



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

CRIMINAL APPEAL NO.84 OF 2018

Vijay s/o Bubasaheb Kakade,
Age-63 years, Occu:Nil,
R/o-Hanuman Nagar, Bypass road,
Osmanabad, Taluka and
District-Osmanabad.

**...APPELLANT
(Ori. Accused)**

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr. A.M. Phule Advocate for Appellant (appointed).
Appellant - Vijay Bubasaheb Kakade present through
Video Conferencing.
Mr. S.D. Ghayal, A.P.P. for Respondent - State.

...
**CORAM: SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 6th DECEMBER, 2023

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

1. The appellant takes an exception to challenge his

conviction in Sessions Case No.68 of 2015 by the learned Additional Sessions Judge, Osmanabad on 29th November 2017 thereby convicting the appellant for the offence punishable under Section 302, 201 of the Indian Penal Code i.e. for murdering his wife and causing the evidence to disappear with an intention to screen himself.

2. The prosecution case is that one Vaibhav Ashok Patil, who is the nephew of deceased Suman Vijay Kakade lodged First Information Report (for short "FIR") on 3rd June 2015 with Osmanabad City Police Station vide Crime No. 184 of 2015. He has disclosed that deceased Suman was his paternal aunt, who was married to the accused. Deceased and accused have two sons and one daughter, however, their one son and daughter have expired. Deceased Suman was residing with her husband i.e. accused, son Kiran and his wife, in Hanuman Nagar, Osmanabad. Accused was always raising suspicion over the character of deceased and used to assault her. Whenever Suman used to come to the house of the informant, she used to disclose the said fact to informant and his father (brother of deceased). Informant, his father and another aunt Mangal (sister of

deceased Suman) used to visit the house of the accused and used to give understanding to the accused, however, there was no change in the behaviour of the accused. Accused still used to raise suspicion over her chastity and assault her. 10 to 15 days prior to the FIR, Mangal had gone to the house of the informant and told him that accused is still beating Suman and even on that day also she was assaulted. Therefore, informant Vaibhav brought Suman to his house where she stayed for about 4 to 5 days and thereafter she was left at her house. At that time accused told informant that why he has intervened when Suman is his wife, he would kill her and even see to the informant. The informant further informed that around 11.00 a.m. on 3rd June 2015 he was near Zilla Parishad office when he received phone call of Kiran who told him to come to house and to see what has happened to Suman. Vaibhav went to the Suman's residence with his father and Mangal. They found foul smell coming from the barrel (water tank) which was in front of the house of Suman. They could see saree and hair floating in the barrel. They went near the barrel and saw Suman's face. She was dead and therefore, he got confirmed that accused has murdered Suman and put her dead body in the barrel filled with water.

3. After the offence came to be registered, investigation was taken up. Inquest panchnama was prepared with the help of two panchas. Even the medical officer had visited the spot and postmortem was conducted at the spot itself. After the postmortem was done, the clothes on the person of the dead body came to be seized under panchnama. After the spot panchnama was executed, accused came to be arrested. He was got medically examined and six injuries were found on the person of the accused. Opinion was sought in respect of the said injuries also. Seized articles were sent for chemical analysis. Statements of witnesses were recorded. After the investigation was over, charge-sheet came to be filed.

4. After committal of the case, the charge was framed and prosecution examined in all seven witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides, the learned trial Judge has held that the prosecution has proved the charge against the accused. The accused has been sentenced to undergo imprisonment for life and to pay fine of Rs.5,000/-, in default to suffer rigorous

imprisonment for one year, for the offence punishable under Section 302 of the Indian Penal Code. He has been further sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs.1,000/-, in default to undergo rigorous imprisonment for six months, for the offence punishable under Section 201 of the Indian Penal Code. The substantive sentences were directed to be run concurrently. The set off under Section 428 of the Code of Criminal Procedure was given. The said Judgment and order is under challenge under Section 374 of the Code of Criminal Procedure, in this Appeal.

5. Heard learned Advocate Mr. Phule, who came to be appointed to represent the appellant who could not afford to engage Advocate of his choice, as the Advocate who earlier represented him failed to appear for many dates and thereafter when another Amicus Curiae was appointed, she came to be appointed as Assistant Public Prosecutor and therefore, fresh Amicus Curiae came to be appointed to represent the accused who is in jail. Heard Mr. Ghayal, appearing for the respondent – State.

6. It has been vehemently submitted on behalf of the appellant that the learned trial Judge has utterly failed in appreciating the evidence. The case of the prosecution was based on circumstantial evidence and therefore, the chain of circumstances ought to have been proved beyond reasonable doubt. PW-4 Kiran and PW-5 Varsha are the son and daughter-in-law of accused and deceased. However, they have not supported the prosecution story that the accused used to raise suspicion over the character of deceased and used to assault her. Rather it has come in evidence of PW-4 Kiran that accused alone was residing their old house which is situated in the same village since death of his another son Balaji in 2011. Nobody has been examined to prove that prior to the death of Suman she was in the company of the accused. PW-3 Vaibhav Ashok Patil is the informant, however it can be seen from his examination-in-chief that he has not fully supported the prosecution. It has not come on record since when the accused was suspecting the fidelity of deceased and subjected her to beating. Informant has also not stated that on or around the date of incident the deceased was in the company of the deceased. The dead body of Suman was found in the barrel / water tank filled with water. It was in highly

decomposed state. The autopsy doctor has not given the probable time of death of Suman. Under the said circumstance, there was absolutely nothing which can point out that accused is the culprit. The conviction is, therefore, illegal which deserves to be set aside.

7. Per contra, the learned APP strongly supported the reasons those were assigned by the learned trial Judge while convicting the accused. The defence has not led any evidence to prove alibi. The cross-examination of a hostile witness cannot be considered to infer that the accused and deceased were residing separately. The accused has also not given any explanation about six injuries which were found on his person when he was examined by PW-7 Dr. Ashwini Sontakke. The accused being the husband of deceased Suman, was her custodian and therefore, it was for him to explain under which circumstances his wife came to be murdered. As the said explanation is absent, the learned trial Judge was justified in invoking Section 106 of the Indian Evidence Act and therefore, the conviction is proper.

8. At the outset, we would like to begin by saying that it is

not a presumption that when a wife is found murdered then the husband has to explain the circumstances. It depends upon the situation and the evidence. The present case is based on circumstantial evidence and therefore as per the settled principles of law as enumerated in ***Sharad Birdhichand Sarda vs. State of Maharashtra*** reported in **(1984) 4 SCC 116** and subsequent pronouncements of the Hon'ble Apex Court; the prosecution is duty bound to prove the five golden principles, which are as follows:-

"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 vs. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri. L.J. 1783] where the 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 innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

9. It has to be considered as to whether the death of deceased Suman was homicidal in nature and if it is so, then when her death occurred. It appears from the entire record that there is no much dispute as regards the death of Suman being homicidal in nature. Still the prosecution has examined PW-1 Dr. Ashwini Jidge who conducted the autopsy. She was the officiating medical officer in civil hospital, Osmanabad. It was informed by the police officer on 3rd June 2015 that the postmortem is required to be conducted at the spot as the dead body is highly decomposed. She herself with her senior colleague Dr. Palla went to Hanuman Nagar, Osmanabad. The dead body was laid near Sintex water tank in front of the house of the deceased Suman. After examining the dead body, she found that

the body was fully decomposed. There were surface wounds and injuries but those could not be seen due to decomposition of body. She opined that 'according to the external and postmortem findings, the decomposed body, the exact cause of death cannot be given. As viscera was preserved for chemical analysis, which reveals no poison as per the report'. She has given the final opinion. PW-1 Dr. Ashwini Jidge has not been cross-examined by the accused. Thus when a dead body was found in the water tank though PW-4 Kiran Kakade has admitted that the water from the tank was required to be taken out by bending oneself, we do not find that it could have been an accident. There is no suggestion that the height of the water tank was not normal and the height of the deceased was such that unless she could have bend she was not able to take out the water from the water tank. Further the evidence of PW-2 Rahul Jadhav, the spot panch, does not suggest that any such material was there near the water tank from which it can be inferred that deceased was in the process of fetching water from the tank. Thus the prosecution had proved that death of Suman was homicidal in nature. However, from the testimony of PW-1 Dr. Ashwini Jidge, we cannot get as to what could have been the probable time of

death of Suman. There was absolutely no attempt by the learned APP conducting the trial to extract the said information. Only fact that has been proved is that on 3rd June 2015 the dead body of Suman was found in highly decomposed state.

10. The prosecution has not examined any person to prove that deceased was in the company of the accused prior to the probable time of death. PW-4 Kiran has stated in his examination-in-chief that he was residing with his wife and deceased in Hanuman Nagar, Osmanabad. He left for Latur on 1st June 2015 with his wife for her medical treatment and he had returned around 11.00 a.m. on 3rd June 2015. He searched for mother as he could not find her and therefore, he went near the drum / water tank and found the mother inside. Thus, it is to be noted that he has categorically stated that they were only three persons residing jointly in Hanuman Nagar i.e. the place where the dead body was found in the drum (Sintex water tank). PW-4 Kiran has not supported the prosecution and though, after seeking permission, questions in the nature of cross-examination have been put to him by the learned APP, yet nothing favourable to the prosecution has been transpired. In his cross-examination

on behalf of the accused, PW-4 Kiran has admitted that his father i.e. accused was residing in his old house since death of his brother Balaji in 2011. Accused used to survive his life in Mahadeo temple. It is to be noted that the prosecution has not utilized the permission that was sought. When PW-4 Kiran has stated that he was not in the house for about three days (inclusive of 3rd June 2015) whether he had told his father to look after the mother in his absence, has not been tried to be extracted from him by the prosecution. PW-4 Kiran has categorically denied that his father used to raise suspicion over the character of his mother. PW-5 Varsha Kiran Kakade – daughter-in-law has also not supported the prosecution. That means, the persons who could have had better knowledge about the dispute between deceased and accused have not supported the prosecution. They cannot be said to be the persons who could have stated that deceased was in the company of accused prior to her death.

11. PW-3 Vaibhav Ashok Patil had lodged the FIR, however, when it came to the substantive evidence, we can find that he has not stated many things which he has told in his FIR. It is to

be noted that PW-3 Vaibhav is an Advocate who has knowledge about the law, still he has not given the details which he had told in the FIR Exhibit-25. He has not stated since when the accused was raising suspicion over the character of his paternal aunt Suman. Whether that suspicion was vague or was in respect of a particular person. Though in his FIR he has stated that ten days prior to the incident he had brought deceased to his house and then left her in the company of the accused four to five days thereafter, he has not stated anything like that in his examination-in-chief. Under the said circumstance, even PW-3 Vaibhav is also not the person who had seen the deceased in the company of the accused and therefore, the inference drawn by the learned trial Court that the accused being the husband was custodian of the wife prior to the death of deceased, appears to be a wrong inference and it has been arrived at on the basis of whims. PW-3 Vaibhav admits in his cross-examination that the accused is having house in Mahadeo lane, Osmanabad and the incident where death has taken place, appears to be at a different place i.e. Hanuman Nagar, Osmanabad. PW-3 Vaibhav claims ignorance to the fact that accused started living in his old house after death of his another son Balaji. Being an Advocate –

having knowledge of law, nobody had estopped informant Vaibhav from setting the law in motion when according to him deceased Suman had made complaint with him that the accused was assaulting her on raising suspicion over her character. We can understand that if the said act was going on for some days and then understanding was given. The word that is used in the FIR is " सतत ", that means continuously. If the assault by raising suspicion over the character was a frequent act, then informant ought to have helped his paternal aunt. The testimony of the informant is therefore, not sufficient to connect the accused to the crime.

12. The prosecution is mainly relying on the testimony of PW-7 Dr. Ashwini Sontakke who had examined the accused on 3rd June 2015. She found following six injuries on the person of the accused:-

"1. Linear abrasion on left side chest below clavicle of size 6 x 0.2 c.m. reddish in colour, caused more than 48 hours.

2. Multiple abrasion on left shoulder back side of size 1 x 1 c.m., 1 x 0.5 c.m., 0.5 x 0.5 c.m. and 0.5 x 0.2 c.m., reddish brown in colour caused more than 48 hours.

3. Contusion on right scapular region of size 15 x 10 c.m. reddish in colour caused more than 48 hours.

4. Multiple abrasion over left shoulder lateral aspect of size 0.5 x

0.5 c.m., 0.5 x 0.2 c.m., 1 x 0.5 c.m., reddish brown in colour caused more than 48 hours.

5. Abrasion on left side chest 5 c.m. below lateral to left nipple of size 1 x 0.5 c.m. reddish brown in colour caused more than 48 hours.

6. Abrasion on right shoulder back side of size 6 x 0.2 c.m. reddish brown in colour caused more than 48 hours.”

13. Accordingly, PW-7 Dr. Ashwini Sontakke has issued certificate Exhibit-44. According to her, the injuries noted by her were possible by nails or hard and blunt object. She has given the age of the injuries as more than 48 hours. In cross-examination, she has admitted that those six injuries noted in Exhibit-44 are possible if a person falls on a hard surface. Important point to be noted is that at the time of the incident, the age of the accused is stated to be 61 years and therefore, possibility of fall cannot be ruled out and by any stretch of imagination those injuries cannot be co-related to the incident merely on the ground that the age of those injuries was more than 48 hours. The said circumstance or an attempt to connect those injuries to the date of incident has not been established beyond reasonable doubt, as in fact the prosecution has failed to prove the probable date and time of death of Suman.

14. Perusal of the Judgment and order passed by the learned trial Judge would show that the findings were based on whims and imagination. The basic legal principles were not considered while assessing or scrutinizing the evidence and therefore, such Judgment and order cannot be allowed to sustain. It deserves to be quashed and set aside by allowing the Appeal. Hence we proceed to pass following order:-

ORDER

I. The appeal stands allowed.

II. The conviction of the appellant Vijay s/o Bubasaheb Kakade in Sessions Case No. 68 of 2015 dated 29.11.2017 by learned Additional Sessions Judge, Osmanabad for the offence punishable under Sections 302 and 201 of the Indian Penal Code stands quashed and set aside.

III. The appellant stands acquitted of the offence punishable under Sections 302 and 201 of the Indian Penal Code.

IV. The appellant be set at liberty if not required in any other case.

V. Fine amount deposited, if any, be refunded to the appellant after the statutory period.

VI. We clarify that there is no change as regards the order in respect of *muddemal* seized in the matter.

VII. The fees of the learned Advocate appointed to represent the appellant is quantified at Rs.10,000/- (Rupees Ten Thousand only), to be paid by the High Court Legal Services Sub-Committee, Aurangabad.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/DEC23