

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

CRIMINAL APPEAL NO.429 OF 2015

Santosh Balu Mali,
Age-27 year, Occu:Labouer,
R/o-Najik Chincholi Shivar,
Kamte Vasti, Tal-Newasa,
Dist-Ahmednagar.

...APPELLANT

VERSUS

The State of Maharashtra,
Through Police Inspector,
Newasa Police Station,
Tq-Newasa, Dist-Ahmednagar.

...RESPONDENT

...

Mr.C.P. Patil Advocate with Mr. Paresh B. Patil Advocate
for Appellant.
Mr.B.V. Virdhe, A.P.P. for Respondent - State.

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

DATE OF RESERVING JUDGMENT : 29th JULY 2022

DATE OF PRONOUNCING JUDGMENT : 22nd SEPTEMBER 2022

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

1. The appellant convict has been held guilty of committing

offence punishable under Section 302, 201 and 498-A of the Indian Penal Code, by Judgment and order dated 15th April 2015 in Sessions Case No.145 of 2014 by learned District Judge-1 and Additional Sessions Judge, Newasa, District-Ahmednagar, and sentenced him to suffer imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code. It is stated in the Judgment that no separate sentence is passed for the offence punishable under Section 201, 498-A of the Indian Penal Code.

2. The prosecution story, in short, is that informant Kashinath Mohan Mali has sister by name Tai Gangule. Tai's husband had expired long back and she being disabled, used to reside with Kashinath. Tai's daughter Suman was married to accused Santosh about 5 to 6 years prior to the First Information Report (for short "FIR") dated 17th June 2014. Suman and accused were having daughter Komal, aged 2 ½ years and a son, aged 4 to 5 months on the date of the FIR. Though the native place of accused Santosh is Gondegaon, he used to reside at village Chincholi, Taluka-Newasa, District-Ahmednagar in the field of one Kamte and the area is known as Kamte Vasti. Accused

Santosh was married prior to his marriage with Suman, however, the first wife was not cohabiting with Santosh. Santosh was addicted to liquor and used to harass Suman. Suman had gone to Kashinath's house at the time of Hanuman Jayanti. Santosh had gone to the house of Kashinath under the influence of liquor and therefore, Kashinath refused to send Suman along with him. Accused Santosh got annoyed with this and gave abuses to Suman in presence of Kashinath, his wife Sindhubai and sister Tai. Accused gave threat to Suman that if she does not accompany him then he would kill her and bury, and then he left. Then after about 2 to 4 days Bhamabai @ Indubai, who is mother of accused Santosh, went to the house of Kashinath and took responsibility of Suman. Therefore, Suman was sent along with Bhamabai. Thereafter on 16th June 2014 Kashinath's relative Bhausaheb Ganpat Shelar, resident of Ghodegaon, Taluka-Newasa gave phone call to Kashinath and told that whereabouts of Suman are not known since last one month and Kashinath should take some action. Therefore, Kashinath, along with his relatives, went to Kamte Vasti. He could find there only Bhamabai along with Suman's daughter Komal. They asked Bhamabai about Santosh and Suman. Bhamabai told them that

on 15th June 2014 around 3.00 p.m. Santosh brought Komal and left her with Bhamabai and went away. Bhamabai had asked accused about Suman and son, at that time he had given evasive answers. Thereafter Kashinath gave missing report in respect of Suman with Police Station on 16th June 2014. Kashinath was suspecting some foul play and therefore he along with his relatives were searching Kamte Vasti on 17th June 2014. Around 12.00 noon they found one heap like structure which was in suspicious state and covered by branches. It was around 100 ft. away from the house of the accused. Kashinath suspected that Suman would have been buried at that place and therefore, he informed the said fact to Police Station. Police went there along with Tahsildar. The said place was dug and at that time they could find a decomposed body of a lady. A purple colour blouse and green colour petticoat were found there. The same were identified by Kashinath and then he identified the dead body of Suman. Police recorded Panchnama and then Kashinath lodged FIR stating that the accused had committed murder of Suman and then buried the dead body.

3. After lodging of the FIR, investigation was taken up. Statements of witnesses were recorded. The dead body was sent for postmortem. Accused came to be arrested. He gave memorandum and discovered the place where he had buried the son. Only skull was found from that place. The sample of DNA was sent for analysis and after the completion of the investigation, charge-sheet was filed.

4. After the committal of the case, charge has been framed, at Exhibit-3, for the offence punishable under Sections 302, 304-A, 201, 498-A of the Indian Penal Code. Accused pleaded not guilty and claimed to be tried. Prosecution examined in all six witnesses to bring home the guilt of the accused and after considering the evidence on record, learned Additional Sessions Judge found accused Santosh guilty of committing offence under Section 302, 201 and 498-A of the Indian Penal Code. Surprisingly the punishment has been awarded of directing the accused to undergo imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code. No fine has been awarded and then it is stated that no separate sentence is passed for the offence punishable under Sections 201 and 498-A of the Indian Penal Code. The accused has been

acquitted for the offence punishable under Section 304-A of the Indian Penal Code. The said conviction is under challenge in this Appeal.

5. Heard learned Advocate Mr. C.P. Patil with learned Advocate Mr. Paresh B. Patil for the appellant and learned APP Mr Virdhe for the respondent – State.

6. It has been vehemently submitted on behalf of the appellant that the case is resting on circumstantial evidence and therefore, unless the chain of circumstances is proved which would show that the author of the crime is accused, the learned Additional Sessions Judge ought not to have convicted the appellant. PW-1 Kashinath is the maternal uncle of the deceased who has lodged the FIR and everything has been taken by him on suspicion. He had absolutely no knowledge as to what happened. It is stated that the dead body was found buried at a distance of 100 ft. from the house of the appellant and evidence would show that in fact it was a skeleton that was found. It is then stated that there was a blouse and petticoat at the said place on the basis of which PW-1 Kashinath says that he had

identified the dead body. It is hard to believe that the maternal uncle would know the clothes of the niece. PW-2 Shantabai is the panch who was present when exhumation was done, however the clothes were not confronted at the time of deposition. Time of panchnama is also suspicious. PW-3 Subhash Mali also states that he was present at the time of exhumation and he is the panch to the spot panchnama. He is relative of the deceased and the informant, therefore, definitely he was interested in the conviction of the accused. He is not even resident of the same village. The Investigating Officer has not even tried to fetch panchas from the same village. Whoever had come along with PW-1 Kashinath, they had been taken as panch witnesses. This creates doubt and it cannot be said to be a fair investigation. PW-4 Jagannath is a panch to the discovery panchnama. It is stated that accused discovered iron bar and mattock. He is also relative of Kashinath. PW-5 API Vinay Sarode does not corroborate PW-4, recovery panch and has given the sequence wrongly. Another fact that is required to be noted is that whatever has been stated by the accused in his memorandum, has been taken as true fact. It is alleged that the accused had made statement that after murdering wife Suman accused had

taken son along with him and he could not make arrangement for his milk, resulting in death of the son. DNA samples were taken and also sent to Kalina, Mumbai, however, report was not produced at all. PW-6 Dr. Mandar Sane has done the autopsy and he says that probable cause of death is 'head injury', but in cross-examination he says that there was no fracture to the skull. He has also stated that accidental fracture may be caused due to digging tools. What procedure was adopted by him to get the dead body identified, is a question. Therefore, with this kind of evidence even if suspicion might be raised, that cannot take the place of proof and it cannot be said that the prosecution had led proof to prove the guilt of the accused beyond reasonable doubt. Such conviction cannot be allowed to sustain and therefore, the Appeal deserves to be allowed.

7. Learned Advocate for the appellant has relied on the decisions in, ***Hanuman Govind, Nargundkar and another vs. State of M.P., AIR 1952 SC 343, Kali Ram vs. State of H.P., AIR 1973 SC 2773, the State of Punjab vs. Bhajan Singh and others, AIR 1975 SC 258, Toran Singh vs. State of M.P., AIR 2002 SC 2807, Rishipal vs. State of***

Uttarakhand, (2013) 12 SCC 551 and Rahman vs. the State of U.P., AIR 1972 SC 110. All these decision are on the point, how to appreciate circumstantial evidence and what is its importance. In brief, it can be said that in this catena of Judgments the Hon'ble Supreme Court has held that the circumstances forming evidence must be conclusively established and even when so established, they must form such a complete chain that it is not only consistent with the guilt but is inconsistent with any reasonable hypothesis of innocence. The circumstances should be such that it leaves no option for the Court except to hold that accused is guilty of offence with which he is charged.

8. Learned APP strongly opposed the Appeal and submitted that it has come on record that the accused was suspicious about the character of Suman, therefore it was the motive for him to commit the crime. Identification of the dead body has been done by PW-1, PW-2, PW-3 and PW-4. Recovery panchnama has been proved through PW-4 and PW-5. Skeleton of son was found after discovery by the accused. Discovery of the weapon as well as skeleton of the son would show that only

the accused had knowledge about the weapons those have been used in the commission of crime and how the son expired. Postmortem report Exhibit-33 clearly shows that there were injuries to the head. Though the opinion was reserved, yet in his examination-in-chief the medical officer has specifically stated that the probable cause of death was head injury. He has also stated that the injuries noted on the head of the deceased were possible by article A, iron bar. When the death was homicidal in nature and the dead body was found to be buried only at a distance of about 100 ft. from the house of the accused, there was sufficient evidence available before the learned trial Judge to conclude that the accused is the author of the crime. The circumstances against the accused were strong enough to convict him. He prayed for dismissal of the Appeal.

9. No doubt the present case is based on circumstantial evidence and therefore the evidence that has been led by the prosecution in this case should comply with the test laid down in the above authorities relied by the learned Advocate for the appellant. Since the facts of each case are different, we will have to scan the evidence adduced in this case to consider as to

whether the above test has been fulfilled or not. As per the informant Kashinath Mali, who is the maternal uncle of the deceased Suman, present applicant was addicted to liquor and he was harassing Suman under the influence of liquor. Accused had threatened Suman to kill and had told that he would bury her. Important point to be noted is that the alleged acts of harassment or cruelty have not been stated by him. As to when Suman had told him about the said cruelty, is not clearly stated by him but then he says that at the time of Hanuman Jayanti when Suman came to his house at that time she had told about the harassment by the accused. It appears from his examination-in-chief that threat to kill and bury Suman was not given by the accused in his presence but it was told by Suman to him. Then what he had done is not stated by him. In fact it was his duty also to give advice to the accused and ensure that his niece is put in safe environment. He then says that thereafter again accused came to his house along with his mother and the mother had then said that Suman would be treated properly and therefore, he allowed Suman to go along with accused. When exactly this has taken place, has been kept in dark. Even if we take that the said threat to kill Suman and bury her was given

by the accused in presence of informant, what was his reaction as against the accused, is not told by him. It is in fact very easy to develop a story at a later point of time, however, what was his action at the relevant time, definitely matters. PW-1 Kashinath then says that after some days his relative informed him that Suman is missing. In his missing report Exhibit-14, it has been stated that Suman is missing since 1st June 2014. Informant says that thereafter he along with his relatives went to Suman's house where he found Bhamabai i.e. Suman's mother-in-law but she told that she do not know about Suman. Interesting point is that prosecution has not examined Bhamabai for the reasons best known to it, who would have more knowledge as to when Suman went missing. The informant says that thereafter he was searching the area and then noticed the heap of soil covered with Neem branches. Because of the doubt the Police also exhumed the place where it is stated that the dead body was found.

10. In his examination-in-chief itself the informant has stated that the body was decomposed, but then he says that he had identified the dead body as that of Suman on the basis of blouse

and petticoat. Objection has been rightly taken by the learned Advocate for the appellant that how the maternal uncle, who had not seen the niece for so many days, can identify the dead body on the basis of these clothes. Petticoat is generally put under the saree and even major portion of the blouse is covered by saree. Here itself it is required to be considered as to what was the position of the face of the dead body which has been noted in the postmortem report. The condition of the dead body – Column No.10, Rigor Mortis – Column No.11 and extent and signs of decomposition – Column No.12 of the postmortem report reads thus:-

10	Condition of body- Whether well-nourished, thin or emaciated, warm or cold,	Not appreciated, as body is skeletonized. Following signs of decomposition present 1. Pulpy pultaceous soft tissue present detached from bony attachments with no appreciable anatomical distinction. 2. Foul smell present over soft tissues and bones. 3. Bones are moist with remnants of tendons and soft tissues adherent. 4. Scalp hairs easily pluckable 5. Loosening of teeth present 6. No maggots
11	Rigor Mortis – Well-marked, slight or absent; whether present in the whole body or part only.	
12	Extent and signs of decomposition: presence post-mortem lividity of buttocks, loins, back and thighs or any other part. Whether bullae present and the nature of their contained fluid. Condition of the cuticle	

11. Then, it is to be noted that when the body was skeletonized, it could be hardly identifiable on the basis of flesh of the face. The body was decomposed but it appears that the skin adherent to face and skull was there. Column No.17 of the postmortem report states two injuries thus:

17.	Surface wounds and injuries- Their nature position, dimensions (measured) and directions to be accurately stated- their probable age and causes to be noted. If bruises to be present what is the condition of the subcutaneous tissues:- 1. Body skeletonized. All bones are present and disarticulated, except sternum and hyoid bone which are missing. 2. Multiple contusions of sizes varying from 5X4cm to 2X1cm over right side of face and forehead. On cut section blood infiltration present
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12. The opinion was reserved as regards the cause of death is concerned, but then PW-6 Dr. Mandar Sane states that the probable cause of death is head injury. Interesting point to be noted is that though the bone samples were sent for DNA analysis by the Investigating Officer, yet, the DNA report was never produced before the trial Court. As per the prosecution

story, Tahsildar was present when the exhumation was done but he has not been examined for the reasons best known to the prosecution. Under all these circumstances, identification of the dead body, merely on the basis of blouse and petticoat, appears to be doubtful. Interesting point to be noted is that the panch PW-2 Shantabai Pawar, who was present at the time of exhumation, states that green colour blouse and blue colour petticoat was on the dead body. If we consider the inquest panchnama, Exhibit-12, the description of those clothes are, purple colour blouse and green colour petticoat. The clothes were not shown to PW-2 Shatabai at the time of her testimony, for the identification. In the missing report, Exhibit-14, PW-1 Kashinath has stated that at the time of missing, Suman was wearing yellow colour saree and yellow colour blouse. From where he got this information, has not been explained by him in his examination-in-chief. Therefore, all these are the contradictions in the prosecution evidence. Why Bhamabai, mother-in-law of Suman, was not asked to remain present at the time of exhumation, is not explained by the Investigating Officer. Further, it is to be noted that PW-3 Subhash Mali, who was the panch to the spot panchnama, PW-4 Jagannath Barde, panch to

the inquest panchnama are all relatives of PW-1 Kashinath. It is hard to believe that PW-5, API Sarode would not have got any panch from the local area. There was no necessity for him to take the relatives of the deceased and the informant as panch witnesses to the panchnamas. Merely because the heap of soil was at a distance of about 100 ft. from the house of the accused, it cannot be presumed that the dead body was of Suman. All the criterias should be proved by the prosecution independently.

13. PW-4 Jagannath is also the panch witness to the discovery panchnama under Section 27 of the Indian Evidence Act. According to the prosecution, the accused, who was in police custody, gave memorandum on 30th July 2014 and stated that he would discover the dead body of his son, who was then 4 months old. The statement that was made by the accused, which led to the death of his son, cannot be admissible in view of the fact that the accused is charged for the offence punishable under Section 304-A of the Indian Penal Code also. No doubt the accused has been acquitted by the learned trial Court for the said offence and there is no need to have detailed discussion in

respect of the same. However, the said investigation which led to the said discovery and the reason would show that how negligently the investigation has been done by PW-5 API Sarode. It appears that he believed in whatever statement was made by the accused in respect of cause of death of his son. It was told by the accused that he had taken the son along with him and he was concealing himself. In that process, he could not provide milk to the son, as a result of which the son died. This reason appears to have been accepted as it is by the prosecution and the investigating agency. As per the testimony of PW-4 Jagannath Barde, PW-5 API Sarode, the accused had shown the place where he had dumped the dead body of his son. It is stated that the accused had taken the entire machinery to the hill near village Gondegaon and then he has taken all of them to the land of one Mungase. From a place, the accused separated certain stones and below those stones there was dead body. However, what has been recovered, is only the skeleton and the bones. PW-5 API Sarode has stated that he has sent the skull of the child to Ghati Hospital, Aurangabad for postmortem. Postmortem cum provisional cause of death certificate is at Exhibit-27, which states that exact opinion about the death

cannot be given. Interestingly, even the doctor has put the name of the deceased and age without any further verification. Only on the basis of skull, how the identification has been done is a question and how everyone accepted the statement of the accused as a gospel truth. Other bones appears to have not been sent to Ghati hospital. Yet, certificate Exhibit-27 states that further investigation is required in that respect. The probable cause of death has not been given, but then it is stated that "however advice to send bone samples to anatomy department for identification, age and sex. Afterwards send them for DNA analysis." PW-5 API Sarode states that he had given letter to Forensic Laboratory, Kalina, Mumbai on 1st July 2014 for DNA test and office copy of letter has been produced at Exhibit-30. Till the end of the trial, the result of the DNA test has not been produced. Under the said circumstance, whether that skeleton which was found near the house of the accused, and the skull and the bones which were discovered by the accused from a different place, were of the mother and son or not, has not been proved beyond reasonable doubt by the prosecution. When proper investigation has not been made, yet, on the basis of the statement of the accused, the Investigating Officer is accepting

that the child died due to malnutrition, it could not have been accepted by the learned trial Judge.

14. By another discovery panchnama, for which also PW-4 Jagannath Barde appears to be the panch witness; iron rod and mattock have been discovered and the medical officer accepts that the injuries noted on the head of the dead body are possible by said iron rod. As aforesaid, both the panch witnesses to the discovery panchnama are from Newasa Budruk and especially PW-4 Jagannath is the relative of the deceased. It can also be seen, as to how PW-4 Jagannath was an interested witness, because he was present at the time of exhumation also which had taken place on 17th June 2014 and thereafter for the discovery that has been allegedly made on 30th July 2014. In view of the fact that these interested relatives of deceased have been engaged by the Investigating Officer, their testimony has become tainted and unbelievable.

15. The Investigating Officer, in his cross-examination has admitted that he has not recorded the statements of the neighbours of the accused. Though he says that various persons

near Kamte Vasti were gathered at the time of exhumation, why he had taken the relatives of the deceased as panch, has not been clarified by him. According to him, no other persons were ready to help them as panch witnesses except the relatives of the informant. This is unacceptable position. If nobody was helping the Investigating Officer, what action he has taken against those persons, is also not explained. He could have taken photographs of the entire work or could have even done the videography of the work. It could have acted more authentically than oral evidence of the interested witnesses.

16. As aforesaid, the case is based on circumstantial evidence. In other words, there is no direct evidence to prove that the accused had committed murder of his wife. There is discrepancy as regards the clothes on the skeleton and the prosecution has withheld the Tahsildar for no reason at all. Prosecution has also withheld Bhamabai and no statements of neighbouring persons were recorded. With these lacunas, the only circumstance that some dead body was found at a distance of about 100 ft. from the house of the accused, cannot be taken as the strong circumstance indicating that accused was the author of the

crime. When identification of the dead body itself is doubtful and there was possibility of getting more scientific evidence in the form of DNA test available to the prosecution and it has not been led, then only on the basis of discovery statements the learned trial Judge ought not to have arrived at a conclusion that prosecution has proved the offence beyond reasonable doubt. All the CA reports have also not been produced on record and only one CA report has been produced at Exhibit-36, which is in the nature of hair like material and tissue like material, and the result of the analysis shows that, general and specific chemical testing does not reveal any poison in the same.

17. Except the testimony of PW-1 Kashinath, there is no other evidence to show about alleged motive behind the commission of the crime. No doubt if there is direct evidence, then the prosecution need not prove the motive, but it is mandatory when it is a case based on circumstantial evidence. As per PW-1 Kashinath, accused was addicted to liquor and then he was causing trouble to Suman. This one line statement cannot be taken as a motive for committing offence of murder. It is not the prosecution case that Suman was resisting accused from

consuming liquor / Suman was not providing money to accused for consuming liquor. The word that has been used in the examination-in-chief is, giving trouble or harassment. At the cost of repetition, it can be said that the acts of harassment have not been stated and therefore offence under Section 498-A of the Indian Penal Code cannot be said to have been proved. The threat to kill that was given around Hanuman Jayanti, of which date or month has not been stated, whether can be stretched for months together to be the motive for committing murder. The answer would be in the negative. There has to be some proximity in the acts. Under such circumstance, it will have to be observed that the prosecution has failed to prove motive also beyond reasonable doubt.

18. The ingredients of offence under Section 302, 201 and 498-A are different. These three are distinct offences and therefore, the punishment should have been separately awarded in view of Section 31 of the Code of Criminal Procedure, however, then it is competent for the Court to direct it to run those separate sentences as concurrently or consecutively. However, the operative order of the learned Additional Sessions

Judge says that he has not awarded separate sentence under Section 201 and 498-A of the Indian Penal Code, for which he has not given reasons at all. This is unacceptable in the eyes of law.

19. The above discussion, therefore, leads us to the conclusion that the learned trial Judge totally erred in holding the accused guilty of committing offence punishable under Section 302, 201 and Section 498-A of the Indian Penal Code. The conviction, therefore, deserves to be set aside by allowing the Appeal. Hence the following order:-

ORDER

(I) The Appeal stands allowed.

(II) Conviction awarded to the appellant in Sessions Case No.145 of 2014 for the offence punishable under Sections 302, 201, 498-A of the Indian Penal Code by the learned Additional Sessions Judge, Newasa, District-Ahmednagar on 15th April 2015 stands quashed and set aside.

(III) The accused-appellant be set at liberty, if not required in any other case.

(IV) It is clarified that there is no change in the order of disposal of muddemal.

[RAJESH S. PATIL]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

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