

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION***

CRIMINAL APPEAL NO.953 OF 2013

Kisanpal Rampal Paswan

Aged 25 years

Occupation Labour residing at Indira

Nagar, Madina Masjid, Mandala,

Mankhurd (West),

Mumbai – 400 043.

(Presently lodged in Thane Central Jail)

...Appellant
(Original Accused)

Versus

The State of Maharashtra

(Through Sr. Inspector of Police,

Mankhurd Police Station in

C.R. No.13 of 2011),

Mumbai.

...Respondent
(Original Complainant)

Mr. Kartik Garg, Appointed Advocate for the Appellant.

Mr. A. R. Kapadnis, A.P.P for the Respondent – State.

***CORAM : REVATI MOHITE DERE &
V. G. BISHT, JJ.***

DATE : 6th JUNE 2022

JUDGMENT (Per Revati Mohite Dere, J.):

1. By this appeal, the appellant has impugned the Judgment and Order dated 23rd September 2011, passed by learned 2nd Additional Principal Judge, City Sessions Fast-Track Court, Sewree, Mumbai, in Sessions Case No.329 of 2011, convicting and sentencing him, as under:-

- for the offence punishable under Section 302 of the Indian Penal Code to suffer rigorous imprisonment for life and to pay a fine of Rs.5000/- in default, to suffer further rigorous imprisonment for one month.

2. A few facts as are necessary to decide the aforesaid appeal are set out hereinunder :-

On 8th January 2011, PW1 – Yeshwant Waman Shinde, S.H.O. attached to the Mankhurd Police Station received a telephonic message from ASI – Kadam informing him that one woman – Rupa Paswan had died in her house in Indira Nagar. Accordingly, PW1 – Yeshwant Shinde, rushed to the house of the deceased. When PW1 – Yeshwant Shinde, reached the house, a local doctor – Dr. Sanjay Musle was already present. Dr. Musle informed PW1 – Yeshwant Shinde, that the deceased had expired. Accordingly, PW1 – Yeshwant Shinde, obtained ADR number from the police station on phone i.e. ADR No.04 of 2011. Thereafter, PW1 – Yeshwant Shinde drew the inquest panchanama in the presence of two panchas. The said inquest panchanama is at Exhibit – 10. The appellant was present at the time of drawing of the said panchanama. The appellant disclosed to PW1 – Yeshwant Shinde that the deceased was

his wife. According to PW1 – Yeshwant Shinde, the deceased was found lying on the mat on the floor and that blackish ligature marks were seen behind her neck. Accordingly, PW1 – Yeshwant Shinde took the custody of the dead body and sent it to Rajawadi Hospital for postmortem. Thereafter, the doctor who conducted the postmortem of the deceased, disclosed to PW1 – Yeshwant Shinde, that the victim's neck was pressed with a soft object, so as to cause her death. PW1 – Yeshwant Shinde again approached the doctor on the next day and discussed the matter regarding the death of the deceased and accordingly on 9th January 2011 lodged a complaint on behalf of the State, as no relative of the deceased had come forward to lodge a complaint. The FIR lodged by PW1 – Yeshwant Shinde is marked as Exhibit – 11. Thereafter, the appellant was arrested after registration of the said FIR. According to PW1 – Yeshwant Shinde, before the appellant's arrest, the appellant had disclosed to him that he had seen his wife (deceased) keeping illicit relations with one Mohd. Azad @ Chottu, a resident of the same locality. The appellant also disclosed that he had informed the same to his in-laws, who had asked him to bring the deceased to them. The appellant is further alleged to have disclosed that there was a quarrel between him and his wife (deceased), prior to the

incident and that his wife (deceased) had told him that she would elope with one Mohd. Azad @ Chottu; and that his wife (deceased) suddenly tried to squeeze his testes, pursuant to which, he strangled her. According to PW1 – Yeshwant Shinde, PW8 – Venkatesh Hiraba Rane, P.I attached to the Mankhurd Police Station registered the complaint/FIR of PW1 – Yeshwant Shinde and conducted further investigation and after investigation filed charge-sheet.

During the course of investigation, the clothes of the deceased were seized vide panchanama on 9th January 2011 alongwith other articles. PW1 – Yeshwant Shinde also recorded the statement of the witnesses during the course of investigation and on completion of the investigation, filed charge-sheet in the Court of the learned Additional Chief Metropolitan Magistrate, Kurla, Mumbai. As the case was sessions triable, the case was committed to the Court of Sessions.

The learned 2nd Additional Principal Judge, framed charge (Exhibit – 3), as against the appellant for the offence punishable under Section 302 of the Indian Penal Code, to which the appellant pleaded not guilty and claimed to be tried.

The prosecution in support of its case examined 8 witnesses.

PW1 – Yeshwant Waman Shinde, S.H.O. attached to Mankhurd Police Station, who lodged the FIR, as against the appellant ; PW2 – Feroz Rope Khan, panch to the clothes of the deceased, which were seized in the hospital on 9th January 2011 and panch to the statement made by the appellant under Section 27 of the Evidence Act on 11th January 2011; PW3 – Nafis Ahmed Khan, to whom the appellant had made an alleged disclosure that his wife had consumed some medicine and had become unconscious (hostile); PW4 – Dr. Pravin Sakham Bagul, the doctor at the Rajawadi Hospital, who performed the postmortem on the deceased – Rupa; PW5 –Niraj Mishrilal Singh, the shop keeper who had last seen the deceased and the appellant together; PW6- Mubarakali Mohd. Idris, the appellant's neighbour who had allegedly heard a quarrel between the appellant and his wife on 7th January 2011 in the night; PW7 – Abdul Hakim Mohd. Hanif Shaikh, the appellant's friend to whom allegedly an extra judicial confession was made by the appellant; and, PW8 – Venkatesh Hiraba Rane, P.I attached to the Mankhurd Police Station, who registered the complaint/FIR lodged by S.H.O - Yeshwant Shinde and the officer who carried out the investigation in the said case.

The defence of the appellant was that of total denial and false implication. According to the appellant, he was at work and as such, was not present at the spot at the time of the incident.

After recording of the 313 statement of the appellant and after hearing the parties, the learned 2nd Additional Principal Judge, was pleased to convict and sentence the appellant as aforesaid in paragraph 1 of this Judgment.

3. Learned Advocate, appointed for the appellant submitted that the prosecution case rests on circumstantial evidence and that the circumstances on record were not sufficient to convict the appellant for the said offence. He submitted that the prosecution had miserably failed to prove its case as against the appellant beyond reasonable doubt i.e. the alleged circumstances of last seen; extra judicial confession made to PW1 - Yeshwant Shinde and PW7 – Abdul Shaikh and recovery of an odani. He submits that the alleged confession made by the appellant to PW1 - Yeshwant Shinde, a police officer was clearly hit by Section 25 of the Evidence Act. He further submits that the burden of proof lies on the prosecution to prove its case beyond reasonable doubt and that merely

because the appellant has not explained the circumstances against him or has not discharged his burden under Section 106 of the Evidence Act, would not absolve the prosecution from proving its case. Learned Counsel relied on the judgments of the Apex Court in the case of ***Sahadevan and Another v/s State of Tamil Nadu***¹; ***Aghnoo Nagesia v/s State of Bihar***²; ***State of Punjab v/s Barkat Ram***³; ***Bharat v/s State of M.P.***⁴; ***Anjan Kumar Sarma and Others v/s State of Assam***⁵; ***Mahila Roomabai Jatav v/s State of Madhya Pradesh***⁶; ***Pawan Kumar Alias Monu Mittal v/s State of Uttar Pradesh and Another***⁷ and ***Nagendra Sah v/s State of Bihar***⁸, in support of his submission.

4. Learned APP supported the impugned Judgment and Order of conviction and sentence passed by the trial Court.

5. Perused the evidence and the relevant documents with the

1 (2012) 6 SCC 403
 2 AIR 1966 SC 119
 3 AIR 1962 SC 276
 4 (2003) 3 SCC 106
 5 (2017) 14 SCC 359
 6 2019 SCC OnLine SC 2046
 7 (2015) 7 SCC 148
 8 (2021) 10 SCC 725

assistance of the learned Advocate, appointed for the appellant and the learned APP for the respondent – State. Admittedly, the prosecution case rests on circumstantial evidence. The circumstances alleged as against the appellant is an extra judicial confession made to PW1 - Yeshwant Shinde and PW7 – Abdul Shaikh; recovery of an odani, at the instance of the appellant; the evidence of last seen, by PW5 –Niraj Singh; hearing of a conversation/quarrel by PW6- Mubarakali Idris on 7th January 2011, after his return to home; and, failure by the appellant to offer any explanation with respect to the death of the wife, being the husband of the deceased and as such having special knowledge of such facts.

6. It is the prosecution case that the appellant who was residing at Indira Nagar, Near Madina Masjid, Mandala, Mankhurd, Mumbai, strangled his wife – Rupa with an odani, as she was having an affair with one Mohd. Azad @ Chottu. The fact, that deceased – Rupa died a homicidal death is not seriously challenged by the defence. The question that arises for consideration is, whether the circumstances on record unerringly point to the complicity of the appellant.

7. As far as the alleged extra judicial confession made to PW1 - Yeshwant Shinde is concerned, it is not in dispute that PW1 - Yeshwant Shinde was an S.H.O. attached to the Mankhurd Police Station, at the relevant time. His evidence reveals that on receiving a telephonic message from ASI – Kadam informing him that one lady i.e. Rupa had died in a house at Indira Nagar, he rushed to the said house; that on arriving at the said house, he found that a local Doctor i.e Dr. Sanjay Musle was already present; and, that he was informed that the deceased had died. Accordingly, PW1 - Yeshwant Shinde secured an ADR number from the police station on phone and drew the inquest panchanama and sent the body for postmortem. PW1 - Yeshwant Shinde has stated in his evidence that he found blackish ligature marks on the deceased's neck. According to PW1 - Yeshwant Shinde when he returned to the police station, he made the necessary entry of the ADR in the police station, and proceeded to Rajawadi Hospital and was present in the hospital, during the time the postmortem was being conducted. PW1 - Yeshwant Shinde has further stated that the doctor performing the postmortem on the deceased informed him that the deceased's throat had been pressed with a soft object, so as to cause her death. Again on the next day, PW1 - Yeshwant Shinde

approached the doctor and discussed the matter and on 9th January 2011 lodged a complaint on behalf of the State, as no relative had come forward to lodge a complaint. According to PW1 - Yeshwant Shinde before the appellant's arrest, when the appellant was not an accused, the appellant disclosed to him that he had seen his wife (deceased) keeping illicit relations with one Mohd. Azad @ Chottu, who was residing in the same locality; that he had informed the same to his in-laws, who asked him to bring the deceased (Rupa) to them; that there was an quarrel between him and Rupa, in which, Rupa told him that she will elope with Mohd. Azad @ Chottu and that Rupa suddenly tried to squeeze his testes, pursuant to which, he strangulated her.

8. Learned Advocate appointed for the appellant submitted that the alleged confession made by the appellant to PW1 - Yeshwant Shinde is hit by Section 25 of the Evidence Act. In support of the said submission, Mr. Garg, learned Advocate for the appellant, relied on the judgment of the Apex Court in the case of ***Aghnoo Nagesia (supra)*** and ***Barkat Ram (supra)***. The Apex Court in the case of ***Aghnoo Nagesia (supra)*** in para 9 has held as under:-

“9. Section 25 of the Evidence Act is one of the provisions of law dealing with confessions made by an accused. The law relating to confessions is to be found generally in Sections 24 to 30 of the Evidence Act and Sections 162 and 164 of the Code of Criminal Procedure, 1898. Sections 17 to 31 of the Evidence Act are to be found under the heading "Admissions". Confession is a species of admission, and is dealt with in Sections 24 to 30. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provision of law. Section 24 excludes confessions caused by certain inducements, threats and promises. Section 25 provides: "No confession made to a police officer, shall be proved as against a person accused of an offence". The terms of Section 25 are imperative. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. ”

9. Admittedly, PW1 - Yeshwant Shinde is a police officer. It is pertinent to note, that the police officer referred to in Section 25 of the Evidence Act, need not be the officer investigating into that particular offence of which a person is subsequently accused. A confession made to him, need not have been made when he was not discharging any police duty. A confession made to any member of the police of whatever rank and at whatever time, is inadmissible in evidence, being hit by Section 25 of the Evidence Act. It is pertinent to note that the FIR was lodged on 9th January

2011 at 13:35 hrs and the accused was arrested on 9th January 2011 at 11:00 hrs and as such the accused was in the custody of the police, at the time when the alleged confession was made. It is thus evident that the alleged confession made by the appellant to PW1 - Yeshwant Shinde being inadmissible will have to be excluded from consideration and as such cannot be relied upon.

10. There is also an alleged confession made by the appellant to PW7 – Abdul Shaikh. PW7 – Abdul Shaikh has in his evidence stated that he is the neighbour of the appellant and as such knows him for the last 2 – 3 years. PW7 – Abdul Shaikh has further stated that he knew one Mohd. Azad @ Chottu Abdul Khalib Shaikh, and that he was residing in front of the appellant's room and that Mohd. Azad @ Chottu would visit the appellant's house in the appellant's presence as well as in his absence. He has stated that in the absence of the appellant, Mohd. Azad @ Chottu would visit the appellant's house, when the appellant's wife and daughter were at home. According to PW7 – Abdul Shaikh, he was suspecting that Mohd. Azad @ Chottu was having an affair with the appellant's wife and therefore, he alerted the appellant and asked him to change his room,

pursuant to which, the appellant changed his room. He has further stated that on account of the same, there used to be quarrels between the appellant and his wife (deceased). He has further stated that after learning about Rupa's death, he visited the appellant's house and asked the appellant when the police were present in his house, as to how Rupa had died, however, the appellant did not disclose anything. He has further stated that on the next day, when the police had brought the appellant to his room, he quietly asked the appellant as what had happened, pursuant to which, the appellant disclosed that he had spotted his wife in a compromising position with Mohd. Azad @ Chottu, in his room, pursuant to which, he strangled her with an odani.

11. In the cross-examination, PW7 – Abdul Shaikh has admitted that he had not disclosed to the police about alerting the appellant about Mohd. Azad @ Chottu's visit to his room in his absence. He has admitted that he had not told the police about the police bringing the accused to the room. The said evidence of PW7 – Abdul Shaikh, with respect to the alleged extra judicial confession made by the appellant to the said witness appears to be doubtful. Firstly, there is an omission in his statement with

respect to the same. Secondly, the said alleged extra judicial confession is contrary to what the prosecution case is, as disclosed to PW1 - Yeshwant Shinde and as such it is difficult to place implicit reliance on the same.

12. As far as the evidence of last seen is concerned, the said evidence is extremely shaky. The prosecution has examined PW5 –Niraj Singh and PW6 - Mubarakali Idris, to prove the evidence of last seen i.e. to show that the appellant was last seen in the company of the deceased. PW5 –Niraj Singh in his evidence has stated that he was at his pan shop on 7th January 2011 at about 10:00 p.m; that one female and her husband had come to his shop. He has stated that the female purchased one gutka sachet from him and that he saw her husband quarreling with her while returning. He has stated that he learnt on the next day that the said female had died and on 10th January 2011 learnt from the police that the said female was murdered by her husband by strangulating her. It is pertinent to note that the said witness has not spelt out the nature of the quarrel nor has he identified or was shown the photograph of the lady who was allegedly present with the appellant. The said witness has in his cross-examination admitted that he did not know where the appellant and the lady who was

with him, went to, from his shop.

13. As far as PW6 - Mubarakali Idris is concerned, the said witness has stated that the appellant was residing in the room, which is behind his room and that there was one tin sheet partition between his room and the appellant. He has stated that the appellant was residing with his wife and daughter in the said room. He has stated that on 7th January 2011, when he returned from work at about 11:00 p.m. to 12:00 midnight, he had his dinner, that he heard some conversation between the appellant and his wife, however, did not pay any attention to the same, as the said conversation was between the husband and wife; and that he slept, thereafter. He has further stated that in the night he heard some noise from the appellant's house and thought it was a mouse and as such did not pay attention and slept. He has further stated in the examination-in-chief that he did not know the relations between the appellant and his wife.

14. The said witness has stated that there was some conversation between the appellant and his wife. He does not talk about any quarrel or the nature of the conversation between the two. The said witness is also

unaware of the relations between the appellant and his wife. Thus, the said evidence is not of great assistance to the prosecution.

15. It is also pertinent to note that the appellant was residing with his wife and daughter. The statement of the daughter has not been recorded nor is there any explanation offered by the prosecution. One of the main circumstance relied upon by the learned trial Court whilst convicting the appellant is, that the appellant failed to give any plausible explanation for the death of his wife, inasmuch as, the said facts, were within his knowledge. It appears that the trial Court has convicted the appellant essentially on the basis of the same.

16. The Apex Court in the case of ***Nagendra Sah (supra)*** has in paras 22 and 23 observed as under:-

- “22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.
- 23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in

discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused.”

17. Thus, the prosecution cannot absolve itself from proving the initial burden cast upon them i.e. proving the case beyond reasonable doubt, as against the appellant.

18. As noted in the aforesaid judgment, failure to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, may be considered as an additional link to the chain of circumstances. When the prosecution itself has failed to prove the circumstances and its case beyond reasonable doubt *qua* the appellant, failure of the accused to discharge his burden under Section 106 of the Evidence Act, would not be relevant.

19. In ***Sharad Birdhichand Sarda v/s State of Maharashtra***⁹ the Apex Court has laid down the five golden principles (Panchsheel) which govern a case based only on circumstantial evidence. Para 153 of the said judgment is reproduced hereinunder:-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established :

- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra¹⁰ where the following observations were made: [SCC para 19, p. 807 : SCC (Cri) p. 1047]

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

- (2) 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,*
- (3) the circumstances should be of a conclusive nature and tendency,*
- (4) they should exclude every possible hypothesis except the one to be proved, and*
- (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the*

9 (1984) 4 SCC 116

10 (1973) 2 SCC 793

innocence of the accused and must show that in all human probability the act must have been done by the accused.”

20. The prosecution has failed to prove the circumstances relied upon by them, as against the appellant for the reasons spelt out and evidence discussed in the foregoing paragraphs. The chain of circumstance is far from complete and does not in all human probability point to the guilt of the appellant.

21. It is well settled, that Courts can use a false explanation or a false defence as an additional link to the chain of circumstances, so proved by the prosecution by legal, cogent and admissible evidence. Falsity of defence or failure to discharge the burden under Section 106 of the Evidence Act cannot take the place of proof of facts, which the prosecution has to establish independently, in order to succeed.

22. In the facts, none of the circumstances are proved by the prosecution beyond reasonable doubt nor do they form a chain, pointing out to the complicity of the appellant, which is consistent only with hypothesis, which is the guilt of the appellant.

23. Having regard to what is stated aforesaid, we pass the following order:-

ORDER

- i) The Appeal is allowed;
- ii) The Judgment and Order dated 23rd September 2011, passed by learned 2nd Additional Principal Judge, City Sessions Fast-Track Court, Sewree, Mumbai, in Sessions Case No.329 of 2011, convicting and sentencing the Appellant, is quashed and set aside;
- iii) The appellant is acquitted of the offence, with which he is charged. The appellant is set at liberty forthwith, if not required in any other case. Fine amount, if paid, be refunded to the appellant.

24. Appeal is allowed and accordingly disposed of.

25. We would like to record a word of appreciation for the able assistance provided and the efforts taken by Mr. Kartik Garg, as an appointed advocate, in conducting the appeal. High Court Legal Services Committee to award fees of the learned Appointed Advocate, as per Rules.

V. G. BISHT, J.

REVATI MOHITE DERE, J.