

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

APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 53 OF 2019

THE STATE OF MAHARASHTRA
VERSUS
PRAVESH S/O. PUNJABRAO MORE

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Advocate for Appellant/State : Mr. R.D. Sanap
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**CORAM : SMT. VIBHA KANKANWADI &
Y.G. KHOBRADE, JJ.**
DATE : 24th April, 2023

ORDER :- (Per: Y.G. Khobragade, J.)

1. This is an application by the prosecution under Section 378 (1) (b) of Cr.P.C. seeking leave to file appeal against the judgment and order dated 04.12.2018 passed by the learned Additional Sessions Judge, Jalna in Sessions Case No.68/2016, thereby acquitting the non-applicant/accused for the offence punishable under Section 302 of the I.P.C.

2. With the able assistance of the learned APP Mr. R.D. Sanap we have gone through the record. We have considered the evidence which was placed before the learned trial Court; with a view whether leave to file appeal can be granted.

3. The story of the prosecution is that the informant-PW1-Subhash Gaikwad lodged a report with Jafrabad Police Station on 19.02.2016 alleging

that he owns two acres of land in remote village of Sanjol, where he resides along with his family members including his wife deceased-Mandabai, son Dipak (PW4) and daughter-in-law Ashwini. The accused is mason and resident of his village. His wife Kavita has 5 – 6 goats. Kavita the wife of the accused used to take her goats to the water tank for drinking water situated in the field of informant. On 18.02.2016, at about 10.00 a.m., he had gone to Chikhli for bringing household articles and returned at his house at about 6.00 p.m. Thereafter, he inquired with his daughter-in-law Ashwini whereabouts of his wife-Mandabai. His daughter-in-law told him that his wife has gone to agricultural field about half an hour ago, to take the bullocks to water. Therefore, immediately he went to his field, however, when he was in the agricultural field of one Sheshrao Hake, he found accused near the well situated in his field. Therefore, he gave call to the accused but the accused did not pay any heed. Thereafter, he went to his field and found his wife-Mandabai had fallen in the well. Thereafter, he gave call to his wife but she did not reply and was motionless. Upon hearing hue and cry neighbouring people gathered near the well. His wife was found dead. On next day i.e. on 19.02.2016 at about 3.49 a.m., he lodged a report alleging that, the accused committed murder of his wife by throwing her into the well on 18.02.2016 at about 6.00 to 6.30 p.m. On the basis of said report a Crime No.20/2016

registered against the accused with Jafrabad Police Station for the offence under Section 302 Indian Penal Code.

4. The PW12-S.R. Patil- Investigating Officer, went to the place of incident and fished out dead body of Mandbai from the well and executed inquest panchanama Exh.18, spot panchanama Exh.31. He seized kettle, lead of kettle and broken pieces of bangles from the spot of the incident. The dead body was sent for autopsy. PW12 recorded statements of the witnesses under Section 161 of the Cr.P.C. The Investigating Officer had arrested the accused. On 20.02.2016 he interrogated the accused. On his interrogation the footwear of the deceased were seized under seizure panchanama Exh.34. The Investigating Officer recorded video shooting of inquest and spot panchanama and made CD. The said CD was seized under panchanama Exh.35. The Medical Officer PW11-Dr. Pallavi Dhakre conducted post mortem on dead body and issued post mortem report Exh.50. The collected viscera of deceased were sent to FSL. As per opinion of PW11 the death of deceased was due to contraction of neck, which is homicidal. The Investigating Officer has got recorded statements of the eye witnesses under Section 164 of the Cr.P.C. through the learned Judicial Magistrate. After completion of investigation, the Investigating Officer filed charge-sheet under Section 173 of the Cr.P.C. against the accused. On compliance of procedure, the learned

Judicial Magistrate committed the case for trial to the Court of Sessions under Section 209 of the Cr.P.C.

5. The learned trial Court framed charge at Exh.6 against the accused under Section 302 of the I.P.C. The plea of the accused recorded. Albeit, the accused pleaded not guilty and claimed for trial. The prosecution examined in all total 12 witnesses to bring home the guilt of the accused. After conclusion of trial statements of accused recorded under Section 313 of the Cr.P.C. The defence of the accused is that he has been falsely implicated in the crime. The accused examined defence witness DW1-Punjabrao More to prove that at the relevant time PW3-Kisan Kharade was in his company and he was not present at the place of incident i.e. well situated in the field of the informant-PW1.

6. Learned trial Court after due hearing passed the impugned judgment and order on 04.12.2018 and acquitted the accused for the offence under Section 302 of the I.P.C. Hence, this application.

7. In order to prove the homicidal death of Mandabai, the prosecution has examined Medical Officer PW11-Dr. Pallavi Dhakre at Exh.49. As per the evidence of PW11, she conducted post mortem on dead body of Mandabai on 19.02.2016 and found following injuries:

1. Multiple contusion on left side of neck. Various size upper part above thyroid of cartilage 3 x 3 cm, 3 x 1 cm, 2 x 1 cm. 1 x 0.5 cm. Bluish reddish colour backward upward direction.
2. Operated scar over left thigh on lateral aspect 8 x 1 cm. In size
3. Left side of epigastric region crab eaten mark 2 x 0.5 cm.
4. Left hypochondriac region 2x0.5cm. crab eaten mark.
5. Left below axillary region crab eaten mark at loin triangular irregular in shape 3 x 2 x 1 cm.
6. On right hand just below shoulder crab eaten mark 2 x 0.5 cm.
7. On right elbow joint on lateral side crab eaten mark 2 x 0.5 cm.

8. As per the testimony of PW11 injury 1 and 2 are ante mortem and rest of the injuries were post mortem. On internal examination she found following injuries:

1. Fracture of temporal bone left side 3 cm. Irregular in type.
2. Dura matter breach below fracture region.
3. Sub dural blood infiltration in temporal region.
4. Evidence of blood infiltration and hemorrhage in neck muscle around trachea.
5. Right and left both lungs were congested and oozing of blood.

9. Accordingly, PW11 issued post mortem report Exh.50. The PW11 opined that death of deceased was due to compression over the neck with head injury. The injury no.1 in column no.17 possible due to contraction of neck. The injury no.2 in column no.19 on skull is possible by hard and blunt

object. However, as per testimony of PW2-Jalindar Deokar, PW5-Bhagwan Lahane and PW12-Investigating Officer, it does not appear that any seizure of hard and blunt object is made either from the spot or at the behest of accused. The internal injury described in column 20 (c) possible was due to contraction of neck. In cross-examination the PW11 stated that no external injuries on the front side of neck were found. The PW11 admitted that if neck is constricted by pressure of palm there is possibility of mark of palm / five fingers over the neck and she has not clearly observed constriction of neck through palm. The PW11 has denied that the injuries to the neck were possible due to fall of deceased accidentally in the well and striking the neck to the iron bar due to saree on the person of deceased. The PW11 has stated that head injury is possible due to dash of deceased to the iron bar and compression of neck is possible due to saree or any cloth. The PW11 has further stated in her cross-examination that if the injury is ante mortem, initially it appears red then in one day it becomes blue. After 2 – 3 days it becomes bluish to black. For developing rigor mortis period of 12 hours is required and probable time of death is not mentioned in post mortem report in this case. On 22.02.2016 she gave her opinion Exh.52 in response query Exh.51.

10. After considering the nature of injuries described in post mortem report Exh.50 and opinion Exh.52 coupled with inquest panchanama Exh.18 and scene of offence Exh.32 it can be said that it has been proved beyond

reasonable doubt that death of deceased-Mandabai is homicidal i.e. due to strangulation by compression of neck.

11. In present case there is no eye witness to the alleged incident of murder of deceased-Mandabai by strangulating her to death by compression of neck. The edifice of the prosecution rests on circumstantial evidence. On perusal of evidence of the prosecution witnesses, it appears that PW1-Subhash Gaikwad informant and PW3-Kisan Kharade had allegedly seen the accused while pushing the deceased-Mandabai in well but both these witnesses have not testified that they saw the accused while strangulating the deceased to death by compression of neck. Therefore, the question arises whether the prosecution has succeeded while proving that it was the accused who strangled the deceased.

12. The prosecution has proved seizure-cum-spot panchanama Exh.34. As per Exh.34 articles like steel kettle (article 1), one chappal of left leg paragon company of deceased (article 2), lead of kettle (article 3) and two broken pieces of green colour bangles (article 4) were seized from the spot. After the arrest of accused, his memorandum statement came to be recorded. The accused has not disputed the inquest panchanama Exh.18, spot cum seizure panchanama Exh.32. Panchanama of water tank Exh.33, seizure panchanama of foot wear Exh.34. The accused has not challenged evidence of

PW9-S.Y. Thombre the PSO and PW10-Sanjay Gaikwad who carried seized muddemal articles to FSL Aurangabad.

13. The evidence of PW1-Subhash is relevant to the incident that deceased-Mandabai had not returned to home and therefore, he had gone to his field to search his wife. PW3-Kisan Kharade tried to say that he had seen the accused while pushing the deceased-Mandabai in well. He testified that on 18.02.2016, he returned from his work at about 5.00 p.m., then, he went to his field to see gram crop. He was sitting near heap of gram crop and was playing game on mobile. At that time, he heard shouts from nearby well situated in the field of PW1-Subash Gaikwad. Then he found that the accused-Pravesh was pushing Mandabai into the well. He went near the well and peeped into the well. At that time the informant-PW1-Subhash came near him and one Sheshrao Hake shouted. Thereafter accused had fled away. As per the testimony of PW3, the informant PW1-Subhash started crying after seeing his wife Mandabai in the well. He got frightened and concealed himself in his field after witnessing the incident of pushing of Mandabai in well by the accused.

14. As per the testimony of PW1 on the day of the incident at about 6.00 p.m. he returned at his home from Chikhli. Thereafter, he inquired whereabouts of his wife with his daughter-in-law Ashwini who disclosed that

Mandabai has gone to field. Thereafter, he immediately proceeded towards his field and had reached in field of Sheshrao Hake, where from he saw the accused near the well situated in his field. Thereafter, he gave call to the accused but the accused got frightened and fled away. Thereafter, he went to the well and found that his wife was lying dead in the well. The testimony of PW7-Kantabai Radad appears that, on the day of incident she was near the field of deceased-Mandabai and when she called Mandabai, Mandabai did not reply. The accused-Pravesh was present there but told her that deceased-Mandabai and her husband are not in their field and he carried fodder for his goats. As per testimony of PW8 the accused had brought his goats in the field of informant-PW1 at about 4.00 p.m. She was grazing her bulls then she took bulls to the water tank in field of deceased-Mandabai. The PW8 has testified that at that time she had asked the deceased-Mandabai to accompany her while returning to home but deceased told her she would come after some time.

15. Therefore, considering the evidence of PW7 and 8 if it is presumed that deceased-Mandabai and the accused-Pravesh were seen together, however, it can be analysed that, PW8-Chandrakala had left the field at about 5.00 p.m., and incident allegedly had occurred in between 6.00 p.m. to 6.30 p.m.

16. As per the testimony of PW1 and 3 when they peeped into well they found dead body of Mandabai was floating in the water of well. However, it can be seen that both of them had not taken immediate steps to take out Mandabai from the well. They had presumed that she was dead, though they had not seen that accused had allegedly strangled her. PW 3 rather says that he concealed his presence till other people came near the well. PW4-Deepak Gaikwad and PW6-Shivaji Gaikwad were those persons who came there. However, the PW3 has not disclosed about the incident either to the PW1 or PW4, who are husband and son of deceased.

17. It would be worthwhile to mention here that if dead body of any human being drown in the well after committing murder in that event the dead body would certainly goes to the bottom of well and it will not come on surface of water immediately. As per the medical jurisprudence, the body will rise slowly to the surface when sufficient gas is formed in the intestinal tract to make the body buoyant; this gas is the result of bacterial decomposition. The time to generate necessary gas will depend upon the temperature of the water and contents of the victim's stomach when drowned. In summer, the average time is eighteen to twenty-four hours. In winter, or when the water is very deep and cold, the time will be much longer. A body will not rise suddenly from the bottom, but rises gradually as more gas is formed and the body becomes buoyant.

18. Further, though the PW3 deposed about witnessing the accused while throwing Mandabai in the well on 18.02.2016, however, the statement of PW3 was not recorded immediately. So also PW3 has not disclosed said fact to his uncle immediately though he noticed presence of PW1 at the spot soon after the incident. Therefore, conduct of PW3 appears to be unnatural and he is the got up witness to support the case of the prosecution. The statement of witnesses i.e. Kantabai Radad (PW7), informant-Subhash Gaikwad (PW1) and statement of Kisan Kharade (PW3) was recorded under Section 164 of the Cr.P.C. at Exh.41, 15 and 20 respectively. However, those statements do not appear in corroboration. There are material omissions amounting to contradictions about disclosing fact of incident and committing the murder of Mandabai by the accused and throwing her in the well. Prosecution has also failed to establish motive for committing murder. Testimony of PW 1 does not bring any motive on record.

19. On perusal of the impugned judgment and order, it appears that the learned trial Court discarded the testimony of PW3-Kisan Kharade on 8 grounds described therein and held that, the prosecution has failed to prove exact time of death of deceased and presence of accused at the well has not been established, when the offence was committed. In absence of such evidence, Section 106 of Evidence Act cannot be used as circumstantial

evidence against the accused nor the guilt of the accused can be drawn by the prosecution.

20. Therefore, considering the material available on record and after discussing various case laws, the learned trial Court acquitted the accused and therefore the said judgment and order does not suffer from any infirmity or perversity. We do not find substantial grounds set out to interfere with the findings of the acquittal of the accused and re-appreciate the evidence.

21. In view of the above discussion, we are not inclined to grant the present application and hence it is dismissed.

[Y.G. KHOBRADE, J.]

[SMT. VIBHA KANKANWADI, J.]