



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

CRIMINAL APPEAL NO. 142 OF 2023

Yogiraj Bhaskar Survey,
Age : 23 years, Occu. Agriculturist,
R/o. Bhagathan, Tq. Gangapur,
Dist. Aurangabad.

...Appellant

Versus

State of Maharashtra

...Respondent

.....
Mr. Somnath G. Ladda – Advocate for the Appellant
Mrs. S. N. Deshmukh – APP for respondent/State
.....

CORAM : R. G. AVACHAT
AND
NEERAJ P. DHOTE, JJ.

RESERVED FOR JUDGMENT ON : 12.08.2024
JUDGMENT PRONOUNCED ON : 09.09.2024

JUDGMENT [Per: Neeraj P. Dhote, J.] : -

1. This Criminal Appeal under Section 374(2) of the Code of Criminal Procedure is directed against the Judgment and Order dated 31.01.2023 passed by the learned Additional Sessions Judge, Vaijapur, Dist. Aurangabad, in Sessions Case No. 65/2017, convicting the Appellant for the offence punishable under Section 302 of the Indian Penal Code [hereinafter referred to 'IPC'] and sentencing him to suffer imprisonment for life and to pay fine of Rs. 10,000/- [Rupees Ten Thousand] and in default, to suffer further rigorous imprisonment for one year.

2. The prosecution's case as revealed from the Police Report is as under : -

2.1. Informant – Sahebrao Mukinda Shinde had one (1) son and seven (7) daughters. Deceased Shalu was one of his daughters. Shalu got married to Appellant on 03.01.2016. The informant gave dowry and gold ornaments to the Appellant. After marriage, Shalu went to her matrimonial home. Fifteen (15) days after the marriage, Appellant and his family members started demanding money from Shalu for purchasing Jeep and started ill-treating her. The informant and his relatives gave understanding to the accused. On 27.05.2017, the informant and his brother went to the house of the Appellant to take Shalu with them. However, the Appellant and his parents did not allow Shalu to go. In the morning of 02.06.2017, Shalu made a phone call to the informant that the accused were abusing her and she was apprehending threat to her life. On the same day around 06:00 p.m., the Appellant and his father informed the Informant telephonically that Shalu was serious and hospitalized. When the informant and his family members reached the hospital, they found Shalu in a dead condition, with ligature mark on her neck, injuries on her chin and marks on stomach and back. After the funeral, he lodged report with Shillegaon Police Station on the next day i.e. 03.06.2017, against the Appellant, his father, mother and brother.

2.2. Crime bearing No. 178/2017 came to be registered with Shillegaon Police Station, for the offence punishable under Sections 302, 201, 498A, 323, 504, 506 r/w 34 of the Indian Penal Code and Sections 3 and 4 of the Dowry Prohibition Act. *Post mortem* report disclosed the cause of death as “*throttling leading to asphyxia leading to cardio-respiratory arrest*”. During the investigation, statement of witnesses came to be recorded. The Appellant and co-accused came to be arrested. The articles collected during the investigation were sent for forensic examination. After the investigation, the Appellant, his father, his mother and his brother came to be charge-sheeted.

3. On committal, the learned Sessions Judge framed the Charge against the Charge-Sheeted accused at Exh.7 to which the accused pleaded not guilty and claimed to be tried. In support of the Charge, the prosecution examined in all ten (10) witnesses and brought on record the relevant documents. After the prosecution closed its evidence, the learned trial Court recorded the statement of the accused under Section 313(1)(b) of the Code of Criminal Procedure. The accused denied the evidence and case of the prosecution and after appreciating the evidence on record and hearing both the sides, the impugned Judgment came to be passed convicting the Appellant as aforesaid and acquitting Accused Nos. 2, 3 and 4.

4. It is submitted by the learned advocate for the Appellant that, the evidence on record does not conclusively establish the Charge against the Appellant. The testimony of Medical Officer, who performed the *post mortem*, is crucial as he could not give the definite cause of death of Shalu and he only gave probable cause of death. It is the Appellant who took the deceased to the hospital. When the Homicidal death is not established, the Charge of Murder should fail. The learned trial Court made his own estimate about the cause of death and convicted the Appellant. The observations made by the learned trial Judge in the impugned Judgment in respect of death were not put to the Medical Officer and also not put to the Appellant in his statement recorded under Section 313(1)(b) of the Cr.P.C. The other evidence, therefore, will be of no assistance to the prosecution to establish the Charge of Murder. There are material omissions in the statement of the witnesses who are related to the deceased as seen from their testimony. He prays that, the Appeal be allowed and the impugned Judgment and Order be quashed and set aside. In support of his submissions, he relied upon the following judgments.

- [i] **Reena Hazarika Versus State of Assam, (2019) 13 SCC 289**
- [ii] **Bhagwan Das and another Versus State of Rajasthan, AIR 1957 SC 589**
- [iii] **Sunderlal Alias Sundera Versus State of Madhya Pradesh, (1952) 2 SCC 464**

[iv] **Pratap Misra and others Versus State of Orissa,
(1977) 3 SCC 41**

[v] **State (Delhi Administration) Versus Shri Gulzari Lal Tandon
1979 SCC (Cri) 526**

5. It is submitted by the learned APP that, before death, deceased made a phone call to her father who is the informant and expressed apprehension and threat to her life and in the evening of same day, she met with Homicidal death. There is evidence of injuries on the dead body which shows that deceased was beaten. The defence of Appellant that his wife died due to epilepsy attack is not acceptable for the reason that there is no evidence to show the history in that regard. Had deceased been suffering from epilepsy, the Appellant would not have married her. The suggestion put to the father that the deceased was suffering from attack of epilepsy and she died due to the same, is denied. The evidence on record clearly establishes that the Appellant's wife Shalu died a Homicidal death at her matrimonial home. No interference is called for in the impugned Judgment and Order and the Appeal is liable to be dismissed.

6. Admittedly, there is no eye-witness to the incident i.e. death of Appellant's wife Shalu. The case is based on circumstantial evidence. The law in respect of circumstantial evidence is well settled right from Judgment in **Sharad Birdhichand Sarda v State of Maharashtra, (1984) 4 SCC 116**, wherein following principles have been laid down.

- (1) *The circumstances from which the conclusion of guilt is to be drawn should be fully established.*

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793, where the following observations were made: [SCC para 19, p. 807 : SCC (Cri) p. 1047]

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

- (2) *The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
- (3) *The circumstances should be of a conclusive nature and tendency,*
- (4) *they should exclude every possible hypothesis except the one to be proved, and*
- (5) *There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

7. If the Charge is for the offence of Murder punishable under Section 302 of the Indian Penal Code, it becomes imperative for the prosecution to prove that the death was Homicidal. To prove the

Homicidal death of Appellant's wife Shalu, the medical evidence becomes relevant and crucial. Prosecution examined Dr. Pramod Madhukar Alhat as P.W.7, who performed the autopsy on the dead body of Appellant's wife Shalu. His evidence shows that, at the relevant time i.e. on 03.06.2017, he was working as a Medical Officer at Primary Healthcare Centre, Lasur, Tal. Gangapur, Dist. Aurangabad. The dead body of Shalu Yogiraj Surve was brought by API Suryakant Deoram Kokane. On performing the *post mortem*, the following injuries were found on the dead body.

Conditions of skin (column No. 14 of postmortem report)

1. *Finger press mark around neck seen (Finger impression).*
2. *Swelling on posterior triangle of neck seen.*

Surface wounds and injuries (Column No. 17 of P.M. report)

1. *Abrasion around neck present approximately 2 c.m. Swollen.*

The Brain and Lungs were congested.

2. *I noticed that eyes of deceased Shalu were closed, her pupils were dilated, tongue was inside mouth and fluid was oozing from mouth and nostrils.*
3. *The rigor mortis was partially present on lower limbs, left hand and back. The post-mortem lividity was present on back and thigh. The stomach and intestine were containing semi digested food.*

8. P.W.7 Medical Officer further deposed that, in his opinion, the probable cause of death of Appellant's wife Shalu was "*throttling*"

leading to asphyxia leading to Cardio-respiratory arrest” and Exh. 43

was the same *post mortem* report which was prepared after the autopsy. As regards the time of death, he deposed that Shalu might have died within 24 hours preceding the time of postmortem examination. He opined that, if the neck of person is pressed by another person or if the neck of person is strangled by rope, death can be caused.

9. The cross-examination of P.W.7 Medical Officer shows that while conducting autopsy, he had carefully seen the dead body. The congestion in lungs, brain larynx, traches and bronchi can occur because of several causes. Such congestion can be due to illness. There can be signs of asphyxia in the epilepsy attack. If due to illness a person is unable to smoothly breathe, there can be sign of asphyxia. Asphyxia means disturbance to smoothly receive adequate Oxygen to the body. Asphyxia is a general term. Asphyxia does not lead to the doctors to any particular direction or point. He further goes to depose that if the person is not adequately receiving Oxygen, he can hold his throat himself and if the person holds his own throat, the finger impression can occur. He did not try to match the finger impression found on neck of deceased Shalu with her fingers and thumb. There was only one thumb impression on the neck of deceased Shalu. He had carefully observed and mentioned that it was the finger impression. There was no thumb impression on the neck of deceased Shalu. He did not mention in the *post mortem* report that he dissected the underneath tissue of abrasion

injury mentioned in column no. 17 and whatever he performed or observed has been mentioned in the *post mortem* report. There was no mention in the *post mortem* report whether the death was Suicidal, Accidental or Homicidal. In every death, there are signs of cardiac arrest.

10. PW7 Medical Officer further goes to depose that, in the present case, in order to find out whether it was a case of throttling or not, certain other tests were necessary. One of the case was appearance of surface of lungs. In case of strangulation or throttling, the appearance of surface of lungs would show the presence of silvery bullahe, there shall be injury to epiglottis, there can be compression of wind pipe, there may be injuries to trachea and larynx part, there can be injury to hyoid bone and thyroid cartilages. At the time of *post mortem* examination, he did not find the presence of silvery bullahe on the surface of lungs, he did not find injury to epiglottis, larynx & trachea, there was no injury to hyoid bone and thyroid cartilage and there was no fracture to hyoid bone. He opened trachea and larynx part. He did not find infiltration of blood in underneath tissue.

11. PW7 Medical Officer further goes to depose that, he did not find conjunctiva and pateche hemorrhage in the eyes of the deceased Shalu. If in strangulation or throttling force is used, there can be pateche hemorrhage in the eyes due to pressure and that sign was

absent in the present case. In case of strangulation or throttling, the victim opens the mouth and tongue protrudes out of mouth. The tongue of Shalu was not protruding and her tongue was inside mouth. He deposed that in view of absence of above signs, he did not give exact cause of death but probable cause of death. The cause of death of Shalu was uncertain. Shalu might have died due to epilepsy attack. It was risky to stick up with the cause of death mentioned in the *post mortem* report.

12. From the above evidence of Medical Officer who performed the autopsy on the dead body, what is seen is that, he could only give probable cause of death. From his above discussed evidence, it is clear that the cause of death of Appellant's wife Shalu remained uncertain. He could not give the exact and certain cause of death. His evidence goes to show that there were many aspects which rules out the possibility of throttling or strangulation. There can be no doubt that the medical evidence is the opinion evidence, however, in absence of any eye-witness to the incident of death of Appellant's wife Shalu, this medical evidence assumes great significance. It cannot be ignored. In absence of any ocular evidence in respect of cause of death, there is no question of inconsistency in the ocular and medical evidence. There is no re-examination of PW7 Medical Officer after the cross-examination of defence. From the above discussed evidence of PW7 Medical Officer, it is clear that there can be more than one cause for the death of Shalu.

13. The prosecution examined the father of deceased Shalu as PW1 Sahebrao Mukinda Shinde. His evidence shows that on 02.06.2017, at 08:00 am, he received a phone call from Shalu asking whether their relative Jagannath Phulare convinced the accused to treat her properly and she further informed him that the accused were abusing her and she was apprehending threat to her life. However, there is no evidence that he took some steps though his daughter expressed threat to her life. It is only in the evening after 06:00 pm when the Appellant informed him that his daughter Shalu was serious and hospitalized at Lasur Station, he along with his family members reached the hospital where he noticed that Shalu was dead and there were ligature mark like strangulation on her neck, injuries on her chin and black and blue marks on her stomach and back. However, even thereafter he did nothing and remained silent and after funeral of his daughter Shalu was over, he went back to his village i.e. Wadiramasgaon. His evidence shows that, after funeral, he was with dead body of Shalu and during that period the police had come and made inquiry. He admitted that, during the said period, the police made inquiry with him. He further admitted that, prior to lodging of report, he did not complain about death of Shalu. His evidence shows that the report was lodged by him on the next day i.e. 03.06.2017, at 01:00 p.m. The silence of this witness for considerable period even though he was informed by his daughter apprehending threat to her life and even after

noticing injuries on her dead body requires us to see his evidence with doubt.

14. His further evidence shows that, Appellant and deceased liked each other. Until death, deceased Shalu never left the house of Appellant and came to her paternal house. Deceased Shalu never told him that she did not want to live with Appellant. Deceased Shalu was happy at her matrimonial house. Whenever he visited the matrimonial house of deceased Shalu, he received good treatment from the accused. When accused told him that Shalu was not cohabiting properly, he convinced her and gave assurance that she would live happily. Shalu had no mobile handset and she used to talk to him from the mobile of Appellant. This evidence on record shows absence of motive for the Appellant to kill Shalu.

15. What is seen from the evidence of PW1 Sahebrao Mukinda Shinde that, on 27.05.2017, there were hot exchange of words between him and the accused when he had gone to bring deceased Shalu with him and he had to leave the house of the accused without taking Shalu with him and due to the said conduct of the accused he got angry and he and his brother decided to teach a lesson to the accused and, therefore, the report was lodged. His evidence further shows that after the funeral of his daughter Shalu was over, he and his relatives decided further course of action and decided to lodge the report and also

decided as to what should be mentioned in the report and accordingly he narrated the contents of the report. From this evidence on record, the possibility of lodging afterthought Report cannot be ruled out.

16. The other evidence is that of PW2 – Phulabai Baburao Shinde, who was sister-in-law of deceased Shalu and daughter-in-law of PW1 – Sahebrao Mukinda Shinde. Her evidence shows that on 03.06.2017, she had been to the hospital at Lasur where she saw the dead body of Shalu having mark on the neck, injuries on abdomen and other parts of the body and she acted as a panch to the Inquest at Exh.17. Her cross-examination shows that she accompanied PW1 Sahebrao Mukinda Shinde in the court and before her evidence, the Inquest was read over to her and therefore she deposed that she knew the contents of the Inquest. Though she deposed that there were marks of beating on the whole body of Shalu, it was not corroborated by the Inquest at Exh.17. The learned advocate has rightly submitted that the evidence of this witness regarding marks of beating on the whole body of the deceased Shalu was not corroborated by the *post mortem* report at Exh.43.

17. PW3 – Yuvraj Shridhar Tathe was the panch for the spot panchanama at Exh. 19. The said panchanama was in respect of house of the Appellant. As he did not support the case of the prosecution, he

was cross-examined by the learned APP. It is rightly submitted by the learned APP that the evidence of witness who did not support the case of the prosecution can be considered to the extent he supports the case of the prosecution. There can be no two views on the said aspect, however, scrutiny of the evidence of this witness shows that it is of no assistance for the prosecution to establish the Charge.

18. PW4 – Chandrabhan Manikrao Jadhav acted as the panch for the seizure panchanama, before whom the clothes of the deceased i.e. white colour saree and one chocolate colour blouse, came to be seized under the panchanama at Exh.21. His evidence shows that when he went to the police station, the clothes were lying on the table and he was not aware from where the clothes were brought.

19. The evidence of P.W.5 Mahadeo Tulshiram Jadhav shows that, at the relevant time he was the Sarpanch of village Wadiramasgaon where PW1 Sahebrao Mukinda Shinde was residing. He was aware of the discord between deceased Shalu and the accused persons. Though he deposed of injuries on the neck, chin and black spots on the back of deceased Shalu, as he visited the hospital, his evidence stands on no better footing than that of PW2 Phulabai Baburao Shinde, which is considered above. His further evidence shows that whatever incidents of discord which had taken place earlier i.e. within five to six months from the marriage of deceased Shalu and the Appellant, was due to the fact

that deceased Shalu was not sent to her parents house. His evidence shows that they decided to teach a lesson to the accused. From his evidence it is clear that what he stated before the police while recording his statement was as per the informant - PW1 Sahebrao Mukinda Shinde.

20. The evidence of PW6 Pandit Sheshrao Warade shows that he was the resident of same village where PW1 Sahebrao Mukinda Shinde was residing. He knew the discord between the accused and deceased Shalu. Though he deposed of providing financial assistance to the informant PW1 Sahebrao Mukinda Shinde to the extent of Rs.50,000/-, from his cross-examination, a reasonable doubt is created in respect of his financial capacity to financially help the informant PW1 Sahebrao Mukinda Shinde to the extent of such amount. Most of his evidence was an improvement from his statement given to the police, which was duly proved from the evidence of PW10 Suryakant Deorao Kokane, the Investigating Officer, who recorded his statement. It is further clear from his testimony that his knowledge about the discord of ill-treatment to Shalu was hearsay.

21. PW8 Shivaji Govind Zakane was the maternal uncle of deceased Shalu. His evidence that when he visited the hospital where the dead body of Shalu was kept, he noticed marks of beating on her body was an improvement from his police statement, which was duly proved from the evidence of PW10 Suryakant Deoram Kokane, the

Investigating Officer, who recorded his statement. His further evidence in respect of giving gold ornaments, Rs. 1.00 lakh in the marriage as a dowry to the Appellant, demand of Rs. 2.00 lakh by the accused for purchasing the Cruiser Jeep, harassment to deceased, he going with PW1 informant and five (5) to six (6) persons to the house of appellant for giving him understanding were improvements from his police statement, which were duly proved in the evidence of PW10 Suryakant Deorao Kokane, the Investigating Officer, who recorded his statement.

22. The evidence of PW9 Milind Pralhadrao Khopade and PW10 Suryakant Deorao Kokane shows that they were the police officers who investigated the Crime. They deposed of the investigation carried out by them. The evidence of PW10 Suryakant Deorao Kokane shows that initially Accidental Death [AD] Case No.18/17 was registered in respect of death of Shalu on the information received from the hospital and he made inquiry in the said AD case during which he recorded the statement of informant PW1 Sahebrao Mukinda Shinde. This shows that, prior to lodging report by PW1 Sahebrao Mukinda Shinde, his statement was recorded in the AD case. It is clear from the evidence of PW10 Suryakant Deorao Kokane, Investigating Officer, that the crime was registered only on the report given by PW1 Sahebrao Mukinda Shinde on 03.06.2017 and not on the basis of statement of PW1 Sahebrao Mukinda Shinde recorded during the AD inquiry. This again fortifies the possibility of lodging an afterthought Report by

PW1 Sahebrao Mukinda Shinde. The evidence of PW10 – Suryakant Deoram Kokane, the Investigating Officer, shows that he had not recorded the statement of the persons present on the spot and the neighbours. His evidence shows that, the villagers, neighbours and the panch witnesses stated nothing to him about the incident and, therefore, he did not record their statements.

23. The overall evidence available on record is considered. Though there is no evidence on record to show that deceased Shalu was suffering from the ailment of epilepsy, in view of medical evidence as discussed above, when it is not proved that the death of Shalu was Homicidal, the conviction for the offence of Murder cannot be maintained. The testimony of the witnesses regarding the marks on the dead body, except marks around the neck, is not the cause of death as seen from the medical evidence. When the very essential requirement to establish the Charge of Murder is absent i.e. Homicidal death, the other evidence on record does not take the case of prosecution any further. Undisputedly, the acquitted accused, the appellant and the deceased were residing together and on the basis of same evidence, accused nos. 2, 3 and 4 are acquitted by the learned trial Court.

24. The learned trial Court made its own estimate and reached to his own conclusion that death of Shalu was Homicidal mainly relying on the extracts of the book i.e. Modi Jurisprudence and Toxicology.

What is seen from the impugned Judgment is that the learned trial Court without putting the extracts from the text book on the Medical Jurisprudence and Toxicology, referred in the judgment, to the Medical Officer, reached to the conclusion that the death was Homicidal. Moreover, the said extracts were not put to the Appellant while recording his statement under Section 313(1)(b) of Cr.P.C.

25. In the case of Sunderlal (supra), the learned trial Judge accepted the verdict of jury and agreed with the majority opinion of the assessors and convicted the accused therein for the offence punishable under Section 394 and 323 but acquitted him of the offence under Section 302 of the IPC. In the appeal filed by the accused against his conviction and the appeal by the Government against his acquittal under Section 302, the High Court confirmed the conviction of the accused under Section 394 but set aside the conviction under Section 323 and held that the accused was guilty of the offence under Section 302 and sentenced him accordingly. The Hon'ble Supreme Court in an Appeal filed by the accused, observed in paragraph no. 7 as *"..... the conviction of the accused by the High Court was mainly based on passages from the text book of Modi on Medical Jurisprudence and Toxicology and these passages had not been put to Dr. Dube when he was in the witness box with the result that the High Court was not right in coming to the conclusion adverse to the accused by merely relying upon these passages."*

26. We do not find it necessary to consider and refer to the other judgments cited by learned advocate for the Appellant. The circumstantial evidence brought on record by the prosecution does not conclusively prove the charge of Murder against the appellant. Though the Charge was also framed for the offence under Section 498A of IPC, the appellant and co-accused have been acquitted for the said Charge. Admittedly, there is no appeal against the said acquittal. In view of evidence available on record as discussed above, it is not possible to maintain the conviction recorded by the learned trial Court against the Appellant for the offence punishable under Section 302 of the Indian Penal Code and the same is required to be quashed and set aside. Hence, the following order is passed : -

ORDER

- [i] The Criminal Appeal is allowed.
- [ii] The conviction recorded by the learned Additional Sessions Judge, Vaijapur, Dist. Aurangabad, vide Judgment and Order dated 31.01.2023 passed in Sessions Case No.65/2017, convicting the Appellant for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer imprisonment for life and to pay fine of Rs. 10,000/- [Rupees Ten Thousand] and in default to suffer further rigorous imprisonment for one year, is hereby quashed and set aside.
- [iii] The Appellant is acquitted of the offence punishable under Section 302 of the IPC.

- [iv] The fine amount, if paid by the Appellant, be refunded to him.
- [v] The Appellant be set at liberty if not required in any other offence.
- [vi] Record & Proceedings be sent back to the learned Trial Court.

[NEERAJ P DHOTE]
JUDGE

[R. G. AVACHAT]
JUDGE

SG Punde