

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

CRIMINAL APPEAL NO.537 OF 2022

Ramesh S/o Umaji Ghene,
Age-45 years, Occu:Labour,
R/o-Talkhed, Taluka-Majalgaon,
District-Beed.

**...APPELLANT
(Orig. Accused No.3)**

VERSUS

The State of Maharashtra,
Through Police Station Officer,
Police Station, Majalgaon (Rural),
Taluka-Majalgaon, District-Beed.

...RESPONDENT

...

Mr. Satej S. Jadhav Advocate for Appellant, appointed
through Legal Aid Committee.
Ms. V.S. Choudahri, A.P.P. for Respondent - State.

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

DATE : 30th OCTOBER, 2023

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

1. Original accused No.3 i.e. husband of deceased Anuradha stood prosecuted in Sessions Case No. 10 of 2012 before the

learned Additional Sessions Judge, Majalgaon, District-Beed along with his two brothers i.e. accused No.1 – Bapu, accused No.2 – Uttam and sister-in-law i.e. accused No.4 – Kamal, (wife of original accused No.1 Bapu) for the offence punishable under Section 498-A, 302, 201 read with Section 34 of the Indian Penal Code. The present appellant alone came to be convicted by the learned trial Judge for the offence punishable under Sections 302, 201 of the Indian Penal Code. Hence this Appeal.

2. Informant PW-3 Eknath Narayan Landge, resident of Beed, lodged the First Information Report (for short "FIR") on 13th October 2011 with Civil Hospital Police Chouki, Beed, which came to be transmitted to Majalgaon Police Station and then offence was registered vide Crime No.131 of 2011 for the offence punishable under Sections 498-A, 306, 504, 506 read with Section 34 of the Indian Penal Code. It was informed in the said FIR that Anuradha was his elder daughter, who was married to present appellant i.e. original accused No.3 about 15 years prior to the FIR. Anuradha and accused No.3 have two sons by name Akshay and Satyam and a daughter by name Anjali. Accused No.3 was having agricultural land and also business of

sweet mart. They all were residing separately from the brothers of accused No.3. The agricultural land and house property was at village Talkhed. Accused No.3 got addicted to liquor about three years prior to the FIR and also bad vices of playing cards. Accused No.3 used to beat and ill-treat Anuradha and children. The other accused persons were also ill-treating Anuradha and therefore, Anuradha came to Beed in the house of the informant, along with the children. Thereafter, even accused No.3 joined them at Beed. After some period i.e. six months prior to the FIR, Anuradha along with her children and husband returned back to Talkhed. In the meantime, when they shifted to Beed, accused No.1 Bapu had taken possession of the house as well as agricultural land owned by accused No.3 and he was cultivating the same. After Anuradha went back to Talkhed, she herself and accused No.3 requested accused No.1 and others to vacate the house. Accused No.1 was not ready and therefore, for a month Anuradha and family resided in the house of cousin brother of accused No.3. The accused persons were insisting that Anuradha should return back to her parents house and they were questioning as to why she had returned to Talkhed. They were giving threats to kill her. In the meantime due to intervention of

the persons in the village, possession of the house was given to accused No.3.

3. It is the further prosecution story that informant Eknath received information from his grand-son Akshay on 12th October 2011 that Anuradha has hanged herself and she is being taken to Beed. Around 12.00 noon the informant along with his two sons went to Vithai Hospital, Beed. But it appears that accused No.3 had taken Anuradha to Deep Hospital where she was admitted at about 1.45 p.m. Treatment was given to her but she was unable to speak and even unable to open her eyes. The informant had noted ligature mark around her neck. Anuradha succumbed at about 8.05 a.m. on 13th October 2011.

4. After the MLC was given, inquest panchnama was carried out by the Police and dead body was shifted for postmortem. FIR came to be registered and investigation was taken up. Panchnama of the spot was carried out. Statements of witnesses were recorded. Seized muddemal was sent for chemical analysis and after the investigation was over, charge-sheet was filed against four persons. After committal of the case, trial was

conducted. Prosecution examined in all seven witnesses to bring home the guilt of the accused. After considering the evidence on record, the learned trial Judge, as aforesaid, held accused No.3 only to be the perpetrator of the crime and sentenced him to suffer rigorous imprisonment for life and to pay fine of Rs.2000/-, in default to suffer simple imprisonment for four months for the offence punishable under Section 302 of the Indian Penal Code. Accused No.3 has been further sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.1000/-, in default to suffer simple imprisonment for three months for the offence punishable under Section 201 of the Indian Penal Code. He has been acquitted of the offence punishable under Section 498-A read with Section 34 of the Indian Penal Code. Accused Nos. 1, 2 and 4 have been acquitted of all the offences.

5. At the time of Appeal before this Court, legal aid has been provided to the appellant. Learned Advocate Mr. Satej Jadhav representing the appellant – original accused No.3, submitted that the impugned Judgment is the example of perversity and the outcome of wrong and illegal appreciation of evidence. The

case was based on circumstantial evidence. Informant was admittedly neither present nor he was the person to go to the place of offence immediately after the news came. PW-6 Akshay is the person who went to the spot immediately as per the prosecution story. He is the school going son of deceased Anuradha and appellant. However, his testimony would show that when he went to the house from the school, he claims that Anuradha was serious and was unable to speak. Anuradha showed mark around her neck by her hand and then showed the finger towards the door of the house, stating that those persons had hanged her and at that time accused Nos. 1, 2 and 4 were standing near the door. Accused No.3 was admittedly not present at that time. Merely because it is the house of the accused – appellant, it was not expected that he would explain the circumstances in which his wife was found injured and then succumbed to those injuries. The principle in Section 106 of the Indian Evidence Act has been wrongly applied by the trial Court. Nobody has been examined by the prosecution who would say that accused No.3 was present in the house just prior to the incident. The persons who were allegedly indicated by deceased Anuradha have been acquitted by the trial Court. Therefore, on

the same set of evidence if the co-accused have been acquitted, similar treatment ought to have been given by the learned trial Judge to the present appellant also.

6. It has been further submitted on behalf of the appellant that PW-3 Eknath is the informant – father but he is not stating that Anuradha was in a position to speak or make gestures when he met her prior to her death. His testimony is mainly to support the allegation in respect of harassment, however, all the accused persons have been acquitted from the offence punishable under Section 498-A of the Indian Penal Code. Panch to the spot panchnama has turned hostile. PW-2 Dr. Anshuman Bahir was the autopsy doctor. He had noted two external injuries and some internal injuries on the dead body. He along with Dr. Waghmare had completed the postmortem and came to the conclusion that death of Anuradha was due to “asphyxia due to hanging”. Here the rope or such instrument with which the hanging would have been done, has not been collected. PW-4 Dr. Anant Mulay was the medical practitioner from Deep Hospital where Anuradha was admitted. It appears that the present appellant was accompanying his wife at the relevant time. PW-4 Dr. Anant

Mulay was of the opinion that the cause of death of patient Anuradha was "due to partial hanging with respiratory paralysis shock". Here the death was not instantaneous if at all there would have been hanging. When PW-6 Akshay went to the house, he had seen his mother lying on the cot. That means nobody had seen Anuradha in hanging position and it is not the case of the prosecution that thereafter somebody had took her down. Testimony of PW-6 Akshay is absolutely not reliable as it can be seen from the cross-examination that he was under the custody of his maternal uncle and therefore, possibility of he being tutored cannot be ruled out. There was nothing on record to connect the appellant with the crime, yet he has been convicted. Therefore, the impugned Judgment deserves to be set aside.

7. Per contra, the learned APP strongly submitted that the learned trial Judge has appreciated the evidence properly. When PW-6 Akshay went to house, he found that the mother was lying on the cot and when he asked as to what had happened, by gesture the communication was tried to be made. The ligature mark was shown and then finger was pointed towards the door

of the house where accused Nos. 1, 2 and 4 were standing. Testimony of PW-3 Eknath would show that Anuradha was subjected to cruelty by the accused persons and threat to kill her was also given. The incident has taken place inside the house of accused No.3 i.e. present appellant and therefore, it was for him to explain those circumstances. Unfortunately the lady could not be saved but the circumstances were sufficient to explain the evidence that has come against accused No.3. He has been rightly convicted.

8. Here, the present case is based mainly on the circumstantial evidence and the alleged oral dying declaration given to PW-6 Akshay. From the witnesses who have been examined by the prosecution, we could get that he is the person who could reach to the place immediately or in other words, he has been posed as the first person to reach inside the house and to whom Anuradha had said something by gesture and therefore, we would like to consider his testimony first. PW-6 Akshay has deposed that the incident had taken place around 10.30 a.m. on 12th October 2011 at village Talkhed. He was having his six monthly examination and therefore, he was in the school. He

says that before he went to school the accused persons were quarreling with his mother and they were saying that she would not be left alive in the village. The accused persons were asking why Anuradha has come to Talkhed and were giving threat to kill her. As regards this prior incident is concerned, we will take it up later because it not only includes accused Nos.1, 2 and 4 but also accused No.3 i.e. present appellant.

9. PW-6 Akshay has further deposed that when he was in the school, his father i.e. appellant came there and directed him to go to the house. He then left the examination and went to the house. His brother and sister were also in the school on account of their examination and then the father brought them also to house. Here, this witness has not given details as to why his father asked him to go to the house. The exact conversation between him and his father has not been told by him intentionally or it has not been extracted by the prosecution. How a student who was giving the examination, would have been allowed to go home by leaving the examination in between, is a question and the prosecution has not examined the school teacher or teachers who permitted Akshay, his brother and sister

to leave the school without giving examination. The brother and sister of PW-6 Akshay have not been examined to state as to what the father had told them also when he allegedly asked them to leave the examination and to go to house. This witness is not explaining as to whether all of them went together to the house or he alone proceeded ahead and did not wait for his father to fetch brother and sister. Thereafter Akshay says that he entered the house and noticed that his mother was serious and was lying on the cot. He asked mother as to what has happened but she was unable to speak. She showed mark on her neck to the witness by hand and also showed her finger towards the door of the house to indicate that those persons have hanged her. The witness says that at that time accused Nos. 1, 2 and 4 were standing near the door of the house. Akshay then says that he asked the accused persons about it but they did not reply. Therefore, he went to his another uncle Datta, who came along with him to the house and then they had called the doctor. Doctor then directed them to shift Anuradha to Government Hospital. Thus, it is to be noted from whatever he has deposed, he does not say about the presence of present appellant inside the house when Anuradha gave the said oral dying declaration.

10. Here, we would like to clarify a fact that an oral dying declaration can be given by gestures also and when such gestures are made, then it was incumbent upon the trial Judge to take those gestures precisely in the same way in the narrative form as the witness was enacting. Here, we may not go into the aspect as to whether Anuradha was in a fit mental state to give the statement because it would depend upon, whether the entire testimony of PW-6 Akshay is believable or not. Even if it is taken as it is, yet the appellant was not present at all when Anuradha showed the finger towards the door of the house, indicating that she was hanged by those persons, and only accused Nos. 1, 2 and 4 were standing near the door. Here the learned trial Judge has acquitted accused Nos. 1, 2 and 4, towards whom Anuradha had allegedly indicated as per the testimony of PW-6 Akshay. PW-6 Akshay is totally silent as to where his father went. He thereafter says that he along with his another uncle Datta, shifted his mother to the hospital. PW-7 Datta is the uncle of PW-6 Akshay to whom he says that he was called.

11. PW-7 Datta says that on the day of incident around 12.00

noon when he was proceeding on the road, he heard noise of Akshay and at that time Akshay came to him and then along with Akshay, he went to doctor. Dr. Chandak examined Anuradha and directed them to shift her to Government Hospital and accordingly Anuradha was shifted. It is to be noted that testimony of Datta is totally silent as to where the appellant was. He does not say that he had tried to establish communication with Anuradha to know what had happened to her. Therefore, his testimony is absolutely not helpful to the prosecution.

12. Now, we would turn towards the first part from the testimony of PW-6 Akshay, which we had left about the prior incident of the same day in which he told that the accused persons were quarreling with Anuradha. As per the prosecution story and the cross-examination of PW-6 Akshay along with testimony of the informant PW-3 Eknath, what could be gathered is that six months prior to the incident, the family of Anuradha had shifted back to Talkhed and prior to that all of them were residing at Beed for a considerable period. Even accused No.3 i.e. present appellant was also with Anuradha and children when they were residing at Beed. Then the question arises, as to why

on the day of incident he would have joined the other accused in quarreling with Anuradha and would have threatened her to kill. According to PW-3 Eknath, when Anuradha, appellant and children were at Beed; accused Nos. 1 and 2 had taken forcible possession of the land and house of accused No.3. If this is so, then accused No.3 would not have joined accused Nos. 1 and 2, rather that dispute would have been between the brothers and Anuradha would not have been blamed. Informant also says that due to mediation by the villagers accused No.1 has vacated the house of accused No.3. In the cross-examination, he has admitted that he was not present at the time of said mediation. None of the villager has been examined to support the said contention. According to PW-3 Eknath, accused Nos. 1, 2 and 4 were harassing Anuradha and giving abuses as well as threat to kill. That means, he is ruling out the present appellant from such act. Taking into consideration this aspect, we do not find that there was any motive for the appellant to commit any crime.

13. As per the testimony of PW-6 Akshay, when he entered the house Anuradha was lying on the cot and she had the ligature mark around her neck. The same fact has been stated by PW-3

Eknath also but the said information was given to him by Akshay and therefore, he is hear-say witness on that point. This fact is then required to be tested with the medical evidence. PW-4 Dr. Anant Mulay, is the doctor from Deep Hospital who examined Anuradha clinically upon admission on 12th October 2011. He says that Anuradha was the case of partial hanging with respiratory paralysis with shock. There is no explanation sought from him by the prosecution as to what he wants to say about 'partial hanging'. In common parlance, partial hanging may occur when victim's feet or any body part would be touching to the ground. As compared to the complete hanging, the ligature mark would be paramount and no part of the body would be touching the ground. But as regards the partial hanging is concerned, the body part would be touching the ground. Here the prosecution has not sought explanation as to whether it was the case of hanging or strangulation. But if we consider the postmortem report and the testimony of PW-2 Dr. Anshuman Bahir, then his finding is, cause of death was "hanging", thereby he wanted to suggest that it is complete hanging. The question, therefore, is how the body would have been brought down and who has done it. In case of complete hanging the death would have been

instantaneous but here the prosecution story is that the incident took place around 10.30 a.m. on 12th October 2011 and Anuradha died on the next day around 8.00 a.m. PW-2 Dr. Anshuman Bahir has stated that if one is tried to be strangled by coiling string around his neck and if said person resist said attempt by obstructing by catching the string, then the ligature mark may not appear at the place where the obstruction is caused by fingers. In case of forceful strangulation by string, there may be fracture of laryngeal and fracture of hyoid bone. In fact when the prosecution has not come with the case of strangulation and findings of this witness are not of strangulation, why such questions were asked, is another confusion. Thus we get a different opinion between the medical officers. The medical officer who examined Anuradha first in time, says that it was the case of partial hanging, whereas the autopsy doctor says that it was complete hanging, yet they both are not explaining as to how that would have been taken place when PW-6 Akshay says that when he entered the house, Anuradha was lying on the cot.

14. If we consider the spot panchnama, it was attempted to be

got proved through PW-1 Mazhar Deshmukh, but he has turned hostile. Yet if the contents are considered, there was no evidence indicating hanging. Interestingly, the investigating officer has not been examined in this case who could have further explained the situation. When PW-3 Eknath lodged the report, it was registered under Section 306 of the Indian Penal Code but later on it appears that Section 302 of the Indian Penal Code came to be added. Initially when the charge was framed on 6th August 2013 vide Exhibit-26, it was under Section 306 of the Indian Penal Code with other Sections. But later on the same Judge has altered it on 10th September 2013 and added Section 302 and 201 of the Indian Penal Code, which according to us, appears to be without application of mind. Unless there was some evidence, the charge ought not to have been altered.

15. PW-4 Dr. Anant Mulay from Deep Hospital, has produced documents of treatment. Exhibit-51 gives history and it is said that the history has been narrated by patient's relative (husband) that, patient on bed in unconscious position today at 12.00 noon i.e. 12th October 2011. It also bears signature of the present appellant when it was conveyed to him that her

condition was serious. Thus, it shows that appellant was with Anuradha and it is not as stated by PW-6 Akshay that he was taking the lead in shifting mother to the hospital.

16. The learned trial Judge totally erred in ignoring all those aspects. Merely because Anuradha was found unconscious in the house owned by present appellant; there was no such situation where the principles of Section 106 of the Indian Evidence Act should have been invoked. Burden never shifted on the shoulders of the appellant to explain the circumstances in which Anuradha was found unconscious with ligature mark. It was the day time and unless it would have been proved that appellant was inside the house at the relevant time, burden would not have been on his shoulders to give any kind of explanation. The oral dying declaration has also been misunderstood and wrongly applied against the appellant when he was not at all present when those gestures were allegedly made. As regards the said gestures are concerned, it raises further doubt that if at all the accused persons i.e. especially accused Nos. 1, 2 and 4 would have committed the crime, why they would have come inside the house after Akshay came. The accused persons would always

try to avoid such situation and their presence is also not stated by PW-7 Datta.

17. While acquitting all the accused persons from the offence punishable under Section 498-A of the Indian Penal Code, the learned trial Judge has disbelieved PW-3 Eknath and PW-6 Akshay. The halfhearted attempt to believe them in respect of Section 302 and 201 of the Indian Penal Code cannot be said to be legal and therefore, the impugned Judgment is perverse. It is the result of wrong appreciation of evidence and wrong application of principles of Section 106 of the Indian Evidence Act. The conviction awarded, therefore, cannot be allowed to be sustained, it deserves to be set aside by allowing the Appeal. Hence the following order:-

ORDER

(I) The appeal stands allowed.

(ii) The conviction awarded to the appellant – **Ramesh Umaji Ghene** by learned Additional Sessions Judge, Majalgaon, District-Beed in Sessions Case No.10 of 2012 on 07.05.2014 for

the offence punishable under Sections 302, 201 of the Indian Penal Code stands quashed and set aside.

(iii) The appellant stands acquitted of the offence punishable under Sections 302, 201 of the Indian Penal Code.

(iv) He be set at liberty, if not required in any other case.

(v) The fine amount deposited, if any, be refunded to the appellant after the statutory period is over.

(vi) We clarify that there is no change as regards the order in respect of disposal of muddemal.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/NOV23