



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

CRIMINAL APPEAL NO.961 OF 2023

Shaikh Yakub Shaikh Khudboddin,
Age : 35 years, Occu : Labour,
R/o. Masoom Colony, Peth Beed,
Tq. and Dist. Beed

.. Appellant

Versus

The State of Maharashtra

... Respondent

.....

Shri. S. G. Ladda h/f. Shri. S. S. Ladda, Advocate for the Appellant
Smt. Uma S. Bhosale, A.P.P. for the Respondent / State.

.....

WITH

CRIMINAL APPLICATION NO. 1292 OF 2024

.....

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

RESERVED ON : 13.11.2024
PRONOUNCED ON : 29.11.2024

JUDGMENT (*Per* NEERAJ P. DHOTE, J.) :

. This Appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') is directed against the Judgment and Order dated 10.08.2023, passed by the learned Additional Sessions Judge, Beed in Sessions Case No.26 of 2022, convicting and sentencing the Appellant as follows :

“1] Accused Shaikh Yakub Shaikh Khudboddin is hereby convicted for the offence punishable under Section 302 of the Indian Penal Code vide Section 235 (2) of Code of Criminal Procedure and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.1,000/- (Rs. One Thousand only) and in default of payment of fine amount to suffer simple imprisonment for fifteen days.”

2. Prosecution's case, as revealed from the Police Report, is as under :

2.1. The Appellant was residing in Masum Colony, Mominpura Road, Peth Beed with his wife. By suspecting the chastity of his wife, the Appellant killed her by throttling at their home on 11.09.2021 around 08:45 p.m. After committing Murder of his wife, the Appellant went to the Peth Beed Police Station and made confession. Policemen went to the house of the Appellant and saw the Appellant's wife lying dead. The relatives of the Deceased came to know about the incident. The sister of the Deceased lodged the Report against the Appellant. Crime *vide* Cr. No.180/2021 came to be registered against the Appellant for the offence punishable under Section 302 of the Indian Penal Code (hereinafter referred to as the 'I.P.C.'). The Inquest and Spot Panchanama came to be drawn. The dead body was referred for Post-mortem. The Appellant came to be arrested. The clothes of the Appellant came to be seized. The statement of witnesses came to be recorded. In the Post-mortem, the cause of death was revealed as "*Asphyxia due to Throttling*". The Articles seized during the course of investigation were referred for Chemical Analysis. On completion of investigation, the Appellant came to be Charge-sheeted.

2.2. On committal, the learned Trial Court framed the Charge against the Appellant at Exh.07. The Appellant denied the Charge and

claimed to be tried. To prove the Charge, Prosecution examined in all 8 (eight) witnesses. After the Prosecution closed their evidence, the Appellant's statement came to be recorded under Section 313 (1)(b) of the Cr.P.C. The Appellant denied the case and evidence of Prosecution. The Appellant examined one defence witness. After the Appellant closed his evidence, the learned Trial Court after hearing both the sides and appreciating the evidence available on record, passed the impugned Judgment and Order.

3. Heard learned Advocate for the Appellant and learned APP for the State.

3.1. It is submitted by learned Advocate for the Appellant that after the namaz on 11.09.2021, the Appellant reached home after 08:30 p.m. and saw his wife in a dead condition and so, he immediately went to the concerned Police Station and informed about the same. Though Prosecution claims that the Appellant confessed the crime, it would not be admissible piece of evidence. The case is based on circumstantial evidence and it is for the Prosecution to establish the circumstances to record the conviction. Unless the Prosecution discharges its initial burden, the provisions of Section 106 of the I.P.C. will not come into play. Medical evidence do not show injury to the Larynx, Wind-pipe and Epiglottis. There is presence of Silver Bullae in the case of strangulation and throttling and it is not present in the case on hand and, therefore,

the cause of death recorded by the Medical Officer cannot form the basis to hold that the Appellant's wife died Homicidal Death. Merely because doctor says, it cannot be termed as Homicidal Death. The bite mark on the hand of the Appellant, as shown in the Arrest Panchanama, was not put to the Appellant in the statement under Section 313 of the Cr.P.C. The evidence of PW7 - Shahadeo Bhanudas Pawar – Investigating Officer nowhere shows that, the Appellant was having injury on his person. The Inquest was not drawn by the Executive Magistrate as mandated by the provisions of Section 174 of the Cr.P.C. There is no evidence to show that, the Appellant was present at home at the relevant time. There is no evidence to show that the finger prints on the neck of the Deceased matched with the finger size of the Appellant. There is no evidence to show that the buttons found on the spot of incident were that of the Appellant's shirt. There is no evidence of tearing the clothes of the Accused or of the Deceased.

3.2. It is further submitted by learned Advocate for the Appellant that, no statements of the children of the Deceased were recorded. There is no evidence of neighbourers to show that quarrel used to take place between the Appellant and the Deceased on the ground of character of the Deceased. The C.A. Report do not show residues of skin of the Deceased in the finger nails of the Appellant. The blood on the spot is not shown to be that of the Appellant or the

Deceased. Doctor's evidence is only an opinion. The evidence is not of that nature which legitimately show that it is only the Appellant who committed the crime. The FIR was not forwarded forthwith to the concerned Magistrate. Exh-68, the copy of Station Diary Entry was merely tendered on record just before the final arguments. The name mentioned therein was different. As the Appellant's statement to the police recorded in the Station Diary is not admissible and if the Station Diary Entry is excluded, there is nothing against the Appellant. There is no evidence that the Appellant and the Deceased were seen alive together before her death. Since Prosecution failed to establish the circumstances against the Appellant, the conviction and sentence is liable to be set aside. In support of his submissions, he relied on the Judgments, which would be considered at the later part of this Judgment.

3.3. It is submitted by learned APP that the case is based on circumstantial evidence. The evidence of Sisters and Brother of the Deceased shows that quarrel used to take place between the Appellant and the Deceased. If the Appellant's defence is to be believed that, when he came home and saw his wife in a dead condition, natural conduct would have been to raise hue and cry and take his wife to the hospital, however the Appellant went to the police station and this unnatural conduct speak volumes about his involvement. It appears

from the cross-examination that, the Appellant's defence was that his wife committed suicide, however it is not explained as to how he learnt that it was the suicide. On the contrary, in his statement under Section 313 of the Cr.P.C. the Appellant denied the Prosecution's case in its entirety. There was injury on the left hand of the Appellant and his shirt pocket was torn which can be seen from the Arrest Panchanama. It indicates that quarrel had taken place between the Appellant and the Deceased and the Deceased resisted the act of the Appellant. The learned Trial Court has rightly appreciated the evidence on record and passed the impugned Judgment and Order and the Appeal be dismissed. The Judgment cited by her would be considered at later point of time in this Judgment.

4. Scrutinized the evidence available on record. Admittedly, the case of Prosecution rests on circumstantial evidence. On this point, learned Advocate for the Appellant cited the following judgments :

- (i) **Malaichamy and Another vs. State of Tamil Nadu, (2019) 17 SCC 568;**
- (ii) **Suresh and Another vs. State of Haryana, (2018) 18 SCC 654;**
- (iii) **Hanumant vs. State of Madhya Pradesh, (1952) 2 SCC 71.**
- (iv) **Tanviben Pankajkumar Divetia vs. State of Gujarat, (1997) 7 SCC 156**

4.1. The aforesaid Judgments are in respect of the settled legal position regarding the principals on circumstantial evidence. The law

on this point is well settled. The Judgment in the case of **Sharad Birdhichand Sarda vs State of Maharashtra, (1984) 4 SCC 116** is referred therein, which laid down the requisites before recording the conviction on circumstantial evidence. They are as under :

- “(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned ‘must or should’ and not merely “may be” established;*
- (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.”*

5. PW1 -Shaikh Rizwana Shaikh Najimulla @ Baba, PW2 - Sayyed Nishad Sayyed Irfan and PW3 - Bashed Sharifurehman Inamdar, are the Sisters and Brother, respectively of the Deceased.

5.1. PW4 - Dr. Sunil Dharmraj Mastud was the Medical Officer at the relevant time, who performed the Post-mortem on the Deceased.

5.2. PW5 - Raju Yadavrao Vanjare was the Panch for the Inquest and Spot Panchanama.

5.3. PW6 - Jakerkhan Salamkhan Pathan was the neighbourer of the Appellant.

5.4. PW7 - Shahadeo Bhanudas Pawar and PW8 - Subhash Ganpatrao Dasarwad were the Police Officer's at the relevant time and posted with Peth Beed Police Station and noted the Station Diary Entry and investigated the crime, respectively.

6. On scrutiny of the evidence available on record, it becomes more than clear that, there is no dispute between both the sides, on the following aspects :

- (i) The Appellant and his the Deceased wife were residing together in the house situated at Masum Colony, Beed.
- (ii) The Appellant's wife met with an unnatural death at their residence.
- (iii) The Appellant went to the Peth Beed Police Station after the death of his wife.

7. To prove the Charge, the Prosecution has relied on the following circumstances :

- (a) Motive.
- (b) Homicidal Death of the Appellant's wife.
- (c) Discovery of dead body at the instance of the Appellant.

(a) Motive :-

8. It is the case of Prosecution that the Appellant committed murder of his wife as he was suspecting her chastity. On the ground of

Motive, the relevant evidence is that of the Sisters and Brother of the Deceased.

9. Evidence of PW1 - Shaikh Rizwana Shaikh Najimulla @ Baba shows that she was the elder sister of the Deceased. She was residing in the same town i.e. Beed, where the Appellant and the Deceased were residing. The Deceased used to come to her house after quarrel with the Appellant as he used to suspect her character. The Deceased used to tell her about the same at the time of her visit to the house of this witness. In the month of Ramzan, the Appellant assaulted the Deceased and the Deceased had come to her house. She took the Deceased to the hospital for medical treatment. At that time, the Deceased resided at her house for a period of one (1) month. During that period, the Appellant visited her house every day with the assurance that, he will not trouble and will not suspect the character of Deceased and will treat her well. After a period of one (1) month, she sent the Deceased to the house of the Appellant. Her further evidence in the cross-examination shows that her another Sister by name Sayyed Nishad Sayyed Irfan (PW2) was also residing in Beed town. Not telling by the Deceased to her against the Appellant, nine (9) days prior to the incident, will not affect her above evidence.

10. Evidence of PW2 - Sayyed Nishad Sayyed Irfan, who was the Sister of the Deceased, corroborates the testimony of PW1 - Shaikh Rizwana Shaikh Najimulla @ Baba. Her evidence shows that the Deceased had informed her over the telephone that, she was residing with PW1 - Shaikh Rizwana Shaikh Najimulla @ Baba, she was beaten by the Appellant during the Ramzan period and PW1 - Shaikh Rizwana Shaikh Najimulla @ Baba had taken her for medical treatment. Her cross-examination shows that the Deceased and PW1 - Shaikh Rizwana Shaikh Najimulla @ Baba were close to each other.

11. Evidence of PW3 - Bashed Sharifurehman Inamdar, who was the brother of the Deceased, further corroborates the testimony of PW1 - Shaikh Rizwana Shaikh Najimulla @ Baba. His evidence shows that after the Deceased was sent by PW1 - Shaikh Rizwana Shaikh Najimulla @ Baba back to the house of Appellant, again quarrel took place between the Appellant and the Deceased and the Deceased had came to his house at Majalgaon. The Appellant visited his house and asked him to send the Deceased with him. After giving understanding to the Appellant, he sent the Deceased with the Appellant. His cross-examination shows that the incident took place within fifteen (15) days after the Deceased went with the Appellant from Majalgaon.

12. Though the above referred three (3) witnesses were cross-examined, their evidence remained unshaken. Merely because they are

the Sisters and Brother of the Deceased, they cannot be disbelieved. Being the Sister and residing in the same town at a short distance i.e. half an hour by walk, it was quite natural for the Deceased to go to the house of PW1 - Shaikh Rizwana Shaikh Najimulla @ Baba. Narrating the plight by the Deceased to PW1 - Shaikh Rizwana Shaikh Najimulla @ Baba was quite natural being the elder Sister and they being close to each other. Taking the Deceased for medical treatment after she had come to her house after beating by the Appellant, shows the extent of assault. What her evidence goes to show is that, the Deceased was sent with the Appellant at her matrimonial house, not that, the Deceased had willingly went to the house of the Appellant. In clear terms, it has come in the evidence of PW1 - Shaikh Rizwana Shaikh Najimulla @ Baba that the cause of quarrel and beating was suspecting the character of the Deceased by the Appellant. Even thereafter, the Deceased had gone to the house of PW3 - Bashed Sharifurehman Inamdar due to quarrel between her and the Appellant. It is clear from the above discussed evidence of PW3 - Bashed Sharifurehman Inamdar that, the said incident was shortly before her death.

13. It would not be out of place to make reference to certain observations in the case of **Sharad Birdhichand Sarda vs State of Maharashtra** (*supra*) which was based on circumstantial evidence. It was the case of unnatural death of the newly married wife of one of the

Accused / Appellant therein, nearly four (4) months after her marriage.

The provisions of Section 32 (1) of the Evidence Act was considered in the light of the previous decisions of the constitutional Court. The relevant paragraph no.21 is reproduced below:

“21. Thus, from a review of the authorities mentioned above and the clear language of Section 32(1) of the Evidence Act, the following propositions emerge:

- (1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.*
- (2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.*
- (3) The second part of Clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-examination is taken by the solemnity and sanctity of*

oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

- (4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.*
- (5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant.”*

13.1. In the above referred case, the letters written by the Deceased to her sister and friends were considered, in addition to the evidence of witnesses. The observations in paragraph nos.64, 65, 66 and 215 are reproduced below :

“64. Great reliance was placed by the Additional Solicitor General, on behalf of the respondent, on the relevance of the statements of PWs 2, 3, 6 and 20. He attempted to use their statements for twin purposes - firstly, as primary evidence of what the witnesses saw with their own eyes and felt the mental agony and the distress through which the deceased was passing. Secondly, he relied on the statements made by the deceased (Manju) to these witnesses about the treatment meted out to her by her husband during her stay at Pune and furnishes a clear motive for the accused to murder her.

65. As regards the first circumstance, there can be no doubt that the said evidence of the witnesses would undoubtedly be admissible as revealing the state of mind of the deceased. This would be primary evidence in the case and, therefore, there cannot be any doubt about the relevancy of the statement of the witnesses in regard to this aspect of the matter. As to what probative value we should attach to such statements would depend on a proper application of the context and evidence of each of the witnesses.

66. As regards the second aspect -which is in respect of what the deceased told the witnesses - it would only be

admissible under Section 32 of the Evidence Act as relating to the circumstances that led to the death of the deceased. In view of the law discussed above and the propositions and the conclusions we have reached, there cannot be any doubt that these statements would fall in the second part of Section 32 of the Evidence Act relating directly to the transaction resulting in the death of Manju, and would be admissible. Before, however, examining this aspect of the question we might at the outset state that the character, conduct and the temperament of Manju, as disclosed or evinced by the admitted letters (Exhs. 30, 32 and 33), which demonstrate that it is most unlikely, if not impossible, for Manju to have related in detail the facts which the aforesaid witnesses deposed. If this conclusion is correct, then no reliance can be placed on this part of the statement of the aforesaid witnesses.

215. I would, however, like to state here that this approach should be taken with a great deal with caution and care and though I respectfully agree with Fazal Ali, J. that the test of proximity cannot and should not be too literally construed and be reduced practically to a cut-and-dried formula of universal application, it must be emphasised that whenever it is extended beyond the immediate, it should be the exception and must be done with very great caution and care. As a general proposition, it cannot be laid down for all purposes that for instance where a death takes place within short time of marriage and the distance of time is not spread over three or four months, the statement would be admissible under Section 32 of the Evidence Act. This is always not so and cannot be so. In very exceptional circumstances like the circumstances in the present case such statements may be admissible and that too not for proving the positive fact but as an indication of a negative fact, namely raising some doubt about the guilt of the accused as in this case.”

14. Coming to the case on hand, the evidence of PW1 - Shaikh Rizwana Shaikh Najimulla @ Baba corroborated by the testimony of PW2 - Sayyed Nishad Sayyed Irfan and PW3 - Bashed Sharifurehman Inamdar, clearly established that after the quarrel and beating, the Deceased used to visit the house of PW1 - Shaikh Rizwana Shaikh Najimulla @ Baba and tell her the reason of her coming to her house, which was quarrel and beating by suspecting her character. This

evidence becomes relevant. The above discussed evidence shows that such incidents of coming of the Deceased to the house of her sister i.e. PW1 - Shaikh Rizwana Shaikh Najimulla @ Baba, were repeated. The Motive is always in the mind of culprit. There can be no direct evidence of Motive. Motive has to be ascertained or gathered from the facts and circumstances of the case. It is clear from the above discussed evidence that, the Appellant used to suspect the character of the Deceased and repeatedly quarrel and beat her and had the Motive to eliminate the Deceased. The circumstances deposed by the above referred witnesses conclusively established that there was Motive for the Appellant to commit the Crime.

(b) Homicidal Death of the Appellant's Wife :-

15. Evidence of PW5 - Raju Yadavrao Vanjare shows that he was the public servant in the Beed Municipality. In the evening of 11.09.2021, he was directed by his superiors to reach Peth Beed Police Station as the Panch. From the Police Station, he along with other Panch and the Policemen went to the Masum Colony, Beed. By opening the lock of the door, they entered the house where the dead body of female was lying. To some extent, he did not support the case of Prosecution, therefore, he was cross-examined by learned APP. His evidence shows that the Inquest at Exh.29 was prepared. In cross-examination it has come that, at the instance of the Police he signed on

the blank papers. His evidence shows that the clothes from the dead body were seized in his presence. From the evidence of this witness, it is only established that he went to the house where the dead body of woman was lying and the Inquest and Spot Panchanama were prepared and nothing more.

16. Evidence of PW8 - Subhash Ganpatrao Dasarwad shows that on 11.09.2021 he was on duty as the Assistant Police Inspector at the Peth Beed Police Station. After he came to know about the death of the Appellant's wife, he summoned the Panchas and reached the house of the Appellant. By opening the door, they entered the house along with the doctor. The wife of the Appellant was lying on the floor and there were marks on her neck indicating strangulation. There was blood on the floor and her bangles were broken. After conducting the Spot Panchanama and the Inquest, the dead body was referred for Post-mortem. Nothing has come in his cross-examination to create dent in the said evidence. From the cross-examination, it is seen that visiting on the spot by this witness and conducting the Inquest and Spot Panchanama was not seriously disputed.

17. Evidence of PW1 - Shaikh Rizwana Shaikh Najimulla @ Baba shows that after her father-in-law received a telephone call in the night of 11.09.2021 informing about the death of her Sister i.e.

the Appellant's wife, she and her father-in-law went to the Appellant's house and saw her Sister, lying on the floor with marks on her neck. From the cross-examination it is clear that, she was residing in the same town and at the distance of half and hour by walk. From the cross-examination, her evidence that, she went to the house of the Deceased gets fortified.

18. Evidence of PW2 - Sayyed Nishad Sayyed Irfan and PW3 - Bashed Sharifurehman Inamdar shows that they had gone to the house of the Appellant after they received the information about the death of their sister. They saw their sister lying dead on the floor. Their coming to the house of the Appellant, where dead body was lying, is fortified as seen from the tenor of the cross-examination.

19. There is medical evidence in the nature of testimony of PW4 – Dr. Sunil Dharmraj Mastud who was the Medical Officer at the Civil Hospital, Beed. His evidence shows that on 12.09.2021 he was on Post-mortem duty. After the police referred the dead body of Shaikh Maleka Shaikh Yakub (wife of the Appellant), he performed Post-mortem. He noticed the following external injuries:

- “1) Two finger nails and hand contusion one below the other over neck anterior on left side of midline about 4 CM lateral to midline and 4 CM below mandible a) 4 x 2 CM Red colour and b) 3.5 x 2 CM Red colour.

- 2) Finger nails and hand contusion over anterior neck on right side about 3 CM lateral to midline and 3 CM below mandible of size 3 x 5 CM and reddish in colour.
- 3) Two finger nails abrasion over anterior neck on left side about 5 CM lateral to midline and 4 CM below mandible one above the other each of size 0.5 CM x 0.5 CM and red in colour.
- 4) On neck dissection anteriorly, there is evidence of subcutaneous hematoma on left and right side of midline over anterior aspect of neck corresponding to finger nails abrasion and contusion as described above. There is also contusion of neck, muscles anteriorly on both side of midline.
- 5) Contusion of 7 x 4 CM, red in colour over left shoulder anteriorly.
- 6) Abrasion over left forearm on ventral aspect, 5 CM above wrist, due to bangles, of size 3 x 0.3 CM, bleeding seen.
- 7) Two finger nail abrasions over dorsal aspect of left mid forearm, one below other of size 0.4 x 0.2 CM each and red in colour.
- 8) Finger nail abrasion of 1.5 x 0.3 CM over dorsal aspect of right hand near wrist, red in colour and vertical in direction.
- 9) Abrasion of 1 x 0.3 CM over right palm red in colour and bleeding present.”

20. His further evidence shows that, all the injuries were ante mortem and cause of death was “*Asphyxia due to Throttling*” and the aforesaid injuries may cause death in ordinary course of nature. The Post-mortem Report is brought on record at Exh.19 and the provisional certificate of cause of death is at Exh.20. The tenor of cross-examination shows that, the defence tried to bring on record that, the Appellant’s wife met with suicidal death, however the defence was unsuccessful in eliciting from the mouth of this medical witness, even slightly, to suggest that the Appellant’s wife died due to hanging. The Post-mortem Report corroborates the testimony of this witness.

21. There is nothing in the evidence of the above referred witness, to suggest even remotely that, the death was by hanging. There is consistent evidence of the witnesses, as discussed above, that the dead body was lying on the floor. The above evidence completely rules out the possibility of hanging.

22. Though during the arguments learned Advocate for the Appellant made submissions in respect of medical jurisprudence that there was no compression of Wind-pipe, no injury to Epiglottis, no presence of Silver Bullae, so as to rule out Homicidal Death, the same admittedly were not put to the Medical Officer who performed the Post-mortem. Thus, the said submissions of learned Advocate for the Appellant cannot be of any assistance.

23. From the medical evidence, it is established that the death of Appellant's wife was due to injuries found during the Post-mortem and the death was Homicidal. The circumstance that the Appellant's wife died Homicidal Death is conclusively established.

(c) Discovery of dead body at the instance of the Appellant :-

24. Evidence of PW7 - Shahadeo Bhanudas Pawar, who was the Asst. Police Sub Inspector at the Peth Beed Police Station on 11.09.2021, shows that at about 08:45 p.m. on the said date, the Appellant had come

to the police station and confessed commission of the Murder of his wife by throttling at their residence. His evidence shows that entry to that effect was made in the station diary. He informed the same to the Police Inspector - Mr. Patil and he along with other staff and two panchas went to the house of the Appellant. He admits in his cross-examination that he did not record the FIR at the instance of the Appellant. In fact, this witness should have recorded the statement of the Appellant in the form of Report and registered the crime, however not doing so will not be fatal for the Prosecution. He denied the suggestion that no such confession was made by the Appellant before him.

25. Evidence of PW8 - Subhash Ganpatrao Dasarwad shows that he was attached to the Peth Beed Police Station as the Asst. Police Inspector on 11.09.2021. He was assigned the investigation of this case. His evidence corroborates the evidence of PW7 - Shahadeo Bhanudas Pawar regarding coming of the Appellant to the police station and confessing the crime. His further evidence shows that he along with Police Inspector Mr. Patil and other staff went to the house of the Appellant. They opened the latch of the door and entered the house. After entering the house comprising of one room, he saw the Appellant's wife lying on the floor. The evidence in respect of he visiting the crime scene is already considered while discussing the circumstance of Homicidal death. His cross-examination fortified that the Station Diary

Entry in that regard was made at 10:27 hrs. No objection was raised, as can be seen from the evidence of this witness, for exhibiting the same as Exh.51. Nothing fruitful has come in the cross-examination to create any dent in the testimony of this witness.

26. The evidence of the above two witnesses, who were the Police Officers at the relevant time and the evidence of PW5 - Raju Yadavrao Vanjare to the extent it supports the case of Prosecution, considered at the time of discussing the circumstance of Homicidal Death, established that the dead body of the Appellant's wife was found in his residence. The evidence of the above referred two Policemen clearly shows that, the place, where the body was lying, was discovered at the instance of the Appellant. We are conscious of the legal position that the confession made by the Appellant before PW7 - Shahadeo Bhanudas Pawar would be inadmissible in evidence by virtue of Section 26 of the Evidence Act. From the defence of the Appellant it is clear that, his going to the Police Station is not in dispute. True it is that the Appellant was arrested after some hours after the discovery of the dead body, the evidence of the above policemen established that it was the discovery under Section 27 of the Evidence Act at the instance of the Appellant.

27. The learned Advocate for the Appellant on this point cited the Judgment in **Aghnoo Nagesia vs. State of Bihar, 1965 SCC OnLine**

SC 109 and in **Rajesh and Anr. v. The State of Madhya Pradesh**, MANU/SC/1040/2023 in support of his contention that it will not be discovery under Section 27 of the Evidence Act as Accused was not formally arrested.

28. In **Rajesh & Anr** (*supra*), the Accused therein was not treated to be in 'police custody' till he was formally arrested', as he did not figure as an 'accused' in the FIR and was not 'accused of any offence' till his arrest. It was held therein that, *"it was his arrest which resulted in actual 'police custody', and the confession made by him, before such arrest and prior to his being 'accused of any offence', would be directly hit by Section 26 of the Evidence Act and there is no possibility of applying the exception under Section 27 to any information given by him in the course of such confession, even if it may have led to the discovery of any fact"*.

29. We confronted the learned Advocate for the Appellant with the Judgment in **Perumal Raja alias Perumal vs. State, Rep. By Inspector of Police, AIR 2024 SC 460**, wherein the earlier Judgments including the Judgments in **Rajesh and Anr. (supra)**, **Aghnoo Nagesia (supra)** and **State of U.P. vs. Deoman Upadhyaya, (1961) 1 SCR 14**, which are relied upon by learned Advocate for the Appellant are considered. The relevant paragraphs from **Perumal Raja alias Perumal (supra)** are reproduced below:

“25. The pre-requisite of police custody, within the meaning of Section 27 of the Evidence Act, ought to be read pragmatically and not formalistically or euphemistically. In the present case, the disclosure statement (Exhibit P-37) was made by the appellant – Perumal Raja @ Perumal on 25.04.2008, when he was detained in another case, namely, FIR No. 204/2008, registered at PS Grand Bazar, Puducherry, relating to the murder of Rajaram. He was subsequently arrested in this case, that is FIR.No.80/2008, which was registered at PS Odiansalai, Puducherry. The expression “custody” under Section 27 of the Evidence Act does not mean formal custody. It includes any kind of restriction, restraint or even surveillance by the police. Even if the accused was not formally arrested at the time of giving information, the accused ought to be deemed, for all practical purposes, in the custody of the police.

26. Reference is made to a recent decision of this Court in *Rajesh & Anr. v. State of Madhya Pradesh*¹³, which held that formal accusation and formal police custody are essential pre-requisites under Section 27 of the Evidence Act. In our opinion, we need not dilate on the legal proposition as we are bound by the law and ratio as laid down by the decision of a Constitution Bench of this Court in *State of U.P. v. Deoman Upadhyaya*¹⁴. The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.¹⁵ This Court in *Deoman Upadhyay (supra)* observed that the bar under Section 25 of the Evidence Act applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was in custody at the time of making the confession. Further, for the ban to be effective the person need not have been accused of an offence when he made the confession. The reason is that the expression “accused person” in Section 24 and the expression “a person accused of any offence” in Sections 26 and 27 have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. The adjectival clause “accused of any offence” is, therefore, descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate a condition of that person at the time of making the statement.

27. Elaborating on this aspect, a three judge Bench of this Court in *Aghnoo Nagesia v. State of Bihar*¹⁶ has held that if the FIR is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by Section 25 of the Evidence Act. The confession includes not only the admission of the offence but all other admissions of incriminating facts related to the offence, except to the extent that the ban is lifted by Section 27 of the Evidence Act. While dealing with the admission of part of confession report dealing

with Motive, subsequent conduct and opportunity, this Court rejected the severability test adopted by some High Courts. The statement can, however, be relied upon and admitted to identify the accused as the maker, and the portion within the purview of Section 27 of the Evidence Act is admissible. Aghnoo Nagesia (supra) has been applied and followed by this Court in Khatri Hemraj Amulakh v. State of Gujarat.¹⁷

28. The words “person accused of an offence” and the words “in the custody of a police officer” in Section 27 of the Evidence Act are separated by a comma. Thus, they have to be read distinctively. The wide and pragmatic interpretation of the term “police custody” is supported by the fact that if a narrow or technical view is taken, it will be very easy for the police to delay the time of filing the FIR and arrest, and thereby evade the contours of Sections 25 to 27 of the Evidence Act. Thus, in our considered view the correct interpretation would be that as soon as an accused or suspected person comes into the hands of a police officer, he is no longer at liberty and is under a check, and is, therefore, in “custody” within the meaning of Sections 25 to 27 of the Evidence Act. It is for this reason that the expression “custody” has been held, as earlier observed, to include surveillance, restriction or restraint by the police.

29. This Court in *Deoman Upadhyay (supra)*, while rejecting the argument that the distinction between persons in custody and persons not in custody violates Article 14 of the Constitution of India, observed that the distinction is a mere theoretical possibility. Sections 25 and 26 were enacted not because the law presumed the statements to be untrue, but having regard to the tainted nature of the source of the evidence, prohibited them from being received in evidence. A person giving word of mouth information to police, which may be used as evidence against him, may be deemed to have submitted himself to the “custody” of the police officer. Reference can also be made to decision of this Court in *Vikram Singh and Ors. v. State of Punjab*¹⁸, which discusses and applies *Deoman Upadhyay (supra)*, to hold that formal arrest is not a necessity for operation of Section 27 of the Evidence Act. This Court in *Dharam Deo Yadav v. State of Uttar Pradesh*¹⁹, has held that the expression “custody” in Section 27 of the Evidence Act does not mean formal custody, but includes any kind of surveillance, restriction or restraint by the police. Even if the accused was not formally arrested at the time of giving information, the accused is, for all practical purposes, in the custody of the police and the bar vide Sections 25 and 26 of the Evidence Act, and accordingly exception under Section 27 of the Evidence Act, apply. Reliance was placed on the decisions in *State of A.P. v. Gangula Satya Murthy*²⁰ and *A.N. Vekatesh and Anr. v. State of Karnataka*²¹.

30. However, evidentiary value to be attached on evidence produced before the court in terms of Section 27 of the Evidence Act cannot be codified or put in a straightjacket formula. It depends upon the facts and circumstances of the case. A holistic and inferential appreciation of evidence is required to be adopted in a case of circumstantial evidence.”

30. Examining the evidence in the case on hand, as discussed above, in the light of the above referred settled legal position, it is clear that the Appellant by going to the police station after the incident had submitted himself to the custody of the police. Even if the Appellant was not formally arrested immediately or before the discovery of the place where dead body of his wife was lying, the trappings of Section 27 of the Evidence Act would apply. It is needless to state that, accompanying the Appellant with the police till the place of discovery in person, is not contemplated under the law. What is important or relevant is that, on the disclosure of the Appellant the place where dead body was lying was discovered.

31. At the time of arguments in the Appeal, learned Advocate for the Appellant submitted that, Exh.68, Station Diary Entry, was tendered on record by the learned APP at the fag end prior to arguments on 24.07.2023 before the learned Trial Court, cannot be used against the Appellant as it was not brought during recording of the evidence. Perusal of the Roznama dated 24.07.2023 shows that, on that day the Appellant and the Advocate representing the Appellant were present in the Court and on the Application submitted by the learned APP, the said

Station Diary Entry dated 11.09.2011 was taken on record by learned Trial Court and marked Exh.68. The said Roznama further shows that, additional statement under Section 313 of the Cr.P.C. of the Appellant was recorded by the learned trial Court on the same date in connection with the said Station Diary Entry. The said additional statement under Section 313 of the Cr.P.C. shows that, the said Station Diary Entry was put to the Appellant. There can be no quarrel on the legal position that, the Station Diary Entry cannot be used as a substantive evidence as observed in **Dagadu Dharmaji Shindore vs. State of Maharashtra, 2005 (Supp.) Bom.C.R. (Cri.) 217** cited by learned Advocate for the Appellant. Even if Exh.68 is kept out of consideration, there is conclusive evidence, as discussed above, which established that, wife's dead body was discovered at the instance of the Appellant. The third circumstance is firmly established.

-: Defence of the Appellant :-

32. All the above circumstances relied upon by Prosecution are conclusively established. The defence of the Appellant, as can be seen from the defence evidence of DW1 – Jabbar Pathan Sattar Pathan, is that the Appellant and this defence witness had gone to offer namaz at 07:00 p.m. on 11.09.2021. After half an hour they had tea between 07:30 p.m. to 08:30 p.m. in the hotel and thereafter they both returned to their respective homes. Cross-examination of DW1 - Jabbar Pathan Sattar Pathan shows that he was residing at the distance of half a

kilometer from the house of the Appellant. The Masjid was at the distance of 1 (one) kilometer from his house. It is confirmed by him in the cross-examination that, the Appellant and his the Deceased wife were residing together and constant quarrel used to take place between the Appellant and his the Deceased wife on the ground of character of his wife. This evidence corroborates the evidence of Sisters and Brother of the Deceased, as discussed above. In his written-statement under Section 313 of the Cr.P.C. at Exh.70 it is stated by the Appellant that he along with his son had gone to offer namaz with the defence witness i.e. DW No.1 - Jabbar Pathan Sattar Pathan, he reached his residence at 08:30 p.m. and saw his wife dead and so, he kept his son with the neighbourers and informed the sister of the Deceased's wife about her death and he proceeded to the police station for lodging the Report. The Sister of the Deceased came to the police station and lodged Report against him and the police beat him and the police had also brought some suspects in the police station. He stated that he did not commit the offence. However, DW No.1 - Jabbar Pathan Sattar Pathan nowhere deposed that, the Appellant's son accompanied them to Masjid.

33. What is clear from the above defence of the Appellant is that, after the namaz was offered by him along with the defence witness he reached his residence. It is strange that on noticing his wife lying dead in his house, he neither raised hue and cry nor informed the neighbourers. He straightway goes to the police station. He did not take

his wife to the doctor. This is an unnatural conduct of the Appellant. This conduct of the Appellant becomes relevant pursuant to Section 8 of the Evidence Act. The evidence of PW7 - Shahadeo Bhanudas Pawar, as discussed above shows that, the Appellant reached the Police Station at 08:45 p.m. This shows that the Police Station was near to his house. The evidence of PW8 - Subhash Ganpatrao Dasarwad, as discussed above, goes to show that they entered the house of the Appellant after opening the latch. This shows that, the Appellant closed the door and went to the police station. The defence of the Appellant is not probable and unacceptable.

34. Learned APP cited the Judgment in the case of **Bheru Singh s/o. Kalyan Singh vs. State of Rajasthan, 1994 SCC (Cri) 555**, wherein it is observed that, *“Where the accused himself lodges the first information report, the fact of his giving the information to the police is admissible against him as evidence of his conduct under Section 8 of the Evidence Act and to the extent it is non-confessional in nature.”*

35. As far as the alternate submission by the learned Advocate for the Appellant that, quarrel took place between the Appellant and Deceased wife became violent and in a fit of anger, the Appellant throttled his wife with no intention to cause her death, therefore, the offence can be lowered down, has no foundation to stand. There is no

such defence of the Appellant in the cross-examination of the witnesses and / or in the statement under Section 313 of the Cr.P.C.

36. In support of his alternate submissions, learned Advocate for the Appellant cited the Judgment of this Court in **Criminal Appeal No.530 of 2018 (Mansing @ Janu Prabhu Rathod vs. The State of Maharashtra)** decided on 11.06.2024, wherein the conviction and sentence was set aside. Perusal of the same shows that, although the evidence of Brother and Parents of the Deceased indicated that the Appellant therein had Motive to eliminate his wife as he used to suspect her character, their evidence did not conclusively established the same in view of the evidence of the daughter (PW6) of the Deceased. The same is not so in the case on hand, and therefore, the said Judgment is of no assistance to the Appellant.

37. The other judgments relied upon by learned Advocate for the Appellant are :

37.1. In **State of Maharashtra vs. Chhabilal Hilal Patil and Another, 2009 SCC OnLine Bom 1046** which was an Appeal against acquittal, wherein it is observed that, *'the parameters for appreciation of the evidence upon which the order of acquittal is based, are different'*.

37.2. In **Shankarlal Gyarasilal Dixit vs. State of Maharashtra, (1981) 2 SCC 35**, which was the case based on circumstantial evidence,

in which the Court had reached the conclusion that the Appellant therein was not present in the house at the time when dead body was discovered.

37.3. In **Reena Hazarika vs. State of Assam, (2019) 13 SCC 289** wherein it is observed that *'Section 313 Cr.PC. cannot be seen simply as a part of audi alteram partem and it casts a solemn duty on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 Cr.PC. and to either accept or reject the same for reasons specified in writing'*.

37.4. In the **State of Maharashtra vs. Raju @ Rajkumar Keshavrao Landge in Criminal Confirmation Case No.01 of 2018** of the Nagpur Bench of the Bombay High Court decided on 26.10.2018 wherein it was noticed that, *'the Advocate therein before the learned Trial Court was provided by the office of Legal Aid and the Court found that no efforts were made to bring on record the inconsistencies, contradictions and omissions in the cross-examination of the witnesses and the Court found that it was exceptional case where there was complete failure of justice resulting in denial of free and fair, reasonable and just trial, which was the constitutional guarantee contained in Articles 21, 22 (1) of the Constitution of India read with Section 304 (1) of Cr.PC. and the Judgment of conviction and sentence was quashed and set aside and the matter was remanded back to the learned Trial Court for conducting the de novo trial'*.

37.5. In **Sharad Kondiba Walke vs. The State of Maharashtra** in **Criminal Appeal No.414 of 2007** decided on 05.01.2010 by Aurangabad Bench of the Bombay High Court wherein it was observed that, '*The Prosecution failed to establish the very presence of the appellant therein in the house during the intervening night by any cogent evidence and it was a duty of the prosecution to establish primarily the nexus between the appellant and the alleged crime, and it was the primary duty of the prosecution to prove and establish the facts that the death of deceased therein was within the special knowledge of the appellant therein, then only provisions of Section 106 of the Evidence Act could have been invoked*'.

37.6. In **The State vs. Motia, 1953 SCC OnLine Raj 51**, wherein the Rajasthan High Court observed on the point of necessity for the Prosecution to produce evidence that, steps were taken at once to seal the articles, and that from the time the articles came into possession of the police to the time they were sent for identification before the Magistrate or for examination to the Chemical Examiner, the seals remained intact.

37.7. In the case on hand, the Appellant was represented by the Advocate of his choice before the learned Trial Court. Secondly, the record shows that the Statement of the Appellant and his defence is considered, which is not found probable and acceptable. In view of the

evidence available on record which conclusively established the circumstances, the said rulings are of no assistance to the Appellant.

38. The proved circumstances established that, the Appellant was suspecting the character of Deceased and therefore, had the Motive to commit the Crime. The Appellant's wife died Homicidal Death at their residence. The dead body of wife was discovered at the instance of the Appellant. These circumstances form a complete chain which unerringly point towards involvement of the Appellant in the Crime. The proved circumstances are inconsistent with the innocence of the Appellant and established that, it is only the Appellant who is the perpetration of the Crime. We do not find that the learned Trial Court committed any error in convicting the Appellant and sentencing him *vide* the impugned Judgment and Order. On reappraisal of the evidence on record, we find ourselves in agreement with the conviction and sentence recorded by the learned Trial Court. Hence, the Appeal is liable to be dismissed and hence, we proceed to pass the following order.

ORDER

- (i) The Appeal is dismissed.
- (ii) Pending Criminal Application No.1292 of 2024 stands disposed of.
- (iii) Record and Proceedings be sent back to the learned Trial Court.

(NEERAJ P. DHOTE, J.)

(R. G. AVACHAT, J.)