

1. This appeal is directed against the judgment and order of conviction passed by the Additional Sessions Judge, Jalgaon dated 5.7.2013 in Sessions Case No.135 of 2012.
2. Brief facts of the prosecution case, are as follows :-
 - a] Deceased Shahanajbee was the wife of the appellant/accused. PW-1 Mudassar Khan and Danish are their sons. Danish was running a Biryani shop with

one Iqbal PW-4 in partnership. Said PW-4 Iqbal used to come to the house of appellant/accused at 12.00 noon to prepare the Biryani till 2.00 p.m. and they both i.e. Danish and PW-4 Iqbal used to sell Biryani from 4.00 p.m. to 10.00 p.m. at Gendalal Mill Rickshaw Stop. The appellant/accused was suspecting that due to frequent visits of PW-4 Iqbal to his house, his wife deceased Shahanajbee has developed illicit sexual relations with PW-4 Iqbal. Thus, the appellant/accused used to quarrel with deceased Shahanajbee on this count.

b] The incident had taken place on 10.4.2012. At about 10.00 p.m. as per routine, after taking dinner, PW-1 Mudassar Khan went on terrace for sleeping. At 2.00 p.m. he woke up for urine and he found his parents sleeping together. He again went to the terrace and slept. On the next day i.e. on 11.4.2012 in the morning at about 7.00 a.m. he woke up. There was a crowd in the lane in front of his house. He got down from the terrace and found that throat/neck of his mother deceased Shahanajbee was cut, blood was oozing and she was in the pool of blood. He found his mother deceased Shahanajbee was dead. PW-1

Mudassar when asked his father appellant/accused Gulam Hussain, he told him that though he has given understanding to deceased Shahanajbee as not to keep illicit relations with PW-4 Iqbal Shaikh, however, she was not listening, and, therefore, he cut her neck and murdered her. On that day itself at about 07.30 a.m. PW-1 Mudassar went to the City Police Station, Jalgaon and lodged the complaint Exhibit-5. On the basis of his complaint exhibit-5, crime no.30 of 2012 came to be registered at City Police Station, Jalgaon against the appellant/accused for the offence punishable under section 302 of the Indian Penal Code.

c] PW-7 P.I. Nagesh Jadhav has carried out the investigation in connection with the said crime. He immediately went to the spot of the incident which is in the house of the informant at Gendalal Mill Area and prepared spot panchnama of the house of accused at first floor i.e. room no.16 of Building no.39. He has found deceased Shahanajbee in dead condition and blood was spread over around her body. At the spot, he also found one knife stained with blood with blue colour handle mentioned thereon "speed", one blood stained

towel, blood stained scarf (odhani). Thus, he has drawn the spot panchnama in presence of the panchas and seized above articles from the spot. Said spot panchnama is marked at Exhibit 27. Knife Article 'A', Towel Article 'B' and scarf Article 'D' were the same found on the spot and seized by him. PW-7 I.O. PI Nagesh Jadhav also found the appellant/accused in Gendalal Mill Area, Jalgaon. He has taken him in the custody and sent him in the police station.

d] Further, the P.S.O. Subhash Patil has seized clothes of the appellant/accused i.e. shirt and pant stained with blood under cloth seizure panchnama in presence of the panchas. The appellant/accused was sent for medical examination by PSO Patil. On the same day, inquest panchnama on the dead body of deceased Shahanajbee was drawn and marked at exhibit-17. Further, clothes on the person of the deceased Shahanajbee also came to be seized under panchnama exhibit 22. PW-7 I.O. PI Jadhav has further recorded statements of the witnesses, including the neighbours as per their say. He has also requested the Judicial Magistrate First Class, Jalgaon to record confessional

statement of the appellant/accused. However, though his statement was recorded, the appellant/accused did not confess.

e] On 16.4.2012 PW-7 I.O. PI Jadhav had sent seized articles in the crime alongwith blood sample of accused and deceased in a sealed condition to the office of the C.A.Nasik for analysis with carrier. During the course of the investigation, on 2.5.2012 PW-7 I.O. PI Jadhav has obtained memorandum of postmortem examination exhibit-11. On 6.6.2012 he has handed over the further investigation to P.I. Choure, however, P.I. Choure has merely filed the charge-sheet against the accused in the Court.

3. The learned Additional Sessions Judge, Jalgaon has framed charge vide Exhibit-2 against the appellant/accused for the offence punishable under section 302 of the Indian Penal Code, to which the appellant/accused pleaded not guilty and claimed to be tried. In order to substantiate the charges levelled against the accused, prosecution has examined in all 7 witnesses. After completion of the prosecution evidence, statement of the

accused under section 313 of the Criminal Procedure Code came to be recorded. The defence of the accused is of total denial. According to the defence of the appellant/accused, someone else came in their house in night and assaulted his wife and murdered.

4. The learned Additional Sessions Judge, Jalgaon by impugned judgment and order of conviction dated 5.7.2013 convicted the appellant/accused for the offence punishable under section 302 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for life and shall also pay a fine of Rs.2,000/- (Rs. Two Thousand only), in default of payment of fine, to undergo rigorous imprisonment for three months. The operative part of the order passed by the learned Additional Sessions Judge, Jalgaon is reproduced herein below :-

- 1- Accused Gulam Hussain Khan Gulam Nabi Khan is hereby convicted under section 235 of the Criminal Procedure Code for the offence punishable under section 302 of the Indian Penal Code. He is sentenced to under go rigorous imprisonment for life and shall also pay fine of Rs.2,000/- (Rs. Two Thousand only) in default of payment of fine to undergo rigorous imprisonment for three months.

2. The pre-conviction detention period, undergone by the accused, shall be set off against the substantive sentence of imprisonment, provided benefit is given under sec.433 of the Code of Criminal Procedure, but subject to limitations in Section 433-A of the Code of Criminal Procedure.
3. Seized property i.e. knife and clothes, being worthless, be destroyed, after period of appeal is over.
5. Being aggrieved by the same, the appellant/accused has preferred this appeal.
6. Learned counsel for the appellant submits that the prosecution case entirely rests upon the circumstantial evidence and there is no direct evidence in this case. Learned counsel submits that some five days prior to the incident, the appellant/accused had been to Indore for his personal work. Though, he has returned from Indore, however, he did not go for any work and left the house by informing that he was again going to Indore. Some four to five days prior to the incident, the appellant/accused has made a phone call on the mobile of deceased Shahanajbee informing thereby that the appellant/accused was going to perform a second marriage and that he would return to Jalgaon only after

performing the second marriage. Learned counsel for the appellant/accused submits that on 10.4.2012 as usual, PW-1 Mudassar Khan went on Terrace for sleeping by 10.00 p.m. and, till that time he has not noticed that the appellant/accused was returned from Indore and he was present in the house. PW-1 Mudassar Khan, however, only by chance, when woke up for urination by 2.00 a.m. in the morning, had seen his father appellant/accused slept in a room by the side of his mother. Learned counsel submits that, PW-1 Mudassar has stated in his cross-examination that police woke him up on the day of the incident. There were around around 50 persons present in front of his house. The door of his house was found closed from inside and that is the only door for approaching the house. Learned counsel submits that in the backdrop of these admissions, the allegations about extra judicial confession made by the appellant/accused to his son PW-1 Mudassar Khan appears to be concocted. Learned counsel submits that motive in this case is also very weak. The prosecution has failed to establish the motive as a circumstance. Learned counsel submits that

conduct of the appellant/accused is also above suspicion. He was taken from his house for recording the statement and not for arrest, but subsequently, he was shown as arrested. Learned counsel submits that since the prosecution has failed to prove the case against the appellant/accused, the provisions of section 106 of the Evidence Act making it incumbent upon the appellant/accused to explain the death of his wife, loses its significance. The appellant/accused is entitled for the benefit of doubt. Learned counsel submits that, the panchas on the important panchnamas have not supported the prosecution case in any manner.

. Learned counsel further submits that the evidence of PW-1 Muddassar Khan is not inspiring any confidence and his evidence is also contrary to the evidence of PW-4 Shaikh Iqbal and PW-7 I.O. P.I. Nagesh Jadhav. Learned counsel submits that the alleged extra judicial confession cannot be relied upon as PW-1 Muddassar has omitted to state this material fact in his complaint specifically. Learned counsel submits that, it is for the prosecution to prove involvement of the accused beyond reasonable doubt before taking

recourse to Section 106 of the Indian Evidence Act. Learned counsel submits that, prosecution has failed to bring home the guilt of the appellant/accused and, as such, he is entitled for the benefit of doubt.

7. Learned APP for the respondent-State submits that, though, prosecution case entirely rests upon the circumstantial evidence, however, there is a chain of circumstantial evidence in this case. Prosecution has proved homicidal death. Further, presence of the appellant/accused in the house on the alleged night is not disputed. Evidence of PW-1 Mudassar is corroborated by his prompt police complaint Exhibit-5. There is no reason for PW-1 Mudassar Khan to depose falsely against the father. Deceased Shahanajbee was lastly seen alive in the company of the appellant/accused, but even then, no reasonable explanation was given by the accused as to the death of deceased Shahanajbee. There is a strong motive in this case and the prosecution has proved the same through PW-1 Mudassar and PW-4 Shaikh Iqbal. The appellant/accused was suspecting about illicit sexual relations of

the deceased Shahanajbee with PW-4 Shaikh Iqbal. Further, the appellant/accused has made confessional statement to his son PW-1 Mudassar Khan, which is duly proved by the prosecution. The appellant/accused has a confidence in his son and thus making of such extra judicial confession to the son immediately after the incident, cannot be doubted. Learned APP submits that seizure of the knife and blood stained clothes of the accused clearly indicates involvement of the accused in connection with the crime. The learned APP submits that prosecution has proved the case beyond reasonable doubt against the appellant/accused. There is no substance in this criminal appeal. Criminal appeal is thus liable to be dismissed.

8. We have carefully considered the submissions advanced by the learned counsel for the appellant-accused and the learned APP for the respondent-State. With their able assistance, we have perused the grounds taken in the appeal memo, annexures thereto, the record and proceeding and the case laws cited by the respective parties.

9. In the instant case, it is not disputed that Shahanajbee died in her matrimonial house itself. The defence has not disputed homicidal death of deceased Shahanajbee. Prosecution has examined PW-2 Dr. Rahul Atmaram Nikam. On 11.4.2012 PW 2 Dr. Rahul Nikam had conducted postmortem examination on the dead body of deceased Shahanajbee. He has noticed following injuries :-

- 1] Contused abrasion over right lateral thigh upper aspect.
- 2] CLW over anterior chest wall 2x1x1 cm.
- 3] Contused lacerated wound over anterior chest wall 1x1x1 cm.
- 4] Sharp incised wound over anterior aspect of neck extending laterally on both sides with trachea, transsection complete at the level of third, trachea ring with strap neck muscle cut 10x3.

10. According to PW 2 Dr. Rahul Nikam, injuries were antemortem in nature and clotted blood was found in the chest cavity. Heart was found empty and other organs were found pale. In his considered opinion, death of deceased Shahanajbee was caused due to hypovolemic shock with respiratory arrest in the case of cut throat

injury. Accordingly, he has prepared memorandum of the postmortem examination. It bears his signature. It is marked at exhibit-11. Prosecution has duly proved the postmortem examination and the cause of death which is self speaking. Deceased Shahanajbee thus met with a homicidal death in her matrimonial home.

. PW 2 Dr. Rahul Nikam has further deposed that in response to the query letter issued by the Investigating officer as to 'whether injuries on the person of the deceased Shahanajbee are possible by knife.' He has answered the said query that said cut throat injury to Shahanajbee was possible by sharp edged weapon like knife Article "A". There is nothing in the cross-examination to draw any other inference about death.

11. It is settled position that if the prosecution case rests upon the circumstantial evidence, motive plays a great role. PW-1 Mudassar Khan, who is son of the appellant/accused has deposed that, his younger brother Danish was running a Biryani shop with PW-4 Shaikh Iqbal in partnership, and as such, PW-4 Shaikh Iqbal used to come their house at about 12.00 noon to

prepare Biryani till 2.00 p.m. Thereafter, his younger brother Danish and Shaikh Iqbal used to sell Biryani from 4.00 p.m. to 10.00 p.m. at Gendalal Mill Rickshaw Shop. Even, deceased Shahanajbee was also helping them to make Biryani. PW-1 Mudassar has deposed that the appellant/accused was suspecting about his mother that she was having some illicit relations with Shaikh Iqbal and thus used to quarrel with deceased Shahanazbee. PW-1 Mudassar Khan has also quoted one incident occurred three months prior to the incident. He has deposed that on account of said suspicion there was a quarrel between his parents at about 10.00 am. At that time, the appellant/accused pressed neck of his mother, however, he rescued his mother deceased Shahanazbee.

12. PW-4 Shaikh Iqbal has deposed that Danish (son of the appellant/accused) is his partner and they were running one Biryani Stall in partnership. Said Danish Khan was residing with his parents and brother PW-1 Mudassar Khan. He used to prepare Biryani at the house of the accused at Gendalal Mill Area. Accused

and Shahenazbee was residing at the first floor in Gendalal Mill Area. Their house was consisting of one room of 10x10 feet. PW-4 Shaikh Iqbal further deposed that deceased Shahenazbee was helping them in preparing Biryani. He was also visiting house of the accused for preparing Biryani. PW-4 Shaikh Iqbal has deposed that the appellant/accused was taking suspicion on Shehanazbee and was quarreling with her. Even, on one occasion he had witnessed the quarrels between them. So far as motive is concerned, there is nothing in the cross-examination of both the witnesses to disbelieve their version. There was no reason for both of them to depose false. Evidence of both these witnesses is consistent, reliable and trustworthy on the point of motive. Prosecution has thus established the motive in this case.

13. So far as the actual incident is concerned, though there is no direct evidence in this case, however, deceased Shahenazbee was lastly seen alive in the company of the appellant/accused. It has come in the evidence of the prosecution witnesses that house of the

appellant/accused and deceased Shahenazbee was consisting one room of 10x10 feet in size. It is thus obvious that PW-1 Mudassar Khan used to sleep on the Terrace of the house.

. Though, there is evidence that the appellant/accused had been to Indore some time prior to the incident, however, the appellant/accused has admitted in his statement under section 313 of the Criminal Procedure Code that, he has returned from Indore on the date of the incident. PW-1 Mudassar Khan when woke up at 2.00 a.m. in the morning to ease himself and at that time he noticed presence of the appellant/accused in the house slept by the side of deceased Shahenazbee. Further, in the morning when he woke from the sleep by 7.00 a.m. had noticed crowd in the lane in front of his house. He got down and found neck of his mother was cut and blood was oozing. He found his mother was dead. His father appellant/accused was present there. PW-1 Mudassar Khan has deposed that he had asked his father and, thereupon, his father appellant/accused disclosed to him that, inspite of his giving understanding to

deceased Shahenazbee as not to keep illicit relations with PW-4 Shaikh Iqbal, Shahanazbee was not listening, and, therefore, he cut her neck and murdered. PW-1 Mudassar Khan also noticed blood stains on the pant and shirt of the appellant/accused. He also noticed one knife (suri) with blood stains on its blade, one handkerchief gagged in the mouth of his mother. Immediately, at about 7.30 a.m. he went to City Police station, Jalgaon and lodged his complaint Exhibit-5. There is no reason for the son to make false allegations against his father. Though, PW-1 Mudassar Khan has admitted in his cross-examination that, on the day of the incident, he went to sleep on the terrace, his father was not present in the house, however, his father appellant/accused might have returned to the house after PW-1 Mudassar Khan went on the Terrace to sleep. However, there is nothing in the cross-examination to disbelieve the evidence of PW-1 Mudassar Khan that he had seen his father slept in the room alongwith his mother at 2.00 a.m. when he woke up for urine.

14. So far as the evidence about extra judicial confession is concerned, according to us, it was but natural on the part of the father to make a confession before the son, when son noticed his mother in dead condition in the house having her throat slit and further noticed weapon knife on the spot itself with the blood on the blade and further blood stains on the clothes of the appellant/accused. This is not an omission. PW-1 Mudassar Khan has stated about the same in his complaint Exhibit-5. It is to be repeated here that within half an hour, after noticing dead body of the mother in his house and further marking presence of the appellant/accused at the spot, PW-1 Mudassar Khan has lodged the complaint in the concerned Police Station. The appellant/accused has also not denied his presence on the spot. During his examination under section 313 of the Criminal Procedure code, in reply to question no.29, the appellant/accused answered that he was taken from his house for recording the statement, but not for arrest, but subsequently, he was shown as arrested.

15. PW-1 Mudassar Khan has deposed about the blood stains on the clothes of his father and also one handkerchief gagged in the mouth of his mother. He has also identified the weapon knife (suri) with blood stains on its blade and also identified the clothes of deceased Shahenazbee with blood stains on it. Those are Kurta Article "K", one Salvar Article "S" and one Brassier Article "B". Clothes of his father i.e. pant Article "P" and full sleeves shirt of accused "F". Though, panch witnesses have not supported the contents of the panchnama, however, there is no reason to discard the evidence of PW-7 Investigating Officer P.I. Nagesh Jadhav on this point. Further, C.A. report Exhibit-34 shows weapon knife and clothes of the deceased were stained with human blood group "B". As human blood group "B" was found/detected on the knife and clothes of the deceased, it can be inferred that blood group of the deceased was "B". The same blood group "B" was also found on the clothes of the appellant/accused i.e. Full Shirt and Full pant.

16. The appellant/accused has failed to give reasonable explanation about homicidal death of his wife in the house. It is well settled that if the fact is especially within the knowledge of the person, then the burden of proving the said fact is upon him. It is important for the prosecution to prove certain facts particularly within the knowledge of the accused. Section 106 of the Evidence Act is not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding existence of certain facts.

17. In a case of **Trimukh Maroti Kirkan vs. State of Maharashtra** reported in **2007 Cri.L.J. 20** 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."

18. In the instant case, murder has been committed in in secrecy inside a house, and though the initial burden to establish the case would undoubtedly be upon the prosecution, however, 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 Supreme Court in the above cited case has held that 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. In the instant case, the appellant/accused has failed to explain as to how deceased Shahenazbee met with homicidal death. In our considered opinion, the prosecution has proved its case with the help of circumstantial evidence and since the appellant/accused has failed to give any cogent explanation about homicidal death of deceased Shahanajbee in the house, the same will be additional circumstance goes against the appellant/accused.

19. In view of the discussion above and in terms of the ratio laid down by the Supreme Court in the above cited case, we find no fault in the judgment and order passed by the Trial Court. There is no substance in this criminal appeal and thus the appeal is liable to be dismissed. Hence, we proceed to pass the following order.

ORDER

- i. Criminal Appeal is hereby dismissed.
- ii. Criminal appeal is accordingly disposed off.

(SANDIPKUMAR C. MORE) (V.K. JADHAV, J.)

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