

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 280 OF 1997

Nandakumar @ Chhotu Vasudev Samant,
Residing at Flat No. 24, Suraj Apartment,
4th Floor, Kastur Park,
Borivli (West), Mumbai-400092.
(At present at Arthur Road
Central Prison, Mumbai)

... **APPELLANT**

..V E R S U S..

State of Maharashtra
(at the instance of Borivli Police Station,
Mumbai)

... **RESPONDENT**

Mr. R. S. Desai i/b Ms. Prabha Badadare, Advocate for appellant.
Mr. S. S. Hulke, A.P.P. for respondent/State.

**CORAM :- S. S. SHINDE AND
SURENDRA P. TAVADE, JJ.**

RESERVED ON :- 25.11.2021

PRONOUNCED ON :- 27.01.2022

JUDGMENT (PER : SURENDRA P. TAVADE, J.) :-

1. Heard.

2. The appellant/original accused has filed this appeal against the judgment and order dated 05.05.1997 passed by the Additional Sessions Judge, Mumbai thereby convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code

(IPC) and the appellant was sentenced to suffer imprisonment for life and to pay fine of ₹ 500/-, in default he was directed to suffer rigorous imprisonment for two months.

3. The case of the prosecution can be summarized as under :-

The informant- Anant Naik had two sons and one daughter namely Nitin, Nilesh and Suchitra (deceased) respectively. The appellant as well as deceased- Suchitra were serving in State Bank of India. The appellant had love affair with Suchitra. They decided to get married. The mother of Suchitra opposed the said marriage but, subsequently the parents of Suchitra gave consent to the said marriage. Accordingly, the appellant and Suchitra got married in the year, 1982. After marriage, there used to be frequent quarrel between the appellant and the deceased. The deceased used to disclose the dispute between herself and the appellant to her mother but, the mother of the deceased could not reconcile the situation and continued to dislike the appellant.

Suchitra gave birth to a baby boy namely Pranjal on 26.11.1983. As the deceased and the appellant were working, Puja Chachad, who was residing nearby the house of the appellant, was appointed to take care of Pranjal. There was understanding between the appellant and the deceased that deceased to supposed to leave

Pranjal to creche and the appellant was supposed to bring his son back from the creche.

4. On 06.12.1988, the appellant returned home and did not bring Pranjal alongwith him and on that count there was altercation between the appellant and the deceased. During the said altercation, the appellant assaulted the deceased by fist and kick blows. She sustained injuries and her Bangals and Mangalsutra were broken. After the assault, the appellant left the house and Suchitra managed to call neighbor Shri N. A. Prabhu (PW1), who was General Secretary of the Bank Employee and residing in adjacent building namely Abhiman Building at Kastur Park. After arrival of Prabhu, Suchitra disclosed him that the appellant assaulted her. She also asked Prabhu to intimate the incident to her parents but, the neighbours had already intimated the incident to the parents of the deceased.

5. The neighbours and Prabhu brought Suchitra at ground floor. At that time, Police patrolling van was passing from nearby building and same was stopped by the neighbours. The incident was reported to the Police, present in the van. The Police Officer instructed the neighbours to take Suchitra to Bhagwati Hospital. Similarly, the message was also sent to Borivali Police Station. The witness Prabhu and the neighbours brought Suchitra to Bhagwati Hospital by Auto

rickshaw at about 01:35 a.m. on 07.12.1988. Suchitra was examined by Casualty Medical Officer, who noted the history as well as injuries found on the person of Suchitra. As the condition of Suchitra was serious therefore, she was referred to Dr. Karekar, who examined her. Suchitra also gave history of assault by her husband to Dr. Karekar, who noted it in medical papers. Dr. Karekar found six external injuries on the person of Suchitra. He performed test of Abdominal Tab and same came to be positive. Dr. Karekar diagnosed that patient had traumatic abdomen and decided to perform emergency operation. Suchitra was therefore sent to operation theatre at first floor. Meantime, PSI Dhawale and Constable Puri reached the hospital and both of them went to the operation theatre and saw that Suchitra was lying on stretcher outside operation theatre and was suffering from pain. PSI Dhawale (PW9) sought permission of Dr. Karekar to record the statement of Suchitra but, the Medical Officer refused the permission as the condition of Suchitra was critical. Hence, her statement was not recorded by PSI Dhawale. Meantime, Anant Naik-father of Suchitra reached the hospital. He saw Suchitra and found injuries on her face and other parts of the body. He made enquiry with Suchitra as to how she sustained injuries. In response, Suchitra disclosed him that the appellant returned home at about 11 p.m. but he did not bring home Pranjali alongwith him. When she asked the

appellant about Pranjal, he started quarreling with her and assaulted her by fist and kick blows and thrown her on floor. Thereafter, Suchitra was operated. Anant Naik lodged First Information Report (FIR) with Police.

6. On the basis of the FIR, Crime No. 485/1988 was registered against the appellant for the offence punishable under Section 325 of the IPC. The Investigating Officer reached the flat of Suchitra namely Flat No. 24, 4th Floor, Suraj Apartment, Borivali. He prepared scene of offence punchnama and also seized pieces of Bangles and Mangalsutra. He also obtained samples of blood stains found on the floor and household articles. He also noted blood stains in the bedroom and the articles were scattered in the bedroom. After panchnama, the Police returned to the Police Station. The Investigating Officer received information from the hospital that Suchitra passed away and therefore, offence under Section 302 of the IPC had been added in the FIR.

7. The Investigating Officer went to the hospital where the statement of Anant Naik was recorded. Clothes of deceased were attached at the hospital and dead-body of Suchitra was sent for post-mortem examination. The Investigating Officer also recorded the statement of witnesses namely Prabhu, Varsha etc.

8. The Investigating Officer also took intensive search to arrest the appellant but, he could not trace him hence 'A-Summery' was recommended. Finally, information was received by PSI Sapkal that the appellant was available at Saibaba Nagar. A trap was laid on 17.11.1994 and the appellant came to be arrested under panchnama. He was identified by the mother of the deceased namely Arundhati Naik. Her statement was recorded and the additional documents were submitted to the Court and interrogation was carried out. After completion of investigation, charge-sheet came to be filed against the appellant in the Court of Metropolitan Magistrate at Borivali.

9. As the offence under Section 302 of the IPC was triable exclusively by Court of Sessions, hence the case was committed to Court of Session at Mumbai. During the trial, the appellant was released on bail and on his appearance charge came to be framed against him under Section 302 of the IPC for which he pleaded not guilty and claimed to be tried. The defence of the appellant was of total denial. According to the appellant, on the fateful day, he had gone for a Bhajan programme at Shri Gajanan Maharaj Temple at Kalyan. He had already been given intimation of the said programme to deceased- Suchitra. The programme was finished at about 12:30 midnight and after, he came to Dadar railway Station (local), but no train service was available therefore, he waited at Dadar Station and then

came to Borivali at about 5:15 a.m. and then he reached at Suraj Apartment. He found that there was group of people gathered at the entrance gate of the apartment. He was informed that Suchitra was taken to Bhagwati Hospital. Hence, he went to Bhagwati Hospital by Auto rickshaw. When he reached hospital, two persons came running towards him and pushed him back in rickshaw and he was taken to Malad. On the way, he was informed that his wife expired and offence has been registered against him; hearing that offence is registered against him, and his wife died he had shock. Then he went to Shirdi and stayed there for long time. As per advice of his friend Vimal Dhavan, he came to Borivali and surrendered himself before the in-charge police officer of concerned Police Station.

10. To prove the charge against the appellant, the prosecution has examined as many as eleven witnesses. The appellant examined two defense witness namely Shridharan Sundaram (DW1) and Smt. Puja Chachad (DW2).

11. Upon considering the evidence of prosecution and defence, the Trial Court held the appellant guilty for the offence punishable under Section 302 of the IPC and he has been sentenced to suffer rigorous imprisonment for life and to pay a fine of ₹ 500/-, in

default to suffer rigorous imprisonment for two months. The said judgment and order is challenged in this appeal.

12. The learned counsel for the appellant submits that the Trial Court wrongly held that the death of the deceased was homicidal. It is submitted that the evidence of Dr. Karekar and Dr. Jalgaonkar was not properly appreciated by the Trial Court. He contended that the prosecution has not led cogent and reliable evidence to prove the alleged dying declaration of Suchitra. It is submitted that the Police Officer Dhawale and Constable Puri had received information about alleged assault on Suchitra and therefore, their evidence on the point of alleged dying declaration could not be believed. It is contended that the statement of Arundhati Nail was recorded six years after the incident and therefore it loses evidentiary value and the Trial Court should have ignored the evidence of Arundhati Naik. It is contended that evidence of son of deceased- Pranjal is not useful to the prosecution to prove either the dying declaration or homicidal death of the deceased. It is contended that the appellant has given the possible explanation of his absence after the alleged incident and that could not be used against him and his absence could not be used as additional circumstance against him. It is further contended, the Trial Court has not properly considered the provisions of law properly. He invites our attention to the contents of the written notes of evidence placed on

record and submitted that the appeal be allowed and the appellant be acquitted.

13. On the other hand, the learned A.P.P. submitted that there is sufficient evidence on record to establish that the appellant had assaulted the deceased and run away from the house. The dying declaration of Suchitra was proved by the prosecution through the evidence of Medical Officers and Police Officers. The death of Suchitra had caused due to rupture of liver which resulted into cardiac arrest. Hence, the prosecution has rightly proved homicidal death of Suchitra. It is submitted that the Trial Court has considered the evidence on record properly and there is no need to interfere with the findings of the Trial Court. It is submitted that the appeal be dismissed.

14. The prosecution has examined in all eleven witnesses. The prosecution mainly relied on the evidence of Dr. Karekar (PW6) and Dr. Jalgaonkar (PW7) to prove the dying declaration as well as homicidal death of Suchitra. According to Dr. Karekar (PW6), in the year 1988 he was attached to Bhagwati Hospital and he was on duty from 8 a.m. on 06.12.1988 for 24 hours till 8 a.m. on 07.12.1988 as a Registrar of A.R. Nerkar Unit. Patient Suchitra was admitted in the hospital at about 01:35 a.m. on 07.12.1988 as indoor patient and he was the first Doctor who examined her after she was admitted in the

hospital. He further deposed that patient gave history of assault by fist and kick blows by her husband. She also disclosed that she was thrown on the ground by her husband. She also gave history of nasal bleeding and the said history was recorded by him in the medical papers.

15. Dr. Karekar further deposed that on examination, he found general condition of Suchitra was poor but, she was fully conscious and pulse were feeble femoral felt, blood pressure was irrecordable. Respiration was 20 per minute. He found following six external injuries on the person of Suchitra :-

- “i) CLW (Lt.) eyebrow 2 x 1 cm skin deep.*
- ii) Contusion over chin and (Lt) zygoma.*
- iii) CLW 1½ x ½ x ½ cm. left zygoma.*
- iv) Lt. Black eye.*
- v) Multiple contusions on either side of anterior part of neck and anterior part of left shoulder.*
- vi) Rt. Fronto Parietal Haematoma.”*

16. He further deposed that he has done Abdominal Tab test which was positive namely on aspiration by needle which was put into the peritoneal cavity shows blood (Non clotting blood) which suggested free peritoneal blood. He drew a diagram showing the injuries. He noted result of examination while he was examining and after completing the examination, he came to the conclusion that the patient

had traumatic Abdomen. He signed the case papers, which marked as Exh.18 collectively. He obtained consent of Anant Naik, father of the patient. Since, the traumatic abdomen requires urgent surgical management, the patient was directly shifted to operation theatre. He performed urgent surgery. The type of surgery was exploratory Laparotomy with right Thoracotomy extension done under general anesthesia by him with the help of Dr. Tripathi. He gave findings of the operation namely Massive (about 3.5 liters) hemoperotiam, massive liver tear left to the gall bladder fossa tearing the liver up to the inferior vena cava with tear of Rt. Hepatic vein with extension into inferior vena cava. Retroperitoneal haematoma in upper part of abdomen was present. It has come in the evidence of Dr. Karekar that during the surgery, patient went into cardiac arrest and was resuscitated by the Anesthetist. Intracardiac adrenaline was given. Internal cardiac massage was also given however, patient could not be resuscitated and was declared dead at 3.15 a.m. on 07.12.1988. He further deposed that after the death, the dead-body was sent for post-mortem examination.

17. In cross-examination, Dr. Karekar admitted that he did not inform that his findings recorded during the surgery were sufficient in the ordinary course of nature to cause death but, he volunteered that information is required to be given to Police by the Casualty Medical

Officer and not by Surgeon. He further admitted that in the case papers, he did not mentioned all findings recorded during the surgery so as to show that the injuries sustained to Suchitra were sufficient in the ordinary course of nature to cause death. He further admitted that in the papers, he gave cause of death as unnatural and unknown. He further volunteers that he referred the dead-body for post-mortem to find out the cause of death. He also admitted that during the operation, he could not determine exact cause of death and therefore, he opined that cause of death is unknown.

18. Dr. Karekar also admitted that cardiac arrest can also on account of Anesthesia. He did not carried out elaborate pre-operative anesthesia test of deceased because the case was emergency surgery and every minute was important. He further admitted that injecting penicillin also result into cardiac arrest. He admitted that he had injected Ampicillin to deceased Suchitra and Ampicillin is a derivative of penicillin. It was suggested that the patient could be found unconscious if his blood pressure is irrecordable but, the said suggestion was refuted by the Doctor and he gave explanation that when they use term blood pressure is irrecordable, they mean that it is irrecordable at the upper portion of the arm. It was suggested to Doctor that rapture of liver could be cause of cardiac arrest but, the said suggestion was refuted. It is admitted that intra-operative

bleeding is the bleeding which occurs during the operation. In the present case, there is reference in the note of anesthetists that there was intra-operative bleeding. On the basis of said admission, learned counsel for the appellant submits that there was no bleeding prior to the admission of the deceased in the hospital. The bleeding started during the operation and therefore, the cause of death is written as unnatural which includes post operative complications but, there is evidence on record namely scene of panchnama wherein it is mentioned that there were blood stains on the floor. The clothes of the deceased Suchitra were having bleeding injuries right from the beginning.

19. The prosecution has also relied upon on the evidence of Dr. Jalgaonkar (PW7), who performed post-mortem on the dead-body of the deceased. According to him, he performed the post-mortem between 5.30 p.m. to 6.30 p.m. on 07.12.1988. He noted external injuries at para no. 17 of the post-moretem (Exh.21). He also deposed that there were eleven injuries on the body of the deceased and the injury no. 11 is suturing during the surgery and all these injuries were ante-mortem injuries. There was hemorrhage, haemotoma and congestion of the brain. The liver was rapture through and through and after examination he completed post-mortem taking sample of blood for grouping and alcohol test. He waited for report of C.A. and

all reports of C.A. were received on 12.01.1989. However, after consulting his colleague and senior, he finally gave cause of death as shock and hemorrhage due to rupture of liver (unnatural) on 31.12.1988 without waiting for C.A. reports. The C.A. report is marked as Exh.22. The viscera was not sent for C.A. He opined that the rupture of live is sufficient in the ordinary course of nature to cause death.

20. It is suggested to Dr. Jalgaonkar that intro-cerebral haemotoma is possible by fall provided in all the cases there is contact with blunt object. It is pertinent to note that there is no material on record to substantiate the theory of fall specially such type of fall which can cause extensive damage to liver. He stated that he did not find fracture of ribs during examinations. He admitted that there is distinction between tear and rupture and the liver was through and through ruptured but did not have a massive tear. He admitted that he was not told that cause of death was cardiac arrest therefore, he could not investigate in that direction during the post-mortem but he admitted that he did not detect cardiac arrest. He also admitted that injuries to the deceased was caused by hard and blunt object and some of the injuries can be possible by fall on hard ground. On the basis of the said evidence, learned counsel for the appellant submitted that there is possibility of fall of the deceased from staircase and she could

have sustained injuries. The Medical Officer has admitted that there can be damage to liver by fall however, in such case the trauma would be forceful and it is inevitable that there can be some external injury corresponding to rupture of liver because of hard and blunt object. In the present case, there was no external injury on the abdomen. Similarly, the scene of offence panchnama show that there were blood stains on the floor of the flat of the deceased. Her inner garments were stained with blood so the theory put forth by the defence that the deceased sustained injuries due to fall from staircase appears to be improbable.

21. The evidence of the Medical Officer equivocally established that the death of the deceased Suchitra was homicidal and not accidental. Once it is established that the death of Suchitra was homicidal, then it is to be seen whether the appellant is responsible for the same. There is no direct evidence in this case and the entire case rests on circumstantial evidence. Learned counsel for the appellant strenuously submitted that in such type of case, chain of circumstance leading to the conclusion of guilt of the accused has to be established. He also relied on the ratio laid down in the case of *Sangili @ Sanganathan Vs. State of Tamil Nadu [AIR 2014 SC 3756]*. In the said judgment, Hon'ble Apex Court has relied on the ratio laid down in the case of *Sharad Birdhichand Sarda Vs. State of Maharashtra [1984 (4)*

SCC 116]. The Hon'ble Apex Court has in the said case observed that following cardinal principle of appreciation of circumstantial evidence are required to be complied with:-

- “(i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established;*
- (ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
- (iii) The circumstances should be of a conclusive nature and tendency;*
- (iv) They should exclude every possible hypothesis except the one to be proved; and*
- (v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”*

22. There is no dual opinion on the above ratio. The prosecution has relied on the following circumstance:-

- i) motive;
- ii) dying declaration; and
- iii) absence of the appellant from the spot immediately after the incident.

23. To prove the motive, the prosecution heavily relied upon the evidence of Arundhati Naik (PW5). The evidence of Arundhati is

strongly objected by the appellant on the ground that her statement was recorded after 6 years of the incident. It is also contended that Arundhati was not present in the hospital when Suchitra was admitted in the hospital. To appreciate the submissions, we have to scrutinize the evidence on record. It has come in the evidence of Nalkur Prabhu (PW1) that in the night of 06.12.1988, at about 11 p.m. he was sleeping in the house and about 4/5 persons came to his house. They informed him that there was quarrel between Chotu (the appellant) and his wife. Chotu has beaten his wife Suchitra and she had called him. He immediately went to the flat of the deceased. She was sitting on the staircase and was bleeding and wailing. She told him to call her father but, the neighbors gathered there disclosed that intimation of the incident was given to the father of the deceased on phone. He further deposed that at that time one Police patrolling van came at the site of building. The neighbors intercepted the Police van and they gave information of the incident to Police and Police asked the neighbors to take the injured to Bhagwati Hospital. Thereafter, the witness further deposed that he alongwith one neighbor took Suchitra to Bhagwati hospital by Auto rickshaw. This evidence is not denied and it is established that information of the incident was communicated to Nalkur Prabhu (PW1), who in turns visited the house of the deceased and thereafter he took the deceased to Bhagwati

Hospital in Auto rickshaw. The information of the incident was given to the parents of the deceased.

24. In view of the above evidence, the evidence of Arundhati (PW5) is to be appreciated. She deposed that in the night of 06.11.1988, her husband received phone call whereby he was informed that her daughter was assaulted by her husband and it was also informed that she had sustained injuries and was bleeding from mouth and nose. Thereafter, one more call was received by her, wherein she was informed that Suchitra was taken to Bhagwati Hospital, Borivali. Accordingly, she alongwith her husband visited Bhagwati Hospital in Taxi. She further deposed that she met the deceased, who disclosed the incident to them.

25. Arundhati deposed that deceased- Suchitra married the appellant in the year 1982 and it was a love marriage. The appellant and the deceased were residing at Flat No. 24, Suraj Apartment, Kastur Park, Simpoli, Borivli (West). Pranjal (PW4) was born on 26.11.1983. She further deposed that she used to visit the house of Suchitra. Suchitra used to tell her that there use to be quarrel between herself and her husband. She advised her to be patient and these quarrels are routine in nature. The said evidence is substantiated by Pranjal (PW4). At the time of incident, Pranjal (PW4) was about 5

years old and at the time of deposing in the Court, he was aged about 13 years. It has come in his evidence that the appellant used to frequently take him to places like Kosobo Nagar, Jogeshwari, Thane, Pune and Saibaba Nagar etc. He used to meet relatives and friends of his father. He further deposed that there used to be quarrel between his parent in the house in the evening and night. The appellant used to demand money from his mother and the appellant used to beat his mother on her refusal to give money. The appellant used to beat her mother by stick on some occasions. He used to obstruct the appellant but, the the appellant also used to beat him. The said sentence is brought on record as an omission hence, required to be ignored. But, it is established from the evidence of Pranjal that there used to be frequent quarrel between the appellant and the deceased Suchitra and he tried to intervene in the same.

26. On this count, learned counsel for the appellant submitted that the appellant was gainful employed and he had no reason to demand money from the deceased and therefore, evidence of Pranjal is not inspiring confidence. It is true that the appellant and the deceased were bank employees and therefore, apparently there was no need of the appellant to demand money from the deceased. But, it has come in the evidence of Arundhati that the appellant was convicted by High Court and he has spent money on the litigation and similarly the

appellant used to do the union work and used to go frequently out of Mumbai. So there is possibility that sometime he may be in need of money. As far as conviction of the appellant is concerned, no details about conviction are brought on record. It is also not challenged by the appellant that he was convicted by the High Court. There is no cross-examination to bring on record that such is not a fact and infact due to conviction it is possible that the quarrel used to be on account of money. So, on going through the evidence of Arundhati and Pranjal, it can be said that the relation between the deceased and the appellant were strained. It also appears that sometime there used to be oral altercation and even physical assault also.

27. It is the case of prosecution that on the day of incident, quarrel took place between the appellant and the deceased because the appellant did not bring Pranjal home. On this point, evidence of Smt. Chachad (D1) is important. She deposed that on the day of incident Suchitra had come to her house but, she did not take Pranjal alongwith her. Smt. Chachad deposed that she had instructions from the appellant not to send Pranjal alongwith Suchitra. She further deposed that Suchitra came to her house at about 5.30 p.m and she thought that she had come to take away Pranjal but, she did not take back Pranjal alongwith her. Therefore, she thought that the appellant may come to receive Pranjal. Smt. Chachad further deposed that in the said

night, the appellant did not come to receive Pranjal therefore, he stayed in her house. So it can be said that in the fateful night, Pranjal was not brought to house and that may be the ground for quarrel also and that was not explained by the defence.

28. The defence has denied the evidence of Arundhati (PW5) on the ground that her statement was recorded at belated stage. It is true that Arundhati's statement was recorded in the year 1994 and no explanation of delay in giving such statement given by her as well as by the Investigating Officer. It is also contended that there is no corroboration to her testimony that she visited to Suraj Apartment as well as Bhagwati Hospital. In the cross-examination, Arundhati gave names of Police Officers namely PSI Dhawale and name of Constable as Churi/Puri. The name of Constable was infact Puri. So, admittedly Dhawale and Puri were present in the hospital when Suchitra was admitted there. Arundhati also deposed that her husband asked PSI Dhawale to record the statement of Suchitra but, the said fact is not confirmed by PSI Dhawale. But, it is a fact that husband of Arundhati lodged report immediately after Suchitra was taken for operation. In the FIR, there are allegations that the appellant had assaulted Suchitra. There is no reference in the FIR that Arundhati had accompanied the informant. Similarly, her statement was also not recorded immediately. So it can be said that there is doubt regarding her presence in the

hospital on the fateful night. For the sake of argument, it is presumed that the presence of Arundhati at hospital was not established by other corroborative evidence or documentary evidence, still it cannot be said that she is a got up witness. We have to consider the normal course of human conduct. In normal course of human conduct, Arundhati received a message that her daughter was serious and she was hospitalized and at that time she and her husband was in the house. It is normal reaction of a mother to rush to meet her child, who is seriously injured and hospitalized. The husband of Arundhati was a retired person and therefore, it can be said that Arundhati must have accompanied her husband to the hospital in a Taxi at wee hours in the night. Therefore, we do not accept the statement of defence that Arundhati was not accompanied her husband to the hospital in the fateful night. She also speaks about marital relationship between the appellant and the deceased. The said evidence is substantiated by Pranjal (PW4) that there used to be frequent quarrels between the appellant and the deceased on account of money and therefore, the prosecution has proved the motive for crime.

29. According to the prosecution, deceased Suchitra had called neighbors and accordingly, Prabhu (PW1) reached the house of Suchitra. It is disclosed by Suchitra to the Prabhu that she was assaulted by the appellant. Similarly, witness Vathasala Shriniwas

(PW3) was also examined to prove the dying declaration. But, both of them have not whisper anything regarding disclosure statement made by Suchitra regarding the incident to them. So the evidence of Prabhu and Vathasala is not sufficient and useful for the prosecution to prove the dying declaration.

30. It has come in the evidence of PSI Dhawale (PW9) that on 06.12.1988 from 6.00 p.m. to 8.00 p.m. of 07.12.1988, he was on Station House Officer duty. In the said night, at about 01.10 a.m., he received a message from Bhagwati Hospital that Suchitra was admitted in the hospital because she was assaulted by her husband. He asked the Writer on duty to enter the message in Station Diary and accordingly the said message is recorded in the Station Diary (Exh.26). He further deposed that he immediately rushed to the hospital. He made enquiries with the duty constable and he came to know that Suchitra was taken to operation theatre on the first floor. He alongwith Constable Puri went to first floor and found that Suchitra was on stretcher in front of operation theatre. She had injuries on face, left eye, cheek and neck. Suchitra had kept her hands on chest and stomach and she was wailing/weeping in pain. He asked Suchitra as to what had happened. She told him that her husband beat her with fist and kick blows. He made efforts to record the statement of Suchitra but, Doctor came there and told him that he has to perform

operation on Suchitra and she was taken to operation theatre. Therefore, he could not record the statement of Suchitra. Similar evidence is given by Constable Puri (PW8). According to him, in the night of 06.12.1988, he joined duty at 5.00 p.m. and was on duty up to 9.00 a.m. on the next day. At about 1.10 a.m. on 07.12.1988, a message is received from Bhagwati Hospital that one lady was assaulted by her husband and she was brought for treatment. Thereafter, he alongwith PSI Dhawale went to the hospital and on reaching the hospital they made enquiries with the Constable on casualty duty. He told that patient was shifted to first floor near operation theatre. Accordingly, he and PSI Dhawale went to the first floor and they saw one lady on stretcher. PSI Dhawale asked the lady what had happened and she told that she was beaten by her husband by fist and kick blows. Then, she was taken to operation theatre. The said evidence is denied by the defence but, there is entry in the Station Diary regarding the incident. At about 1.10 a.m. he immediately rushed to the hospital. Diary entry is produced on record, which show that information of admission of Suchitra was recorded in the Police Station. Thus, PSI Dhawale and Constable Puri to rush to the hospital. Therefore, their presence cannot be denied.

31. In second set of evidence, on the point of dying declaration there is evidence of the Medical Officers. Admittedly,

Suchitra was taken to casualty ward of Bhagwati Hospital where Suchitra narrated history of assault. The Doctor, who recorded the history is not examined but, the medical papers are produced on record and those are at Exh.18, wherein Suchitra had given history of assault at the time of her admission in the hospital. Dr. Karekar (PW6) had examined Suchitra and he also recorded the history of injuries sustained to Suchitra. Dr. Karekar deposed that the general condition of Suchitra was poor. He enquired with Suchitra and she disclosed that she was assaulted by fist and kick blows by her husband and accordingly, he recorded the said history in the case papers. The said case papers are also produced on record. It appears that when Suchitra was admitted in the hospital, her parents were not present. So, there is no question of tutoring Suchitra to give false history to the Medical Officer or Police Officers. Also, Dr. Karekar had no reason to record false history in the case papers. Similarly, he was not in inimical terms with the appellant. So, history written in the medical papers of Suchitra can be treated as dying declaration recorded by the Medical Officer.

32. The Medical Officer categorically stated that though the general condition of Suchitra was poor but, she was fully conscious and able to speak and therefore, in our opinion the prosecution has proved the dying declaration of Suchitra recorded in the medical

papers. Similarly, the prosecution has also proved oral dying declaration made by Suchitra before the Police Officers namely PSI Dhawale and Constable Puri. The said dying declaration speaks that she was assaulted by her husband by fist and kick blows.

33. We have already observed that there is no direct evidence regarding the incident and participation of the appellant. The evidence on this point is found in the form of dying declaration made by the deceased Suchitra to the witnesses. The first disclosure was to Prabhu (PW1), who did not support the case of the prosecution. Second disclosure was before Medical Officer working at casualty ward. Name of Doctor is not on record but, OPD papers (Exh. 18) show that at the time of admission, the Doctor had recorded history as “patient gave history of assault by fist and blows by husband”. It was also noted that patient was conscious and immediately referred to the operation theatre. The third person, who heard the dying declaration was Dr. Karekar (PW6), who recorded the history given by Suchitra. He also noted that at the time of recording the history of assault, the patient was fully conscious. The oral dying declaration was given before PSI Dhawale (PW9) and Constable Puri (PW8) and both of them have deposed that Suchitra disclosed that she was assaulted by fist and kick blows by her husband.

34. It is pertinent to note that after examination, the Trial court put question to Dr. Karekar, wherein Dr. Karekar informed that injury to neck can be caused by nails and hand blows and the contusion on shoulder can be caused by blow with hands. However, the answers given by Dr. Karekar were incorrect, as contusion cannot be caused by nails but, only abrasion can be caused by nails. The opinion of Dr. Karekar was not supported by medical science and deserves to be rejected. Dr. Karekar had drawn the diagram by the side of injury no. 5. The location is such that contusion cannot be caused by fall or even by dragging on rough ground. The only probable way in which these multiple contusion can be caused is by strangulating the victim by using one hand and forcing her against hard ground or wall. Existence of injury no. 6, which is hametoma on right fronto parietal region also show that trauma was given by hard and blunt substance or the victim hit her head or the victim was hit to hard substance. The medical evidence speaks volumes and corroborates to the oral testimony in relation to dying declaration made by Suchitra. Dying declaration of Suchitra made to the witnesses is therefore can be believed as truthful.

35. The learned counsel for the appellant submitted that examination of the appellant under Section 313 of the Code of Criminal Procedure (Cr.P.C.) is not satisfactory and not done as per the

established procedure and in accordance with law on the subject. The learned counsel for the appellant relying upon written submission submitted, that medical papers including the notes prepared by the Surgeon and Anesthetist are not put to the appellant. It is also submitted that the evidence of Dr. Karekar was put to the appellant in three questions. The said questions do not cover his entire evidence and therefore, the appellant could not explain the circumstance brought against him in the evidence. To appreciate the submission of the learned counsel for the appellant, one must see the question put to the appellant in the statement under Section 313 of the Cr.P.C. The question nos. 21 to 23 are in respect of opinion expressed by Dr. Karekar. Question No. 21 is in respect of examination of Suchitra by Dr. Karekar and the history given by Suchitra. The said question was very crucial because, there were specific allegations against the appellant that he assaulted Suchitra by fist and kick blows. Question No. 22 is in respect of the injuries noted by Dr. Karekar in case papers. It is mentioned by Dr. Karekar that he prepared notes of operative procedure. The said notes of operative procedure were produced on record but not exhibited and thus were not used against the appellant as material substance against him. Question No. 23 is very specific wherein it is put to the appellant that injury nos. 1, 2 and 3 of the notes of operation were sufficient in ordinary course of nature to cause

death. The said questions cover cause of death of Suchitra but, the appellant has simply answered that he does not know anything about the injuries. Question No. 36 is in respect of post-mortem report prepared by Dr. Jalgaonkar. The explanation of the appellant was sought as regards the post-mortem report (Exh.21) but, he has shown ignorance about the same. The post-mortem report consist of 22 columns and it is not required that to put question on the observation of the Medical Officer given in each column of the post-mortem report. The post-mortem report is a technical report and the cause of death mentioned therein was put to the appellant and he showed ignorance about the same. The circumstance used against the appellant were put to him and there is no grievance made by the appellant that by not putting the material substance he has been prejudiced. Therefore, in our opinion, the examination of the accused under Section 313 of the Cr.P.C. was properly done. On going through the examination of the accused under Section 313 of the Cr.P.C., we are of the opinion that there is no shortcoming therein. The questions, which were important and relevant for explanation of the appellant, were put to him.

36. Admittedly, the appellant was not present after the occurrence and he was hiding for 6 years till he surrendered himself at Police Station on 17.11.1994. The learned counsel for the appellant submitted that abscondence of the appellant cannot be used against

him as an additional link. It is true that abscondence is one of the circumstance, which is taken into consideration while assessing the evidence placed on record by the prosecution. Abscondence of the accused further substantiate truthfulness of the dying declaration. According to the appellant, in the fateful night, he was giving religious discourse at Gajanan Maharaj Temple at Kalyan till late night. He missed the last local train and finally reached the house at about 5.15 a.m. He was informed by the person gathered near the gate of the building that there was quarrel between his wife and someone, during which his wife fell down from stairs and sustained injuries. Thus, he went to the hospital and at the hospital, two persons prevented him going inside and put him back in rickshaw. They were not members of Bank union but were well wisher from State Bank of India. The said persons informed him that relatives of his wife are accusing him of murder of Suchitra. When he made enquiries regarding Pranjal, the strangers informed him that Pranjal was safe. He finally went to Shirdi where he stayed in shock and forget himself and he was brought back to worldly affairs by his friend Vinod Dhawan. He listen to the advice given by Vimal Dhawan and decided to surrender before Police and accordingly he surrendered before the Police. The prosecution has tried to established that the appellant was arrested in presence of two witnesses namely Prabhakar Salvi and Popatlal Shaha but, the said

evidence is discarded by the Trial Court. Therefore, there is substance in the defence of the appellant that he surrendered himself before the Police in November-1994. But, he has not examined any person whom he meet in the fateful night, who gave him information about the incident occurred with Suchitra. The story put forth by the appellant appears to be imaginary and cannot be believed. The evidence led by the prosecution show that the appellant had assaulted his wife on the fateful night and then ran away from the spot. The explanation given by the appellant is not worthy of credence.

37. On going through the above discussion, we hold that the prosecution has established the cardinal principles laid down by the Hon'ble Supreme Court in the case of ***Sharad Birdhichand Sarda (supra)***. The prosecution has established that there was quarrel between the appellant and the deceased. The appellant assaulted the deceased by fist and kick blows whereby she sustained bleeding injuries. Similarly, she had injuries on his face, neck and the fatal injury on abdomen whereby her liver was ruptured. She sustained bleeding injury and the said fact was established from the scene of offence panchnama. There were blood stains on the floor of bed room and drawing room. Similarly, her clothes including inner wear were also stained with blood. No doubt, it is proved on record that there was collection of blood admeasuring 3. 5 liters in the cavity and said

bleeding was during the course of operation but, the prosecution has established that the deceased was conscious when she was brought to the hospital and she made statement before the Medical Officer and Police Officer and even before the neighbors but, unfortunately the neighbors did not support the case of the prosecution and therefore, the prosecution has established that due to assault by the appellant, the deceased Suchitra sustained external as well as internal injuries. The internal injuries proved to be fatal. Therefore, the prosecution proved that chain of circumstance so complete that has not left any reasonable ground for the conclusion consistent with innocence of accused and it has proved that in all human probability the act must have been done by the appellant.

38. Now the question arises whether the charge under Section 302 of the IPC is proved against the appellant. According to the learned counsel for the appellant, the prosecution has failed to prove the intention of the appellant to kill his wife. Therefore, charge under Section 302 of the IPC is not proved. To substantiate the submission of the appellant, he has relied on the ratio laid down in the case of ***K. Ravi Kumar Vs. State of Karnataka [(2015) 2 SCC 638]***. It was held that to invoke Exception-4 to Section 300 of the IPC the following requirement must be specified:-

- i) it is a sudden fight;
- ii) there was premeditation;
- iii) the act was done in heat of passion;
- iv) the appellant had not taken any undue advantage or acted in a cruel manner.

39. The cause of quarrel is not relevant nor is it relevant who offer the provocation or started the assault. The number of wounds caused is not the decisive factor but, what is important is that occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Off course, the offender must not have taken any undue advantage or acted in cruel manner. Where, all of a sudden quarrel, a person in a heat of movement picks up a weapon which is handy and cause injuries, one of which prove fatal, then he would be entitled to the benefit of this Exception provided he has not acted cruelly.

40. Keeping in view the law laid down by the Supreme Court in the case of *K. Ravikumar* (supra), we are inclined to extend the benefit of Exception-4 to Section 300 of the IPC to the appellant for more than one reasons:-

- i) Firstly, according to the prosecution there was no pre-meditation in the commission of the crime;

- ii) There is not even suggestion that the appellant had motive to commit offence against the deceased, leave alone the serious offence like murder.
- iii) The incident that occurred was due to sudden quarrel, which ensued between the appellant and the deceased on the purported issue that the appellant had not brought his son alongwith him from creche.
- iv) No conclusive evidence is adduced by the prosecution that on any count, serious quarrel ever ensued in 6 years of marriage between the couple and that have a cause which can lead to killing of the deceased or whether any unsuccessful attempt was ever made by the appellant to kill the deceased.
- v) Lastly, we are not able to see from the post-mortem that there was any external grievous injuries caused to the deceased.

41. On the contrary, it has come in the medical evidence that death of Suchitra was caused due to massive blood loss. It is certain that the blood loss, which occurred due to injury to vena cava, ruptured liver and tear of hepatic vein and there is enough medical evidence that such injuries result in blood loss and bleeding on operation table. The medical record indicate that Anesthetist tried to resuscitate the patient and gave introuptic massage to her after the cardiac arrest was noticed. It appears that there are two versions of cause of death. Dr. Jalgaonkar, who performed the post-mortem

deposed that he was not told of cardiac arrest and therefore, he has not investigated the said aspect. Anesthetist's submission show that Suchitra died due to cardiac arrest. So there was possibility that the excessive bleeding occurred to Suchitra during the operation. There is note of the Anesthetist that blood was collected in peritoneal cavity due to intra-operative bleeding. But, on said statement, Dr. Karekar did not offer any comment.

42. Therefore, in our opinion, the case falls under Section 304, Part-II of the IPC instead of Section 302 of the IPC.

43. In the light of the above mentioned discussion and as emerged from the evidence on record, we are of the considered view that there are reasons sufficient to give benefit of Exception-4 to Section 300 of the IPC to the appellant and we hold that the offence in question was not murder but, it was an offence of culpable homicide not amounting to murder as specified in Exception-4 to Section 300 of the IPC punishable under Section 304, Part-II of the IPC. In the result, we allowed the appeal but only to the extent that instead of Section 302 of the IPC, the appellant stands convicted for the offence of culpable homicide not amounting to murder which is punishable under Section 304, Part-II of the IPC and sentence to undergo imprisonment for a period of 07 years.

44. The appellant is directed to surrender before the Trial Court within a period of two weeks to undergo sentence imposed upon him.

45. The appellant is entitled for set off under Section 428 of the Code of Criminal Procedure for the period undergone by him during the investigation and pendency of the appeal.

46. The appeal is accordingly disposed of in the above terms.

(SURENDRA P. TAVADE, J.)

(S. S. SHINDE, J.)