

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 600 OF 2014

Subhash Tukaram Hanwate
Age 38 years, Occ. Masonry
R/o. Shet Majurwadi, Tamsa
Tq. Hadgaon, District Nanded

...Appellant
(original accused no.1)

versus

The State of Maharashtra

...Respondent

.....
Mr. Pratik Kothari with Miss Nandini Chittal h/f Mr. A.H. Kasliwal advocate
for the appellant
Mr. R.D. Sanap, A.P.P. for respondent State
.....

**CORAM : V. K. JADHAV AND
SHRIKANT D. KULKARNI, JJ.**

**Date of Reserving
the Judgment : 23.09.2021**

**Date of pronouncing
the Judgment : 24.09.2021**

JUDGMENT (PER V.K. JADHAV, J.) :-

1. This appeal is directed against the judgment and order of conviction dated 11.08.2014 passed by the Additional Sessions Judge-2, Nanded in Sessions Case No. 21 of 2013.

2. Brief facts giving rise to the prosecution case are as follows:-

a) Deceased Chhayabai was the wife of the appellant-accused and their marriage was performed 18 years prior to the incident. After marriage, deceased Chhayabai was treated well for a period of 12

years. The appellant-accused and deceased Chhayabai had one daughter and two sons out of their wedlock. However, since last 6 years prior to the incident, the appellant-accused had started ill-treating her on account of non fulfillment of demand of Rs.60,000/- from her parents for purchasing a motor cycle. P.W.1 Ganeshrao Dhage, father of deceased Chhayabai, informed to the appellant that he was unable to fulfill the demand. However, there was no change in the behaviour of the appellant-accused. In the month of July, 2012, P.W.1 Ganeshrao paid Rs.10,000/- to the appellant-accused and his family members, however, there was no change in the behaviour of the appellant-accused. The incident had taken place on 23.10.2012, at about 10.00 to 10.30 a.m. P.W.1 Ganeshrao had received information that his daughter Chhayabai was assaulted by her husband with first and kick blows and he killed her by throttling. P.W.1 Ganeshrao had thus rushed to the matrimonial home of deceased Chhayabai. He saw the dead body lying in the house and there was swelling on her chest and ligature mark on neck. P.W.1 Ganeshrao thus rushed to the police station and lodged the complaint Exh.31.

b) On the basis of said complaint dated 23.10.2012, crime No. 44 of 2012 came to be registered for the offences punishable under Sections 302, 498-A r.w. 34 of I.P.C. against the appellant-accused and his brothers. P.W.6 Dy.S.P. Vasant Chavan took over the investigation of the crime. P.W.6 Dy.S.P. Vasant Chavan has visited

the spot and prepared inquest panchanama of the dead body Exh.32. He has thereafter sent the dead body for post mortem examination. P.W.6 Dy.S.P. Vasant Chavan has also prepared spot panchanama Exh.49. On the same day, he has recorded the statements of the witnesses and also effected arrest of the accused persons. During investigation, while in custody, the appellant-accused gave a disclosure statement to point out the rope used in commission of the crime. Thus, in presence of the panchas, memorandum panchanama Exh.52 was drawn. In pursuance to the disclosure statement, the appellant-accused led the police party and the panch witnesses to his residential house and after entering into the house, the appellant-accused took out the rope from fuel wood. The same was sized under recovery panchanama Exh.38. On 29.10.2012, on completion of investigation, charge sheet has been submitted.

c) Learned Additional Sessions Judge-2, Nanded has framed charge against the appellant-accused and three others, (brothers of the appellant-accused) for the offences punishable under Sections 302 and 498-A r.w. 34 of I.P.C. and under Section 302 r.w. 34 of I.P.C. vide Exh.16. The contents of the charge were read over and explained to them. The appellant-accused and other co-accused persons pleaded not guilty to the charge and claimed to be tried. The prosecution has examined in all six witnesses to substantiate the charges levelled against the accused persons. After completion of

prosecution evidence, the statements of the appellant-accused alongwith other accused persons came to be recorded under Section 313 of Cr.P.C. The defence of the appellant-accused is of denial. As per the defence of the appellant-accused, deceased Chhayabai was suspecting about illicit relations of appellant-accused with some other woman and therefore, deceased Chhayabai committed suicide by hanging.

d) The learned Additional sessions Judge-2, Nanded by judgment and order dated 11.08.2014 in Sessions Case No. 21 of 2013 convicted the appellant-accused for the offence punishable under section 302 of I.P.C. and acquitted other co-accused persons. The learned Additional Sessions Judge-2, Nanded has passed the following order :

“1. The accused No.1 Subhash s/o Tukaram Hanwate, No.2 Devidas s/o Tukaram Hanwate, No.3 Sanjay s/o Tukaram Hanwate and No.4 Rohidas @ Pappu s/o Tukaram Hanwate, are acquitted under Section 235 (1) of Cr.P.C. of the offences punishable under Section 498-A, 302 r.w. 34 of Indian Penal Code.

2. The accused No.1 Subhash s/o Tukaram Hanwate is convicted under Section 235(2) of Cr.P.C. of the offence punishable under section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine Rs.2,000/- in default to suffer rigorous imprisonment for six months.

3. The period of detention is given set off under Section 428 of Cr.P.C.

4. The bail bonds of accused No. 2 to 4 stands cancelled.

5. The muddemal property vide Exh.2 being worthless of value, be destroyed after appeal period.

6. On transcription, copy of judgment be supplied to accused free of costs, under Section 363 of Cr.P.C.”

3. The learned counsel for the appellant-accused submits that the prosecution case entirely rests upon the circumstantial evidence and there is no direct evidence in this case. Learned counsel submits that the trial court has recorded the finding in negative to point No.1 and thereby held that the prosecution has failed to prove that the deceased Chhayabai was subjected to cruelty for non fulfillment of unlawful demand. Learned counsel submits that in view of the same, there is no apparent motive on the part of the appellant-accused to commit murder of deceased Chhayabai.

4. Learned counsel for the appellant-accused submits that the prosecution has failed to establish that the death of Chhayabai was homicidal death. Learned counsel submits that the prosecution has failed to discharge the initial burden to prove the prosecution case and thus, the burden would not shift on the appellant accused in terms of provisions of Section 106 of evidence Act. Learned counsel submits that though the rope shown to have been recovered at the

instance of the appellant-accused, however, there is no further connecting evidence in support of the said recovery allegedly at the instance of the appellant-accused. Learned counsel submits that the prosecution has failed to prove its case against the appellant-accused. The circumstances from which the conclusion of the guilt is to be drawn are not fully established. The circumstances brought on record are not conclusive in nature and tendency. Learned counsel submits that when two views are possible, one leading towards the acquittal and another towards conviction, the benefit should be given to the accused.

Learned counsel for the appellant accused in order to substantiate his contentions placed reliance on the following cases:-

1. **Eswarappa vs. State of Karnataka**, reported in (2019) 16 SCC 269.
2. **Shivaji Chintappa Patil vs. State of Maharashtra**, reported in AIR 2021 SC 1249.
3. **Abbas Nawaj Shaikh vs. State of Maharashtra**, reported in 2019 All M.R. (Cri.) 1316.
4. **Bapu vs. The State of Maharashtra**, reported in 2019 All M.R. (Cri.) 242.
5. **Vikramjit Singh vs. State of Punjab**, reported in (2006) 125 SCC 306.

6. **Kali Ram vs. State of Himachal Pradesh**, reported in AIR 1973 SC 2773.

5. Learned A.P.P. submits that the P.W.1 Ganeshrao, father of deceased Chhayabai, has deposed that deceased Chhayabai was subjected to ill-treatment on account of non fulfillment of demand of Rs.60,000/- for purchasing of motor cycle. Even he had paid some amount to satisfy the said demand to certain extent. However, the ill-treatment to deceased Chhayabai remained continued. Learned A.P.P. submits that the dead body of deceased Chhayabai was found in her matrimonial home. It was custodial death. The appellant accused has not offered any explanation as required under Section 106 of the Evidence Act.

6. Learned A.P.P. submits that if the offence has taken place in secrecy inside of the private house, in such circumstance, it will be difficult for the prosecution to lead evidence to establish the guilt of the accused if strict principle of circumstantial evidence is insisted upon by the courts. Learned A.P.P. submits that in the instant case, murder has been committed in the secrecy inside of the house. The initial burden to establish the case would be upon the prosecution. However, nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. Learned A.P.P. submits that in view of the section 106 of Evidence Act, there will be a

corresponding burden on all the inmates who were in the house to give a cogent explanation as to how the death was occurred.

7. Learned A.P.P. submits that the prosecution has established the homicidal death of deceased Chhayabai in her matrimonial home. Thus, initial burden has been discharged by the prosecution. The appellant-accused has not satisfactorily explained the homicidal death of deceased Chhayabai in the matrimonial home and the same thus, provides additional link of circumstance against the appellant-accused.

Learned A.P.P. in order to substantiate his contentions placed reliance on the following cases :

1. **Trimukh Maroti Kirkan vs. State of Maharashtra, reported** in 2007 Cri.L.J. 20.
2. **State of Uttar Pradesh vs. Samman Dass**, reported in AIR 1972 SC 677.

8. We have perused the material exhibits tendered by the prosecution; the evidence of the prosecution witness, the statement of the appellant-accused recorded under Section 313 of Criminal Procedure Code, the evidence of the appellant-accused himself and the impugned judgment. After giving our thoughtful reflection to the matter, we are wholly satisfied that there is substance in this appeal and the same must be allowed.

9. In order to prove the homicidal death of deceased Chhayabai, the prosecution has examined P.W.3 Dr. Gopikrushna Patil. P.W.3 Dr. Patil has conducted post mortem examination on the dead body of deceased Chhayabai on 23.10.2012. On external examination, P.W.3 Dr. Patil found ligature mark encircling neck above the level of thyroid cartilage. Impression of knot was present on left lateral side of neck. The ligature mark was grooved and parchment like. In his opinion, the said ligature mark was ante mortem in nature. P.W.3 Dr. Patil has opined that the probable cause of death was asphyxia with cardio respiratory arrest secondary to hanging. He has accordingly prepared the post mortem notes which bears his signature and the same is marked at Exh.46.

10. P.W.3 Dr. Patil had admitted in his cross examination that the ligature mark present around the neck of deceased Chhayabai may be caused by self hanging. The hanging as compared to strangulation is mostly suicidal. Further, the ligature marks usually appear obliquely as compared to the strangulation. In case of death by strangulation, the ligature marks usually appear horizontally or transverse continuous round the neck. The strangulation is always considered as the compression of neck by a force other than hanging and the weight of the body has nothing to do with strangulation.

11. In the instant case, the body of deceased Chhayabai was lying on the cot in her matrimonial home. There were no other injuries on the body of deceased Chhayabai. In the Text Book of Medical Jurisprudence and Toxicology authored by Modi, in its 24th Edition in Chapter 19, page 449, it is observed as follows:-

"Homicidal hanging, though rare, has been recorded. Usually, more than one person is involved in the act, unless the victim is a child or very weak and feeble, or is rendered unconscious by some intoxicating or narcotic drug. In a case, where resistance has been offered, marks of violence on the body and marks of a struggle or footprints of several persons at or near the place of the occurrence are likely to be found."

12. In the case of **Eswarappa vs State of Karnataka** (supra) relied upon by learned counsel for the appellant, the Hon'ble Supreme court by referring the aforesaid extract from Modi's Jurisprudence and Toxicology, in para 6 and 7 has made the following observations:-

6. It is not possible to infer strangulation merely because of two ligature marks. We say this due to the absence of any mark of struggle or violence on the body or in/around anyone else for that matter could have managed to strangle an adult woman and then hang her without any struggle. Such cases normally occur with the help of a companion. There is no evidence to that effect.

7. In Modi's Medical Jurisprudence and Toxicology, it is observed as follows:

Homicidal hanging, though rare, has been recorded. Usually, more than one person is involved in the act, unless the victim is a child or very weak and feeble, or is rendered unconscious by some intoxicating or narcotic drug. In a case, where resistance has been offered, marks of violence on the body any marks of a struggle or footprints of several persons at or near the place of the occurrence are likely to be found.

13. In the case of **Shivaji Chintappa Patil vs. State of Maharashtra** (supra), relied upon by learned counsel for the appellant-accused, the Supreme court in identical facts, by referring the aforesaid observation in Modi's Jurisprudence and Toxicology, in para 15, 16 and 17, has made the following observations:-

"15. It is thus clear, that the medical expert has admitted, that in both the cases of suicidal or homicidal hanging, the ligature marks around the neck shall go upwards ears. He has further admitted, that after consulting his senior medical officer and going through the books, he concluded that it was a case of hanging. He has further admitted, that Article No. 1 which is a rope, which is found on the spot, can be used for suicidal hanging. He has further admitted, that in case of homicidal strangulation, the bodily resistance would have been reflected.

16. It will be apposite to refer to the judgment of this Court in the case of Eswarappa alias Doopada Eswarappa (supra), wherein this Court relied on Modi's Medical Jurisprudence and Toxicology and observed thus:-

"7. In Modi's Medical Jurisprudence and Toxicology, 23rd Edn., p. 572 it is observed as follows:

"Homicidal hanging, though rare, has been recorded. Usually, more than one person is involved in the act, unless the victim is a child or very weak and feeble, or is rendered unconscious by some intoxicating or narcotic drug. In a case, where resistance has been offered, marks of violence on the body and marks of a struggle or footprints of several persons at or near the place of the occurrence are likely to be found."

None of the well-known signs referred to by the learned author are present in this case."

17. In the present case also, admittedly, there are no marks on the body which would suggest violence or struggle. In any case, the medical expert himself has not ruled out the possibility of suicidal death. On the contrary, the Post-Mortem Report shows, that the cause of death was 'asphyxia due to hanging'."

14. In the instant case, there are no marks of violence or marks of struggle on the body. There is no evidence to suggest that deceased Chhayabai was rendered unconscious by some intoxication or drug before subjecting her to homicidal hanging. P.W.3 Dr. Patil has also admitted in his cross-examination that ligature mark present around the neck of deceased Chhayabai may be caused by self hanging. In the light of this evidence, it appears that the trial court has erred in holding that the prosecution has proved the homicidal death of deceased Chhayabai.

15. It is well settled that the motive plays great role when the prosecution case entirely rests upon the circumstantial evidence. In the instant case, learned Judge of the trial court has recorded finding in negative to point No.1 and thereby held that the prosecution has failed to prove that deceased was subject to cruelty on account of non fulfillment of demand. We have carefully gone through the evidence of P.W.1 Ganeshrao. P.W.1 Ganeshrao has deposed that deceased Chhayabai was given in marriage to appellant-accused some 18 years prior to the incident. She was treated well for a period of 12 years and the couple was blessed with two sons and one daughter. There are no details as to when the demand of Rs.60,000/- for purchase of motor cycle was made after happy marital life for long period of 12 years. It is merely alleged by P.W.1 Ganeshrao that the appellant accused started consuming liquor and ill-treating deceased Chhayabai for bringing Rs.60,000/- for purchasing the motor cycle. There are no details as to in what manner deceased Chhayabai was subjected to cruelty. It is thus difficult to believe that after such long happy marital life for a period of 12 years, as of sudden, the appellant-accused addicted to liquor and started ill-treating deceased Chhayabai by making demand of Rs.60,000/- for purchase of motor cycle.

16. The prosecution has examined P.W.4 Sujata, who is daughter of appellant-accused and deceased Chhayabai. P.W.4 Sujata, who was 19 years of age, though subjected to cross-examination by

learned A.P.P. before the trial court by declaring her hostile, has deposed that there used to be quarrel between her mother and father on account of cultivation of land of one Kamalbai. Her mother deceased Chhayabai insisted that the appellant-accused should not cultivate the land of said Kamalbai on Batai basis. P.W.4 Sujata has deposed that her mother deceased Chhayabai was suspecting illicit relations of her father (appellant-accused herein) with said Kamalbai. Even deceased Chhayabai had told P.W.4 Sujata that she would prefer to die if the appellant-accused would not leave to cultivate the land of Kamalbai. There is nothing in the cross-examination at the hands of learned A.P.P. to disbelieve this part of her evidence. P.W.1 Ganeshrao has also admitted in para 10 of his cross-examination that prior to the incident, the appellant-accused had taken 5 acres of land of Kamalbai for cultivation on Batai basis.

17. Thus, in view of the findings recorded by the trial court to point No.1 in negative by holding that the prosecution has failed to prove that deceased Chhayabai was subjected to cruelty on account of non fulfillment of demand, so also in terms of evidence of P.W.4 Sujata, we are of the opinion that the prosecution has failed to establish and prove the motive. It is true that the absence of motive cannot be a ground to reject the prosecution case. However, if the motive is proved, that would supply the link in the chain of circumstantial evidence and absence of motive is a fact that weighs in favour of the accused. The reference of the case of **State of Uttar**

Pradesh vs. Krishanpal reported in (2008) 16 SCC 73 can be made. We are of the considered view that the prosecution has failed to prove the motive beyond doubt. Thus, the important link to complete the chain of circumstances is missing in the present case.

18. The Supreme Court has laid down the guiding principles with regard to the conviction on the basis of the circumstantial evidence in the case of ***Sharad Birdhichand Sarda Vs. State of Maharashtra*** reported in (1984) 4 SCC 116. Those principles are reiterated in catena of cases including ***Shivaji Chintappa Patil vs. State of Maharashtra*** (supra) relied upon by learned counsel for the appellant-accused. The said five guiding principles in the aforesaid case are as follows:-

- “1. The circumstances from which the conclusion of guilt is to be drawn ‘must or should be’ and not merely ‘may be’ fully established.
2. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
3. The circumstances should be of a conclusive nature and tendency;
4. They should exclude every possible hypothesis except the one to be proved; and
5. There must be a chain of evidence so complete as not to

leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

19. In the case of **Trimukh Maroti Kirkan vs. State of Maharashtra** reported in **2007 Cri.L.J. 20** relied upon by the learned APP, the Supreme Court in paragraph no.12 of the judgment has made following observations:-

“12. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecution* 1944 AC 315 quoted with approval by Arijit Pasayat, J. in *State of Punjab vs. Karnail Singh* (2003) 11 SCC 271). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads : 2003 AIR SCW 4065

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

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

20. In the case of **Vikramjit Singh vs. State of Punjab** (supra) relied upon by learned counsel for the appellant, the Supreme court has dealt with the scope of section 106 of Evidence Act and observed that it does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution has been proved, the burden in regard to such fact which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule where the burden of proof may be imposed upon the accused by reason of statute.

21. In the instant case, though death of deceased Chhayabai

occurred in secrecy inside the house and though the burden of prosecution would be comparatively lighter in character, unfortunately, the prosecution has failed to discharge the said initial burden. On the same set of allegations, the trial court has acquitted co-accused Nos. 2 to 4 in connection with the present crime. It is the prosecution case that the appellant-accused and co-accused persons, in furtherance of their common intention, had committed murder of deceased Chhayabai. The prosecution has failed to establish the motive. We find no apparent reason for the appellant-accused to commit murder of his wife deceased Chhayabai after a happy cohabitation of 12 years and when the couple was blessed with two sons and one daughter. P.W.4 Sujata has also denied that her deceased mother Chhayabai was subjected to ill-treatment on account of non fulfillment of certain demand by the appellant-accused. On the other hand, she has given altogether different version indicating the possibility of suicide by deceased Chhayabai rather than her homicidal death. P.W.3 Dr. Patil has also admitted in his cross-examination that ligature mark around the neck of deceased Chhayabai may be caused by self hanging. Though a rope is shown to have been recovered at the instance of the appellant-accused, however, there is no further connecting evidence so far as the recovery of the said rope is concerned.

22. In the instant case, in our considered opinion, two views are possible, one pointing out the guilt of the appellant-accused and

other of his innocence. In the case of **Devi Lal v. State of Rajasthan** reported in (2019) 19 SCC 447, in para 19, the Supreme Court has made the following observations :

“19. That apart, in the case of circumstantial evidence, two views are possible on the case of record, one pointing to the guilt of the Accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the Accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same.”

23. In the facts of the present case and considering that the prosecution has failed to discharge the initial burden though the said burden is comparatively lighter as against other cases based upon the circumstantial evidence, we are of the view that the ratio laid down by the Supreme Court in the case of **Trimukh Maroti Kiran** (supra) is not applicable to the facts and circumstance of the present case. The appellant-accused is thus entitled for the benefit of doubt. We accordingly proceed to pass the following order:-

ORDER

- I. Criminal appeal is hereby allowed.
- II. The impugned judgment and order of conviction

passed by the Additional Sessions Judge-2, Nanded in Sessions Case No. 21 of 2013 dated 11.08.2014 thereby convicting the appellant-accused Subhash Tukaram Hanwate for the offence punishable under Section 302 of I.P.C. and sentencing him to suffer imprisonment for life and to pay fine Rs.2,000/- in default to suffer R.I. for six months is hereby quashed and set aside.

- III. The appellant accused is hereby acquitted of all the charges. The appellant accused shall be set at free forthwith if not required in connection with any other case.
- IV. The fine amount, if deposited, shall be refunded to him.
- V. The appellant-accused Subhash Tukaram Hanwate shall execute P.B. of Rs.15,000/- with one surety of the like amount to appear before the higher court as and when the notice is issued in respect of any appeal or petition filed against the judgment of this Court. Such bail bonds shall remain in force for a period of six months from the date of its execution.
- VI. Criminal Appeal is accordingly disposed of.

(SHRIKANT D. KULKARNI J.)

(V. K. JADHAV, J.)

rlj/