

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

CRIMINAL APPEAL NO. 174 OF 2015

Ramesh S/o. Chagan Vithore,
Age. 35 years, Occ. Labour,
R/o. Old Lakhmapur,
Tq. Gangapur, Dist. Aurangabad.

....Appellant
(Orig. Accused)

Versus

The State of Maharashtra
Through Police Station,
Gangapur, Tq. Gangapur,
Dist. Aurangabad.

....Respondent

Advocate for Appellant : Mr. B.N. Patil
APP for State : Mr. A.M. Phule

**CORAM : SMT. VIBHA KANKANWADI &
RAJESH S. PATIL, JJ.**

DATE : 28th JULY, 2022.

ORAL JUDGMENT [PER : SMT. VIBHA KANKANWADI, J.] :-

1. Present appeal has been filed by the original accused challenging his conviction in Sessions Case No. 55/2013 for the offences punishable under Section 302, 498-A of the Indian Penal Code, by learned Additional Sessions Judge, Vaijapur, District Aurangabad, on 02.12.2014. He has been sentenced thus :

“1) Accused Ramesh S/o. Chhagan Vithore is hereby found guilty and convicted for committing offence of murder punishable under section 302 of Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs. 10,000/- (Rupees Ten Thousand only). In default to undergo further imprisonment for five months.

2) Accused is also found guilty and convicted for committing offence punishable under section 498-A of Indian Penal Code and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs. 2,000/- (Rupees Two Thousand only). In default to undergo further imprisonment for two months.”

2. The prosecution story is that the deceased Kalpana got married to the appellant about nine to ten years prior to the date of the First Information Report i.e. 20.04.2013. She had a daughter and two sons from the accused. All of them used to reside near the bank of river Godavari in Village Galpera. Deceased Kalpana had lodged First Information Report against the husband, mother-in-law and cousin mother-in-law for the offence punishable under Section 498-A of Indian Penal Code with Police Station Shirur, District Beed, prior to incident. They all were arrested in connection with that offence but thereafter, there was a settlement between Kalpana and accused. As a result of which two months prior to the date of the present First Information Report i.e. 20.04.2013, Kalpana started residing with her husband and children at Village Old Lakhmapur Shivar, Taluka Gangapur, District Aurangabad. The prosecution story, further, is that eight days prior to 20.04.2013, Kalpana's parents had visited her house, at that time it was disclosed by Kalpana to them that the accused is harassing her by demanding amount of Rs. 50,000/- on account that he wants to fight out the litigation which she had imposed on them. Kalpana's parents had again given advice to the accused to co-habit with Kalpana properly and they had returned to their village. However, on 28.04.2013, informant Narhari Shivilal Bale i.e. the brother of deceased Kalpana received phone call on his mobile at about 07:00 a.m. from his brother-in-law, disclosing that Kalpana has been killed and then he along with his parents and other relatives went to Old Lakhmapur to the house of Kalpana. They

saw Kalpana in the pool of blood. They could notice that there were injury marks on the head of Kalpana as well as a nylon rope around her neck. They asked the daughter of Kalpana as to what had happened. She disclosed that the mother i.e. Kalpana has been strangulated by father (accused) with the nylon rope and then assaulted by handle of the axe on her head. Thereafter, the brother of the deceased lodged First Information Report which came to be registered as Crime No. 80/2013 and further investigation was started.

3. The police had carried out the spot panchnama as well as the inquest panchnama at the spot and then sent the dead body for postmortem. After the postmortem was done, the dead body was handed over to relatives for cremation. Statements of witnesses have been recorded. The sample of blood, earth, weapon etc. were collected from the spot as well as the clothes were sent for chemical analysis. The statements of witnesses were recorded. Daughter of the deceased was found to have received injuries, she was sent for medical examination and treatment was given to her. Her statement under Section 164 of Code of Criminal Procedure was got recorded through Judicial Magistrate First Class, Gangapur. After collecting postmortem report, the charge sheet came to be filed.

4. After the committal of the case before Additional Sessions Judge, Vaijapur, charge came to be framed at Exhibit 4 for the offences punishable under Section 498-A, 302 of Indian Penal Code. The contents of the charge were read over to the accused in vernacular. He pleaded not guilty. Trial has been conducted. Prosecution has examined in all ten witnesses to bring home the guilt of the accused. Since incriminating evidence was found, the statement of the accused under Section 313 of the Code of Criminal Procedure has been recorded. After hearing both sides, the learned Additional Sessions Judge, Vaijapur, held the accused

guilty of committing offence punishable under Section 302 and 498-A of Indian Penal Code and sentenced as above. The said conviction is under challenge in this appeal.

5. We have heard learned Advocate Mr. B.N. Patil for the appellant – accused and learned APP Mr. A.M. Phule for State. Perused the record and proceedings.

6. Taking into consideration, the points raised before us following points are arising for determination findings and reasons are same are as follows :

POINTS

1) Whether the prosecution had proved that on 19.04.2013 at about 21.00 to 22.00 hours, the accused in his house at village Lakhmapur Shivar, Taluka Gangapur, has committed murder intentionally and knowingly causing death of his wife Kalpana by inflicting injuries on her head and by strangulating her by means of nylon rope and thereby, committed offence punishable under Section 302 of Indian Penal Code ?

2) Whether the prosecution has proved that since two months prior to 19.04.2013 till 19.04.2013, the accused had subjected his wife Kalpana to cruelty at his residence at Village Lakhmapur Shivur, Taluka Gangapur and thereby, committed an offence punishable under Section 498-A of Indian Penal Code ?

FINDINGS

1] In the affirmative.

2] In the negative.

REASONS

7. **POINT NO. 1 AND 2:** Both the points are taken up together for discussion in order to avoid repetition. It has been vehemently submitted on behalf of the appellant that though the informant is the brother of deceased Kalpana, he had no personal knowledge about the incident. The only witness on whom the prosecution laid hand is the child witness P.W. 6 – Payal, who is the daughter of the accused and deceased. However, it is the fact that since the date of death of Kalpana till the deposition of P.W. 6 – Payal, she was with P.W. 1 – Narhari, therefore, there was every possibility of tutoring of the witness by P.W. 1 – Narhari. Learned Additional Sessions Judge, Vaijapur, had not considered the testimony of the child witness in proper perspective. The angle of capacity of P.W. 1 – Narhari to tutor P.W. 6 – Payal was not considered and her testimony has been taken as gospel truth. What has come even in her testimony was that there was no light in their hut on that night but still, the girl was saying that her father had strangled her mother and, thereafter, assaulted her on her head. In her cross-examination, P.W. 6 – Payal has stated that there were no quarrels between her father and mother prior to the day of incident and they all were living happily. She even accepted that her father used to bring sweets for her. If everything was going happily, then how the accused could have decided to commit murder of the deceased, is a question. Testimony of P.W. 1 – Narhari would show that police had arrived at the place even prior to his arrival but nobody has brought it on record as to who had given the intimation to the police. There are contradictions and omissions in his testimony as he tried to draw a picture that accused was not doing any job but such statement has not been made by him in the First Information Report. P.W. 2 – Shivilal is the father of the deceased. Though it might appear that

he is corroborating to the testimony of his son; yet, it is to be noted that according to the father, the accused was demanding money for cultivation of land whereas the son is saying that, that amount was demanded to mitigate the litigation expenditure. This, basic difference in the testimony of these two persons would show that the case will not fulfill the ingredients of Section 498-A of Indian Penal Code. P.W. 1- Narhari as well as P.W. 2 – Shivilal have accepted that there was no electricity facility in the hut of the accused. P.W. 3 – Dagadu Birute is the relative of the deceased and he has been used as panch to the spot panchnama. This shows that the investigation was not carried out properly and interested persons were engaged by the police. Same is the case with the testimony of P.W. 4 – Bandu Bange. He was related to deceased Kalpana and says that he had gone along with the brother and the father of deceased after the information was given that Kalpana has been killed. P.W. 5 – Pandurang Bale was the cousin of deceased Kalpana. All are on the same point and had seen the dead body of Kalpana but it can be considered from their cross-examination that they are related to the deceased and before they could reach the house of the deceased police had already arrived.

8. Learned Advocate appearing for the appellant has further submitted that P.W. 7 – Dr. Dilip is the Medical Officer, who had conducted the autopsy and has given the opinion regarding cause of death as head injury with asphyxia due to strangulation. Death of Kalpana is definitely admitted to the accused but it cannot be said that the accused is the author of those injuries. The prosecution evidence would show that it is full of relatives of the deceased and the prosecution intended to mainly concentrate on the testimony of P.W. 6 – Payal, who was tutored. Even if we accept the things as it is; yet at the most the case would fall under Section 304 part – I of Indian Penal Code. Since P.W. 6 – Payal has stated that there was no quarrel between her parents, the thing

would have happened due to the sudden provocation given by the deceased. The appellant is in jail since the date of his arrest and, therefore, his sentence can be reduced when the case would fall under Section 304 Part – I of Indian Penal Code, to the sentence, which the appellant has already undergone.

9. Learned APP has strongly opposed the appeal and submitted that the offence has been proved beyond reasonable doubt by the prosecution by examining necessary witnesses. P.W. 6 – Payal is the eye witness. The testimony of the child witness has been properly assessed by the learned Additional Sessions Judge, Vaijapur. Though she is saying that there was no electricity facility in their hut; yet, it could be seen that she was able to identify her parents. Though, she is saying that there were no quarrels between her parents prior to that date, it was not extracted by the accused from her in her cross, if the accused wanted to bring the case under part – 1 of Section 304 of Indian Penal Code, that there was sudden quarrel on that night. In her examination-in-chief, she has stated that when father started assaulting mother, she was crying and saying that “पप्पा नका मारु (Father don’t assault)”. Still, the father went on assaulting her mother and when she i.e. P.W. 6 – Payal started to go towards the house of her uncle, she was stopped by father and he had assaulted her also. The injuries on her person have been proved by prosecution through P.W. 8 – Dr. Ajit Pawar. P.W. 8 Dr. Pawar had examined P.W. 6 – Payal on 24.04.2013 and has stated that the age of the injury which he found on Payal was within 24 hours and could have been possible by hard and blunt object. There is nothing in the cross of P.W. 8 – Dr. Anil which could discard the said evidence. The testimony of the eye witness stood supported by medical evidence in the form of testimony of P.W. 7 – Dr. Dilip, who had conducted the autopsy. He had noticed about 11 injuries on the person of deceased and the age of the injuries were within 24 hours. He could find internal injuries, which

were corresponding to the external injuries, noted in column No. 17 of the postmortem report Exh. 24. From the testimony of P.W. 7 Dr. Dilip and the contents of postmortem report Exh. 24, it can be said that the death of Kalpana was homicidal in nature. Testimony of P.W. 6 – Payal cannot be said to be a tutored evidence. Suggestions to that effect in her cross-examination have been denied by her. Merely, because she was residing with P.W. 1 – Narhari that only fact is not sufficient to infer that P.W. 1 – Narhari would have tutored her to such an extent to give evidence against her own father. Since she was a natural person to see or witness the incident, she has narrated what she has seen. Her statement under Section 161 of Code of Criminal Procedure, statement under Section 164 of Code of Criminal Procedure as well as her testimony before the Court are consistent.

10. Learned APP, further, submitted that the testimony of P.W. 1 – Narhari, P.W. 2 – Shivilal, P.W. 3 – Dagadu, P.W. 4 – Bandu and P.W. 5 – Pandurang would show that all of them had knowledge that the accused was subjecting Kalpana to cruelty on the count that she should bring amount of Rs. 50,000/-. The reasons might have been given differently but the figure of the amount is consistent. Therefore, taking into consideration all these statements, the learned Additional Sessions Judge, Vijapur, has correctly held that the prosecution has proved the guilt of the accused beyond reasonable doubt. No case is made out in this appeal to bring the case under part – 1 of Section 304 of Indian Penal Code and, therefore, he prayed for dismissal of the appeal.

11. At the outset, it is to be seen that as per the prosecution story, Kalpana had already filed a complaint/First Information Report against her husband, mother-in-law and cousin mother-in-law with Shirur Police Station, District Beed. Unfortunately, the prosecution had not been brought the said First Information Report before the Court; but

it appears that the accused accepted the position that such First Information Report was filed against him by Kalpana and he was arrested in connection with that crime. Since that First Information Report has not come on record, there is no chance for this Court to go through the contents of that First Information Report, as to what was the allegations made by Kalpana, as to since when she was subjected to cruelty by the accused and co-accused. But here in this case, in the First Information Report itself it was stated as well as supported orally by the prosecution witnesses that the dispute was resolved and then Kalpana and children started residing with accused. It also appears that after the settlement, accused and co-accused had not approached this Court for quashing the said FIR. The case appears to be still pending. The accused could not have been subjected to prosecution twice and, therefore, taking into consideration the contents of the First Information Report the point No. 2 has been framed above is in respect of the period of two months after the settlement of the dispute between Kalpana and accused. The prosecution story, therefore, appears to be that she was again subjected to cruelty, since two months prior to the First Information Report and it came to be highlighted when P.W. 2 – Shivilal had visited the house of Kalpana, eight days prior to the First Information Report. Testimony of P.W. 1 – Narhari, P.W. 2 – Shivilal, P.W. 3 – Dagadu, P.W. 4 – Bandu and P.W. 5 – Pandurang is consistent enough in saying that after there was compromise or settlement of dispute between Kalpana and accused and they started residing together at Lakhmapur, accused again started ill-treating Kalpana by demanding amount of Rs. 50,000/-. Now except P.W. 2 – Shivilal, all other witnesses are saying that the said amount was demanded for spending on litigation i.e. fighting for litigation. But P.W. 1 – Narhari, P.W. 3 – Dagadu, P.W. 4 – Bandu and P.W. 5 – Pandurang were admittedly not present when Kalpana had narrated the said act of ill-treatment or demand by accused to the parents. On this point, we can consider only the testimony of P.W. 2 – Shivilal, to whom that disclosure is

stated to have been made by deceased Kalpana. The testimony of others would be then 'hearsay'. PW. 2 – Shivilal states that after Kalpana started residing with accused and children, he had visited her place about eight days prior to the incident. Kalpana told him that the accused demanded money to her for cultivating the land, however, PW. 2 – Shivilal does not narrate that what was the further narration of Kalpana to him regarding the acts of accused for the non-fulfillment of the demand of money. In other words, the acts of "harassment" are not specifically stated by PW. 2 – Shivilal. Under such circumstance, the case has not been proved as regards offence punishable under Section 498-A of Indian Penal Code. It will not be out of place to mention that the best evidence which could have been brought on this point, (for the offence punishable under Sections 498-A of Indian Penal Code), was through PW. 6 – Payal. It has not been stated by her that she had ever heard her father demanding amount of Rs. 50,000/- to her mother for any count and was ill-treating her mother. In order to prove the ingredients of offence punishable under Section 498-A of Indian Penal Code, the prosecution should prove that the 'cruelty' to the woman was of such a nature as is likely to drive that woman to commit suicide or to cause grave injury or danger to life or health (whether mentally or physically). In the alternative, the prosecution can also prove the 'cruelty' to the woman was in the nature of 'harassment', with a view to coerce her or any person related to her to meet any unlawful demand or any property or valuable security or is on account of failure by her or any person related to her to meet such demand. This is in view of explanation (a) or (b) to Section 498A of Indian Penal Code. PW. 2 – Shivilal, to whom such information was given by Kalpana eight days prior to the incident only, states that the accused had demanded money to her for cultivating the land. The 'acts of harassment' by accused were not disclosed by Kalpana to PW. 2 – Shivilal and, therefore, at the cost of repetition it is said that the ingredients of an offence under Section 498-A of Indian Penal Code were not proved at all.

It appears that the learned Additional Sessions Judge, Vijapur, got carried away with the fact that the deceased had lodged report against the accused with Shirur Police Station. However, he failed to consider the fact that about two months prior to the incident there was settlement and Kalapana started to reside with accused. Even if we take that the said complaint was then pending; yet, when it was not brought before the Court, the learned Additional Sessions Judge, Vijapur, was not justified in taking into consideration those events, which were narrated and had taken place prior to the settlement. Therefore, the said conviction awarded to the accused for the offence punishable under Section 498-A of Indian Penal Code deserves to be set aside.

12. Now turning towards the offence under Section 302 of Indian Penal Code, it is to be noted that the testimony of P.W. 6 – Payal who is the eye witness, stands supported by the medical evidence in the form of P.W. 7 – Dr. Dilip. He had found following injuries on the dead body :-

- 1) Ligature mark around neck – horizontal in direction and below thyroid cartilage, encircling complete neck 28 cm in length x 2 cm., in breadth.
- 2) Abrasion around ligature mark.
- 3) Evidence of ecchymosis in subcutaneous tissue in ligature mark.
- 4) Muscle fibres of neck around ligature torned.
- 5) Evidence of torned left carotid artery.
- 6) Evidence of trachel cartilage fracture.
- 7) CLW left cheek 4 x 2 x 1/2 cm.,
- 8) Right cheek 2 x 1/2 x 1/2 cm.,
- 9) On scalp left supraorbital region 4 x 2 x 1/2 cm., lateral to left eye.
- 10) Abrasion over nose 1/2 x 1/2 cm.
- 11) Right forearm 1/2 x 1/2 cm.

13. After considering the external injuries and corresponding internal injuries P.W.7 has opined that “the death was due to head injury with asphyxia due to strangulation”. Therefore, these two pieces of evidence are sufficient to arrive at a conclusion that the death of Kalpana was homicidal in nature. The strangulation has been done with the help of nylon rope, which was found on the spot. The spot panchnama has been proved by the prosecution. We do not agree with the submissions on behalf of the appellant that the case would fall under exception and would be governed in Part 1 of Section 304 of Indian Penal Code. Nothing was extracted by the accused in the cross-examination of P.W. 6 – Payal that there was any kind of quarrel between Kalpana and accused, at the time of incidence, when there was no provocation by Kalpana or there was no such topic which could have led to sudden quarrel between them, the accused cannot take shelter that his case would fall under the exception. ‘Strangulation’ by means of nylon rope pre-supposes force used by the accused and it could be only with an intention to cause death/ murder. In **State of Andhra Pradesh vs. Rayavarapu Punnayya & Anr** reported in [1976 (4) SCC 382] Hon’ble Supreme Court explained the distinction between ‘culpable homicide’ and ‘murder’ and held that :-

"12. In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" sans "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The first is, what may be called, "culpable homicide of the first degree". This is the greatest form of culpable homicide, which is defined in section 300 as "murder". The second may be termed as "culpable homicide of the second degree". This is punishable

under the first part of section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of section 304..

13. The academic distinction between "murder" and "culpable homicide not amounting to murder" has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of sections 299 and 300."

14. This has been reiterated recently in **Ajmal v/s. The State of Kerala** reported in **2022 LiveLaw (SC) 609** and it has been observed that :-

*"13. The considerations that should weigh with courts, in discerning whether an act is punishable as murder, or culpable homicide, not amounting to murder, were outlined in **Pulicherla Nagaraju @ Nagaraja Reddy v State of Andhra Pradesh**. This court observed that:*

"29. Therefore, the Court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters - plucking of a fruit, straying of cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no

premeditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under section 302, are not converted into offences punishable under section 304 Part I/II, or cases of culpable homicide not amounting to murder are treated as murder punishable under section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances; (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention”.

Thus, adopting the said criteria, in the case in hand when the death is by strangulation, it amounts to ‘murder’.

15. Testimony of P.W.6 – Payal would show that she was aged eight when she gave deposition. She was ‘child witness’. Under Section 118 of Indian Evidence Act all persons are competent to testify, unless the Court considers that they are prevented from understanding the

questions put to them or from giving rational answers to those questions by tender years etc. We can lay our hands on the decision of the Supreme Court in **P. Ramesh v/s. State represented by Inspector of Police reported in (2019) 20 SCC 593**, wherein it has been observed that,

“Section 118 of the Indian Evidence Act 1872 deals with the competence of a person to testify before the Court. Section 4 of the Oaths Act, 1969 requires all witnesses to take oath or affirmation, with an exception for child witnesses under the age of 12 years. Therefore, if the Court is satisfied that the child witness below the age of 12 years is a competent witness, such a witness can be examined without oath or affirmation”.

Further after relying on earlier decision of the Apex Court, it has been held that :-

“16. In order to determine the competency of a child witness, the Judge has to form her or his opinion. The Judge is at liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the Court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it

can be taken that she/he is a competent witness to be examined.”

16. In this case also the understanding capacity of PW.6 - Payal was tested by the Court before oath could be administered to her. When the concerned Court found that she was giving rational answers and had the knowledge about the sanctity of oath, it is stated that the oath was administered to her. Therefore, the criteria, which are required to be considered for taking the evidence of a child witness, have been adhered to. Rather, in the cross-examination, it has been asked to her as to whether she is afraid of giving evidence and also that of police persons; she has answered in the negative. The only statement that has been made by her is that her maternal uncle told her on that day of deposition that they are required to go to Court to give evidence against the accused. Only on the basis of this statement we cannot arrive at a conclusion that she was tutored. Rather her statement under Section 161 of Code of Criminal Procedure, 164 of Code of Criminal Procedure which was also on oath appears to be consistent with her testimony. She was also injured at the same night and she states that she was assaulted by father when she had tried to go to the house of her uncle. The injuries on her person proved through PW 8. In the cross-examination of PW. 8, it is rather suggested by the accused that injury is possible due to assault. When she herself had also received injuries and had unfortunately seen father committing murder of her mother by strangulation and head injury; now her testimony can be discarded only on the basis of the single statement that her uncle had told on that day that she is required to come to Court to give the evidence against accused i.e. her father. Therefore, she was competent witness and her testimony was reliable.

17. The testimony of other witnesses, who had reached to the spot after they had received the information, would show that they had

seen the nylon rope around the neck of deceased, the injuries sustained by Kalapana on her head and all those observations by them regarding the situation of the dead body stand corroborated with the inquest panchanama as well as the postmortem report at Exhibit 24.

18. Another aspect, that is, required to be noted is, from the testimony of P.W. 6 – Payal the presence of accused at the spot has been proved. So also, it is proved that Kalpana died due to the injuries on her body that too in the hut. Yet, in his statement under Section 313 of Code of Criminal Procedure there is absolutely no explanation by the accused as to under which circumstance his wife died. In view of Section 106 of Indian Evidence Act, the burden of proof of a fact i.e. murder of his wife in his hut was on the shoulders of accused. Apart from the direct evidence, the fact can also be taken that it is a case of custodial death and, therefore, the accused husband was bound to give explanation about the circumstances in which his wife was found dead.

19. After the scrutiny of the entire evidence, it can be clearly said that the prosecution had proved that the accused had committed offence punishable under Section 302 of Indian Penal Code beyond reasonable doubt. The minimum sentence i.e. the imprisonment of life has been awarded. We discard the defence that the case falls under Section 304 part 1 of Indian Penal Code and, therefore, the conviction of the appellant accused for the offence punishable under Section 302 of Indian Penal Code deserves to be upheld.

20. For the reasons stated above, the appeal deserves to be partly allowed, in view of the fact that it has been held that the conviction of the appellant for the offence punishable under Section 498-A of the Indian Penal Code deserves to be set aside. Hence, the following order:-

ORDER

- i) The Appeal stands partly allowed.
- ii) The conviction of the accused/appellant - Ramesh S/o Chagan Vithore, in Sessions Case No.55 of 2013 by learned Additional Sessions Judge, Vaijapur, District Aurangabad, dated 02.12.2014, for the offence punishable under Section 302 of Indian Penal Code, stands confirmed.
- iii) The conviction of the accused/appellant - Ramesh S/o Chagan Vithore, in Sessions Case No.55 of 2013 for the offence punishable under Section 498-A of Indian Penal Code, stands set aside.
- iv) The fine amount deposited, if any, for the sentence under Section 498-A of Indian Penal Code, by the appellant be refunded to him.
- v) Rest of the conviction and order requires no change.

(RAJESH S. PATIL, J.)**(SMT. VIBHA KANKANWADI, J.)**