



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

CRIMINAL APPEAL NO.369 OF 2020

1. Saberkhan Sherukhan @ Saifullakhan,
Age : 22 years, Occu : Driver,
2. Majidkhan s/o. Saifullakhan,
Age : 29 years, Occu : Driver,
3. Sajedkhan s/o. Saifullakhan,
Age : 27 years, Occu : Service,

All R/o. Gulshan Colony,
Jintoor at Present Zamzam Colony,
Parwa Gate, Parbhani,
Tq. & Dist. Parbhani

.. Appellants
(Accused No.1 to 3)

Versus

The State of Maharashtra

...Respondent

.....
Shri. S. J. Salunke, Advocate for the Appellants
Smt. V. S. Chaudhari, APP for Respondent / State
.....

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

**RESERVED ON : 24.01.2024
PRONOUNCED ON : 09.02.2024**

JUDGMENT : [Per NEERAJ P. DHOTE, J.]

. This is the Appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.') against the Judgment and order dated 16.03.2020 passed by the learned Additional Sessions Judge, Parbhani in Sessions Case No. 39 of 2019

convicting the Appellants and sentencing them to suffer imprisonment for life and to pay fine of Rs.5,000/- each, in default to suffer rigorous imprisonment for one year each, for the offence punishable under Section 302 r/w. Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as the 'I.P.C.') and to suffer Rigorous Imprisonment for three years each, and to pay fine of Rs.2,000/- each, in default to suffer simple imprisonment for three months each, for the offence punishable under Section 201 r/w. Sec. 34 of the I.P.C.

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

2.1. The Informant – Shaikh Ahmed Shaikh Nizam (PW No.1) was having two daughters by name Mumtaz and Gulnaz. Mumtaz was married to Sajedkhan i.e. Appellant No. 3 and Gulnaz was married to Majidkhan i.e. Appellant No.2 and their marriage was performed in the year 2012. After marriage, both the daughters went to their respective matrimonial home and started residing at Parbhani. His daughter Mumtaz was being ill-treated by her husband and in-laws and was asked to get Rs. Five Lakh from her father. In the midnight of 29.11.2018, his daughter Gulnaz telephonically informed him that Mumtaz died due to heart attack. The Informant, who is also the resident of Parbhani, reached the house of his daughter with his relatives. They saw the dead

body of Mumtaz in the house of Gulnaz. On enquiry, he came to know that Mumtaz died in her matrimonial house and the Appellants brought the dead body to the house of the Gulnaz in the auto rickshaw. Informant and his relatives were not allowed to see the body of Mumtaz which was covered. The Appellants took the dead body to Jintoor in the ambulance for cremation. The Informant lodged the report with the police and Parbhani police called the Jintoor Police. The Jintoor police enquired from the Informant whether he wants the Post-mortem of deceased Mumtaz to be done, to which the Informant replied in the affirmative. The Post-mortem was conducted and the cause of death was revealed as 'Strangulation'. The Informant went to Kotwali Police Station and lodged the Report at Exh.12 against the Appellants.

2.2. After lodging the Report, the investigation was set in motion. During the course of investigation, the Panchanama's were carried out, the Appellants came to be arrested, the Articles were seized and sent for Chemical Analysis, the relevant documents came to be collected and on completion of investigation, the Appellants came to be charge-sheeted.

3. The learned Trial Court framed the Charge against the Appellants for the offences punishable under Sections 302, 304-B, 498-A, 201 r/w. Section 34 of the I.P.C. and under Section 4 of the

Dowry Prohibition Act *vide* Exh.6. The Appellants pleaded not guilty and claimed to be tried. To prove the Charge, the Prosecution examined in all ten (10) witnesses and brought on record the relevant documents. On appreciation of the evidence, the learned Trial Court passed the impugned Judgment and order acquitting the Appellants for the offence punishable under Sections 304-B, 498-A r/w. Section 34 of the I.P.C. and for the offence punishable under Section 4 of the Dowry Prohibition Act and convicted the Appellants for the offences punishable under Sections 302, 201 r/w. Section 34 of the I.P.C.

4. Heard Shri. Sudarshan J. Salunke, learned Advocate for the Appellants and Smt. V. S. Chaudhari, learned APP for the Respondent / State. Perused the Paper-book.

5. It is submitted by the learned Advocate for the Appellants that the evidence of PW No.1 - Shaikh Ahmed Shaikh Nizam show that his first statement to the police was suppressed and the subsequent report cannot be treated as the FIR. He submitted that if the second statement to the police is considered as FIR, then there is a delay in lodging the FIR. He submitted that though the case is based on the evidence of the eye witness, the motive behind the crime is not proved. He submitted that the Appellants are acquitted for the offence punishable under Sections 498-A, 304-B of the IPC and under Section 4

of the Dowry Prohibition Act. He submitted that the evidence on record do not prove the Charge against the Appellants and therefore, they be acquitted by allowing the Appeal.

6. Learned Advocate for the Appellants has placed reliance on the following Judgments:

- (i) Dhanpal vs. State by Public Prosecutor, Madras 2009 AIR SCW 5973.
- (ii) P. Mani vs. State of T. N., AIR 2006 SC 1319.
- (iii) Syed Aslam Syed Abdul vs. State of Maharashtra, 2008 BCI 68.
- (iv) Sou. Ranjana vs. State of Maharashtra, 2018 (3) ABR (Cri) 487.
- (v) State of Maharashtra vs. Prabhakar Somaji Ambhore, 2019 (2) ABR (CRI) 342.
- (vi) Shivaji Chintappa Patil vs. State of Maharashtra, 2021 ALL MR (Cri) 1569 (SC).
- (vii) Badam Singh vs. State of M.P., AIR 2004 SC 26.
- (viii) Thulia Kali vs. State of T. N., 1972 Cri.L.J. 1296.

7. It is submitted by the learned APP that the houses of both the sisters are nearby and PW No.3 – Gulnaz Pathan, who is the sister of the deceased, is the eye witness to the incident. It is submitted that one of the Appellants is the husband of PW No.3, therefore, she did not approach the police immediately after witnessing the incident. It is submitted that, there is no delay in lodging the First Information Report. It is further submitted that the credible evidence is brought on record by

the Prosecution and as the death is by Strangulation in the house of the Appellants, it is for the Appellants to discharge their burden under Section 106 of the Indian Evidence Act. It is submitted that there is proper appreciation of the evidence by the learned Trial Court and no interference is called for in the impugned Judgment and order and the Appeal be dismissed.

8. Perusal of the above referred Judgments relied upon by the learned Advocate for the Appellants show the following settled legal position.

- (i) It is the fundamental principle that it is for the Prosecution to prove its own case and the burden cannot be shifted on the accused,
- (ii) Suspicion, however, strong cannot take place of legal evidence,
- (iii) Section 106 of the Indian Evidence Act does not absolve prosecution of discharging its primary burden of proof.

9. From the evidence available on record, there is no dispute on the following aspects:

- (a) Deceased Mumtaz and PW No.3 – Gulnaz are the real sisters and daughters of PW No. 1 (Informant) – Shaikh Ahmed Shaikh Nizam,
- (b) Appellants No.2 and 3 are real brothers.
- (c) Deceased Mumtaz was the wife of Appellant No.3 - Sajedkhan. The Appellant No.2 - Majidkhan is the husband of PW No.3 – Gulnaz,

(d) Mumtaz died in the late evening / night of 28.11.2018.

10. The evidence of PW No. 6 – Dr. Santoshkumar Pandurang Chavan show that on 29.11.2018 he was working as the Medical Officer in the Rural Hospital at Jintoor and the dead body of Mumtaz Begum was referred to him by the Police for Post-mortem and he performed Post-mortem from 03.30 p.m. to 04:30 p.m. His evidence show that the dead body was well nourished and well built and cold and rigor mortis was present over the whole body. He found ligature mark present over neck above the level of thyroid cartilage anteriorly and running horizontally, running towards backwards and encircling whole neck. Ligature material not present in Situ. Ligature mark was present in two turns with 0.5 cm apart at some places and over lapping at some places. His evidence further show that length of ligature mark was 28 c.m. and 0.6 c.m. in breadth in each turn. The ligature mark was deep grooved in the form of pressure abrasion. The skin of ligature mark was dried, hard and perched (skin became hard) with two abrasions at left chin of size 1 x 0.5 cm which were reddish in colour. On dissection under the soft tissue shows hemorrhages in the form of adherent blood clot. Fracture of hyoid bone on left side at the junction of body and present with adherent blood clot. There was no fracture of thyroid and cricoid cartilage seen. Injuries were ante mortem. The cause of death was **‘asphyxia due to strangulation’**. Post-mortem Report at Exh.38 is

brought in Evidence. It is deposed that the injuries mentioned in Column No.17 were sufficient to cause death in ordinary course and the ligature mark may occur by object like Rope - Article- 'A'.

11. Though in the cross-examination of PW No.6 - Dr. Santoshkumar Pandurang Chavan it has come that he did not mention the age of the injuries caused to the neck and the age of ligature mark and in case of hanging by oneself by taking two rounds of Rope, one round will completely encircle the neck. However, he volunteered that by hanging oneself with two rounds, another round would be in a 'V' shape. It is denied that it was a case of hanging and wrong opinion was given due to pressure of the people and the police.

12. The cross-examination could not create any dent in the evidence of this doctor witness. Evaluation of the evidence of the said PW No.6 – Dr. Santoshkumar Pandurang Chavan show that the death of Mumtaz was due to 'asphyxia due to strangulation'. Post-mortem Report at Exh.38 corroborate the testimony of this PW No.6 - Dr. Santoshkumar Pandurang Chavan.

13. The evidence of PW No.2 - Riteshkumar Kamalkishor Murkiya show that on 01.12.2018 he was called by the police at Zamzam colony and police took the panchas to one house from where

one rope came to be seized under the panchanama at Exh.17. The cross-examination of this witness show that he was working as the Conductor (bus depot). It has come that the Zamzam colony was on Dargah road. His evidence show that he did not know who was the owner of the house where the panchanama was done and did not know as to who and how many persons were residing there.

14. The evidence of PW No.10 - Yunus Khan Gulab Khan Pathan show that at the time of the incident he was posted at the Police Station Kotwali as PSI and he received the investigation of the accidental death bearing No. 35/18 and he conducted the spot panchanama with the assistance of the panchas from S. T. Department and the said place was shown by the father of the deceased (PW No.1). His evidence go to show that the panchanama at Exh.17 was the same spot panchanama and Ropes-Article 'A' and 'N' were seized from the said spot. The cross-examination of this witness show that the Ropes were seized from the spot which was the residence of the deceased.

15. The evidence of PW No.3 – Gulnaz Majidkhan Pathan show that the distance between her house and the house of the deceased Mumtaz was 1000 to 1200 feet. Her evidence show that on 28.11.2018 Appellant No. 3 – Sajidkhan told her husband i.e. Appellant No.2, that he will kill his wife and when Appellant No.2 asked him the reason, the

Appellant No.3 stated that she was not bringing Rs. Five Lakh from her parents. Thereafter, her husband i.e. Appellant No.2 called Appellant No.1 who came out and both went outside and she followed them which was around 10:45 p.m. to 11:00 p.m. She deposed that all the Appellants and her mother-in-law Shamshubee (absconding accused) were present in the house of the deceased. She peeped inside through the hole of window and saw that Appellant No.3 and her mother-in-law caught hold the hands and Appellant No.2 caught hold the legs of her sister Mumtaz and Appellant No.3 strangulated Mumtaz by using rope. She deposed that she got frightened after seeing the incident and went to her house. This part of testimony of this PW No.3 Gulnaz that she actually witnessed the murder of Mumtaz by the Appellants and absconding accused, has been disbelieved by the learned Trial Court. It is observed by the learned Trial Court in the impugned judgment that the latin maxim '*falsus in uno, falsus in omnibus*' i.e. 'false in one thing, false in everything' neither was a sound rule of law nor a rule of practice and was not applicable in the criminal trials.

16. The further evidence of PW No.3 - Gulnaz show that Appellant No. 1 took the auto rickshaw of her husband and all the Appellants brought the dead body of her sister at her house and threatened to kill her (PW No.3 - Gulnaz) and asked her to inform her parents over the phone that her sister suffered heart attack and

accordingly she made a phone call to her father (PW No.1 - Shaikh Ahmed) and told him that her sister died due to heart attack and her family members came to her house and enquired as to how the dead body was in her house. She denied the suggestion that Appellants went out of the station, her sister came to her house and there were quarrel between the deceased and her (PW No.3 - Gulnaz) and due to anger Mumtaz hanged herself. Though it has come in the evidence of this witness that Appellant No.3 went to Jintoor on the date of the incident, the witness volunteered that he returned in the night. The evidence of PW No.3 - Gulnaz show that the Appellants took the dead body of her sister to Jintoor in ambulance.

17. It is true that from the evidence of PW No.3 – Gulnaz, it is seen that, Accused No.1 to 3 were residing in separate houses. Her evidence establishes that the dead body of Mumtaz was brought to her house which was also the residence of Accused no.2 being her husband and from there the dead body was taken to Jintoor in ambulance, which was the place where the parents of Appellants No.2 and 3 were residing.

18. It has come in the evidence of PW No.3 – Gulnaz that in the house of the deceased, Madarsa was being run wherein work of teaching, taking care of lodging and boarding of the orphan students was being done and there were 30 to 35 students, who were residing

there and at the same time, it has come in her evidence that, the students were residing in the hostel since one (1) year. This evidence will not affect the case of prosecution for the reason that the evidence of PW No.3 - Gulnaz show that the house of deceased Mumtaz was having 4 to 5 rooms and that the dead body of Mumtaz was brought to her house in the night time.

19. The conduct of PW No.3 – Gulnaz of not informing her neighbours and relatives about the incident is quite natural, as her evidence clearly show that she was threatened by the Appellants of dire consequences. When one of the Appellants was her husband and others were the relatives of her husband, such threat by them, when the dead body of her sister was brought to her house, would be a spine chilling experience and would naturally frighten a normal human being. The defence that PW No.3 – Gulnaz and deceased Mumtaz engaged in quarrel with their father (PW No.1 – Shaikh Ahmed) on the ground of second marriage by their father and maintenance of their mother, brother and sister and committing suicide by Mumtaz by hanging herself due to anger out of the said quarrel is neither probable, nor acceptable. As discussed earlier, the evidence of doctor has ruled out the possibility of death of Mumtaz by hanging herself by the rope has been ruled out.

20. The evidence of PW No.1 - Shaikh Ahmed Shaikh Nizam

show that on 29.11.2018 his daughter Gulnaz (PW No.3) informed him at 12:15 a.m. that Mumtaz died due to heart attack and so, he reached at Jamjam colony i.e. the area where his both daughters were residing. His evidence show that he found Mumtaz covered in blanket and they were not allowed to see her dead body. The dead body was taken to Jintoor. His cross-examination confirms that he learnt about the death of his daughter Mumtaz through the phone call of Gulnaz (PW No. 3) and so he went along with other relatives to the house of Gulnaz and saw the dead body of Mumtaz at the house of Gulnaz. The cross-examination show that the body was taken to the house of the Appellant No.3 at Jintoor.

21. The evidence of PW No.9 - Narayan Rambhau Kulthe show that on 28.11.2018 he was working as a Driver on the Ambulance of one Vitthal Kakade and used to park the Ambulance at Government Hospital, Parbhani. His evidence show that when he was sleeping in the Ambulance Shri. Saberkhan (Appellant No.1), auto driver came to him around 12:30 a.m. and told that his maternal aunt died due to attack and he wanted to take her at Jintoor. His evidence show that he went to Dargah road, Jamjam colony from where the dead body was carried to Jintoor and he charged Rs.1500/-. His evidence show that Appellant No.1 was sitting on his side, and one male and two females were sitting behind at the back side of ambulance. His cross-examination show that

he was knowing Saberkhan (Appellant no.1) for the last one year before the incident.

22. The above discussed evidence show that PW No.3 Gulnaz informed her father about the death of her sister Mumtaz over the phone and accordingly PW No. 1 - Shaikh Ahmed came to the house of PW No.3 – Gulnaz where he saw the dead body of Mumtaz. The above discussed evidence further show that the dead body of Mumtaz was taken to Jintoor in the ambulance. Though, the aforesaid witnesses PW No.3 - Gulnaz, PW No.1 – Shaikh Ahmed and PW No.9 – Narayan were cross-examined by the defence, their evidence remained intact. Though the evidence of PW No.3 - Gulnaz to the extent that she witnessed the actual incident by peeping through the window is kept out of consideration, her evidence on other aspects inspire confidence. It is clearly established by the Prosecution that the dead body of her sister Mumtaz was brought by the Appellants to her house. The evidence of PW No.1 - Shaikh Ahmed show that he informed the police for the post-mortem, but the Appellants were not ready for the same.

23. The Hon'ble Apex Court in the case of **Trimukh Maroti Kirkan Vs. State of Maharashtra; (2006) 10 SCC 681**, in Paragraph Nos.15, 21 and 22, have observed as follows :-

“15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation”.

“21. In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of this Court.

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. In Nika Ram v. State of H.P [AIR 1972 SC 2077], it was observed that the fact that the accused alone was with his wife in the house when she was murdered there with 'khokhri' and the fact that the relations of the accused with her were strained would, in the absence of any cogent explanation by him, point to his guilt. In Ganeshlal v. State of Maharashtra [(1992) 3 SCC 106], the appellant was prosecuted for the murder of his wife which took place inside his house. It was observed that when the death had occurred in his custody, the appellant is under an obligation to give a plausible explanation for the cause of her death in his statement under Section 313 Cr.PC. The mere denial of the prosecution case coupled with absence of any explanation was held to be inconsistent with the innocence of the accused, but consistent with the hypothesis that the appellant is a prime accused in the commission of murder of his wife”.....

24. The evidence on record clearly establishes the homicidal death of Mumtaz. The evidence on record has established that her dead body was brought by the Appellants at the house of PW No.3 – Gulnaz, which was also the house of Appellant No.2, being her husband. The

prosecution has discharged their burden. It is for the Appellants No. 1 to 3 to explain as to from where the dead body of Mumtaz was brought. The burden would certainly be on the Appellants by virtue of Section 106 of the Indian Evidence Act. However, except denial there is no explanation by the Appellants. In their statements recorded under Section 313 of the Cr.P.C., the Appellants have denied the prosecution's evidence and they remained silent. This further fortifies the prosecution's case.

25. The evidence of PW No.4 - Siddiqui Naderuddin Naseruddin Siddiqui show that the clothes i.e. Gown Article 'B', Salwar Article 'C' and handkerchief Article 'D' were seized by the police under the panchanama at Exh.22. From his evidence, the Prosecution has established that the clothes of deceased were seized during the course of the investigation.

26. The evidence of PW No.5 - Prakash Namdeorao Shinde show that he was the panch for seizure of the clothes of the Appellants pursuant to the Memorandum under Section 27 of the Indian Evidence Act at the instance of the Appellants vide Memorandums and Panchanamas at Exhs. 29 to 34. Admittedly, the reports of the Chemical Analyzers of the said clothes do not show that they were brought in evidence before the Trial Court on record and were exhibited.

27. The evidence of PW No.7 - Syed Khaled Syed Wajid show that he was an engineer and drew and prepared the plan of construction at the instance of Appellant No.3 and the evidence of PW No.8 – Shaikh Shakil Shaikh Salim show the seizure of some documents from PW No.7 – Syed Khaled Syed Wajid.

28. The contention of the learned Advocate for the Appellants that the first report of PW No.1 – Shaikh Ahmed has been suppressed, has no merits as the evidence of PW No.10 – Yunus Khan Gulab Khan Pathan, Investigating Officer show that initially the death of Mumtaz was registered as the Accidental Death bearing No.35/2018. Even the evidence of PW No.1 – Shaikh Ahmed show that initially he reported the incident to the Kotwali Police Station, which contacted Jintoor Police Station and after the Post-mortem at Jintoor, the F.I.R. came to be registered after the cause of death was revealed as '**Strangulation**'.

29. One aspect, which is flagged by the learned Advocate for the Appellants is that of delay in registering the Crime and delay in recording statement of PW No.3 - Gulnaz. On scrutiny of the evidence of PW No.1 – Shaikh Ahmed show that after he learnt about the death of his daughter Mumtaz he went to the house of PW No.3 - Gulnaz where the dead body of Mumtaz was kept and after going there he informed the police. The evidence of PW No.10 – Yunus Khan Gulab Khan Pathan, Investigating Officer show that the death was initially recorded as

accidental death on 30.11.2018 at about 11:28 p.m. and numbered as 35/2018. Evidence of PW No.1 – Shaikh Ahmed show that the information which he got from PW No.3 - Gulnaz was that Mumtaz died due to heart attack and he was not allowed to see the dead body of Mumtaz when he reached at the house of PW No.3. It is only after the cause of death was revealed after the post mortem, the report was lodged. Thus, we do not see that the delay is fatal to the case of the Prosecution.

30. It is clear from the evidence of PW No.3 - Gulnaz that she was threatened by the Appellants with dire consequences to tell the false reason of death of Mumtaz as Heart Attack. PW No.3 – Gulnaz was the wife of Appellant No.2 and sister-in-law of Appellant No.3. The relation between the Appellants and PW No.3 – Gulnaz were such that it would require great courage to immediately disclose about commission of the crime of murder of her sister by her family members. The conduct of PW No.3 – Gulnaz cannot be said to be abnormal. Thus, recording of her statement by the police after four to five days from the incident is not fatal to the case of Prosecution.

31. Through the evidence of PW No.1 – Shaikh Ahmed (Informant), PW No.3 Gulnaz and PW No.6 – Dr. Santoshkumar Chavan, the Prosecution has established that deceased Mumtaz died homicidal death and her dead body was brought by the Appellants to the house of

PW No.3 – Gulnaz and through the evidence of PW No.9 – Narayan Rambhau Kulthe it is established that the Appellants along with co-accused had taken the dead body of Mumtaz for cremation at another place i.e. Jintoor. The only defence is that of denial and there is absolutely no explanation from the Appellants. The evidence on record establishes that the Appellants are responsible for the Homicidal death of Mumtaz. The conscious acts of the Appellants to shift the dead body of Mumtaz from her matrimonial house to the house of PW No.3 (Gulnaz) and thereafter taking it to Jintoor for cremation clearly brings their act within the ambit of Section 201 of the I.P.C.

32. The learned Trial Court has rightly convicted the Appellants for the offences punishable under Section 302 r/w. Section 34 and Section 201 r/w. Section 34 of the I.P.C. and sentenced them to the punishment as recorded in the operative part of the impugned judgment. The judgments cited by the learned Advocate for the Appellants are on the facts of the respective cases. The Appeal deserves to be dismissed, hence we proceed to pass the following order:

ORDER

- (i) The Appeal is dismissed.
- (ii) Record and Proceedings be sent back to the Trial Court.

(NEERAJ P. DHOTE, J.)

GGP

(R. G. AVACHAT, J.)