



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

CRIMINAL APPEAL NO.1003 OF 2019

Deepak s/o. Laxman Bhivsane,
Age : 33 years, Occ. Agriculture,
r/o. Wadodchatha, Wangi Khurd,
Tq. Sillod, Dist. Aurangabad

..Appellant

Vs.

The State of Maharashtra,
Through Police Inspector,
Police Station, Sillod Rural,
Tq. Sillod, Dist. Aurangabad

..Respondent

Mr.M.M.Parghane, Advocate for appellant
Mrs.U.S.Bhosale, APP for respondent
Mr.A.V.Soman, Advocate appointed to assist the court.

**CORAM : R.G.AVACHAT AND
NEERAJ P. DHOTE, JJ.
DATE : FEBRUARY 23, 2024**

JUDGMENT (PER R.G.AVACHAT, J.) :-

The challenge in this appeal is to the judgment of conviction and order of sentence dated 20.07.2018, passed by learned Addl. Sessions Judge-7, Aurangabad, in Sessions Case No.244 of 2015, whereby, the appellant was convicted for the offences punishable under Sections 302 and 498-A of Indian Penal Code and therefore, sentenced to suffer imprisonment for life and R.I. for one year, respectively, and to pay fine with default stipulation. The substantial sentences have been directed to run concurrently.

2. The facts, giving rise to the present appeal, are as follows:-

Sunita (deceased) was sister of PW 1 - Dnyaneshwar. She had married the appellant in 2004. The couple was blessed with three daughters. After birth of second daughter, the appellant started ill-treating Sunita. The reason behind the same was, he wanted to be father of a male-child. Sunita gave birth to third female child. The delivery of child took place at the house of her parents. The appellant brought her back to his house at village Wadodchatha. He, thereafter, started ill-treating her severely.

3. On 02.08.2015, PW 1 - Dnyaneshwar was his home at Aurangabad. He received a phone call of one Shravan Gaikwad, informing his sister - Sunita to have passed away. He along with his mother, therefore, rushed to the place of the appellant. He noticed Sunita was laid on a wooden cot in front of the house of one Jitendra Bhivsane, at Bouddha Wada. She was motionless. He noticed injuries on her person. She was rushed to the Government hospital, Sillod. The Medical Officer there, declared her dead.

4. The First Information Report (Exh.14) was lodged on 07.08.2015 by PW 1 - Dnyaneshwar. According to him, Mayuri

(PW 3), daughter of the appellant and the deceased, related him the appellant to have beaten up the deceased with stick. The appellant had urged her to die. The deceased, therefore, consumed poisonous substance (insecticide). Based on the FIR, crime vide C.R. No.I-103 of 2015, for the offences punishable under Sections 306 read with Section 498-A of Indian Penal Code was registered.

5. The dead body of Sunita had already been subjected to autopsy. The post-mortem report indicates that PW 11 - Dr.Aniruddha had reserved his opinion, pending chemical analysis report. On receipt of the C.A. Report, since no poisonous substance was noticed during chemical analysis of viscera, he opined the cause of death to be "*neurogenic shock and hemorrhagic shock due to underlying injuries to left sided kidney and spleen*". Section 302 of I.P.C., therefore, came to be invoked in place of Section 306 of I.P.C.

6. Statements of witnesses acquainted with the facts and circumstances of the case were recorded. The scene of offence panchnama was drawn. Upon completion of investigation, the appellant was proceeded against by filing of charge sheet. Learned Judicial Magistrate, First Class, Sillod, Dist. Aurangabad, committed the case to the Court of Session, for trial in accordance with law. The case was assigned to the Court of Addl. Sessions Judge-7,

Aurangabad (trial court). The trial Court framed Charge (Exh.5). The appellant pleaded not guilty. His defence was of false implication on account of his brother-in-law wanted to rob the appellant of his agriculture land.

7. The trial court, on appreciation of the evidence in the case, convicted the appellant and consequently, sentenced as stated above.

8. Heard learned counsel for the parties.

9. learned counsel for the appellant would submit that had the appellant really intended to kill his wife, he would have assaulted on any vital part of the deceased. According to him, since no other person was residing with the appellant and the deceased, the appellant had number of means to eliminate the deceased, had he really intended to finish her off. According to learned counsel, the appellant is behind the bars for little over seven years. He, therefore, urged for converting the conviction from offence under Section 302 of Indian Penal Code to Section 304 Part II of Indian Penal Code.

10. Learned APP would, on the other hand, submit that the minor daughter (PW 3 - Mayuri) had seen the appellant assaulted the deceased. There is evidence of a neighbour (PW 4 - Bhiken) to

indicate that the appellant used to beat the deceased, frequently. There is also evidence to indicate the appellant to have had desire of contracting second marriage since he wanted to have a male child. According to learned counsel, the deceased died while in the custody of the appellant. The appellant failed to explain the injuries on the person of the deceased. She, therefore, urged for dismissal of the appeal.

11. Mr.A.V.Soman, learned counsel, was requested to assist the Court in this matter. We appreciate his assistance. According to him, the opinion given by the Doctor goes a long way to infer the appellant to have killed his wife. The appellant tried to deflect his in-laws. The appellant informed his mother-in-law the deceased to have committed suicide. According to learned counsel, no interference with the impugned judgment is warranted.

12. Considered the submissions advanced. Perused the evidence on record.

13. PW 11 - Dr. Aniruddha conducted autopsy. The post-mortem report is at Exh.39. He noticed following injuries on the person of the deceased:-

- 1) *Contusion over back running from mid of scapula to left lateral lumber region size 17.5 c.m. x 5 c.m. greenish black colour.*
- 2) *Contusion over supra scapula region on left side of size 7.5 c.m. x 5 c.m. greenish black colour.*
- 3) *Contusion multiple injuries 5 in number on left gluteal and thigh size 17 x 5 c.m. rest of two are 10 c.m. x 5 c.m. in neck of femorus side.*
- 4) *Contusion over calf region size 1/2 x 1/2 c.m. greenish black colour.*
- 5) *Contusion over medial size of thigh 5 x 5 c.m. greenish black in colour*

All injuries are ante mortem. All these are superficial injuries. In column No.21 of post mortem report, spleen with weight of this column shows spleen conjectured and hemorrhage. External surface of spleen shown abrasion size 3 x 1/2 x 1/2 c.m. with underline collection of blood. Left kidney shows hemorrhage. Right kidney shows hemorrhage. Right kidney found slightly peril . All these injuries are sufficient to cause death.

According to him, viscera was preserved for chemical analysis. On receipt of the C.A. Report, he opined the cause of death as *“neurogenic shock and hemorrhagic shock due to underlying injuries to left sided kidney and spleen”*.

14. Admittedly, the deceased and the appellant were the only adults residing together. Admittedly, the couple was blessed with three daughters. When PW 1 – Dnyaneswar and his mother (PW 6 - Gayabai) rushed to the place of the appellant, they noticed

the deceased to have been lying on the wooden-cot. The same suggests that the appellant even did not rush the deceased to any hospital. In the examination under Section 313 of the Code of Criminal Procedure, the appellant did not offer any explanation as to the injuries on the person of the deceased.

15. The Apex Court in the case of **Trimukh Maroti Kirkan Vs. State of Maharashtra, (2006) 10 SCC 681** observed thus -

“12. In the case in hand there is no eye-witness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence.

13. ...

14. 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 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. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A

Judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecution 1944 AC 315 # quoted with approval by Arijit Pasayat, J. in State of Punjab vs. Karnail Singh (2003) 11 SCC 271). 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 Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.....

.....

22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.”

16. Section 300 of the Indian Penal Code defines the offence of ‘murder’, which reads as under :-

300. Murder — *Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—*

2ndly. — If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

3rdly. — If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

4thly. — If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

17. Intention to cause death is inferred from the nature of the weapon used and the part of body on which assault is made. In the present case, the appellant and the deceased were the only adult persons residing together. Had the appellant really intended to finish off his wife, he would have assaulted on any vital part of the body of deceased with a dangerous weapon. As per the case of prosecution itself, the appellant had beaten up the deceased with stick. The description of the stick, which has been seized itself is 2 ft. in length. The injuries were not on vital part of the body of the deceased. In our view, therefore, the appellant cannot be said to have caused the aforesaid injuries with an intention to eliminate her.

The Doctor opined that the injuries on the person of the deceased, were sufficient in ordinary course to cause death. We are, therefore, inclined to attribute the appellant with the knowledge of causing death of the deceased, by such injuries. It would, therefore, be an offence of culpable homicide not amounting to murder, punishable under Section 304 Part II of Indian Penal Code.

18. In view of the above, the appeal deserves to be allowed partly. Hence, the following order:-

- (i) The appeal is partly allowed.
- (ii) The impugned order dated 20.07.2018, passed by learned Addl. Sessions Judge-7, Aurangabad, in Sessions Case No.244 of 2015, convicting and sentencing the appellant for the offence under Section 302 of Indian Penal Code, is set aside.

Instead, the the appellant is convicted for the offence punishable under Section 304 Part II of Indian Penal Code and therefore, sentenced to suffer rigorous imprisonment for six years and to pay a fine of Rs.2,000/- (Rupees Two Thousand), in default, to suffer simple imprisonment for six months.

- (iii) Rest of the terms of the impugned order of conviction and consequential sentence, to stand unaltered.

- (iv) Both sentences to run concurrently.
- (v) The appellant has undergone imprisonment for the period more than he has been sentenced. He be, therefore, released forthwith, if not required in any other case.

[NEERAJ P. DHOTE, J.]

[R.G. AVACHAT, J.]

KBP