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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

CRIMINAL APPEAL NO.94 OF 2021

Kishor alias Bajrang s/o Mukundrao
Ramteke, aged about 58 years, occupation
- Rickshaw Puller, resident of Savitribai
Fule Nagar, Nelson Mandela Road, Galli No.7,
Nagpur. **Appellant.**

:: V E R S U S ::

State of Maharashtra, through Police
Station Officer, Police Station Ajni, Nagpur. **Respondent.**

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Shri D.V.Chauhan, Counsel Appointed for the Appellant.
Shri M.J.Khan, Addl.Public Prosecutor for the Respondent/State.

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CORAM : ROHIT B.DEO & URMILA JOSHI-PHALKE, JJ.
CLOSED ON : 08/12/2022
PRONOUNCED ON : 24/02/2023

JUDGMENT (Per : Urmila Joshi-Phalke, J.)

1. By this appeal, the appellant (accused) challenges judgment and order dated 29.12.2018 passed by learned Sessions Judge, Nagpur in Sessions Trial No.464/2017 whereby the accused is convicted for offence punishable under Section 302 of the Indian Penal Code and sentenced him to suffer life imprisonment.

2. Such of facts necessary for the decision of this appeal are as follows:

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Report was lodged with Ajni Police Station, district Nagpur by Sheela Ganesh Jaronde, the daughter of the deceased, on 23.5.2017 on allegations that the deceased is her mother and the accused is her real brother. At the time of incident, the deceased was residing along with the accused. As the accused was addicted to vices, his wife and his children are residing separately and, therefore, only the accused and deceased were residing together. On 22.5.2017, at about 8:00 am, when she was attending her duty, she received a phone call of her sister who disclosed that her mother is no more and, therefore, she went at the house of her mother and found that police were taking her mother to hospital and, therefore, she went in the hospital and saw that her mother had sustained injuries. The neighbours, who gathered in the hospital, disclosed that in night on 21.5.2017 Kishor, the accused, abused her mother and assaulted her. One of neighbours Maya Borkar informed the police and the police arrived at house and gave understanding to the accused. Thereafter, also, the accused assaulted her mother and caused her death. On the basis of the said report, the police have registered the offence vide Crime No.333/2017 under Section 302 of the Indian Penal Code. Prior to registration of the crime, the police have already registered

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the murge report on the basis of the report by neighbour Maya Borkar.

3. After registration of the crime, wheels of the investigation started rotating. During investigation, Investigating Officer has visited alleged spot of incident and drawn spot panchanama in presence of panchas. During spot panchanama, Investigating Officer has collected broken pieces of bangles, slipper (chappal) and alleged weapon of the offence i.e. a stick. The Investigating Officer has also drawn inquest panchanama and seized the clothes of the deceased. The accused was arrested and his clothes were also seized in presence of panchas. During investigation, Investigating Officer has collected postmortem notes and forwarded all the incriminating articles to Chemical Analyzer. After completion of investigation, he had submitted the chargesheet against the accused.

4. As the offence punishable under Section 302 of the Indian Penal Code was triable by Sessions Judge, learned Magistrate committed the case to Sessions Judge. Learned Sessions Judge framed the charge vide Exhibit-4. The accused pleaded not guilty and claimed to be tried.

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5. To substantiate the charge against the accused, the prosecution examined in all nine witnesses, which are as follows:

P.W.1-Sheela Ganesh Jaronde - informant	Exhibit-9
P.W.2-Mangesh Dnyaneshwar Admane, who acted as a pancha on spot panchanama, inquest panchanama, and clothes seizure panchanama of the deceased and the accused.	Exhibit-15
P.W.3-Maya Bhagchand Borkar, neighbour who witnessed the accused assaulting the deceased.	Exhibit-21
P.W.4-Parmanand Baliram Tiwari, ASI, who received the information regarding assault on the deceased.	Exhibit-24
P.W.5-Dr.Nitin Shamrao Barmate, Medical Officer.	Exhibit-26
P.W.6-Rajendra Laxmanrao Ghuge, who received the information regarding the assault on the deceased.	Exhibit-34
P.W.7-Sanjay Somaji Sahare, photographer.	Exhibit-50
P.W.8-Rahul Girdharrao Kalamkar, neighbour.	Exhibit-74
P.W.9-Yogesh Vinayakrao Ingle, Investigating Officer.	Exhibit-75

6. Besides the oral evidence, the prosecution also placed reliance on following documents:

1. report Exhibit-10;
2. F.I.R. Exhibit-11;
3. Spot panchanama Exhibit-16;
4. inquest panchanama Exhibit-18;

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5. clothes seizure panchanama regarding clothes of the accused Exhibit-19;
6. murge report Exhibit-22;
7. postmortem report Exhibit-29;
8. examination report of weapon by Medical Officer Exhibit-31;
9. advance cause of death certificate Exhibit-33;
10. arrest panchanama Exhibit-44;
11. blood samples, seizure panchanama of the accused Exhibit-47;
12. clothes seizure panchanama regarding the deceased Exhibit-48;
13. murge report Exhibit-76;
14. requisition letter to Chemical Analyzer Exhibit-77;
15. Chemical Analyzer's Reports Exhibits-80(4), 81(1), 81(2) 81(3);
16. DNA Report Exhibit-84;
17. letter addressed to the Assistant Commissioner of Police for obtaining extract of report given by dialing number 100 and extract of log book.

7. Learned Judge below recorded evidence and on the basis of the evidence, after hearing the prosecution as well as the defence, convicted and sentenced the accused as indicated above.

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8. We have heard learned counsel Shri D.V.Chauhan appointed for the accused and learned Additional Public Prosecutor Shri M.J.Khan for the State.

9. Learned counsel Shri D.V.Chauhan for the accused vehemently submitted that learned Judge below recorded erroneous reasoning to support the order of the conviction which is unsustainable. In fact, there was direct evidence available against the accused that state of intoxication of the accused rendered him incapable of forming the specific intent which is essential to constitute the offence under Section 302 of the Indian Penal Code. The accused did not have capacity to form the intent necessary to constitute the crime. The intention and motive of the accused is not proved by the prosecution. The evidence adduced by the prosecution is not sufficient to warrant the conviction as evidence of PW4 Parmanand Tiwari and PW6 Rajendra Ghuge, who visited the alleged spot of incident, after receiving the information about the assault by the accused, shows that the deceased declined to lodge any report. Moreover, though the police received the information, they had not taken any action. The entire circumstances on record are sufficient to show that the accused is entitled for benefit of doubt.

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10. *Per contra*, learned Additional Public Prosecutor Shri M.J.Khan for the State submitted that the prosecution has adduced direct as well as circumstantial evidence which unerringly points out the guilt of the accused. The evidence of PW3 Maya Borkar shows that she is neighbour of the accused and the deceased. Her evidence shows that at the time of the incident only the accused and the deceased were residing together. At the relevant time of the incident, she heard abuses by the accused and, therefore, she came outside the house and peeped into the house of the accused through window and saw that the accused was assaulting the deceased who was lying on the bed by means of stick. She immediately informed by dialing number 100. The said information is received by PW6 Rajendra Ghuge. He took the necessary entry in the station diary and reached at the spot. He had produced the said entry. After reaching, he inspected the spot. Prior to that, PW4 Parmanand Tiwari, who was attending the calls from control room, received the information that the deceased is assaulted in the house. He met Maya Borkar and enquired with her and, thereafter, he communicated with the accused. He also communicated with the deceased and the deceased refused to lodge report. In the morning, the deceased found dead in the house. Learned

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Additional Public Prosecutor Shri M.J.Khan submitted that admitted fact is that only the accused was residing with the deceased at the time of the incident. On earlier night, Maya Borkar witnessed the accused assaulting the deceased and the deceased was found dead in the morning. The accused who was present in the house during the night has not explained circumstances how the deceased died when the cause of death is that the death of the deceased is due to head injury with blunt trauma on chest. Thus, in view of Section 106 of the Indian Evidence Act, it is the accused who has to explain circumstances which are especially within his knowledge. Thus, the accused failed to explain circumstances and hence the accused is guilty of the crime.

11. In the present case, the crime is committed inside the house wherein only the deceased and the accused were present. It is settled position of law that in cases of circumstantial evidence, circumstances from which conclusion of guilt is to be drawn, should be in first instance fully established, and all facts so established should be consistent only with hypothesis of guilt of the accused. The circumstances should be of conclusive in nature that they should exclude every hypothesis than that of the guilt of the accused and such evidence should

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not only be consistent with the guilt of the accused, but should be inconsistent with his innocence. Keeping in mind these principles, the evidence on record is to be assessed.

12. The prosecution has relied upon the following circumstances to bring home the guilt of the accused:

A. homicidal death of deceased Kamalbai Mukundrao Ramteke;

B. previous assault on the deceased by the accused witnessed by PW3 Maya Borkar;

C. evidence of PW8 Rahul Kalamkar witnessing the deceased in the courtyard of the house who disclosed that the accused is not allowing her to enter inside the house;

D. the dead body of the deceased was found inside the house having several injuries on her person;

E. medical evidence shows that death of the deceased is due to the head injury with blunt trauma on chest;

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F. evidence of PW4 Parmanand Tiwari showing that PW3 Maya Borkar made a phone call by dialing number 100 and he received a message from control room and he visited the alleged spot of incident and gave understanding to the accused;

G. PW9 Yogesh Ingle collected the documents showing that PW3 Maya Borkar had made a call to Ajni Police Station and informed about the assault on deceased, the entry was taken and extract of the said entry is part of the chargesheet. On the basis of the telephonic information, murge was recorded, and

H. evidence regarding Chemical Analyzer's Reports and DNA Report.

13. In order to establish homicidal death to show that manner in which the death of the deceased was caused, reliance is placed on the evidence of PW5 Dr.Nitin Shamrao Barmate who is Medical Officer. He conducted postmortem examination of Kamalbai Ramteke along with Dr.Sarah Al Hinnawi. He testified that he received requisition to conduct the postmortem. He also received inquest panchanama. On postmortem examination, he

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found clothes of the deceased were having blood stains. He removed the said clothes. On external examination, he found following injuries on her person:

"(i) Laceration of size 0.5 cm x 0.5 cm x muscle deep present over right side of forehead, 2 cm above lateral aspect of right eyebrow, transversely oblique;

(ii) Contusion of size 3 cm x 2 cm present over left side of forehead, 1 cm lateral and above lateral aspect of left eyebrow, vertically oblique, reddish;

(iii) Abrasion of size 4 cm x 2 cm present over left cheek, transversely oblique, reddish;

(iv) Contusion of size 12 cm x 8 cm present over left shoulder and left lateral aspect of arm, vertically oblique, reddish;

(v) Tram line contusion of size 5 cm x 0.5 cm present over left scapular region, vertically oblique, reddish with gap of 1 cm, 1 cm below injury No.4;

(vi) Tram line contusion of size 9 cm x 0.5 cm present over left scapular region, vertically oblique, reddish with gap of 1 cm, 2 cm medial to injury No.5;

(vii) Tram line contusion of size 5 cm x 0.5 cm present over left scapular region,

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vertically oblique, reddish with gap of 1 cm, 3 cm below injury No.5;

(viii) Tram line contusion of size 7 cm x 0.5 cm present over superior aspect of left shoulder vertically oblique, reddish with gap of 1 cm;

(ix) Abrasion of size 4 cm x 2 cm present over lateral aspect of right forearm, upper half, transversely oblique, reddish;

(x) Contusion of size 6 cm x 4 cm present over lateral aspect of left forearm, upper half, vertical, reddish;

(xi) Contusion of size 12 cm x 6 cm present over postero lateral aspect of left forearm, lower half, vertical, reddish;

(xii) Abrasion of size 2 cm x 1 cm present over left elbow, transversely oblique, reddish;

(xiii) Lacerated wound of size 4 cm x 0.5 cm x muscle deep present over dorsal aspect of left hand, 2 cm below base of fingers;

(xiv) Two lacerated wounds of size 2 cm x 0.5 cm x muscle deep and 1 cm x 0.5 cm x muscle deep present over dorsum of left hand, 1 cm below injury No.9;

(xv) Lacerated wound of size 3 cm x 0.5 cm x muscle deep present over dorsal aspect of left hand, margins clean cut, and

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(xvi) Multiple abrasion of size 3 cm x 2 cm to 1 cm x 1 cm present over right knee, transversely oblique, reddish."

He also carried out internal examination and found that under scalp contusion was present over frontotemporo occipital region of size 12 cm x 8 cm, reddish in colour with haematoma present. He further observed that subdural haematoma present over left temporal region about 80cc blood and blood clots present, reddish in colour subarchanoid haemorrhage present as a thin film of blood whole cerebral hemisphere, reddish in colour. Brain - congested and oedematous. He also seen on cut section, petechial haemorrhages present in the while matter.

On examination of chest wall, he observed fracture of right 6th and 7th ribs in mid axillary line and 8th in posterior aspect with haematoma in surrounding intercostal muscles. Fracture of left 6th and 7th ribs in mid axillary line with haematoma in surrounding intercostal muscles. Contusions present over lateral aspect of lower of lobe of left lung of size 4 x 2 cm.

The said Medical Officer further testified that all these injuries were antemortem. The stomach was containing

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300 cc of semi digested food. Injury Nos.1, 2, 5, 6, 7, and 8 mentioning column No.17 and internal injuries mentioning in column Nos.19 and 20 are sufficient to cause death individually and collectively in ordinary course of nature. The cause of death was head injury with blunt trauma chest. Accordingly, he prepared the postmortem note which is at Exhibit-29.

14. The evidence of the Medical Officer further reveals that on 26.5.2017 he received a letter from Ajni Police Station along with the weapon in a sealed condition signed by PSI Ingle with two queries regarding the nature of weapon and possibility of causing injuries. The said letter is at Exhibit-30. The weapon was bamboo stick. The length of the weapon was 116 cms, maximum diameter 2cms and minimum 1 cm, circumference 8cm, reddish blood stains present over bamboo sticks at places. The Medical Officer opined that injury Nos.1 to 16 under column No.17 and internal injuries mentioned under column Nos.19 and 20 can be possible by the above examined weapon bamboo stick. He answered the second query which was regarding the likelihood of the deceased sustaining injuries because of such assault by that weapon. He opined that the injuries sustained by the deceased are possible by assault with such weapon. He

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further opined that the injuries cannot be caused by accident or fall on the ground or against any hard surface. He also identified the weapon before the Court. The witness is cross-examined at length. During cross-examination, nothing incriminating is elicited to falsify his version that injuries are sufficient to cause death. It was suggested that as the deceased was aged about 80 years, she may lose her balance and sustain such types of injuries, but he denied the same. He further denied that such injuries are possible if a person hits against the wooden poles due to the loss of balance.

Thus, the defence of the accused that the deceased sustained injuries accidentally is denied by the Medical Officer.

15. Besides the medical evidence of PW5 Dr.Nitin Barmate, the prosecution further relied upon evidence of PW2 Mangesh Admane vide Exhibit-15 who acted as a pancha on the inquest panchanama. He testified that in his presence in the medical college panchanama was drawn on the dead body. They saw injuries on the hand and head of the dead body. There was contusion on the head and on the arm near the wrist. Accordingly, the panchanama was prepared. PW9 Investigating Officer Yogesh Ingle had also supported the evidence of PW2

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Mangesh Admane regarding injuries found on the person of the deceased. Though the accused has raised the defence that the deceased sustained the injuries due to the fall while going to toilet in the night, the accused has not adduced any evidence either through cross-examination or through independent evidence to show that the deceased sustained injuries due to fall. Admittedly, the dead body of the deceased was found lying in his house and not near the toilet.

16. The evidence of the Medical Officer in the present case is of much importance. It is not only an opinion evidence but a medical witness who has witnessed the injuries and performed postmortem examination is a witness of fact. This proposition of law has been stated by the Honourable Apex Court in the case of **Smt.Nagindra Bala Mitraand vs. Sunil Chandra Roy and another, reported at 1960 SCR (3) 1.** Thus, the evidence of the Medical Officer as well as the inquest panchanama proved by PW2 Mangesh Admane establishes that the deceased died homicidal death. The possibility of accidental death is ruled out by the medical evidence during the cross-examination. No other evidence is on record to show that there was possibility of causing death accidentally and, therefore, we have no hesitation

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to hold that the prosecution succeeded in proving that the death of the deceased is homicidal one.

17. Now, it has to be seen whether the prosecution is succeeded in proving that it is the accused who is perpetrator of the crime. To establish the guilt of the accused, the prosecution mainly placed reliance on the evidence of PW3 Maya Borkar examined vide Exhibit-21 and PW 8 Rahul Kalamkar examined vide Exhibit-74 who are neighbours. Before discussing their evidence, we would like to refer the evidence of PW1 Sheela Jaronde examined vide Exhibit-9 who is first informant and daughter of the deceased. Admittedly, she is not an eyewitness of the incident. Her evidence is only to the extent that at the relevant time of the incident the accused, who is her brother, and the deceased, who is her mother, were residing together and none other was residing along with them. So far as the conduct of the accused is concerned, she has not supported the prosecution case. As per her evidence, the accused was addicted to vices. She specifically stated that she is not aware about the exact incident. During her cross-examination, it is elicited that she is not aware about the contents of the First Information

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Report. Thus, her evidence is material only to the extent that the accused and the deceased were residing together.

18. As already stated above that the prosecution mainly placed reliance on the evidence of PW3 Maya Borkar who is neighbour of the deceased, her evidence shows that she was acquainted with the accused as well as the deceased as she was residing in their neighbourhood. She further testified that the accused was addicted to liquor and used to abuse the deceased under the influence of liquor. From her evidence, it came on record that on 21.5.2017 at about 10:30 pm when she returned home, she heard the voice of Kamalbai i.e. the deceased and also heard the abuses of the accused and, therefore, she peeped through the window and saw that the accused was abusing the deceased. The deceased was lying on cot and the accused was sitting on the chair beside her and was assaulting her with stick and hands. She immediately dialed 100 number from her mobile for the assistance of the police. The police came there and they tried to pacify the accused and left the place. Thereafter, she went at her home. In the morning, when she woke up, she heard the accused saying that dead body is lying in his house. Thereafter, she along with the other neighbours went inside the

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house and found the deceased lying in the house sustaining injuries on her hand and blood was oozing from injuries. Thereafter, she informed the daughters of the deceased. She further testified that the stick was lying beside the deceased.

19. To corroborate the version of PW3 Maya Borkar, the prosecution has adduced the evidence of PW4 Parmanand Tiwari examined vide Exhibit-24 who was attached to Ajni Police Station at the relevant time. He testified that he was on duty during the intervening night of 21.5.2017 to 22.5.2017 as C.R.Mobile Van Incharge. He received phone call from the control room that at Savitribai Fule Nagar, Lane No.7, quarrels were going on. He immediately visited the spot of the incident. He had received the information that one person is abusing and beating his mother. He met Maya Borkar, who made a phone call, and the accused. He also enquired with the deceased and the deceased refused to lodge any report. He gave understanding to the accused and left the place. Thus, the fact that PW3 Maya Borkar made the phone call by dialing number 100 is supported by PW4 Parmanand Tiwari. To substantiate the contention that PW3 Maya Borkar immediately made a phone call to the police, PW9 Investigating Officer Yogesh Ingle has collected the documents from the Ajni

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Police Station. Exhibit-80(2) is the extract of the registered which shows that at about 23:39 the police received the message that some quarrel is going on at Savitribai Fule Nagar. Thus, the evidence of PW3 Maya Borkar that she made a phone call is supported by the evidence of PW4 Parmanand Tiwari and by Exhibit-80(2).

20. PW3 Maya Borkar was cross-examined by the defence. During her cross-examination, it is brought on record that she heard the voice of abuses of the accused and voice of the deceased. Thereafter, she went in the courtyard. She saw the accused and TV in the house through the window. She further witnessed the deceased lying on the cot and the accused was assaulting his mother. Thus, in the cross-examination also the facts are positively came on record. Her further cross-examination shows that the police came at the spot after receipt of her call and made enquiry with her as well as with the accused. Thus, the cross-examination also shows that it was the accused who assaulted the deceased. The fact that she witnessed the incident through window and that window was available in the house has further come on record during the cross-examination of PW9 Investigating Officer Yogesh Ingle. PW9

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Investigating Officer Yogesh Ingle has stated during cross-examination that towards southern side of the house there is one door and one window. He further stated that in the spot panchanama where the cot is shown, there is one window to the wall near the cot. Thus, the fact that window was available to the house is positively brought on record by the defence during the cross-examination.

21. To corroborate the version of PW3 Maya Borkar, another witness examined by the prosecution is PW8 Rahul Kalamkar examined vide Exhibit-74 who also testified that on 21.5.2017 when he returned from work at about 6:30 to 6:45 pm, he saw the deceased sleeping outside the house of the courtyard. He made enquiry with her and the deceased disclosed him that Bajrang i.e. the accused does not allow her to come inside the house. Thereafter, he took her in the house and served her food and left for his home. On the next morning, rickshaw owner was giving call to the accused as the accused was running his rickshaw on rent. The accused disclosed to him that dead body is lying in his house. Thereafter, he went inside the house of the accused and saw that the deceased has sustained the injuries

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and is having blood stains on her head. This witness is also cross-examined, but nothing incriminating came on record.

22. Besides the evidence of these witnesses, the prosecution placed reliance on the evidence of PW2 Mangesh Admane who acted as a pancha on the spot panchanama as well as panchanama regarding seizure of the clothes. His evidence shows that along with the police he visited the alleged spot of the incident. They inspected the spot. The police shown him one cot, one TV, and one stick. The stick was lying near the dead body. He had also seen the blood stains on the spot of the incident, on some clothes and on a bamboo stick. The police took photographs of the spot. All articles are seized and sealed and panchanama was drawn which is at Exhibit-16. He has identified the photographs. The evidence of PW6 Rajendra Ghuge also shows that at the relevant time he was attached to Ajni PS. He received a phone call and received the information that Kamalbai Ramteke died. He took entry in the station diary which is at Exhibit-35 and reached at the spot. At the spot, he called PW9 Investigating Officer Yogesh Ingle and, thereafter, spot panchanama was drawn. PW9 Investigating Officer Yogesh Ingle

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also testified that he has drawn spot panchanama and seized articles.

23. PW2 Mangesh Admane is cross-examined regarding the spot, but nothing incriminating came on record. It is tried to bring on record that he has not acted as a pancha, but he denied the same. During the cross-examination of PW6 Rajendra Ghuge also, nothing incriminating is brought on record regarding the spot of the incident. The cross-examination of PW9 Investigating Officer Yogesh Ingle specifically shows that towards southern side of the house there was one door and one window. The window was near the cot. He admitted that he had not shown the window in the panchanama. Except the fact that window was not shown in the panchanama nothing incriminating came on record.

24. PW7 Sanjay Somaji Sahare is the photographer who obtained photographs of the spot of the incident. As noted above, PW4 Parmanand Tiwari is the police official who received initial information regarding the assault by the accused on the deceased. PW6 Rajendra Ghuge is also police officer who received information regarding death of the deceased and he visited the spot and witnessed the injuries on the person of the deceased and PW9 Yogesh Ingle is the Investigating Officer who

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narrated about the investigation carried out by him. The sum and substance of the evidence is that one murge report was filed on 22.5.2017 by PW3 Maya Borkar. He visited the alleged spot of incident and drawn the spot panchanama. He seized incriminating articles from spot panchanama and collected necessary documents. He further testified that he forwarded articles to the Chemical Analyzer. He also collected extract of the log book wherein the earlier information about the quarrel was mentioned. Though these witnesses are cross-examined at length, nothing incriminating came on record.

25. The scientific evidence, on which the prosecution placed reliance on, is the Chemical Analyzer's Reports and DNA report. Exhibit-81(1) is the Chemical Analyzer's Report in respect of various articles that is clothes of the deceased, the clothes of the accused, weapon of the offence i.e. stick, bed sheet, a pair of sleeper, pieces of bangles collected from the spot, and burnt cigarettes butt. The analysis of the articles were carried out and it is opined that human blood is detected on Exhibit-1 blouse, Exhibit-2 saree, Exhibit-3 petticoat, Exhibit-4 clothe strip, Exhibit-5 bamboo sticks, Exhibit-6 bed sheet, Exhibit-7 saree, Exhibit-8 pair of sleeper and Exhibit-11 full shirt of the accused. Blood

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Group was not detected and, therefore, the articles are forwarded for DNA examination. The DNA Report is at Exhibit-81(2). The DNA Report shows that the DNA Profile obtained from blood detected on Exhibit-1 blouse, Exhibit-2 saree, Exhibit-3 petticoat, Exhibit-4 cloth strip, Exhibit-5 bamboo sticks, Exhibit-6 bed sheet, Exhibit-7 saree is identical and from one and the same source of female origin and matched with the DNA Profile obtained from blood samples of Kamalbai Ramteke. The DNA Report further shows that DNA profile obtained from Exhibit-10 cigarettes butt and blood detected on Exhibit-11 full shirt are identical and from one and the same source of male origin and matched with blood samples of Kishor Ramteke, the accused. Thus, as per the DNA Report, blood stains found on the blouse, saree, petticoat, clothes strips, bamboo stick, and bed sheet are of Blood Group of the deceased. Whereas, blood stains found on the full shirt of the accused are of his blood group.

26. On the basis of the above discussed evidence, the prosecution claimed that the prosecution has proved its case beyond reasonable doubt. The defence of the accused during his statement under Section 313 of the Code of Criminal Procedure is that the deceased fell on ground when she was proceeding to

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attend the nature's call and, therefore, she had suffered injuries. The accused has also explained that PW3 Maya Borkar is deposing false as he was tenant in her house and she was insisting for vacating the house and as he has not vacated the house, he is falsely implicated in the alleged crime.

27. On appreciating the evidence, it is undisputed that at the relevant time only the deceased and the accused were residing together and no third person was residing along with them. It is also undisputed that at the relevant time that is during the intervening night of 21.5.2017 to 22.5.2017 only the accused was present along with the deceased in the house. It is also undisputed that the dead body was found in the morning and the alleged incident occurred inside the house. Admittedly, there is no eyewitness to the alleged incident.

28. The evidence of PW3 Maya Borkar is to the extent that prior to the incident the deceased was assaulted by the accused and she had witnessed the same. Now, it has to be seen whether her evidence is trustworthy, cogent, and reliable. Though she is cross-examined at length, the defence has not put to her regarding enmity between her and the accused on account of eviction of the accused from the house. Though the accused

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has taken a defence during his statement under Section 313 of the Code of Criminal Procedure that she is deposing false, as she was insisting the accused to vacate the house, in which the accused was residing, the said defence is not put to her. It is attempted by the defence to show through the statement under Section 313 of the Code of Criminal Procedure that she is interested witness as she was insisting to evict the accused from the house which is owned by her. The term "interested" postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or some other oblique motive. In the present case, the accused has suggested the motive in his statement under Section 313 of the Code of Criminal Procedure, but no such cross-examination was carried out by putting the defence to the witness. On the contrary, the evidence of Maya Borkar is corroborated by PW4 police official Parmanand Tiwari, who received information on the basis of phone call by Maya Borkar and he visited the spot immediately. Not only the evidence of PW4 Parmanand Tiwari but also the evidence of PW9 Investigating Officer Yogesh Ingle shows that during the investigation he collected the documents showing that Maya Borkar made a phone call to the police informing that the

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deceased was assaulted by the accused. Thus, no other reason came forwarded before us to disbelieve the version of Maya Borkar. On the contrary, her conduct appears to be the most natural and reasonable one.

29. The evidence on record shows that the death of the deceased was caused inside the house. Prior to the death, the deceased was assaulted by the accused and the same was witnessed by PW3 Maya Borkar. Prior to the incident, PW8 Rahul Kalamkar has also witnessed the deceased sitting outside the house while the deceased disclosed him that the accused is not allowing her to enter into the house. Therefore, PW8 Rahul Kalamkar took her inside the house. The spot panchanama shows that blood stains are found inside the house on the clothes of the deceased, on bed, on bed sheet, and on stick lying near the dead body.

30. Thus, the circumstances that prior to the death the deceased was assaulted by the accused and the same was witnessed by PW3 Maya Borkar and blood stains are found on the stick and other articles sufficiently show that the death of the deceased was caused inside the house when the only accused was present in the house.

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31. In the light of the above facts and circumstances, Section 106 of the Indian Evidence Act, 1872 would attract. The said Section reads thus:

“106. Burden of proving fact especially within knowledge.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

32. The scope of Section 106 of the Indian Evidence Act, 1872 shows that the prosecution must discharge the initial burden of establishing *prima facie* the guilt of the accused beyond all reasonable doubt. The principle underlying Section 106 of the Indian Evidence Act, 1872 is that the burden to establish those facts which are within the personal knowledge of the person, burden is cast upon that person and if he fails to establish or explain those facts, an adverse inference may be drawn against him. In the case, the offence takes place inside the privacy of the house when only accused was present along with deceased. It is held by the Hon'ble Apex Court in the case of *Trimukh Maroti Kirkan Vs. State of Maharashtra (2006) 10 SCC 681* that if an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and

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in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. The Hon'ble Apex Court has referred the judgment of Privy Council Stirland Vs. Director of Public Prosecution 1944 AC 315 and observed that the law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Indian Evidence Act, 1872 which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

33. Illustration (b) to Section 106 throws some light on the content and scope of this provision and it reads :

“(b) “A” is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him.”

Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case

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would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence.

34. In view of Section 106 of the Indian Evidence Act, 1872 there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer an explanation.

35. In the present case, thus, the prosecution had proved the fact that the death of the deceased is homicidal death caused inside the house when only the deceased and the accused were present. The fact is corroborated by the earlier conduct of the accused that he assaulted the deceased which was witnessed by PW3 Maya Borkar. The circumstance, that the accused was not allowing her to enter in the house but it was PW8 Rahul Kalamkar who took her inside the house, is also proved. Though the defence is taken by the accused that the deceased was old

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aged and she used to fall down by losing her balance in the house and on the day of the incident also she fell down while proceeding to attend nature's call, the circumstances brought on record show that the deceased was found dead when she was lying on the bed. No blood stains are found near the toilet or any other place. Thus, the defence of the accused is not supported by any other evidence to show that the deceased sustained injuries due to fall on the ground. The Medical Officer ruled out the possibility that the deceased can sustain these injuries due to fall or by coming into contact with the wooded pole or any hard substance. As such, contention of the defence that the deceased died accidental death is not sustainable.

36. The accused further raised the ground in the appeal that he was in a state of intoxication. The accused has admitted in his statement under Section 313 of the Code of Criminal Procedure that he consumed alcohol. Thus, as he was in an intoxication condition, he was incapable of forming specific intent which is essential to constitute an offence under Section 302 of the Indian Penal Code. It is further submitted that due to intoxication he did not have the capacity to form the intention. The first and foremost thing is that the accused has not taken the

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said defence during the trial. Moreover, whether the said defence is available to the accused and due to this exception whether the accused can be exonerated from the liability, Section 85 of the Indian Penal Code speaks about the exception under intoxication. The said Section reads thus:

"85. Act of a person incapable of judgment by reason of intoxication caused against his will.
- Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law; provided that the thing which intoxicated him was administered to him without his knowledge or against his will."

37. In the present case, the evidence on record shows that the accused was addicted to liquor. Thus, there is no evidence of whatsoever in nature to show that the accused was given liquor without his knowledge or against his will and, therefore, he is not entitled to the benefit of Section 85 of the Indian Penal Code.

38. Thus, what emerges from the evidence of the prosecution is that when the deceased and the accused were residing together, the deceased was assaulted by the accused and due to the assault she was found dead in the house. The

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evidence of PW3 Maya Borkar is supported by circumstances that the death of the deceased was caused in the house when only the accused and the deceased were present and no explanation is put forth by the accused in what circumstances the death of the deceased was caused. The evidence of PW3 Maya Borkar that the deceased was assaulted by the stick is supported by scientific evidence that is Chemical Analyzer's Report and DNA Report which show that the blood found on the stick was of the female origin and matched with the blood group of the deceased. Thus, the prosecution proved the charges levelled against the accused beyond reasonable doubt. Proof beyond reasonable doubt does not mean proof beyond any doubt. It cannot be considered as if a mathematical formula. The phrase 'beyond reasonable doubt' has been often referred and is well understood. The learned author Glanville Williams in his book '*The Proof Of Guilt*' has said the following with respect to '*the Quantum Of Proof*'. "To say that the burden of proving a crime is generally on the prosecution does not conclude all questions. What degree or quantum of proof is needed : is it mere likelihood, or certainty, or something in between these two extremes? This question in turn raises a fundamental issue of penal policy." Proof beyond reasonable doubt does not mean

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proof beyond the shadow of a doubt. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course, it is possible but not in the least probable.' The case is proved beyond reasonable doubt.

39. As observed above, though it is tried to impress that the death of the deceased was caused due to accidental injuries, the said defence was not substantiated by any evidence. A question would always arise as what would be the reason for PW3 Maya Borkar to implicate the accused against whom she had no grudge. Though the accused has taken the defence of intoxication first time in appeal, the protection of Section 85 of the Indian Penal Code is not available to him. The accused had caused the death of a helpless old woman who is his mother who carried him nine months in her womb and brought him up. The manner in which she was assaulted is apparent from the injuries sustained by her which are in the nature of external as well as internal. The circumstances, unless explained by the accused, must be considered as incriminating against him.

40. In the facts and circumstances of the case, no perversity appears in the findings recorded by learned Judge

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below in the impugned judgment and order of the conviction and the sentence. Hence, the appeal must fail and is liable to be dismissed and the same is **dismissed**. The record and proceedings be sent to the Trial Court.

41. As per rules, fees are quantified to be paid to learned counsel Shri D.V.Chauhan appointed for the accused.

42. Learned counsel Shri D.V.Chauhan for the accused graciously submitted that the fees quantified to be paid to him be deposited to the High Court Bar Association at Nagpur.

(URMILA JOSHI-PHALKE, J.)

(ROHIT B.DE0, J.)

!! BrWankhede !!