

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

9 CRIMINAL APPEAL NO.323 OF 2017

Shaikh Akbar Shaikh Akhtar,
Age 30 yrs., Occ. Labour,
R/o Sanmitra Colony, Partur,
Tq. Partur, Dist. Jalna.

... Appellant

... **Versus** ...

The State of Maharashtra

... Respondent

...

Mr. S.G. Ladda, Advocate for the appellant

Mr. A.M. Phule, APP for the respondent

...

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

DATE : 11th SEPTEMBER, 2023

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present appeal has been filed by the original accused challenging his conviction for the offence punishable under Section 302, 498-A of the

Indian Penal Code, 1860 by learned Additional Sessions Judge, Jalna in Sessions Case No.101/2016 on 04.07.2017.

2 It is not in dispute that deceased Rehana got married to the accused about 2½ years prior to First Information Report dated 16.04.2016. Deceased Rehana and appellant were residing at Sanmitra Colony, Partur, Dist. Jalna. Rehana was blessed with two sons; one is Asad aged 1½ and second Ayan aged 08 months at the time of incident. They both were residing in a rented premises away from the parents of the appellant.

3 The law was set in motion by Afsarkhan Kabirkhan Pathan by lodging First Information Report on 16.04.2016. He is the father of deceased Rehana. He was also residing in rented premises in Sanmitra Colony. He has five sons and three daughters including deceased Rehana. He alleged that accused was raising suspicion over the character of deceased and there used to be quarrels between them. Appellant used to assault Rehana by raising suspicion. Rehana used to convey the cruelty meted to her to the informant and thereupon informant used to console her. Around 7.00 p.m. on 15.04.2016 when he was sitting in front of his house after dinner, he came to know around 9.30 p.m. that quarrels are going on between his son-in-law and daughter and the son-in-law is assaulting daughter. Therefore, informant

went to the house of Rehana along with his wife and son Amjad. People had gathered in front of the house and the door of the house was closed. He himself, his wife and son Amjad then peeped in from the gap of the door and found that Rehana was in supine position on the ground near cot. The appellant was throttling her with both hands and the children were crying. Informant and his son as well as the people, who had gathered, requested accused to open the door, but he did not and, therefore, somebody called police. After the arrival of the police, Jamadar Mr. Suradkar and Mr. Dusane convinced accused to open the door. Thereupon accused opened the door and then it was found that Rehana was in unconscious state. Police made arrangement to shift her to Government Hospital, Partur in police jeep, however, after examining him Doctor declared her as dead. Around 00.45 hours on 16.04.2016 the First Information Report was registered.

4 It is the prosecution story that the accused was taken in custody from the spot and after the registration of the First Information Report he came to be arrested. After Rehana was declared dead, inquest panchnama was executed in presence of two panchas and the dead body was sent for postmortem. The panchnama of the spot was carried out and certain articles were seized from the spot. The medical examination of the accused was got done. Certain samples of Rehana as well as accused were taken and sent for

analysis. Statements of witnesses came to be recorded and after the completion of the investigation charge sheet was filed.

5 After the committal of the case, the charge was framed and trial has been conducted. Prosecution has examined in all 08 witnesses to bring home the guilt of the accused and after considering the evidence on record and hearing both sides the learned Additional Sessions Judge, Jalna held the accused guilty. The accused has been sentenced to suffer imprisonment for life and to pay fine of Rs.5,000/- (Rupees Five Thousand only), in default of payment of fine to suffer rigorous imprisonment for two years for committing an offence punishable under Section 302 of the Indian Penal Code. Further, he has been sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.1,000/- (Rupees One Thousand only), in default of payment of fine to suffer simple imprisonment for four months for committing an offence punishable under Section 498-A of the Indian Penal Code. Both the sentences were directed to run concurrently. This conviction is under challenge in this appeal.

6 Heard learned Advocate Mr. S.G. Ladda for the appellant and learned APP Mr. A.M. Phule for the respondent.

7 It has been vehemently submitted on behalf of the appellant that

the charge that came to be framed against the accused was for strangulation and not for throttling. The two actions are different and if we consider the testimony of PW 8 Dr. Dnyandeo Nawal, who conducted the autopsy, then he had found finger marks (bruise) single bruise on right side of the neck, at the level of Thyroid Cartilage. He has given the probable cause of death as “asphyxia due to throttling”. Therefore, the said opinion is not corroborating the charge i.e. for strangulation. Though the accused has admitted the spot panchnama; yet, it does not corroborate the oral testimony because as per the prosecution story the incident was going on prior to 9.30 p.m. and ultimately the First Information Report came to be lodged around 12.45 a.m. Therefore, when the scuffle was going for so much of time, when exactly the dead body was taken to Government Hospital has not come on record. In fact, the accused did not get a proper opportunity to cross-examine the Medical Officer. If we consider the cross-examination of PW 8 Dr. Nawal, then it appears that there was no proper representation to the accused. Many questions ought to have been asked and in fact, this is the situation in respect of other witnesses also. The accused was not given a fair trial. If the concerned Presiding Officer would have been vigilant and would have seen that proper questions are not being put by the Advocate representing the accused, then he could have taken up the step. Accused has a right of fair

trial and if he is not properly represented by a competent Advocate, then it cannot be said that, that opportunity and right was made available to him. Such improper representation vitiates the trial. He relied on the decision in **Criminal Confirmation Case No.01 of 2018** with companion appeals decided by this Court (Bench at Nagpur) i.e. **The State of Maharashtra vs. Raju @ Rajkumar Keshavrao Landge** on 26.10.2018, wherein it has been held that when there was no efforts made to bring on record the inconsistencies, contradictions and omissions in the cross-examination of the witnesses and the questions which should have been asked were ignored, then it cannot amount to fair trial. In this case the matter was sent for *de novo* trial and, therefore, learned Advocate Mr. S.G. Ladda appearing for the appellant in the present case has put forward the same request of sending the matter for *de novo* trial.

8 It has been further submitted on behalf of the appellant that the learned trial Judge failed to consider that the alleged eye witnesses i.e. PW 1 Afsarkhan – father of deceased, PW 2 Amjadjkhan – brother of deceased, PW 3 PHC Mr. Jessulal Bhurewal as well as PW 4 PHC Mr. Milind Suradkar, who reached the spot, PW 5 Dipak Adhe, have given different timings as to when they went to the spot. As per PW 1 and PW 2, they received the information around 9.30 p.m. and then they went to the house of deceased and accused.

PW 3 Jessulal Bhurewal says that he had received phone call from PW 5 Adhe at 8.45 p.m. stating that some people had gathered near the house of the accused and then he went to that place. PW 4 PHC Milind Suradkar has said that he was informed by PSO PW 3 Mr. Bhurewal around 10.00 p.m. that people had gathered near the house of accused and, therefore, he should go there and see what has happened. PW 5 Dipak is in fact resident of Sanmitra Colony, Partur and when he was in his house around 9.30 p.m. to 10.00 p.m., he saw crowd in front of the house of accused and, therefore, he went there. Therefore, it is unbelievable that there could be so much of variation in the timings. All of them admit that many persons had gathered at the spot, then why nobody including police had tried to break the door of the house. Nobody had tried to save the daughter though each one of them is saying that from the gap of the door they could see that the accused was throttling Rehana. If they would have moved swiftly, at least they could have saved the girl. Each one of the witnesses is exaggerating and, therefore, learned trial Court ought not to have relied on the testimony of any of them. Each one of them says that he made request to the accused to open the door and ultimately after the arrival of the police the accused has opened the door. The alleged role of the police in the entire episode is questionable. The learned Advocate Mr. S.G. Ladda appearing for the appellant, therefore,

mainly prayed for the remand and *de novo* trial to give a proper opportunity to the accused to defend himself and secondly, he submitted that the available evidence on record is also insufficient to prove the guilt of the accused beyond reasonable doubt and, therefore, he needs to be acquitted.

9 Per contra, the learned APP strongly opposed the appeal and supported the reasons given by the trial Court. He submitted that proper opportunity was given to the accused to defend himself. He himself had engaged Advocate of his choice and, therefore, now he cannot say that he was not properly represented. The cross-examination of PW 8 Dr. Nawal does not destroy the findings recorded by him that death of Rehana was by throttling. It was homicidal death. PW 1 to PW 5 all are eye witnesses. PW 3 to PW 5 are the police witnesses and they had no reason to implicate the accused. The gap between the door of the house of the accused is also noted in the spot panchnama Exh.08 which came to be admitted by the accused himself. It appears that the witnesses concentrated on convincing the accused to open the door and it cannot be then found fault that they had not taken care to break open the door. The said question was not asked to any of the eye witnesses. It is not only the right of the accused to have fair trial but it is also the right of the prosecution as well as the victim. When proper opportunity was given to the accused to defend himself, that too by Advocate

of his choice, then no question arises for sending the matter for *de novo* trial. The conviction awarded to the accused is perfectly legal.

10 We would like to deal with the point regarding fair trial now raised on behalf of the appellant. At the outset, no such point/ground was taken in the appeal memo nor prayer for remand/re-trial was made. Still such prayer can be entertained when orally circumstances are pointed out. The reliance has been placed on the decision in **Raju Landge** (supra) decided by this Court (Bench at Nagpur). However, it can be seen from the judgment that the *de novo* trial was directed in view of the fact that was pointed out that the Advocate who was appointed to represent the accused before the trial Court was given by the Legal Aid Authority and it appears that even the learned trial Judge was not satisfied with his performance and wanted to appoint an eminent criminal lawyer as an *Amicus Curiae* in the said matter, at a late stage. Said learned Advocate refused on the ground that there was no major role left to be played by him to protect the interest of the accused when he was sought to be appointed and, therefore, relying upon the decision in **Jayendra Vishnu Thakur vs. The State of Maharashtra** [(2009) 7 SCC 104], **Zahira Hibibullah Sheikh vs. State of Gujarat** [(2006) 3 SCC 374, **Mohd. Hussain alias Zulfikar Ali vs. State (Government of NCT of Delhi)** [(2012) 2 SCC 584], it was reiterated that Code of Criminal Procedure

ensures that an accused gets a fair trial. It is essential that the accused is given reasonable opportunity to defend himself in the trial. He is allowed the assistance of a lawyer of his choice and if he is unable to afford one, he is given a lawyer for his defence. The right to be defended by a learned counsel is a principal part of the right to fair trial. These were considered to be the minimum safeguards to be adopted for a fair trial, otherwise it would amount to prejudice to accused. Here, in the present case, the accused i.e. the present appellant had engaged Advocate of his choice. Now, the Advocate, who is representing him before this Court, if he finds that certain questions which ought to have been asked were not asked, that does not mean that there was not a fair trial. Every Advocate conducts the matter as per his capacity and knowledge. The manner of asking questions and the procedure adopted differs from Advocate to Advocate. Now, as regards the testimony of PW 8 Dr. Nawal, the autopsy surgeon, is concerned, if it is not asked to him, as to whether the throttling was earlier than to the hanging part and how with only one thumb impression or single bruise on right side and three finger marks on the left side of the neck will cause throttling is not asked, then, it cannot be said that the learned Advocate who was representing the accused was lacking in any knowledge or it is intentional failure on his part to ask the said question. Even if we consider it to be an inadvertent

omission, we cannot say that it was not a fair trial and now it requires *de novo* trial. The prejudice has not been shown by the learned Advocate for the appellant and, therefore, we discard his prayer which now he claims to be the prime prayer in the appeal.

11 Now, turning towards the evidence that has been led by the prosecution, at the outset, the spot panchnama and the inquest panchnama was admitted by the accused. Therefore, there was no question of examining anybody to prove the contents of the same. Still the Investigating Officer has made reference to those panchnamas and has said that the contents of the same are true and correct. As regards the oral evidence is concerned, the testimony of PW 1 Afsarkhan, PW 2 Amjadkhan, who are the father and brother of deceased, stood corroborated to each other. They have stated that around 9.30 p.m. they received the information about the quarrel going on in between Rehana and the accused. They went to the spot and saw the things going on inside the house from the gap/slit of the door. They had seen the accused pressing the neck of deceased Rehana. They have also stated that they were requesting the accused to open the door, but he was not responding and somebody informed the said fact to police.

12 The testimony of PW 1 and PW 2 stood corroborated with the

testimony of PW 3 Jessulal Bhurewal, PW 4 Milind and PW 5 Dipal, who are the police persons. As regards PW 5 PHC Dipak is concerned, he states that he is the resident of Sanmitra Colony, Partur and around 9.30 p.m. to 10.00 p.m. when he was at home, he received the information that crowd has gathered in front of the house of the accused, who was residing in his colony. Therefore, he went there. He had also seen from the slit of the door. He was saying that the accused was assaulting Rehana. Though he called accused to open the door when he was not responding, he made phone call to PW 3 Jessulal Bhurewal, who was the then PSO on that day. Testimony of PW 5 Jessulal Bhurewal and PW 4 Milind then stood corroborated that upon PHC Jessulal Bhurewal's directions PHC Milind along with other police staff went to the spot. Learned Advocate for the appellant has objection as regards testimony of PW 3 Jessulal Bhurewal, who has stated that he had received the phone call from PW 5 Dipak Adhe around 8.45 p.m., whereas PW 5 says that he had gone to the spot around 9.30 to 10.00 p.m. The time gap is of such an extent that it is impossible that all the said duration accused was pressing the neck of the deceased and the question - as to why the crowd had not kicked the door and forced open it ? To this, we would like to say that sometimes the timings may not be important or stressed upon, because memory is likely to fed as regards the time is concerned, but not the entire

event. The core was that PW 5 had given a phone call to the PSO i.e. PW 3 Jessulal Bhurewal and thereafter he had sent the police team to the said place. He had not gone to the place. In the cross-examination he has admitted that he had not brought the station diary along with him and, therefore, when his evidence was recorded after a gap of about one year he might have stated a wrong time. Even if we keep his testimony aside, it will not disturb the chain. The police persons i.e. PW 5 and PW 4 had gone to the place after 10.00 p.m. PW 1 and PW 2 have stated that they have received the information at 9.30 p.m. and they had gone at that place. Thus, we do not find that there was much time gap in entire activity. Of course, it was unfortunate that none from the crowd had thought of breaking open the door and especially even PW 5 Dipak the lady has then lost her life. If presence of mind would have been shown by the public, then the life of a lady could have been saved. But that does not absolve the appellant from his criminal liability. All these witnesses i.e. PW 1, 2, 4 and 5 had seen accused assaulting Rehana and pressing her neck and then the Medical Officer corroborates the cause of death as throttling and, therefore, we have no doubt in our mind that Rehana's death is homicidal in nature and there is direct evidence in respect of the same that accused is the author of the crime. The slit to the door i.e. gap in between the door has been noted in the spot panchnama

Exh.08, which has been admitted by the accused. Therefore, spot panchnama supports the testimony of these eye witnesses.

13 When there is direct evidence, then motive does not assume importance. It has been stated that though it was the love marriage between Rehana and accused and it appears to be against the wish of PW 1 Afsarkhan; accused appears to have developed suspicion in his mind in respect of deceased's character. In his cross-examination PW 1 has stated that Rehana had not disclosed the name of the person in respect of whom the suspicion was connected by the accused. However, as aforesaid, even if we see that the motive appears to be shaky; yet, when there is direct evidence and even the police officers who were not at all interested witnesses had seen the occurrence, then there is absolutely no necessity for the prosecution to prove the motive.

14 As aforesaid, PW 1, 2, 4 and 5 are the eye witnesses and they have stated that after the police arrived and they ultimately convinced accused to open the door, he opened the door and came out. This fact is simply denied by the accused, but mere denial here is not sufficient. He is not denying his presence in the house at that time nor he has led any evidence by taking the defence of *alibi*. Therefore, Section 106 of the Indian

Evidence Act would come into play. It was for the accused to explain the circumstances in which his wife found murdered in the house, that too, at night time, when he was in the house. No explanation is by the accused in his statement under Section 313 of the Code of Criminal Procedure. We, therefore, hold that there was no perversity or illegality committed by the learned trial Judge in convicting the appellant by holding that he is the author of the crime. The appeal should fail. Hence, the appeal stands dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

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