

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

CRIMINAL APPEAL NO.139 OF 2021

Tulshiram s/o. Khemchand Durbe,
Age : 49 years, Occ. Agri.,
r/o. Thergaon, Tq.Paithan,
Dist.Aurangabad

..Appellant

Vs.

The State of Maharashtra

..Respondent

Mr.N.S.Ghanekar, Advocate for appellant
Mr.P.G.Borade, APP for respondent

**CORAM : R.G.AVACHAT AND
R.M.JOSHI, JJ.**

**RESERVED ON : DECEMBER 05, 2022
PRONOUNCED ON : DECEMBER 14, 2022**

JUDGMENT (*Per R.G. Avachat, J*) :-

The appellant has been convicted vide order dated 31.08.2019 passed by learned Addl. Sessions Judge, Aurangabad, in Sessions Case No.290 of 2016, for the offence of murder of his wife and therefore, sentenced to suffer life imprisonment and to pay fine of Rs.5,000/- with default stipulation. He is, therefore, in appeal before us.

2. The facts, giving rise to the present appeal, are as follows:-

Shobha (deceased) married the appellant over twenty years before May, 2016. The couple was blessed with three children. Balasaheb, one of the children, died in motor accident. Another child (son) is said to have left the house for no return on account of having been fed up with the appellant's addiction to alcohol and illtreatment meted out under such influence.

3. Rohidas (PW 1), brother of deceased Shobha, received a phone call of his sister – Mangal (PW 10) on 22.05.2016 at 09.00 p.m. She informed him the appellant to have beaten Shobha. She requested Rohidas to go to Shobha's house to find out what the matter was. Rohidas, therefore, went to the house of the appellant. It was 11.00 p.m. Electricity supply was off. In the cellphone torch, he noticed Shobha to have suffered head injury. Her body was cool. She appeared to have passed away. Rohidas (PW 1), therefore, lodged the FIR (Exh.28), alleging the appellant to have committed murder of his sister, Shobha.

4. The crime came to be registered and investigated as well. On completion of the investigation, the appellant was proceeded against by filing charge sheet. On committal of the case,

learned Addl. Sessions Judge, Aurangabad, framed Charge (Exh.5). The prosecution examined twelve witnesses and produced in evidence certain documents. On appreciation thereof, the trial Court convicted the appellant, as stated above.

5. Heard learned counsel for the parties. Perused the evidence on record.

6. The case is based on circumstantial evidence. The circumstances relied upon to bring home the charge are:-

- (i) The appellant to have been addicted to alcohol;
- (ii) He would illtreat his wife (deceased Shobha) and even gave threat to commit her murder;
- (iii) Deceased Shobha and the appellant were the only persons at home at the material time.

7. The evidence of PW 1 – Rohidas suggests that his sister – Mangal (PW 10) had called him on cellphone and informed to have learnt the appellant to have beaten Shobha. She, therefore, asked him to visit Shobha's house to find as to what the matter was.

PW 1 – Rohidas, in turn, rushed to the house of the appellant. He noticed Shobha to have suffered head injury. The blood was oozing. Shobha's body had become cool. She had passed away. He informed the police. They arrived. A panchnama was drawn. The dead body of Shobha was sent for post mortem examination. He then lodged the FIR (Exh.28).

8. The evidence of PW 1 – Rohidas further reveals that there were trees behind the house of the appellant. There was a peg meant to tie the cattle. No urinal or toilet facility was there at the house of the appellant. A makeshift bathroom was prepared just backside of the house of the appellant. Although electricity facility was there, the supply was off. When he reached the appellant's house, he did not inform the police no sooner he noticed Shobha to have suffered head injury.

9. PW 2 – Onkar's evidence disclosed that he had been to the house of the appellant on the fateful evening. It was about 8.30 p.m. Shobha was asleep. The appellant was under influence of liquor. He made phone call to Mangal (PW 2). Both Shobha and Mangal talked to each other during the said call. Mangal asked PW 2

– Onkar to rush Shobha to the hospital. He, therefore, called his wife to the house of the appellant. It was, however, found difficult to rush Shobha to the hospital on motorbike.

10. PW 3 – Vitthal is the witness to the scene of offence panchnama (Exh.43). The panchnama indicates that the dead body of Shobha was placed on the open space just outside the house of the appellant. The house was of tin sheet walls and roof as well. PW 4 – Santosh is a photographer. He snatched the photographs of the scene of offence and of the dead body as well. The clothes of the deceased came to be seized under panchnama (Exh.66) in the presence of panch witnesses, PW 5 – Ramlal, while the clothes of the appellant came to be seized under panchnama (Exh.75) drawn in the presence of PW 7 – Amol. PW 8 – Charansing, Police Naik, had carried all the seized articles to F.S.L.

11. PW 10 – Mangal, sister of deceased Shobha, testified that she would frequently receive phone calls of Shobha, informing her the appellant to have been extending threats to eliminate Shobha. It is further in her evidence that on the fateful day, she received phone call of Shobha from the cellphone of PW 2 – Onkar.

During the said conversation, Shobha told the appellant to have had assaulted on her head. She, therefore, contacted PW 1 – Rohidas. She shared the information and asked him to go to the house of the appellant.

12. PW 6 – Sachin is grown up son of the deceased Shobha and the appellant. It is in his evidence that the appellant used to beat him, his mother and the brother as well under the influence of liquor. The appellant had insisted his mother to give the appellant divorce. It is further in his evidence that since the illtreatment given by the appellant became unbearable, his elder brother left the house for no return. On the fateful day, he had come to Aurangabad.

13. Dr.Rohit (PW 9) conducted autopsy on the dead body of the deceased Shobha. He noticed abrasion of 2 x 2 cm. on her right knee joint, and contused lacerated wounds 2 x 2 cm. on left occipital bone behind left ear. He found depressed fracture of 2 x 2 cm of underline bone. There were congested brain tissues of 2 x 3 cm. In his opinion, the cause of death of Shobha is "death due to internal brain tissue injury and internal brain hemorrhage with depressed fracture of occipital bone". He denied to suggest that the head injury could have been caused by fall on hard surface.

14. The question is, whether the deceased met with homicidal death and the appellant is the author thereof. It is the case of the appellant that the deceased was not keeping well. No urinal or bathroom facility was available in his house. The deceased fell on hard surface. As a result, she suffered head injury and succumbed thereto. Although Dr.Rohit denied suggestion that the injury was possible by fall, he did not give any reason in support of his view. What could only be observed based on the post mortem report, is that deceased Shobha died of head injury.

15. It is true that son of the appellant (PW 6 – Sachin) had no reason to speak against his father. His evidence, however, suggests that he was not home on the fateful day. His statement was recorded little over two months after the incident. He was residing with his maternal uncle. Admittedly, the FIR (Exh.28) has been lodged by 11.48 p.m. on the next day of the incident. The informant - Rohidas, real brother of the deceased, had, admittedly, reached the appellant's house within hours of the alleged incident. He had noticed the deceased to have suffered head injury. Admittedly, he is a witness to the inquest panchnama (Exh.29). The same suggests that the police had reached the appellant's house

immediately. The informant still kept mum for over 24 hours to lodge the FIR. The possibility of having lodged the FIR afterthought, therefore, may not be ruled out. The same is the case about the evidence of PW 10 – Mangal, real sister of the deceased. She too is a witness to the inquest panchnama (Exh.29). The same suggests that she had reached the hospital immediately. She gave her statement to the police eight days after Shobha breathed her last. Had she really learnt Shobha to have been assaulted by the appellant on the fateful day itself, both the brother and sister of the deceased would not have spared a minute to lodge the FIR, alleging the appellant to have killed their sister – Shobha.

16. Learned APP relied on a judgment of the Apex Court in the case of **Trimukh Maroti Kirkan Vs. State of Maharashtra, 2006 (10) SCC 681**, wherein it has been observed thus :-

Evidence Act, 1872 – Section 106 – Burden of Proof – Murder in secrecy inside a house – 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, is insisted upon by the Courts – 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 – Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970.

It has further been observed by the Apex Court, as under:-

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

17. There can be no dispute over what has been observed by the Apex Court in **Trimukh Kirkan's** case (supra). Each case has its peculiar facts and circumstances.

18. In the case in hand, the appellant and deceased Shobha were the only persons at home at the material time. Electricity

supply was off that time. Admittedly, no bathroom or toilet facility was available in the house of the appellant. A makeshift bathroom was, therefore, raised just behind the house. It is the case of the appellant that the deceased had gone out of the house to answer the nature's call. She fell and suffered head injury. Admittedly, the deceased remained home overnight, post she suffered the head injury. The same suggests that her brother – Rohidas (PW 1 - informant) and sister – Mangal (PW 10) made no efforts to rush her to the hospital for emergent treatment. The appellant was said to be under influence of alcohol. In spite of the the informant to have allegedly learnt the appellant to have hit the deceased on her head, he lodged the FIR 26 hours after the incident. The police authorities were very much with him since the inquest panchnama (Exh.29) was drawn in the early morning. He (Rohidas) and PW 10 – Mangal signed the inquest panchnama. Still, both of them did not disclose the police the appellant to have had assaulted the deceased on her head.

19. As such, the prosecution evidence could not be said to have made out a case beyond reasonable doubt. In our view, therefore, the appeal must succeed.

20. In the result, the following order:-
- (i) The appeal is allowed.
 - (ii) The impugned judgment of conviction and order of sentence dated 31.08.2019 in Sessions Case No.290 of 2016 passed by learned Addl. Sessions Judge, Aurangabad, is set aside.
 - (iii) The appellant is acquitted of the offence punishable under Section 302 of Indian Penal Code.
 - (iv) He be released forthwith, if not required in any other case.
 - (v) Fine amount deposited by the appellant, if any, be refunded to him.

[R.M. JOSHI, J.]

[R.G. AVACHAT, J.]

KBP