

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

CRIMINAL APPEAL NO.147 OF 2016

Shaikh Nabab Shaikh Khajamiya,
Age-31 Years, Occu:Nil,
R/o-Maliqpura, Taluka-Parli-Vaijnath,
District-Beed,
At present Nasik Road Central Prison.

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

...

Mr. A.S. Usmanpurkar Advocate for Appellant appointed
through Legal Aid.
Mr. A.M. Phule, A.P.P. for Respondent – State.

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**CORAM: SMT. VIBHA KANKANWADI AND
Y.G. KHOBRADE, JJ.**

DATE : 19th APRIL, 2023

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

1. Present Appeal has been filed by the original accused No.1 challenging his conviction by learned Additional Sessions Judge, Ambajogai in Sessions Case No.95 of 2012 on 22nd August 2013, thereby holding him guilty of the offence punishable under

Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay a fine of Rs.1000/-, in default to suffer rigorous imprisonment for one month.

2. The prosecution story is that one Shaikh Shoukat Shaikh Gaffar, resident of Majalgaon lodged a report with Parali Police Station on 1st October 2012. He had stated that he is having two brothers and two sisters. His younger sister Shaikh Taslim got married to accused No.1 – appellant in 2003. She was treated properly for about 1½ to 2 years after the marriage. In the meantime Taslim gave birth to one son and one daughter. After the birth of daughter, accused No.1 started drinking liquor and saying that girl ought not to have taken birth. He used to assault Taslim. Thereafter Taslim gave birth to one more daughter and thereafter accused No.1 intensified harassment to her. Informant Shoukat and his relatives had called accused No.1 at Majalgaon and also met him at Parali from time to time to give him understanding, however, there was no change in his behaviour. About 11 months prior to the First Information Report (for short “FIR”), Taslim was pregnant on fourth occasion. The expectation of accused No.1 and his relatives i.e. mother-in-law, brothers-in-law was that she should get son. About 2½ months prior to the

delivery, accused left Taslim to her parental home by saying that he is not having money to be borne for delivery of the wife and he has no work. Therefore, the informant had arranged for a painting shop to him at Majalgaon. Taslim was kept there in the parental home. About a month later, Taslim delivered fourth child and she was a girl. Accused got dishearten and annoyed because of birth of the daughter. After about 1½ months of delivery, accused took Taslim to Parali and told that he will not harass her. In fact when the mother and brothers of the accused had come to Majalgaon after delivery of Taslim, they were also dishearten as daughter was begotten. Taslim was taken by accused to Parali eight days prior to the FIR. After Taslim went to Parali, the accused persons were harassing her on the ground that the daughter has born. Accused -appellant had also given threat that he would kill Taslim either by giving shock or strangulation or throttling or by poisoning. Informant received phone call of the brother-in-law of the accused around 11.45 p.m. on 30th September 2012 stating that accused has committed murder of Taslim in his house. Thereafter, informant, his father, brother and other relatives went to Parali. They saw that Taslim has expired and her dead body was kept in Government Hospital mortuary.

Informant had then lodged FIR with Police around 3.00 a.m. of 1st October 2012.

3. On the basis of the said FIR, offence vide Crime No.73 of 2012 came to be registered for the offence punishable under Sections 302, 498-A read with Section 34 of the Indian Penal Code and the investigation was undertaken.

4. Inquest panchnama was prepared with the help of two panchas and the dead body was sent for postmortem. Panchnama of the spot was executed with the help of two panchas and certain articles were seized from the spot. Accused was in the Police Station and he came to be arrested. The other accused came to be arrested later on. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure including the child witness – son of the accused. The preliminary report regarding death of Taslim as well as later on the postmortem report gave the probable cause of death as 'Asphyxia secondary to throttling'. After the completion of the investigation, charge-sheet came to be filed.

5. After the committal of the case, charge was framed against

in all three accused persons i.e. husband, brother-in-law and mother-in-law of deceased Taslim. The trial has been conducted after accused persons pleaded not guilty. Prosecution has examined in all 7 witnesses to bring home the guilt of the accused. After considering evidence on record and hearing both the sides, the learned trial Judge held accused No.1 – husband guilty of committing offence punishable under Section 302 of the Indian Penal Code, as above, however, acquitted him from the offence punishable under Section 498-A of the Indian Penal Code. Accused Nos.2 and 3 were acquitted of the offence punishable under Section 498-A, 302 read with Section 34 of the Indian Penal Code. Accused No.1 – husband has challenged his conviction in the present Appeal. It will not be out of place to mention here that prosecution has not filed any Appeal challenging acquittal of original accused Nos.2 and 3.

6. Heard learned Advocate Shri Usmanpurkar appointed through Legal Aid to represent the appellant and learned APP Shri Phule appearing for the State.

7. It has been vehemently submitted on behalf of the appellant that since the other accused have been acquitted of

the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, the present appellant also ought to have been acquitted. Further, accused No.1 as well as other accused persons have been acquitted of the offence punishable under Section 498-A of the Indian Penal Code also, therefore, the motive behind the commission of the offence cannot be said to be non fulfillment of dowry or illegal demand as alleged. The prosecution has come with the case that since fourth child was daughter and there were already two daughters, accused No.1 was annoyed with the deceased and therefore, he eliminated her. This motive does not appear to be convincing. Testimony of PW-5 Dr. Pankaj, who conducted the autopsy, shows that he had noticed two injuries, first was four marks of abrasions on left side of neck and second one was marks of cyanosis seen over neck and lips. According to him, the injuries were ante-mortem and would have been caused 10 to 12 hours prior to the postmortem. PW-5 has stated that those injuries were possible by throttling, but in the cross-examination he has stated that he was not the specialist on the subject. He had not conducted any investigation in connection with nails. PW-5 further admitted that there are five kinds of asphyxia and there is no throttling

asphyxia. He had not mentioned the degree of pressure that would have been applied and further taking into consideration his cross-examination, the cause of death given by him is doubtful. The prosecution has also relied on the testimony of PW-6 Shaikh Ibbrahim, 9 years old son of the deceased as well as accused No.1, who has been examined as eye witness, but it is to be noted that he is a tutored witness. His entire testimony has been taken in question and answer form. PW-7 Shaikh Sattar is the Police Officer who had recorded the FIR and carried out the investigation. In his cross-examination, it has come on record that on the day of incident accused had gone to the Police Station around 12.00 midnight. Accused told Police Officer that he has killed his wife but the complaint / report was not taken by this witness as he wanted to confirm the news. When these things have come on record, it ought to have been held by the learned trial Judge that the evidence that has been adduced, does not prove guilt of the accused beyond reasonable doubt. The learned trial Judge has not considered the testimony of the defence witnesses. DW-1 Shaikh Mukram is the brother of accused No.1. He has deposed that he was watching cricket match and after that when he wanted to sleep, his neighbours

Haji Baba and Shaikh Nabi came to his house and told that accused No.1 has given a phone call to Nabi and asked to see what has happened to the wife of accused. Thereafter, they all went to the house of the accused. They found that door of the house was open and deceased was lying on the ground. Three daughters of the accused were sleeping in the house and they could not find the accused. This witness has been cross-examined at length but nothing could be extracted by the prosecution. DW-2 Nabi is the neighbour of the accused who received the phone call of the accused and then had gone to the house of the accused. It has never come on record that accused had admitted in any way before anybody that he has committed murder of his wife. He was not present in the house but his wife was found murdered in the house, therefore, the trial Judge ought not to have invoked Section 106 of the Indian Evidence Act. The burden never shifted on the accused to explain the alleged custodial death of his wife.

8. Learned Advocate for the appellant has relied on the decision in ***Mohan Singh vs. Prem Singh and another, AIR 2002 S.C. 3582(1)***, wherein it has been held that the statement made in defence by accused under Section 313 of the

Code of Criminal Procedure can certainly be taken aid of to lend credence to the evidence led by the prosecution, but only a part of such statement under Section 313 of the Code of Criminal Procedure cannot be made the sole basis of his conviction. The law on the subject is almost settled that statement under Section 313 of the Code of Criminal Procedure of the accused can either be relied in whole or in part. It may also be possible to rely on the inculpatory part of his statement if the exculpatory part is found to be false on the basis of the evidence led by the prosecution. Here in this case, though there are certain answers which have been given by the accused in the affirmative to the questions put to him under Section 313 of the Code of Criminal Procedure, yet it cannot be the basis for his conviction. The Appeal, therefore, deserves to be allowed.

9. Per contra, the learned APP relied on the reasons given by the learned trial Judge and submitted that accused himself had gone to the Police Station and gave information about committing murder of his wife. Though that statement by itself may be inadmissible in evidence, yet that fact has been extracted in the cross-examination of PW-7. Even the witness of the accused i.e DW-2 Nabi has stated that he had received

phone call around 11.15 to 11.30 p.m. on 30th September 2012 from the accused stating that he is in the Police Station and Nabi should go to the brother and mother of the accused and awaken them. He has intentionally not stated the exact request that was made by the accused to him. For what purpose accused wanted DW-2 Nabi to go to his brother and mother and awaken them, has not been made clear by this witness. DW-2 Nabi is further not explaining as to why he himself, accused No.2 and Haji Baba went to the house of accused No.1. If we consider the testimony of DW-1 Shaikh Mukram, then he says that Haji Baba and Nabi came to his house and told him that accused has told that something has happened to his wife and then they went to the house of accused No.1. How accused No.1, who was in the Police Station, would know that something has happened to his wife, is a question. Therefore, the plea of alibi tried to be taken indirectly, cannot be considered at all. The testimony of PW-5 Dr. Pankaj would show that the cause of death was 'Asphyxia secondary to throttling'. Therefore, it is homicidal in nature. PW-6 Shaikh Ibrahim is the son of the accused. The answers given by this witness would show that he had sufficient maturity. He has specifically stated that on the day of incident, he was

watching India versus Pakistan cricket match. He had seen accused quarreling with mother. In fact this witness was taken by accused to the Police Station along with him. Witness Ibrahim says that he had also told to Police that father has killed mother. All these answers have come in the cross-examination, therefore, now the accused cannot say that he will not rely on those answers. Thus, there was sufficient evidence against the accused. The motive has also come on record through PW-6 Ibrahim. There is no merit in the present Appeal and it deserves to be dismissed.

10. At the outset, we would like to say that informant is not the eye witness and therefore, we would like to discuss the evidence of PW-5 Dr. Pankaj first. He is the doctor who had conducted the autopsy in Sub-District Hospital, Parali Vaijnath, District-Beed. As aforesaid, he found the injuries on the person of the deceased Taslim and he has stated that age of the injuries was 10 to 12 hours prior to the postmortem. He found that abrasions were caused to neck and taking into consideration the fact that such injuries are possible in the case of throttling, he has given the cause of death as 'Asphyxia secondary to throttling'. In the cross-examination, PW-5 has stated about the

various kinds of asphyxia and then voluntarily stated that throttling asphyxia comes under mechanical asphyxia. He admitted that in cases of mechanical asphyxia mouth, eyes, nose remain closed due to non supply of oxygen and the internal parts may choked out. Whether there was different situation in the dead body before him, has not been asked to him. Therefore, that general knowledge cannot be imported in the present case. There is no other contrary situation which is brought on record which will cast doubt on the opinion given by the expert. We, therefore, hold that death of Taslim is homicidal in nature.

11. PW-6 Ibrahim is the son of the deceased and accused – appellant. He was 9 years old when his testimony was recorded on 27th June 2013. The date of incident is 30th September 2012. That means, on the day of incident, Ibrahim was around 8 years old. Preliminary questions were asked to Ibrahim by the Presiding Officer to know whether he is a fit witness as per Section 118 of the Indian Evidence Act. It has been specifically mentioned that from the questions put to the witness the Presiding Officer found that Ibrahim was giving rational answers and therefore, upon his satisfaction, oath was administered to PW-6 Ibrahim. We do not find any procedural irregularity in

recording testimony of PW-6 Ibrahim. As aforesaid, entire testimony of Ibrahim has been recorded in question and answer form. It is in fact the discretion of the Court and therefore, when accused is unable to point out any injustice because of recording of the evidence in question and answer form, we do not have any doubt as regards the procedure. Witness Ibrahim has specifically stated in his examination-in-chief that on the day of incident, at night time his father was abusing and beating his mother as she delivered only female child. His father then pushed his mother on the ground and pressed her throat and then his mother died. The father then took him to Police Station. In the Police Station, his father told that he has killed his wife. Interesting point to be noted is that in the cross-examination conducted on behalf of all the accused, those clarifications have also been invited which were left by the prosecution. Rather the answers to some of the questions confirm the prosecution theory. No doubt, it was tried to be brought on record that he is a tutored witness, but the fact remains that Ibrahim was absent from the house even as per the testimony of DW-1 Shaikh Mukram when he had gone to the house of the accused. It is further extracted from PW-6 Ibrahim, as to where he was sitting

when he went to the Police Station along with his father and he has stated that he was sitting in Wireless room whereas the father was in another room. The suggestions given to PW-6 Ibrahim in his cross-examination and the answers to the same will have to be considered and those answers which are supporting the prosecution story cannot be now denied by the appellant. PW-6 Ibrahim has stated that his father is addicted to liquor. Father used to raise quarrels with mother daily by consuming liquor. He has also stated that on the day of incident, he had taken dinner at about 9.00 p.m. He was watching India – Pakistan cricket match, which had started at about 9.00 p.m. He has further clarified that team of Pakistan was balling and team of India was batting. His father was not watching cricket match. Ibrahim had not slept till the match was over. It was extracted from him as to what he had told to the Police. He has told that his father has killed his mother by throttling. No doubt, minor says that Police has obtained his signature, but we do not want to give importance to this aspect. From the entire testimony of PW-6 Ibrahim, we can see that he was the smart boy and boldly answered the questions which were put to him. There is no

reason to discard his testimony. When there is direct evidence available, motive does not play significant role.

12. PW-1 Shoukat is the brother of deceased and he has told about the fact that in what circumstances accused had dropped Taslim to her parents house when she was pregnant on the fourth occasion. He had seen that the accused was not liking the daughters and accused wanted Taslim to deliver a son. It will not be out of place to mention here that PW-6 Ibrahim is the eldest amongst the siblings and the accused had a son, still the accused wanted another son, it appears. The fourth child to accused and Taslim is also daughter and as the accused used to quarrel with Taslim under the influence of liquor, it appears that he has committed her murder.

13. The testimony of PW-2 Mubin Khan, the spot panch as well as PW-6 Ibrahim and DW-1 Mukram would show that accused, Taslim and their children were residing in the separate room. The incident has taken place at night time. Under the said circumstance, the burden would be on the accused, the husband to prove that how his wife received throttling injuries or found dead by throttling. We do not find that the testimony of both the

defence witnesses is sufficient to prove the plea of alibi, because the person who was with the accused i.e. PW-6 Ibrahim, has been examined by the prosecution and he says that he was taken by accused to the Police Station after the incident. The evidence of defence witness rather shows that accused had given a phone call to Nabi when accused was in Police Station. How and in what circumstances accused went to Police Station, has not been explained by him in his statement under Section 313 of the Code of Criminal Procedure. Therefore, we hold that prosecution had proved that the accused – appellant is the author of the crime.

14. If we consider the statement of the accused under Section 313 of the Code of Criminal Procedure, it can be found that he has given answer in the affirmative to the question that he has scuffled with the deceased and killed her by throttling. Accused has also given answer in the affirmative when asked that after death of Taslim he went to the Police Station along with Ibrahim. He also answered it in affirmative when asked that he told to the Police that he has killed his wife. There is no question of denying the ratio laid down in ***Mohan Singh vs. Prem Singh and***

another (supra), but here there is evidence led by the prosecution and those answers which are referred above, given to the questions in statement under Section 313 of the Code of Criminal Procedure will have to be taken in aid to lend credence to the evidence led by the prosecution. Therefore, taking into consideration the evidence that is adduced, we do not find any illegality or perversity in convicting accused No.1 i.e. present appellant for the offence punishable under Section 302 of the Indian Penal Code. The said offence was proved by the prosecution beyond reasonable doubt. There is no merit in the present Appeal and it deserves to be dismissed.

15. Accordingly, the Appeal stands dismissed.

[Y.G. KHOBRAGADE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE