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

CRIMINAL APPEAL NO.747 OF 2013

Yeshwant Harishchandra Walvi
r/Nevale, Taluka: Palghar
District Thane

... Appellant

Vs.

State of Maharashtra
at the instance of Boisar Police Station
vide C.R. No.134/2011

... Respondent

Ms.Keral Mehta i/b Niranjan Mundargi for the Appellant

Mr.S.S. Hulke, APP, for Respondent – State

**CORAM: S.S. SHINDE &
S.P. TAVADE, JJ.**

JUDGEMENT RESERVED ON: OCTOBER 25, 2021

JUDGEMENT DELIVERED ON: OCTOBER 28, 2021

JUDGEMENT (PER S.S. SHINDE, J.):

1. This Appeal challenges the impugned judgment and order dated 21st June, 2013 passed by the learned Sessions Judge, Palghar in Sessions Case No.35 of 2011, whereby the appellant – accused was sentenced to suffer R.I. for life and payment of fine of Rs.5,000/- and in default thereof, to suffer R.I. for four months.

2. The prosecution case in brief is as under:

The first informant, namely, Miss Suvarna Lilka used to reside with her grandmother at village Nevale, Taluka Palghar, as her father Subhash Lilka had expired and her mother Lalita got married with the Appellant – Yeshwant Harishchandra Walvi. The first informant used to reside in the house of her father Subhash Lilka in the same area with her grandmother. She also used to visit her mother as and when required.

It is the case of the prosecution that Lalita, the deceased, was a labourer and her husband, the appellant – accused, was unemployed. He was addicted to liquor consumption and used to demand money from the deceased and quarrel with her on that count. He even used to abuse and assault the deceased on many occasions. On 27th February, 2011, at about 8 am, the first informant was passing near the house of the deceased, when she heard some quarrel was going on between the appellant and the deceased. She did not pay attention to it as she thought it to be a routine matter and went to the weekly market at Vangaon. She returned home after 12pm. At about 3pm, she went to the house of her mother Lalita where she noticed that her step father i.e., the

appellant, was standing in the courtyard of the house. She entered the house and noticed that blood was oozing from the head injury of her mother Lalita. There were injuries on the face and ear of her mother Lalita. She tried to wake up the deceased but there was no response. She also noticed that a wooden log was lying nearby with blood stains on it. Then, she made telephone calls to her grandmother and aunt Kalpana Madhukar Lilka and informed about the incident to them. Her aunt and uncle reached there at about 8pm. They also tried to awaken her but there was no response from the deceased. Thereafter, the first informant lodged complaint against the appellant, bearing F.I.R. No.134 of 2011 with Boisar Police Station, Taluka Palghar for the offence under section 302 of the Indian Penal Code. After completion of the investigation, chargesheet came to be filed and as the matter was triable by the Court of Sessions, the case was committed to the Court of Sessions.

3. Charge came to be framed on 19th October. The trial ended in conviction of the appellant whereby the appellant was sentenced to suffer R.I. for life and payment of fine of Rs.5,000/- and in default thereof, to suffer R.I. for four months.

4. Ms.Mehta, learner Advocate appearing on behalf of the appellant invited our attention to the evidence of prosecution witnesses and submitted that the prosecution has utterly failed to establish the role of the appellant in the alleged commission of the offence. The prosecution has not brought on record any evidence suggesting that the accused was present at the relevant time within the proximate time of the alleged incident. It is submitted that Lalita (the deceased) was in the habit of consuming liquor and lie over the road in breed condition, as deposed by PW1 Suvarna Lilka and PW2 Madhukar Lilka. Therefore, the learned advocate appearing for the appellant submitted that the appeal deserves to be allowed.

5. On the other hand, the learned APP appearing for the Respondent – State, invited the attention of this Court to the evidence and findings recorded by the trial Court and submitted that the trial Court has properly appreciated the evidence on record and has reached to a correction conclusion.

6. The prosecution had examined in all 8 witnesses. PW1 Suvarna Subhash Lilka is the first informant and the daughter of

the deceased. PW2 Madhukar Babu Lilka, is the paternal uncle of the first informant. PW3 Vishnu Ganapat Panchalkar is a panch witness. PW4 Anil Arjun Wavre is the husband of Kalpana Lilka, whom the first informant had made a telephone call, when she noticed the deceased with blood and head injuries. PW5 Dr. Manoj Balkrushna Shinde is the medical officer, who had performed the postmortem on the body of the deceased. PW6 Nisha Deepak Chaudhary is a panch witness. PW7 Harinarayan Shivdarshan @ Bachan Shukla, is a panch witness and PW8 Nagesh Baburao Dhone is the Investigating Officer.

7. The material witnesses are PW1 Suvarna Subhash Lilka, PW2 Madhukar Babu Lilka and PW5 Dr. Manoj Shinde. PW1 Suvarna Subhash Lilka is the first informant and the daughter of the deceased. She had deposed that after the death of her father Subhash, her mother Lalita got married with the appellant from the same village. She used to reside at her deceased father's house with her grandmother Parvati. She stated that her house and the house of her mother were in proximity. She used to visit her mother at different times. She had stated that her mother was a labourer and the appellant used to remain at home. She had

stated that her mother Lalita and the appellant used to consume alcohol and quarrel with each other. The appellant used to beat Lalita on account of her refusal to give him money. PW1 had stated that on the fateful day, she had gone to the weekly bazar at Vangaon and returned to her home at about 2 to 3pm. Thereafter, she went to meet her mother Lalita. At that time, she had noticed that her mother had bleeding injuries on both her cheeks and she was lying inside the house. She tried to wake her up but she was immobile. Therefore, she called her uncle Madhukar, who came in the night at 8pm. Thereafter, she had lodged the police complaint.

PW1 was crossexamined, wherein she had stated that her mother was a drunkard and used to lie on road in breed condition at times. She had stated that she did not know whether the appellant used to go to work in MIDC.

8. PW2 Madhukar Babu Lilka is the paternal uncle of the first informant. He had deposed that after the death of his brother i.e., Subhash Lilka, his wife i.e., the deceased, got married with the appellant. He had stated that both the appellant and the deceased used to drink liquor and under the influence of liquor, used to quarrel with each other. On the date of the incident, he had gone

outside the village when he received a phone call from the first informant informing him that Lalita was not getting up. Then, he visited the house of the deceased and found that the deceased was lying and was having injury over her head. He had noticed that Lalita was dead and blood was found around her. Thereafter, he had stated that they went to the police station and Suvarna lodged the complaint. On the next day, the police had called him and recorded his statement.

In the cross-examination, PW2 had stated that the deceased Lalita was lying over the road. He had stated that the deceased used to lie over the road in breed condition and some times, she was required to be picked up from the road to be taken back to her home. He had also stated that the appellant used to go to work at MIDC.

9. It appears that the entire prosecution case rests upon the evidence of PW1 and PW2 and also the medical officer – PW5 Dr.Manoj Shinde. PW5 Dr.Manoj Shinde, who was working as medical officer at the relevant time at Tarapur Primary Health Center, was examined by the prosecution. It is stated that during his examination, he found surface wounds as mentioned in column

17 of the postmortem report. He also found fracture on the right side of the chest of the victim in column 18 of the postmortem report. He further opined that the injuries mentioned in columns 17 and 18 are ante-mortem. The said injuries can be caused by blow given by hard substance. He further stated that the said injuries can be caused by wooden log.

During his cross examination, he stated that the victim may have died twelve hours prior to his conducting postmortem. In the stomach of victim, he found alcohol. He further stated that liver of an alcoholic person becomes weak. The liver cannot be ruptured by a slight blow. The ribs can be fractured as in the present case even by a fall but it depends upon how the person falls and with how much force he or she falls and also on a substance on which he or she falls. There was no open injury over the chest where the ribs were fractured. There is simply a contusion.

10. The evidence of the medical officer unequivocally indicates that the victim died a homicidal death. However, at the same time, the report does not rule out the possibility of injuries if victim falls on the ground or on hard surface.

11. If the evidence of PW1 and PW2 is considered in its entirety, nowhere they have stated that within the proximate time of death of victim, the appellant-accused was present in the house or nearby the house or they saw him going out of the house. The prosecution utterly failed to establish the presence of the accused at the spot of incident or nearby the spot of incident.

12. It is to be noted that the panch witnesses, PW3 Vishnu Ganapat Panchalkar and PW6 Nisha Deepak Chaudhary had turned hostile.

13. We have carefully perused the findings recorded by the trial Court and are surprised to note that in absence of evidence on record showing the presence of the accused at the spot of incident or nearby spot of the incident within the proximate time of death, relying upon the contents of FIR, the trial Court proceeded to hold that the appellant was present in the house at the relevant date and time of the incident. It is unfortunate that the trial Court misguided itself by relying upon the FIR when the said FIR cannot be read in its entirety as part of the evidence. At the most, the contents of FIR can be confronted to the informant during the course of cross examination. The trial Court has wrongly invoked

provisions of Section 106 of Indian Evidence Act, 1872 and reached to the wrong conclusion that it was for the accused to explain how and in which circumstances, the victim died in the house. As already discussed, there was no question of shifting onus on the accused when the prosecution utterly failed to prove the presence of the accused at the spot of incident or nearby spot of incident at the relevant date and time.

14. In that view of the matter, in our considered view, this is a fit case wherein the impugned judgment and order dated 21st June, 2013 passed by the learned Sessions Judge, Palghar in Sessions Case No. 35 of 2011 deserves to be set aside and the appellant deserves to be set at liberty. Hence, we pass the following order:-

ORDER

- i. The appeal is allowed.
- ii. The impugned judgment and order dated 21st June, 2013 passed by the learned Sessions Judge, Palghar in Sessions Case No. 35 of 2011 is hereby quashed and set aside.

iii. The Appellant shall be set at liberty forthwith in case he is not required in any other case.

iv. The appellant be released on his executing P.R. bond of Rs.10,000/- for a period of one month. The appellant is further directed to comply with the provisions contained in Section 437A of the Code of Criminal Procedure, 1973 and furnish bail of Rs.10,000/- with one surety to the satisfaction of the concerned trial Court within the period of one month from the date of his release from the jail.

15. The appeal stands disposed of accordingly.

(S.P. TAVADE, J.)

(S.S. SHINDE, J.)