

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.592 OF 2014

Pandharinath Genubhau Sawant,
Age 39 years, Occ.Auto Rickshaw Driver,
R/o.Sagar Kutir Seva Sangh, 429,
Sat Bungalow, Andheri (West),
Mumbai-400 061.
(Lodged at Kolhapur District Central Prison).

Appellant

versus

The State of Maharashtra

Respondent

Mr.Prasanna Shahane i/by Mr.Milind Deshmukh, Advocate for
Appellant.

Mrs.Geeta P. Mulekar, APP for State.

**CORAM : A.S.GADKARI AND
PRAKASH D.NAIK, JJ.**

Date of Reserving the Judgment : 5th April 2023

Date of Pronouncing the Judgment : 16th June 2023

JUDGMENT – (Per : Prakash D. Naik, J.) :-

1. The Appellant has preferred this Appeal u/s.374 of Code of Criminal Procedure (`Cr.P.C.`) challenging Judgment and Order dated 16th January 2012 passed by Extra Joint Ad-hoc Additional Sessions Judge, Sewree, Mumbai in Sessions Case No.627 of 2010, thereby convicting the Appellant for offence punishable u/s.302 of Indian Penal Code (`IPC`) and sentencing to suffer imprisonment for life and to pay fine of Rs.10,000/-.

2. The facts of the prosecution case in nutshell are as under :-

(i) On 19th June 2009 at about 10.30 a.m, while P.S.I Shinde was on duty as S.H.O at Versova Police Station, accused came to the Police Station and reported that, his wife has committed suicide by hanging herself to the ceiling fan. P.S.I Shinde along with Police Constable went to the house of accused and saw that, the victim was lying on the back. He secured local doctor who examined the victim and declared her dead;

(ii) Inquest/spot panchanama was prepared. Dead body was referred to Cooper Hospital for the purpose of post mortem;

(iii) Kondiba Kalbhor, brother of victim, lodged complaint on 19th June 2009 alleging murder of Baydabai (victim) by accused by strangulation with the help of saree due to quarrel between them;

(iv) Post mortem was conducted. The report indicated that, death of Baydabai was due to compression of neck. C.R No.193 of 2009 was registered u/s.302, 498-A and 201 of IPC;

(v) Clothes of victim were seized under panchanama. Accused was arrested on 20th June 2009. Accused made disclosure statement for production of Towel and Ornaments of his wife/victim and lead police and panchas to his house and produced the said articles, which were seized under panchanama;

(vi) Statement of Kailash Sawant, brother of accused, was

recorded u/s.164 of Cr.PC before learned Metropolitan Magistrate, Andheri, Mumbai. On 20th June 2009 accused was referred to hospital for nail clipping and collecting blood sample. It was sent to chemical analyzer for analysis;

(vii) Accused made extra-judicial confession to his brother Kailash Sawant of committing murder of his wife Baydabai. C.D.R of mobile phone of accused and his brother Kailash was collected from Nodal Officer. It was transpired in the investigation that, accused had committed murder of his wife by pressing her neck due to constant quarrels between them and illicit relations of the accused with another woman. On completing investigation charge sheet was filed. Case was committed to the Court of Sessions.

3. Charge was framed against accused for an offence u/s.302 of IPC vide Order dated 21st March 2011. Prosecution examined eight witnesses. PW-1 PSI Sanjay Ransingh Shinde recorded statement of accused and brother of deceased. PW-2 Kondiba Chindhu Kalbhor is the brother of deceased. PW-3 Savitri Mohan Raj is the employer of deceased with whom deceased was working as maid. PW-4 Phulabai Shivaji Shirsat is the maternal sister of deceased. PW-5 Dr.Virendra Vinayak Shewale is the Medical Officer who conducted post mortem of the deceased. PW-6 Kailashh Genubhau Sawant is brother of accused. PW-7 Sanjay Hiranman Kalwade is the panch witness. PW-8

Ramesh Mona Gavit is Investigating Officer.

4. Learned Advocate for Appellant submitted as under :-

(a) The appellant has been falsely implicated in this case. Prosecution has failed to establish the case beyond doubt;

(b) The case is based on circumstantial evidence. It was the duty of prosecution to prove all the circumstances;

(c) The circumstances from which the conclusion of guilt is drawn, should be full proof and such circumstances must be conclusive in nature. All the circumstances should be complete and there should be no gap left in the chain of evidence;

(d) The prosecution has failed to prove that, death was homicidal. The benefit of doubt ought to have been given to the accused on account of failure of prosecution to clear the doubt whether the death was homicidal or suicidal;

(e) The evidence of witnesses does not inspire confidence. The alleged ill-treatment spelt out by the witnesses is after thought as there was no complaint in the past by victim;

(f) Prosecution has failed to bring on record the motive for which Appellant has committed alleged crime. There is no evidence on record to establish that, Appellant was having illicit relationship with any woman;

(g) PW-6 has not supported the prosecution case in respect

to the alleged extra-judicial confession made by Appellant. The Trial Court has, however, drawn adverse inference on the basis of alleged C.D.R showing exchange of call between Appellant and PW-6;

(h) Unless prosecution discharges its initial burden to prove the charge against accused, no adverse inference could be drawn against accused by invoking Section 106 of India Evidence Act;

(i) Evidence of witnesses is in the nature of hear say and cannot be accepted. In the absence of cogent evidence to prove that, Appellant has killed the deceased, he ought not to have been sentence for the offence of murder.

5. Learned Advocate for Appellant has relied upon following decisions :-

(i) Shivaji Chintappa Patil Vs. State of Maharashtra¹;

(ii) Parubai Vs. State of Maharashtra².

6. Learned APP submitted that, although the prosecution case is based on circumstantial evidence, there are strong circumstances to establish that, Appellant has committed murder of his wife. The conduct of Appellant is suspicious. The victim and Appellant were together on the day of incident. The victim died in the residential premises of Appellant. Appellant approached police and submitted report that, victim had committed suicide by hanging to ceiling fan.

1 AIR-2021-SC-1249

2 2021-DGLaw (SC)-85

When the police arrived at the residence, the victim was found lying on the back. There is no witness who has seen the victim in hanging position. During the trial Appellant has changed his defense and contended that, victim has died on account of strangulation due to her saree. Appellant has not given plausible explanation in accordance with Section 106 of Evidence Act. Appellant did not inform the incident of alleged death of his wife to his neighbours. He provided misleading information to police. Evidence of witnesses shows that, Appellant was ill-treating his wife. She was assaulted in the past. Although brother of the accused had turned hostile qua his version about extra judicial confession made by the accused to him, prosecution has brought on record that, on the date of incident, the Appellant/accused had made a call to his brother.

7. Undisputedly the case is based on circumstantial evidence. The law relating to circumstantial evidence is well settled. The circumstances from which the conclusion is drawn should be fully proved. The proved circumstances must be consistent with the hypothesis of the guilt of accused and inconsistent with his innocence. When a case rests on a circumstantial evidence, it must satisfy following tests :

(a) The circumstances from which inference of guilt is sought to be drawn must be cogently and firmly established;

(b) Those circumstances should be on definite tendency unerringly pointing towards guilt of the accused;

(c) The circumstances taken cumulatively should form a chain so complete that, there is no escape from the conclusion that, within all human probability the crime was committed by the accused and none else;

(d) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

8. In the case of Shivaji Chintappa Patil Vs. State of Maharashtra (supra) relied upon by learned Advocate for Appellant, it was observed that, Section 106 of Evidence Act does not directly operate against either husband or wife staying under the same roof and being the last person seen with the deceased. Section 106 of Evidence Act does not absolve the prosecution to discharge its primary burden of bringing the prosecution case beyond reasonable doubt. It is only when the prosecution had led evidence which if believed will sustain conviction or which makes out a prima facie case that, question arises of considering the facts of which burden of proof lie with accused. The factual matrix of this decision would indicate that, the

deceased was married to the accused about nine years ago. One of the witness gave a call to the accused on the day of incident and he expressed his inability to accompany him to the field by informing him that, victim had committed suicide by hanging. Initially accidental death was registered and subsequently offence u/s.302 was registered. The medical officer has deposed that, probable cause of death was asphyxia due to strangulation. However, in the post mortem report, the cause of death was cardio respiratory arrest due to asphyxia due to hanging. The medical officer has further deposed that, in case of suicidal or homicidal hanging, the ligature mark shall go upwards ears. In the light of his evidence the Court observed that, medical expert had admitted that, in both the cases of homicidal or suicidal hanging, the ligature marks shall go upward ears. The medical expert has not ruled out possibility of suicidal death and cause of death was asphyxia due to hanging. In such circumstances the Hon'ble Supreme Court has ruled that, trial Court and High Court have erred in holding that, prosecution has proved that, death of the deceased was homicidal. Prosecution has failed to prove beyond doubt that, death of victim was homicidal. Thus, the said decision was delivered on the basis of facts and evidence on record.

9. In the case of Parubai Vs. State of Maharashtra (supra),

relied upon by advocate for appellant (accused no.1) the accused before the Apex Court, her husband and mother in law were tried for offence u/s.302 and 436 of IPC. The appellant was convicted and other accused were acquitted. Husband of appellant was initially married to deceased Mandabai and then had an affair with appellant/accused. They performed marriage. Incident of fire occurred. Mandabai and her children suffered burn injuries. Mandabai and her two children succumbed to burn injuries. The trial Court held that appellant had strong motive for committing act. She had not explained how she came out of room without any burn injuries. The High Court discarded the extrajudicial confession made by appellant to father in law. High Court, however, convicted appellant on the ground that she had not sustained any injury due to fire. She did not try to alarm the deceased and her children. The Supreme Court held that there was no sufficient evidence to connect appellant with crime. Suspicion, however, strong, cannot take the place of proof. Even this decision is based on facts of the case.

10. Keeping in mind the settled principles of law the evidence on record needs to be appreciated.

PW-1 Sanjay Ransingh Shinde was attached to Versova Police Station as P.S.I. He stated that, on 19th June 2009 he was on duty as S.H.O. The accused visited police station and reported that, on 18th

June 2009 in the night quarrel took place between himself and his wife. After dinner they went to sleep. At about 2.30 a.m the accused woke up and saw his wife hanging to the fan. He took her down and sprinkled water on her face and after feeding water to her she was made to sleep. In the morning at about 7.00 a.m he took his children to school and returned back to house and made an attempt to wake up his wife but she could not wake up. Report was recorded (Exh.14). PW-1 went to the place of incident and saw that, victim was lying on the back. The local doctor was called and on examination he declared that, victim was dead. Inquest panchanama was prepared (Exh.15). The dead body was referred to Cooper Hospital for post mortem. On 19th June 2009 statement of Kondiba Kalbhor (brother of victim) was recorded (Exh.16). Statements of witnesses were recorded. Cause of death certificate was received which indicated that, death was due to compression of neck. He lodged the complaint on 19th June 2009 (Exh.17). C.R No.193 of 2009 was registered u/s.302, 498-A and 201 of IPC. Investigation was handed over to P.I.Mr.Gavit on 20th June 2009. Accused was arrested on 20th June 2009. Towel was recovered at the instance of accused. Some ornaments of the deceased were also recovered from him. In the cross-examination he stated that, he did not call any document to ascertain ownership of the room where the incident

occurred. Statement of Kondiba Kalbhor was recorded on 19th June 2009 at the spot. After receipt of post mortem report, complaint was lodged by him. During investigation it was transpired that, accused committed strangulation by towel.

11. PW-2 Kondiba Chindhu Kalbhor has deposed that, deceased Baydabai was his sister. Her marriage was performed with accused 15 years ago. Out of the wedlock they have two children. On 19th June 2009 at about 7.30 a.m he was informed by Dattu Sawant that health of Baydabai is critical. He went to the house of accused. He met Dattu Sawant near the house of accused. Sister was lying on the back. Accused was present. On the previous day he had been to house of accused and saw that the door of the house was closed and accused was assaulting his sister. He inquired with his sister the reason for assault. She informed that accused was regularly assaulting her. He inquired with accused the cause of assault. He stated that he would kill his wife. He went to police station. His statement was recorded. His sister used to inform him that her husband has kept mistress. In the cross-examination he stated that after he was informed on mobile by Dattu Sawant, he went to the house of accused and saw 20 to 25 persons gathered there. His statement was recorded by police at the house of accused on 19th June 2009. He cannot read and write Marathi. Contents in FIR

(Exh.16) were not read over to him by police. He had stated in the FIR about assault made by accused against his sister before 2 to 4 days of incident. It is not specifically stated that incident of assault took place before 2 to 4 days of day of incident.

12. PW-3 Savitri Mohan Raj stated that, victim was working with her as house maid from 2005 to 2009. She was of good nature. She had informed her that, she is subjected to physical harassment as her husband is having illicit relation with another woman and he was not giving any amount to her. She had observed that, Baydabai was mercilessly beaten by her husband with wooden log on her back and she had sustained injury. After the incident of assault Baydabai had visited her house and she had noticed mark of injury on her back. Baydabai had informed her that, accused had assaulted with leg blow on her abdomen. She suggested Baydabai to report about her harassment to the Police. Baydabai told her that in case she lodges complaint against her husband, he would kill her. Husband of Baydabai had talk with her and told her that his wife is unnecessarily suspecting his character. She told accused not to bear Baydabai. The accused assured that he would not assault her. The victim has two sons. Her younger son is suffering from T.B. Baydabai was spending money for treatment. On 19th June 2009 Baydabai did not attend her work. She contacted on mobile of her husband. He

disconnected call. She again contacted him. He told her that Baydabai is sick and not in a position to attend work. Thereafter she came to know about the incident. She went to house of accused. Accused was sitting in the corner of house. She came to know that, accused had killed Baydabai by pressing her neck with the help of cloth and pressing on her mouth by towel. In cross examination she stated that she did state in her statement given to the police that, victim had told her that, she was beaten by with wooden log on her back and she had suffered injury and that was observed by her. She did not state in her statement that, she came to know that victim was killed by her husband by pressing her neck with the help of cloth/towel.

13. PW-4 Phulabai Shivaji Shirsat has deposed that, victim was her maternal sister and she was residing in the neighbouring house. On 19th June 2009 she was called at the house of victim. She saw injury marks on the neck of victim. Panchanama was prepared. Doctor examined Baydabai and declared her dead. In the cross-examination she stated that, she was called by police to act as panch. The contents of panchanama were not read over to her by police. At the time of panchanama some contents were read over to her by police. She denied that, she had simply put her thumb impression on the blank paper and did not know the contents of panchanama.

14. PW-5 Dr.Virendra Vinayak Chewale is the medical officer. According to him, on 19th June 2009 he was attached to Cooper Hospital, Mumbai. He conducted post mortem on the body of victim. On external examination he found following injuries :

“Ligature mark seen around the neck measuring 24 cm in length thickness 9 cm pate on right side 2cm in the middle.

Located at 7 cm from chin 5 cm from left ear to right ear dark on left side, pale on right side. Total neck circumference 31 cm.”

On internal examination of the body he found following injuries :

“Hyoid bone fractured, larvneral mucosa congested. Patechial haemmorages seen. Normal size shape.”

He stated that, the cause of death was due to compression of neck unnatural. He issued post mortem report under his signature. Due to compression of neck with the help of saree or by any cloth on wrapping around the neck and tiding such injury hyoid bone fractured is possible and because of that, death occurs. The said internal injury referred in column 20 of the post mortem is anti-mortem in nature. In the cross-examination it was stated that, it is not true that, fracture of hyoid bone in case of self tiding by odhni in process of sleeping is possible. But it is true that, death without such fracture of hyoid bone is possible in case of self tiding by odhni in process of sleeping. Hyoid bone fracture referred to in column 20 of

post mortem report occurred at the time of death and that, is the cause of death.

15. PW-6 Kailash Genubhau Sawant has stated that, accused is his brother. On 19th June 2009 he received a message that, victim was lying unconscious. He went to the house of accused. He was not present. Victim was lying unconscious. Doctor was called. The victim was shifted to Cooper Hospital. Victim was declared dead. Accused was in police lock-up. He did not meet accused on the date of incident or on the next day. Prior to the day of incident till accused was released on bail, there was no occasion to meet him. Accused never told him the cause of death of victim. He was not knowing about relations of accused with his wife. It did not happen that, on 19th June 2009 in the morning message was received from the accused and he was called by the accused and informed that, on the previous night quarrel took place between accused and his wife and in that, process he committed murder of his wife by strangulation. It did not happen that, there were constant quarrels between accused and his wife and that, he on several occasions told them not to quarrel and to behave properly. His statement was recorded by police on 20th June 2009. He denied that, his statement was recorded by Magistrate as per his say but his signature was obtained on the recorded statement without reading the contents to

him. The statement recorded by Magistrate bears his signature but did not admit the contents thereof. The witness was declared hostile and permission was granted to the APP for cross-examination. In the cross-examination he stated that, victim was working as house maid. Brother of Baydabai used to inform him about quarrels between accused and his wife. He never tried to convince the accused. Since last 10 years relations between him and accused are strained due to land dispute. He could not assign any reason as to why in his statement dated 20th June 2009 which were marked as A, B, C were recorded by police. He never signed any paper without reading the contents. He never made grievance to any one that, his signature was obtained on the statement recorded by Magistrate without reading over the contents to him.

16. PW-7 Sanjay Hiranman Kalwade stated that, he was called by police to act as pancha. Accused made a disclosure statement that, he would produce towel and ornaments. The accused produced the towel and ornaments. In the cross-examination he stated that, accused is from his village and he knows him. On 23rd June 2009 he was called by police to act as panch.

17. PW-8 Ramesh Mona Gavit has deposed that, he was attached to Versova Police Station as Police Inspector. Investigation of this case was handed over to him on 20th June 2009. He recorded

statement of witnesses. Statement of Kailash Sawant was recorded u/s.164 of Cr.PC before the Magistrate. During investigation C.D.R was collected from Nodal Officer of Vodafone. Investigation was conducted by him. Charge sheet was filed. In the cross-examination it was stated that, in the process of ADR Inquiry statement of Kondiba Kalbhor was recorded. At that time crime was not registered on the basis of statement of Kondiba Kalbhor. In consultation with superiors PW-1 was directed to record FIR. Statement of PW-6 was recorded by P.S.I Mr.Shinde. He did not record statement of Nodal Officer.

18. Statement of accused was recorded u/s.313 of Cr.PC. He has denied all the circumstances put to him. His defense is that, case is false.

19. On scrutiny of the evidence as stated above we find that, there are strong circumstances to indicate the involvement of Appellant in the crime. Prosecution has established that, it was homicidal death of the victim Baydabai Pandharinath Sawant. PW-5 Dr.Shewale has referred to cause of death due to compression of neck which was unnatural and issued post mortem report. The medical evidence indicate that, there were ligature mark around neck of the victim measuring 24cm in length thickness 9cm on right side 2cm in the middle located at 7cm from chin 5cm from left ear to right ear dark

on left side on right side. Inquest panchanama also shows injury marks on the neck of the victim. The defense of the accused is that, it was not homicidal death but case of self strangulation by Odhani in the case of sleeping. It is pertinent to note that, report Exh.17 filed by accused states that, victim committed suicide by hanging with the help of saree to ceiling fan. Statement of accused u/s.313 of Cr.PC is silent that, it is the case of self tiding by Odhani by victim in the process of sleeping. The evidence of PW-2 and PW-3 refers to the ill-treatment by accused to the victim.

20. Undisputedly the case is based on circumstantial evidence. The prosecution is expected to prove its case by chain of circumstances. Admittedly accused and his wife were living together. Wife was subjected to ill-treatment. The victim was in the company of accused. It was expected that, accused would give plausible explanation of the cause of death of his wife. The prosecution has proved its initial burden and therefore in view of S.106 of Evidence Act, the accused was expected to give plausible explanation about death of his wife. Apparently the children of accused/victim were not examined by prosecution. It is not clear whether their statements were recorded.

21. On the date of incident the accused visited police station and gave report Exh.17 that, his wife has committed suicide. However, it

is not the defense of accused qua statement u/s.313 of Cr.PC or the cross-examination of the witnesses examined by the prosecution that, victim has committed suicide. False defense was claimed by accused that, it is a case of self tiding during sleep.

22. U/s.106 of Evidence Act when any fact is established within the knowledge of any person, the burden of proving that, fact is upon that, person. It is true that, prosecution has discharged initial burden of establishing prima facie the guilt of accused beyond doubt. In the present case there is strong evidence that, accused is instrumental in committing murder of his wife.

23. PW-5 has deposed that, he has conducted post mortem on the body of victim and found external as well as internal ligature marks around neck. He further deposed that, cause of death is due to compression of neck unnatural. His evidence further indicate that, due to compression of neck with the help of saree or by any cloth wrapped around neck, hyoid bone fracture is possible. However, it is to be noted that, there is no evidence remotely to indicate that, it was a case of self tiding by odhni in the case of sleeping. PW-5 has stated that, it is not true that, hyoid bone fracture in case of self tiding by odhni in the process of sleeping is possible. Inquest panchanama, evidence of PW-4 indicate that, there were injuries around the neck of victim.

24. In the case of circumstantial evidence motive plays material role. The victim was subjected to ill-treatment by accused. This is spelt out in the evidence of witnesses viz PW-2 and PW-3. The victim was being assaulted by accused in the past. There used to be quarrels between them on account of the fact that, accused was having illicit relations with another woman.

25. Towel was recovered at the instance of accused. PW-1 and PW-7 have stated that, accused made a disclosure statement of production of towel and ornaments vide memorandum Exh.19 and led them to the place from where towel was recovered and seized. The C.A report Exh.45 mentions that, blood sample of accused is of blood group 'O'. It is true that, there is no evidence to nail clipping detected in the blood. PW-6 Kailash Sawant has not supported the prosecution in respect of extra judicial confession made by the accused. The prosecution, however, relied upon C.D.R which indicate that, there was call between accused and PW-6 on the date of incident. There are certain minor omissions and contradictions, however, it does not shake the truthfulness of the evidence of prosecution. The prosecution has established strong circumstances to indicate that, accused was instrumental in committing murder of his wife. His conduct is also suspicious. The incident had apparently occurred between night of 18th June 2009 and 19th June 2009. It is

not disputed that, accused was in the house at the time when wife was found dead. He reported to the police that, in the night his wife had hanged herself, he took her down, gave water to her and made her sleep. He did not take help of neighbours. This version itself is doubtful. On the next day morning, as per report, he went to the school to drop the children and then found that, his wife is dead. His defense in the trial is that, wife died due to self strangulation of odhni. Thus, conduct of the Appellant/accused is suspicious. The circumstances on record are sufficient to hold him guilty of the offence. The decisions relied upon by learned counsel for Appellant are referred as the principles of law, but same were delivered in the facts of said case. No case is made out to set aside the Judgment of conviction. The appeal must fail.

ORDER

- (i) Criminal Appeal No.592 of 2014 is dismissed;
- (ii) Impugned Judgment and Order dated 16th January 2012 passed in Sessions Case No.627 of 2010 by Extra Joint Ad-hoc Additional Sessions Judge, Sewree, Mumbai, is confirmed.

(PRAKASH D. NAIK, J.)

(A.S.GADKARI, J.)