it is not mentioned in his statement before the police that the accused resided in his room since 11th July 2012 to 14th July 2012 and he paid Rs.500/- towards rent. He cannot say why it is not mentioned in the statement that after 14th July 2012, Maniyar did not return back. Police did not show him accused at the Police Chowky. Police brought the accused to his office. The police had shown the accused to him. Police had told him that the accused was residing in his room. He was not shown any dead body or photograph for identification purpose. He do not have agreement to show that PW-1 was residing in his room. He do not have any documentary proof to show that, he is the owner of the premises. There is no documentary proof as regards the existence of two rooms. Police did not open the lock in his presence. Police did not record any panchnama and did not carry search of the room in his presence.

10. PW-4. Mr. Jagannath Shinde, A.S.I was attached to Ghatkopar Police Station. He received information about the body of female lying in drainage from control room. He went to the spot, body was removed with the help of Fire Brigade. The Fire Brigade removed the body and it was taken to Rajawadi Hospital. The Medical Officer declared that the victim was dead before admission. In the cross examination he stated that, there were injuries on the body. It appeared that it might be cognizable offence. On the basis of his statement ADR was registered on the same date.

11. PW-5. Indrajit Buzawan Azad was called at the Ghatkopar Police Station on 16th July 2012. Police told him to act as panch witness for recovery of clothes of deceased. Panchnama of clothes and articles on the person of deceased was prepared. The Panchnama was marked as Exh.24. The articles were kept on the table in his presence. He did not see any panchnama between 09:00 pm to 10:00 pm. Police did not show him any articles between 09:00 pm to 10:00 pm. In the cross examination he stated that, he was shown all the articles which are identified by him before the Court. He identified the articles on the person of deceased which are marked as Art. 'A' collectively.

12. PW-6. Mr. Munna Ismail Hussain Chowdhary connected as panch witness on 01st August 2012, according to him the accused made a statement that he is ready to show where the brick is kept and would produce the brick. He was ready to show the place where he kept the clothes and he would produce the same. He identified the accused in Court. The accused with police and panch witness went to spot and showed gutter. He took out the brick lying behind the tree. He took them to room. He took out the clothes kept on the rope tied inside the room it was pant and shirt. The police seized the articles. He identified the brick and clothes produced by accused. In cross examination he stated that, he do not have permit or license for business although he is hawker since last ten years. He had visited Ghatkopar Police Station on several occasions to pay penalty. On every occasion he attended the Court and pleaded guilty. He had acted as panch witness in police cases. He deposed in the Court as panch witness. The place around gutter was open place. The police officer said that, there were blood stains on the brick. The room where clothes were seized was 10-15 minutes walking distance from the said gutter. The panchnama was marked as Exh.27 and 28.

13. PW-7. Mr. Narendra Shinde is the Medical Officer. He was attached to Rajawadi Hospital. He conducted post-mortem on the body of the victim. He noticed following injuries:

- i) 1) CLW 3 cm above right ear 6 x 4 x 1 cm., 2) CLW 5 cm above angle of right eye lateral side 4 x 3 x 1 cm., 3) Peeling of skin above right breast over right shoulder upto neck 36 x 16 cm., 4) Peeling of skin forehead 13 x 8 cm.
- ii) Head - 1) Contusion and Haematoma left side occipital area to left temporal to parital area 11 x 13 cm, 2) Contusion and Haematoma frontal area 9 x 8 cm, 3) Skull – fracture left temporal, fracture right temporal bone, brain liquified decomposed, subdural haematoma present, weight 1100 gm.
- iii) The final cause of death – Hemorrhagic shock due to head injury with skull bone fracture, unnatural.

He produced original post-mortem notes. The post-mortem notes were marked as Exh.30. He stated that, injuries noticed in column No.17 of the report may result into death of a person. The injuries may be caused by brick or stone. He was shown muddemal Art. 'C' brick. The injuries may be caused by such brick. The fracture injuries to the head noted in the report may not be caused unless the

head is hit with some object. In cross he deposed that the report of caused on death was given on 20th May 2013. The final cause was reported after the report of chemical analyzer was received. He denied that, the injury noted in column Nos. 17 and 19 of the report may be caused by fall from height.

14. PW-8. Mr. Rajkumar Vishnu Kothmire was attached to Ghatkopar Police Station as Police Inspector. He received message from mobile van that, one women was lying in gutter near Balasaheb Desai Colony. A. S. I Shinde visited the place along with staff. They found that one women was lying in the gutter. They called for help from the Fire Brigade. The women was removed from the gutter. She was taken to Rajawadi Hospital. She was examined by Medical Officer and declared dead. Inquest Panchnama was prepared. PW-1 came to the Police Station on 26th July 2012. He had seen the photograph in the newspaper Gujarati daily "Metro Mirror" and had identified to be that of his sister Jugara. He went to the Hospital and identified the body of his sister Jugara. He made telephone call to his father at his native place and informed the incident to him. His father informed him that, husband of Jugara was at native place along with the child. Father of PW-1 went to native of accused and made inquiry with him and accused informed him that, jugara had

ran away with Mubarak, with whom she had affair. PW-1 informed this information to this witness. PW-1 also informed that father of deceased took accused to local Police Station where he disclosed information that he killed Jugara since she had affair with Mubarak. On the statement of PW-1 FIR was registered. Police squad was sent to native place of the accused. Both the accused were taken in the custody on 28th July 2012. They were produced before the local Magistrate. After obtaining transit remand, they were brought to Mumbai. The accused No.1 was interrogated. He disclosed that, he was residing at Borivali, he showed the room which was searched on 31st July 2012. Clothes of deceased and accused were found in the room. Photograph was also found in the room. It was seized in panchnama. He identified the clothes seized in panchnama. He made inquiry with the persons who were residing in the neighbourhood. Statements were recorded. On 01st August 2012, the accused stated that, he is ready to show the brick and clothes. Statement Exh. 27 was recorded in the presence of panch witnesses. Brick and clothes were recovered at the instance of the accused. Mobile phone was recovered from the brother of the accused on 02nd August 2012, panchnama was prepared. CDR was collected. Investigation was completed and chargesheet was filed. In the cross examination it is stated that, necessary entries are taken

in the Station Diary. However, along with chargesheet, extract of the entries are not produced. Information regarding dead body was received at Police Station on 16th July 2012. Since it was not revealed that it is a case of murder, FIR was not registered against unknown persons and only ADR was registered. When the accused was arrested, no statement of local head of the village was recorded. Exh. 46 and 47 do not bear the name and stamp of the company. It is not accompanied by any certificate regarding electronic record. The subscriber form and consumer identification form is not accompanying the record. Statements of persons in whose name phone numbers registered were not recorded. He did not find any material during investigation showing relations of deceased with person named Mubarak. He had not recorded any statement of such person. Statement of father and mother of deceased were not recorded. He recorded statement of Jignesh Pathak by using computer in Marathi and it was explained to him in Hindi. Due to pressure of work the date is wrongly recorded as 14th June 2012 in place of 16th July 2012 and instead of 23rd July 2012 he has mentioned as 16th July 2012.

15. PW-9. Smt. Salma Ayub Shaikh was called by Ghatkopar Police Station for recording panchnama. She stated that, body of the victim was lying in the gutter. It was taken out with help of Fire

Brigade people. There was injuries on her head and neck. She was wearing green colour Salvar and black colour Kameez. She was wearing Mangalsutra. Body was taken to Rajawadi Hospital. Inquest panchnama was prepared in her presence. It is marked as Exh.36. In cross examination she deposed that, she is a social worker. Police Station is fifteen minutes walking distance from her house. She helps police whenever it is required. This was third instance of attending panchnama. Whenever required, the police call her to Police Station. She was already at the place since there was foul smell and people had gathered. She was at the place when she received call from the police. She accompanied dead body to Rajawadi Hospital. The panchnama was prepared at Rajawadi Hospital. It takes twenty minutes to reach Rajawadi Hospital from the spot. She was in the Hospital for two hours.

16. PW-10 Mr. Salim Mehmood sayyed has deposed that police called him on 31st July 2012. He was told that, house search is to be conducted at Borivali and panchnama was to be recorded. Accused was present at Police Station. He identified the accused. They proceeded to Borivali. Mr. Kothmire and other police officers were present. Accused was also present. He showed room. It was a tin sheet room. It was having roof of cement sheet. The accused stated that his wife and children stay in the said room. Bag was

found containing two pairs of Salvar, Kameez, one Godhadi, one colour Photo, and Imitation Jewellery. The articles were seized. He was shown the bag along with articles. He identified the articles. He was also shown photograph. It is the same photograph which was seized by panchnama in his presence. In cross examination he stated that, he is doing business as hawker and he do not have hawker's license. Fine is charged to him by police and B.M.C. He is doing business since last 15 to 20 years. The photograph was marked as Art. 'G'.

17. PW-11 Naresh Vishnu Chavan was attached to Ghatkopar Police Station as P.S.I. According to him on 16th July 2012, He was on duty as S.H.O. Report was received that, one lady was lying in gutter. He went to that spot, lady was found lying in the gutter. She was removed from the gutter. She was dead. She was taken to Rajawadi Hospital. There was head injury to the body. There were bruise injuries to her right hand. She was wearing top and black colour bottom. She was wearing Mangalsutra. Thereafter, body was taken for the post-mortem. Clothes were also seized. Inquest panchnama was prepared. It was marked as Exh.24. The witness produced muddemal with application Exh.55 and list Exh.56. Envelope containing valuation certificate by M. G. Gold Checkers and one metal article were produced. Another envelope containing

article was opened. The articles were Mangalsutra, one Ring, pair of Painjan and finger Ring. He identified the same. In cross examination he deposed that, the information was received on 16th July 2012, he had seen the dead body at the spot. The dead body was found in the gutter. He did not find that, it was the case of unnatural death. The investigation was handed over to Mr. Kothmire. In case of Registration of ADR, the inquest panchnama must find mention of ADR serial number. There is no mentioned in the inquest panchnama of the ADR number since the information was only to the effect that one women had fallen in the gutter.

18. Shree. Jignesh Pathak was examined as Court Witness. He is a Journalist working with Gujarati Newspaper (Metro City Mirror). He stated that, he visited Ghatkopar Police Station in connection with his work as Journalist. In July 2012, he had visited said Police Station. He met Mr. Kothmire, he was informed about finding of female dead body and whether he could publish the photograph of the dead body as the police may get clue regarding identity of deceased. Mr. Kothmire had photograph of the dead body which was given to him. It was published in the issue dated 23rd July 2012. The photograph was handed over to him on 16th July 2012. In the cross examination by learned APP, in his statement recorded by police the date of his visit to Police Station is mentioned as 14th July

2012. It is typographical error. The mention therein that the news was published on 16th July 2012 in Metro City Newspaper is incorrect to the extent of date. The photograph was not published on 16th July 2012. In cross examination conducted by defense Advocate it was stated that Mr. Kothmire did not seize the copy of newspaper in which photograph was published by way of panchnama. Witness was permitted to be re-examined on the point of date of publication of the news item. The witness stated that, he has brought with him original newspaper in which the news item was published. The news item was published on page No.4 of the newspaper. The exhibition of document was not objected. Since the question as to the date of news item is in question page No.4 of newspaper together with the news item published was marked as Exh.65 to that limited extent. In further cross examination it is stated that, the police did not ask for the soft copy of the news item. He is unable to produce the soft copy before the Court on that day. Soft copy is preserved in the office of newspaper for the purpose of record. Police did not obtain certificate from him under Section 65(B) of the Indian Evidence Act. News item does not mention that photograph was provided by police.

19. The Trial Court recorded the findings that, the prosecution has proved that accused No.1, husband of deceased committed murder

of Jugara on 15th July 2012 by giving blow of brick on her head and that accused No.1 has caused evidence to disappear by throwing dead body of Jugara into gutter. Hence, accused No.1 was convicted for the offence punishable under Sections 302 and 201 of I.P.C. The accused No.2 was however acquitted on the ground that, the prosecution has not proved that, he has abetted accused No.1 in commission of offence of murder of Jugara.

20. Learned Advocate for the appellant advanced several submissions and submitted that the Judgment of the Trial Court convicting appellant be set aside. Submissions can be summarized as under:

- i) The case is based on circumstantial evidence since there is no eye witness to the incident. The prosecution has failed to prove the chain of circumstances to establish the guilt of the accused.
- ii) The prosecution is relying on the theory of last seen together on the basis of evidence of PW-2 and PW-3. There are discrepancies in the evidence of these witnesses. It suffers from omissions and contradictions.

- iii) There was no blood on the brick which was recovered during the investigation. There is no evidence to prove that the victim was assaulted by brick. It was recovered from a open place which accessible to the public.
- iv) The last seen theory cannot be believed as there is long gap between the time when the accused was allegedly seen by the witness with deceased and the finding of dead body body. The accused and deceased had allegedly left Boriwali on 14th July 2012 and the body was found at Ghatkopar on 16th July 2012. There is no nexus of last seen and the commission of offence.
- v) The prosecution has not established the time of death.
- vi) The photograph of the deceased was not produced before the Court in evidence.
- vii) The CDR was not proved. Certificate under Section 65(B) of the Evidence Act was not produced. The Trial Court discarded the evidence of CDR.
- viii) The panch witnesses were habitual. They were available to police frequently.

- ix) While recording the statement of the accused under Section 313 of Cr.P.C, all the incriminating circumstances were not put to the accused. However, the Trial Court has convicted the appellant on the basis of such circumstance.
- x) The Trial Court has erroneously invoked Section 106 of the Evidence Act, when the prosecution has failed to discharged its initial burden showing complicity of the accused in the crime.
- xi) The accused has been convicted on the basis of surmises which are not supported by any evidence.
- xii) C.A Reports do not corroborate prosecution case.
- xiii) Motive not established.

21. In support of submissions, learned counsel for the appellant relied upon the following decisions:

- i) State of Goa V/s. Sanjay Thakran & Anr. (2007) 3 SCC 755.
- ii) Anjan Kumar Sarma V/s. State of Assam, (2017) 14 SCC 359.
- iii) Tara Singh V/s. State, AIR 1951 SC 441.

iv) Ajay Singh V/s. State of Maharashtra, (2007) 12 SCC 341.

v) Sukhjit Singh V/s. State of Punjab, (2014) 10 SCC 270.

22. Per contra Learned APP submitted as follows:

- a) There is enough circumstantial evidence to prove the guilt of the accused.
- b) The Trial Court has given its finding after analyzing the evidence on record with reasons.
- c) The motive to commit crime has been established by the prosecution as well as the accused himself though the cross examination.
- d) The Trial Court has rightly invoked Section 106 of the Evidence Act. The circumstances which were special to the knowledge of the accused were not explained by him as to how the death of the victim has caused.
- e) The prosecution has proved the strong circumstance of last seen together through evidence of PW-2 and PW-3.

- f) Evidence of PW-2 and PW-3 is corroborated the fact that, accused was occupying premises at Borivali. The premises occupied by accused No.1 were searched and clothes along with photograph of deceased were recovered.
- g) The accused did not file any missing complaint on disappearance of his wife. He was arrested in Uttar Pradesh. The dead body of his wife was found at Ghatkopar. The accused is silent with regards to these circumstances. Section 106 of Evidence Act calls for explanation from the accused.
- h) There is recovery of clothes of the accused from the premises belonging to his friend at the instance of the accused.
- i) The C.A report indicates that, blood was found on the pant of the accused. Blood was found on the clothes of the victim.
- j) The premises from which clothes of the accused were recovered is situated at Ghatkopar which is closer to the place, where dead body was found.

- k) Brick used in assaulting victim has been recovered at the instance of accused.

23. On scrutiny of evidence we find that the case of the prosecution is based on several circumstances. Scanning the evidence we do not find that the Trial Court has committed any error in giving finding of guilt against the accused on the basis of the circumstances proved by prosecution. The Trial Court has given a finding that the following circumstances are duly established.

- 1) Accused No.1 was the husband of deceased Jugara.
- 2) Accused No.1 entertained grudge against deceased Jugara on suspicion that she had relations with one Mubarak (this gives motive to accused No.1 to kill Jugara).
- 3) Accused No.1 leaves his native place together with deceased and their son for coming to Mumbai.
- 4) Accused No.1 takes room on rental basis at Ganpat Patil Nagar, Borivali from PW-3 Mr. Dilip Gupta on 11th July 2012.
- 5) Accused No.1 was last seen with the deceased leaving the room at 6 pm on 14th July 2012 by PW-2 Ujjwala.
- 6) Accused No.1 did not return to the room.

- 7) Dead body of Jugara, wife of accused No.1, found in a gutter in front of Home Guard Training Center, Balasaheb Desai Colony, Ghatkopar (W), Mumbai on 16th July 2012.
- 8) Accused No.1 returns to native place with his son on 17th July 2012.
- 9) Accused No.1 explains when asked by relatives of the deceased that Jugara had run away.
- 10) Accused No.1 lodges no missing report about missing of his wife either at Mumbai or at his native place.
- 11) Accused No.1, together with accused No.2, arrested on 26th July 2012 at the native place at Uttar Pradesh.
- 12) House search of a room at Ganpat Patil Nagar, Borivali in presence of panch witness PW-10 Salim Sayyed shows that trunk was found containing clothes of male and female and photograph Art.G of deceased Jugara.
- 13) Brick seized at the instance of accused No.1.
- 14) No explanation by the accused about death of his wife Jugara.

24. It is not disputed that Jugara @ Seratun, Nisha was wife of the accused No.1 (Appellant). She was found dead in the gutter at Ghatkopar Mumbai. The evidence of PW-1 established that photograph which he had noticed in the newspaper and dead body which was shown to him was that of his sister Jugara. There is no dispute with regards the identity of the dead body found on 16th July 2012. It is pertinent to note that, the appellant was arrested in Uttar Pradesh on 28th July 2012. The dead body of the victim who is the wife of appellant was found at Ghatkopar Mumbai on 16th July 2012. There were injuries on her body. There was no missing complaint by the appellant at his native place. He is completely silent as to how she came to Mumbai and consequently found dead.

25. The Medical Officer PW-7 has stated that there was injury on the body of deceased. The opinion regarding cause of death was reserved. The same was given subsequently. It was opined that, the cause of death was Hemorrhagic due to head injury with skull bone fracture (unnatural). Post-mortem notes were produced on record. PW-7 has stated that injury can be caused by blunt object like stone or brick. He was shown the seized article brick. He stated that it may cause injury in the nature of fracture to the head. The fracture injuries to head may not be caused unless head is hit with

some object. The defense had assailed his evidence on the ground that, the opinion as to cause of death was given by him belatedly on 20th May 2013. The witness however stated that final cause was reported after the report of Chemical Analyzer was received. Although suggestion was given to him that the injury noticed in post-mortem report may be caused by fall of person from height, it was denied by him. There is no reason to doubt the correctness of his opinion and contents of post-mortem report. The death was unnatural and due to hemorrhagic shock on account of skull bone fracture which relates to act of hitting head with hard and blunt object. It is relevant to note that the dead body was lying in the drainage which had resulted into spilling of the skin as noted in the post-mortem report which mentions that, there was spilling of skin of the dead body over head and brain. The inquest panchnama also indicates that the skin over the head and right elbow of deceased had turned whitest. On these aspects, the Trial Court gave finding that death of Jugara was homicidal. We are in agreement with the finding of the Trial Court.

26. We are conscious of the fact that the case is based on circumstantial evidence. There is no eye witness to the incident. It is well settled that in a case of circumstantial evidence, all the circumstances from which the conclusion of the guilt is to be drawn

should be fully and cogently established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt.

27. One of the major circumstance against the accused to connect him with the crime is that of last seen together. We have referred to the evidence of PW-2 Ujjwala and PW-3 Dilip Gupta. PW-2 is an independent witness. She has no axe to grind against the accused. She is a natural witness. There is nothing to doubt her evidence. She has stated that the accused/appellant, his wife and son had come together in search of the premises on 11th July 2012. The adjacent room was rented out to the accused in consultation with PW-3. According to her accused along with his wife and son left premises at about 06:00 p.m on 14th July 2012 and never returned to room. The owner of the premises PW-3 Dilip Gupta was also examined. It is true that, there are omissions in the evidence of PW-2 which were brought in the cross examination by the defense. It is also brought on record that, there is no agreement executed between the parties or there is no document to show that PW-2 was occupying the premises. However, the core of her evidence that, the accused came and resided for three days had not been demolished through the cross examination. This fact is established through the evidence of PW-2 and PW-3. The accused however feigned

ignorance with regards to this circumstance. His defense is that it is false. It is the case of the prosecution which is evident from the deposition of PW-1 that accused, victim and their son left for Mumbai on 06th July 2012. The accused along with his son had reached Uttar Pradesh on 17th July 2012 and on inquiry he had disclosed that, the victim has ran away. It is pertinent to note that, the theory of last seen together is made strong by the fact that, the accused was arrested in Uttar Pradesh on 28th July 2012 and he was brought to Mumbai. The residential premises which were allegedly occupied by the accused and deceased was searched. It is the same premises which was referred to by PW-2 and PW-3 being occupied by the accused, his wife and their son. During the search the bag containing the clothes was found in the premises on 31st July 2012. This fact is established from the evidence of PW-8 Mr. R. V. Kothmire and PW-10 Salim Mehmood sayyed. It is relevant to note that photograph of deceased was also found in the said premises. Both these witnesses were cross examined by the advocate for the accused. However, nothing could be brought on record to doubt the evidence relating to search of premises and finding of clothes, jewelry and photograph of deceased. In these circumstances, it was enjoined upon the accused to give explanation in accordance with Section 106 of the Evidence Act. The prosecution had discharged its

duty to establish strong circumstance that the accused and deceased were together and hence, non explanation of this circumstance by the accused would invite adverse inference against him as link to connect him with the crime.

28. PW-1 is the brother of deceased. From his evidence it appears that, the marriage was solemnized between accused No.1 and deceased about six years prior to the incident. The accused and deceased had come to Mumbai during the intervening period and had again returned to native place at Gaudihawa, Uttar Pradesh. The victim had delivered child. She was at her parental home after the delivery. She had told PW-1 that the accused is suspecting her character. On account of fact that, she is having illicit relationship with Mubarak, she was ill-treated and threatened by the accused. He also stated that the accused, victim and son left village on 06th July 2012. They had informed that, they are going to Mumbai. The accused returned to village with son but not with his wife on 17th July 2012. The only explanation given by him is that, the wife had ran away. The accused have denied this circumstance. Surprisingly in the cross examination the witness was questioned with the fact that, the victim had stayed at parental home for several days after delivery. Accused No.1 was at Mumbai and he was not taking his wife back home for several days. Panchayat was called. The line of

cross examination would indicate that the accused was not taking the victim back home from her parental house. The victim had told PW-1 about Mubarak and that he resides at Ghatkopar. The said fact was told after her delivery. Thus, the motive which was attributed by the prosecution has been made stronger through the cross examination by the defense. The witness has also stated in the cross examination that, the victim had told him that the accused would suspect that, she is having relation with one Mubarak at Ghatkopar. In case of circumstantial evidence motive is vital and strong circumstance. The prosecution has attributed to him the motive which is corroborated by defense in the cross examination.

29. The evidence of PW-8 and PW-10 relating to search at the premises where the accused had allegedly stayed with wife and son has not been shaken in any manner. The cross examination of PW-1 do not include suggestion as to why the victim came to Mumbai.

30. The evidence of PW-4 relates to recovery of dead body of the victim. The evidence of PW-5 panch witness refers to the clothes of deceased. The evidence of PW-6 relates to the recovery of brick at the instance of accused and his clothes from the room. This fact is proved by Exh.27. The brick was not found at open place. It was taken out from the bushes by accused. The accused then took the

police and panchas to the room which is situated at a short distance from the place where dead body was found. The room belongs to the friend of the accused. Clothes of the accused were recovered from the said room. This panchnama has been proved through the evidence of witness PW-6. He was cross examined. However, there is nothing on record to disbelieve the evidence of this witness. Assuming that witnesses were acquainted with the police, their evidence cannot be discarded unless the evidence of witnesses suffers from discrepancies or doubtful. According to defense, the recovery cannot be believed because the person from whose house the recovery is made has been examined although named in the panchnama. It is also contended that, no blood was detected on brick. It may be noted that, the brick was hidden near the gutter. However, it has been recovered at the instance of the accused and it cannot be said that the place was open and accessible to the public. Although the police had visited the place at the time of recovery of dead body, it cannot be said that the place of brick was known to them as it was taken out from the bushes. The Medical Officer has opined that, the injuries on deceased can be possible by the brick. It is also pertinent to note that, the pant which was recovered from the said premises had blood stains and it was detected to be human blood. The blood was also found on clothes of deceased.

31. The evidence regarding CDR relating to the calls between accused No.1 and 2 and the tower location of the accused No.1 has been discarded by the Trial Court as the same was not found in accordance with the provisions of the Evidence Act. The certificate under Section 65(B) was not produced.

32. The learned counsel representing the accused had contended that, probable time of death is not established and there is a missing link in the evidence which connects accused with the crime. It would not affect prosecution case. The evidence of Court Witness who published the photograph of dead body was also assailed. On perusal of his evidence we do not find any reason to discard his evidence. He was sought to be examined to clarify the date of publishing news item.

33. Thus, the evidence of PW-10 in whose presence the house of accused was searched and articles recovered which was corroborated the testimony to PW-2. PW-10 identified accused No.1 to be present at the time of panchnama. He referred to finding of bag containing salwar kameez, imitation jewelry and one colour photo. He identified the clothes and photograph. These articles

together with evidence of PW-10 establishes the fact that, they were found in the room adjacent to the room of PW-2.

34. Thus, from the evidence it has been established that, on 11th July 2012 accused No.1 and deceased came to reside in room adjacent to that of PW-2 and they left on 14th July 2012. The deceased was found dead on 16th July 2012. The dead body of wife of appellant was found in gutter at Ghatkopar. Clothes of accused No.1 (Appellant) were recovered from his friend's room at Ghatkopar which is at short distance from place of where dead body was found. Thus, there is strong reason to believe that the accused must have taken his wife to Ghatkopar and killed her.

35. The learned defense counsel had contended that, all the circumstances are required to be put to the accused to give him opportunity to tender explanation while recording statement under Section 313 of Cr.P.C. He relied upon the decisions referred to hereinabove. In the case of Ajay Singh V/s. State of Maharashtra. It was observed that, the object of examination under Section 313 of Cr.P.C is to give the accused an opportunity to explain the case made against him. The statement can be taken into consideration in judging his innocence or guilt. The word generally in sub-section 1(b) of Section 313 of Cr.P.C does not limit the nature of questioning

to one or more questions of a general nature relating to the case but it means that, the question should relate to the whole case generally and should also be limited to any particular part or part of it. The question must be framed in such way so as to enable the accused to know, what he has to explain, what are the circumstances which are against him and for which explanation is needed. The conviction is based on the failure of accused to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of Cr.P.C was that attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that, the case is made out against the accused so that, he may be able to give such explanation as he desires to give. Thus, from the ratio laid down in the aforesaid decision it is clear that, the statement can be taken into consideration in judging the innocence of the accused or his guilt and where there is a onus on the accused to discharge it. It would depends on the facts and circumstances of the case if such statement discharges the onus. The factual aspect of the said decision indicates that the accused was tried on a charge for having committed murder of his wife by pouring kerosene on her person and set her on fire. As regards the prosecution case that, kerosene was found on the clothes of accused no question was put to the accused while he was examined

under Section 313 of the code. Applying the ratio in this decision, it is apparent that, the accused has not discharged his onus. All the circumstances emanated from the evidence of the witnesses were put to the accused. However, the accused was silent. This strong circumstance which warrant explanation from the accused was relating to last seen together. If the deceased was at Mumbai with victim how he was found at Uttar Pradesh and dead body of deceased was found at Ghatkopar. The silence of accused speaks volume of adverse inference against him. We have perused the statement of the accused No.1 under Section 313 of Cr.P.C. Question Nos. 7, 8, 11 and 13 would be relevant, which are quoted hereinbelow:

"7) He has further stated that, on 06th July 2012, you accused No.1 & 2 left the village along with his sister for Mumbai and after 2-3 days you came back to the native place. What you to say about it?

8) He has further stated that, on 17th July 2012 his family members asked you about Jugra and you told them that she had run away. What you have to say about it?

11) PW – Ujwala Imran Eeiddrisi has stated that, on 11th July 2012, you accused No.1 Mohammad Ismail came along with your wife and son in search of rented premises and she let out one adjacent room of Dilip Gupta to you by informing Dilip Gupta and you paid Rs.500/- to Dilip Gupta. What you have to say about it?

13) She has further stated that, on 14th July 2012 at 6.00 pm you left the room informing her that you would return during night but did not return and on 19th July 2012 she informed Dilip Gupta that you did not return to the room. What you have to say about it?"

36. The accused had given answer that the evidence is false. It is also relevant to consider that the clothes and the photograph of the victim were found in the premises allegedly occupied by him which has been established through evidence of PW-8 and PW-10. The questions relating to the evidence of these witnesses by question Nos. 46, 64, 65, 66, 67 and 68 were put to him but no explanation was given by him except denial.

37. Even otherwise the evidence of PW-2, PW-8 and PW-10 strongly supports prosecution. It is required to be noted that, the accused was arrested at Uttar Pradesh. Transit demand was obtained and he was produced before the concerned Court at Mumbai. Deceased is the wife of the accused and she was found dead in the gutter at Mumbai. The prosecution has established that, she was in company of the accused/appellant at Mumbai who was subsequently arrested at Uttar Pradesh. This is the strong circumstance which is corroborated by other evidence and record analyzed hereinabove which is sufficient to convict the appellant accused. In addition to this there is no explanation of whatsoever nature which is warranted on account of aforesaid circumstances. In accordance with Section 106 of the Evidence Act. Even by keeping

aside the rigours of Section 106 of Evidence Act. There are strong circumstances which tilt towards the guilt of the accused.

38. In the case of Sukhjit Singh V/s. State of Punjab (Supra) the Apex Court reiterated the significance of faithful and fair compliance of Section 313. It was held that it is not an empty formality. Incriminating material has to be brought to the notice of the accused under Section 313 of Cr.P.C which can cause immense prejudice to him when there is no evidence to establish his complicity in the alleged offence. The decision is of no help to the appellant. In the case before the Apex Court it was found that no incriminating material was brought to the notice of the accused while putting questions. In these circumstances, it was observed by the Court that, there can be no doubt that when the requisite questions have not been put to the accused it has caused immense prejudice to him, more so when there is no evidence to establish his complicity in the crime. As stated above, we do not find any force in the submission of the learned counsel for the defense as prima facie, there are strong circumstances against him and the same were put to him. The circumstances which were put to him were answered either by stating that, they are false or that, he do not know about it.

39. The learned counsel relied upon the decision in the case of State of Goa V/s. Sanjay Thakran in support of his submission that the circumstance of last seen together in the present case cannot be relied upon to convict him. The Supreme Court has observed that, the duration of the time gap between the accused person seen in the company of deceased and detection of crime established a material consideration. Normally, such evidence would be taken into account where prosecution establishes that the time gap was so small that the possibility of any other person being with deceased could completely be ruled out. In the very decision, it was also observed that, it cannot be said that in all cases where there is a long time gap between the above two points, the evidence of last scene together is to be rejected. Even in such cases the proof of last scene together would be relevant if the prosecution establishes that, in the intervening period there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of crime. In the case before the Apex Court there was considerable time gap between the person scene together and the proximate time of crime and therefore the Court held that, the circumstance of the last scene together could not be taken into account to fasten the guilt. In the present case in the intervening period there was no possibility of any other person meeting or

approaching the victim. The relation between the victim and the accused would be relevant factor in this case, deceased was the wife of the accused. She was seen with him and the son. Thereafter, she was not seen and her body was found in gutter. The accused was found at Uttar Pradesh. The evidence of last seen together cannot be discarded on any count in the present case. The other decision relied upon the learned counsel for the appellant is in the case of *Anjan Kumar Sarma V/s. State of Assam (supra)*, Wherein it was observed that, lack of clinching chain of circumstances and only circumstance of last seen together and absence of satisfactory explanation cannot be made basis of conviction. In that case, the only circumstance was of last seen together and there was no proof of other circumstances. The accused in the said case were acquitted by the Trial Court. The High Court reversed the order of acquittal into conviction. There was no motive to commit the crime. It was observed that the inference drawn by the Court that, the accused killed deceased and the body was thrown is not on the basis of any proved facts and there is no evidence on record to show that, deceased was with the accused. In the facts of the case the Court found that, the evidence of last seen which is the only circumstance cannot be useful in convicting the accused. It was also observed that, failure of the accused to given

explanation under Section 313 of Cr.P.C alone is not sufficient to establish the charge against the accused.

40. In the case of ***Sharad Birdichand Sarada V/s. State of Maharashtra, AIR 1984 SC 1622***, the Hon'ble Supreme Court elaborated the five golden principles of circumstantial evidence laid down in ***Hanumant V. State of M.P., AIR 1952 SC 343***. These five golden principles are as follows:-

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

2. The fact 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 that act must have been done by the accused."

41) In the case of ***Shambu Nath Mehra V/s. State of Ajmer AIR 1956 SC 404***, the Hon'ble Supreme Court has explained the requirement of Section 106 of the Evidence Act. It would be appropriate to quote the observations in paragraph 9, 10 and 11 of the said decision.

“9. This 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. It is evident that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle V. Emperor and Seneviratne V. R.

10. Illustration (b) to Section 106 has obvious reference to a very special type of case, namely to offences under Sections 112 and 113 of the Indian Railways Act for travelling or attempting to travel without a pass or ticket or with an insufficient pass, etc. Now if a passenger is seen in a railway carriage, or at the ticket barrier, and is unable to produce a ticket or explain his presence, it would obviously be impossible in most cases for the railway to prove, or even with due diligence to find out, where he came from and where he is going and whether or not he purchased a ticket. On the other hand, it would be comparatively simple for the passenger either to produce his pass or ticket or, in the case of loss or of some other valid explanation, to set it out; and so far as proof is concerned, it would be easier for him to prove the substance of his explanation than for the State to establish its falsity.

11. We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be “especially” within the knowledge of the accused. This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain

facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts."

42. In the case of **Joseph S/O Kooveli Poulo vs State Of Kerala, (2000) 5 SCC 197**, It was held that falsity of the defense plea, false answers given to the Court, denial of circumstances instead of making an attempt to explain or clarify the incriminating circumstances provides a missing link for completing the chain of incriminating circumstances.

43. In (State of Maharashtra Vs. Suresh), 2000 Bom.C.R.(Cri.) 736 (S.C.) : (2000) 1 S.C.C. 471, it has been held that when the attention of the accused is drawn to such circumstances that inculcate him in the crime and he fails to offer appropriate explanation or gives a false answer, the same can be counted as providing a missing link for completing the chain of circumstances.

44. In (State of W.B. Vs. Mir Mohammad omar), (2000)8 S.C.C. 382 : 2000 S.C.C (Cri) 1516 : AIR 2000 S.C. 2988 Court held that if fact is especially in the knowledge of any person, then burden of proving that fact is upon him. It Is impossible for the prosecution to prove certain facts particularly within the knowledge of the accused.

Section 106 is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference. Section 106 the Evidence Act is designed to meet certain exceptional cases, in which, it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused.

45. In the case of (State of Rajasthan Vs. Kashiram), (2006) S.C.C. 254 the Apex Court has held that “If the accused fails to offer an explanation on the basis of facts within his personal knowledge, he fails to discharge the burden cast upon him by section 106 of the evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation on the burden placed on him, that itself provides an additional link in the chain of circumstances proves against him. Section 106 does not shift the burden of proof in the criminal trial which is always on the prosecution. It lays down a rule that when the accused does not throw any light upon facts which are specially within his knowledge

and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain.”

46. The Trial Court after scrutiny of evidence has dealt with this issue of not explaining the circumstances by the accused in paragraph 32 of the decision which reads as under:-

“32. In case of relations between the accused no.1 and the deceased being that of husband and wife, the husband is bound to explain above any mishap that has occurred to his wife when they are residing and moving together, as such husband and wife. It is expected from the accused to come out with some explanation as to the cause of death of his wife. Apart from it, the conduct of the accused also is important. The conduct of accused no.1 in not making complaint about missing of his wife either at Mumbai or at his native place not only raises a suspicion but it would point out towards guilty mind. Further conduct of the accused no.1 in not offering any explanation during the course of cross examination of a witness or even in his statement under section 313 of Cr.P.C should provide a bridge for a missing link in between two circumstances. The accused cannot lightly go away by not offering any explanation and by keeping silence in a case where he is definitely expected to open his mouth and say something relevant to the incident of death of his wife. It is the accused in the present case who was only supposed to know whereabouts of his wife and he was expected to make efforts to find out his wife if he really believed that his wife was missing. In the present case, evidence of PW-1 Allauddin Maniyar, who is brother of the deceased, would show that on 6.7.2012 accused no.1 and his deceased sister left their native place along with their son. His evidence would further show that, on 17.7.2012, accused No.1 went back to his native village along with his son without his wife. It is relevant to note that, the dead body of the wife of accused no.1 was found on 16.7.2012 at Ghatkopar. Evidence of PW-1 Allauddin would further show that when his family members asked the accused about whereabouts of his

wife, accused no.1 bluntly stated that she had run away. Thus, the fact that the accused left his native place on 6.7.2012 along with his wife and came back to native place on 17.7.2012 without his wife would give rise to an inference that the accused must have knowledge as to the death of his wife. Otherwise he must have raised a hue and cry by making complaint to the police and relatives about missing of his wife. Silent entry of the accused no.1 to his native place without speaking a word about his wife on his own itself is a vital and incriminating circumstance against the accused no.1 apart from the fact that, he was last seen with his wife by PW-2 Ujjwala on 14.7.2012 at 6 pm when accused no.1 and his wife left the room which they had taken on rent for accommodation recently on 11.7.2012."

47. We are of considered view, that the Trial Court has perfectly analysed the circumstances and invoked Section 106 of Evidence Act. Apart from the non explanation we found that, the circumstance of last seen together, recovery of the clothes and articles and photograph of the victim from the premises where the accused was residing, recovery of clothes of the accused from a place which was at a close distance from the place where the dead body was found. Recovery of brick and finding of body in the gutter at Mumbai, arrest of the accused at Uttar Pradesh are the strong circumstances which by itself proves the guilt of the accused and hence, we do not find any reason to differ from the view that the charge against the appellant has been established beyond all reasonable doubts and hence, conviction has to be sustained.

ORDER

- i) Criminal Appeal stands dismissed.
- ii) The Judgment and order dated 7th March 2015 passed by the Additional Sessions Judge, City Civil Court Greater Boday, in Sessions Case No. 737 of 2012 convicting the appellant under Sections 302 and 201 of the I.P.C is hereby confirmed.

(PRAKASH D. NAIK, J.)

(PRASANNA. B. VARALE, J.)