



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

CRIMINAL APPEAL NO.942 OF 2019

Farid s/o. Ahamad Shaikh,
Age : 45 years, Occu : Driver,
R/o. C/o. Sadik Momin, Vikas Nagar,
MIDC Road, Osmanabad

.. Appellant
(Orig. Accused)

Versus

The State of Maharashtra
Through Police Inspector,
Gandhi Chowk Police Station, Latur,
Dist. Latur.

.. Respondent

.....

Shri. Prashant Giri, Advocate for Appellant
Smt. S. N. Deshmukh, A.P.P. for the Respondent / State.

.....

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

RESERVED ON : 02.12.2024
PRONOUNCED ON : 14.12.2024

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 11.04.2019, passed by the learned Sessions Judge, Latur in Sessions Case No.85 of 2016, convicting Appellant for the offence punishable under Sections 302 and 498-A of the Indian Penal Code (in short, 'I.P.C.') and sentencing him to suffer Imprisonment for Life with fine of Rs.10,000/- (Rs. Ten Thousand Only), in default, to suffer Rigorous Imprisonment for 1 (One) Month and to suffer Rigorous Imprisonment for 3 (Three) years with fine of Rs.5,000/- (Rs. Five

Thousand), in default, to suffer Rigorous Imprisonment for 15 (Fifteen) Days, respectively.

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

2.1. Deceased – Naseem Shaikh (hereinafter referred to as the 'Deceased') was the wife of Appellant. They were married for 20 (Twenty) to 22 (Twenty Two) years. They had 3 (Three) Daughters and 2 (Two) Sons. Initially they were residing at Osmanabad, which was the matrimonial place of Deceased. Appellant used to earn money by driving the truck. Appellant used to harass Deceased. After some years, Appellant and his family shifted to Latur and started residing in a rented premises. Appellant used to suspect the character of Deceased. The ill-treatment to Deceased by Appellant continued.

2.2. On 24.07.2016 Appellant asked his Brother-in-law (the Informant) to book one bus ticket for him for Aurangabad. Accordingly, the Informant booked a ticket and gave his mobile number to the traveller. On the next day morning i.e. 25.07.2016, the Informant received the phone call from the travel operator's office to reach Shivaji Chowk and so, he called Appellant and Deceased on their phone. As both did not respond to his call, he went to the house of Appellant. He gave call to Deceased, however, there was no response. He pushed the

entrance door and it got opened as was not latched from inside. He noticed Deceased in hanging position. He screamed and the neighbours gathered. The children of Appellant were sleeping in the adjacent room. He informed the Police and Accidental Death Report (ADR) came to be registered. The Police conducted the Inquest and Spot Panchanama and thereafter the body was referred for Post-mortem.

2.3. On 26.07.2016 the Informant lodged the Report with the concerned Police Station against Appellant for abating the Suicide of his Sister. The minor son of Appellant told the Informant that he witnessed the Appellant strangulating his mother with Saree. The Police recorded the supplementary statement of the Informant and recorded the statement of minor Son of Appellant. The statement of the witnesses were recorded. The Investigating Officer took steps to add Section 302 of the I.P.C. in the crime which was registered at the instance of the Informant for abatement to commit Suicide. The muddemal collected during the course of investigation was referred for Chemical Analysis. From the Post-mortem Report the cause of death was revealed as '*Asphyxia due to Hanging*'. On completion of investigation, Appellant came to be Charge-sheeted for the offence punishable under Sections 302 and 498-A of I.P.C.

2.4. On committal, the learned Trial Court framed the Charge against Appellant for the offence punishable under Sections 302, 498-A,

323, 504 of the I.P.C. *vide* Exh.11. Appellant did not plead guilty and claimed to be tried *vide* plea at Exh.12. To establish the Charge, Prosecution examined in all 12 (Twelve) witnesses and brought on record the relevant documents. After Prosecution closed their evidence, the statement of Appellant came to be recorded under Section 313 (1) (b) of the Code of Criminal Procedure (for short, 'Cr.P.C.') by the learned Trial Court. Appellant denied the case and evidence of Prosecution. According to Appellant, in the night of 24.07.2016 he left for his duty and his wife committed Suicide and he was innocent. On hearing both the sides and appreciating the evidence on record, the learned Trial Court passed the impugned Judgment and Order.

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

3.1. It is submitted by the learned Advocate for Appellant that the evidence on record shows that initially ADR was registered. Thereafter, the offence for abatement to commit suicide came to be registered and thereafter the Crime for the offence of Murder came to be registered against Appellant, which itself shows that Appellant has been falsely implicated. The cause of death shows that it was the case of hanging which indicate Suicidal death. The medical evidence do not support Prosecution's case of Homicidal Death. The medical evidence

did not rule out the possibility of Suicidal Death. If two views are possible from the evidence on record, one favourable to Appellant need to be accepted. Only after Prosecution establishes the Homicidal Death, the burden under Section 106 of the Indian Evidence Act would shift on Appellant. There are material omissions in the evidence of Prosecution witnesses. In support of his submissions, he cited the Judgment in **Shivaji Chintappa Patil vs. State of Maharashtra, (2021) 5 SCC 626**, which would be discussed later and contended that the Appeal be allowed by setting aside the impugned Judgment and Order.

3.2. It is submitted by the learned APP that if the statement of Appellant recorded under Section 313 of the Cr.PC. is seen, it goes to show that Appellant was very much present at his home in the night when the incident took place. Though Appellant asked the Informant to book the bus ticket for him, he did not travel on the said ticket. Evidence of the Informant is natural and believable. There is testimony of the child witness who witnessed the incident. The medical evidence shows that the death was almost Homicidal. The testimony of the child witness and the medical evidence is to be considered together. The testimony of the witnesses remained unchallenged in the cross-examination on vital aspects. The Spot Panchanama shows that the bangles of Deceased were broken, which rules out the possibility of Suicidal death. The learned Trial Court has rightly appreciated the

evidence on record. No interference is called for in the impugned Judgment and Order and the Appeal be dismissed.

4. Scrutinized the evidence on record. Following aspects are not in dispute, as is clear from the evidence on record.

- (a) Deceased and Appellant were residing together with their children,
- (b) Deceased met with an unnatural death at their residence,
- (c) Appellant was working as the truck driver.

5. The evidence of PW1 - Shaikh Wasim Chand shows that, Deceased was his elder Sister. He was residing near the house of Deceased at Latur. At the request of Appellant, he removed the bus ticket for 25.07.2016 in the name of Appellant for Aurangabad. In the morning of 25.07.2016 he got a call from the travel operator's office, since he had given his mobile number at the time of booking the ticket, and he was asked to reach Shivaji Chowk. He gave call on the phone of Deceased and on the phone of Appellant, however none of them responded to his call. Therefore, he went to their house and called Deceased, however, there was no response. So, he pushed the door and it opened as it was not latched from inside. He saw Deceased in hanged position with the help of Saree. He screamed. Neighbour - Najeen Saudagar (PW3) came there hearing his scream. His nephew also got up who was sleeping in the same room. He informed the Police and the Police arrived on the spot and

conducted the Inquest and Spot Panchanama. The cross-examination shows that this evidence of PW1 - Shaikh Wasim Chand is not challenged. Coming of PW3 - Najeen Saudagar, the Police and others on the spot of incident is fortified in the cross-examination.

6. The evidence of PW3 – Najeen Mohsin Saudagar shows that, she was the resident of Latur and was residing near the house of Deceased. The spot of incident was the house of her father namely Gulab Pathan. In the morning of 25.07.2016 around 05:30 a.m. she heard the scream of PW1 -Shaikh Wasim Chand and so, she went to the house of Deceased and found Deceased hanged in a sitting position. Her evidence shows that the Police came on the spot and conducted the Panchanama. Her cross-examination shows that Deceased was her Cousin Sister. The cross-examination shows that her said evidence was not challenged.

7. The evidence of PW4 – Shaikh Mohsin Chand shows that, he was the resident of Latur and Brother of Deceased. On 25.07.2016 he received the phone call from PW1 - Shaikh Wasim Chand, who informed him that Deceased was found hanged and asked him to come immediately on the spot. Accordingly, he went to the house of Deceased, where he found Deceased (his Sister) in a hanged position. After the Police completed the formalities, the body was cremated. Thereafter, the Report was given to the Police that Deceased committed suicide. The

cross-examination shows that his said evidence was not seriously challenged.

8. The evidence of PW9 – Krishna Vitthal Vibhute shows that, he was the Photographer by profession having his establishment by name and style 'Diamond Photo Studio'. On 25.07.2016 he received the phone call from the Police Officer - Mr. Chavan i.e. PW11, and he was asked to come to the spot of incident. Accordingly, he went to the spot around 07:00 a.m. and clicked the photographs of the dead body from his digital camera. He developed the photographs of the spot which were at Exh.49. His cross-examination shows that his said evidence was not challenged.

9. The evidence of PW11 – Sudhir Arjun Chavan shows that on 25.07.2016 he was attached to Gandhi Chowk Police Station as Assistant Police Inspector (A.P.I.). At 06:00 a.m. he received call from the Police Station Officer (P.S.O.) that incident of Strangulation / Hanging had taken place. He went to the Police Station, made the Station Diary Entry and went to the spot of incident with the First Informant, his staff and photographer. It was the house of Gulab Pathan consisting of rooms inside the channel gate. The spot of incident was the 6th (sixth) room. He found Deceased in hanging position with her legs touched to the bed and stiff hands. After taking the necessary measurements, the body was removed. He conducted the Spot Panchanama at Exh.26 and the Inquest at Exh.27. He identified the photographs at Exh.49, which were taken by

the photographer i.e. PW9 – Krishna Vitthal Vibhute. He referred the body for Post-mortem. The ADR was registered at the instance of PW1 - Shaikh Wasim Chand. His evidence was not seriously challenged in the cross-examination.

10. The evidence of PW8 – Chand Nawaj Shaikh shows that he was the father of Deceased. On 25.07.2016 in the morning when he was at Murud, he received the phone call from PW1 - Shaikh Wasim Chand asking him to come immediately to Latur. Accordingly, he came to Latur and learnt about the incident. His cross-examination shows that his house was near the spot of incident. On the same day cremation was done. His said evidence remained unchallenged in the cross-examination.

11. Evidence of PW10 – Shivraj Uttamrao Mane shows that on 25.07.2016 he was attached to the Government Hospital, Latur as a Resident Doctor. Body of Deceased i.e. Naseem Fareed Shaikh, was brought by the Gandhi Chowk Police with the Inquest for Post-mortem. He performed the Post-mortem. On internal examination, he found the following injuries.

- “(1) Evidence of “V” shaped ligature mark placed above the level of thyroid cartilage, encircling the neck, running upward – backwards deficient posteriorly is parchmented, faint reddish brown in colour. Length of ligature mark 20 cm, breadth 3.5 cm (maximum) and 2 cm (minimum).

- (2) Ligature mark is broaden rt side up to midline and of less breadth on left side. Distance of ligature mark from left mastoid – 6 cm and from right mastoid 5 cm, from chin 7 cm, from suprastoxnal notch 8 cm. Neck circumference 34 cm.
- (3) On neck dissection – evidence of pale white and listering surface seen under ligature mark, margins of which show petechial haemorrhages, lymphoides congested above the level of ligature mark.
- (4) No evidence of strap muscle injury.
- (5) No evidence of fracture of thyroid / cricoid cartilage. No evidence of fracture of hyoid bone.
- (6) Thyroid gland congested.
- (7) No evidence of any palpable fracture on external examination.
- (8) Evidence of abrasion on right angle of mouth of size 0.5 x 0.5 cm, irregular in shape, brownish black scab seen.”

11.1. On external examination, he found the following injuries :-

- “(1) No evidence of under-scalp injury.
- (2) No evidence of fracture of skull.
- (3) Meninges intact, congested.
- (4) Brain congested, 1300 gms, on cut section petechial haemorrhages seen in white mater of brain.
- (5) Walls, ribs, cartilages – intact. No injury.
- (6) Pleura – Congested, no free fluid collection in pleural cavity, intact.
- (7) Larynx, trachea and bronchi – Intact, no injury.
- (8) Both lungs congested, on cut section oozes dark fluid blood Evidence of petechial haemorrhages subpleurally.
- (9) Pericardium – intact, no injury.
- (10) Heart with weight. 290 gm. Coronaries patent. No valvular abnormality.

- (11) Large vessels – containing dark fluid blood.
- (12) Abdomen – intact, no injury, no free fluid collection in peritoneal cavity.
- (13) Stomach and its contents – 500 gms. Undigested rice particles chicken pieces (Biryani), mucosa – haemorrhagic, eroded.
- (14) Small intestine and its contents – No peculiar abnormal smell perceived partly loaded gases and feces. Mucosa congested.
- (15) Large intestine and its contents no abnormal smell perceived.
- (16) Liver, pancreas and suprarenals, spleen, kidneys congested, on cut section oozes blood.
- (17) Bladder – empty, mucosa normal.”

11.2. He preserved the viscera for chemical analysis. He gave the cause of death as '*Asphyxia due to Hanging*'. The Post-mortem Report was brought on record in his evidence at Exh.52. He deposed that the possibility of death due to weight of body was less and as per his findings, the death was mostly Homicidal. The injury and abrasion at right angle of mouth can be a defence injury and such injury was possible, if a person is hanged after pressing the neck. The death was within 3 (Three) hours from her (Deceased's) meal. His evidence shows that the photographs at Exh.49 were shown to him and he opined that from the position seen in the photographs the death can be Homicidal.

11.3. His cross-examination shows that the said abrasion was 3 (Three) days prior the date of Post-mortem. Constriction produced by

the pressure of the fingers and palms upon the throat was called throttling. In the case of throttling, thyroid cartilage and hyoid bone get fractured. He did not observe such fracture of thyroid cartilage and hyoid bone of Deceased. It is not necessary, but possibility was that the ribs and spine may get dislocated, if a person sits on the stomach and throttle a person, but not in every case. In the case of throttling, the larynx and trachea are congested. In the present case, larynx and trachea are found intact. In case of throttling, lungs are usually markedly congested, showing hemorrhagic patches. In majority of the cases of hanging, the point of suspension is not very high. Death by hanging can be achieved even in sitting, kneeling or lying position. In case of throttling, abrasion marks are found on the neck of Deceased. No abrasion or nail marks were found on the neck. In the case of strangulation the fracture of larynx and trachea is found, which was not found in this case. In the case of strangulation, there is bleeding from nose, mouth and ears. No such bleeding was found in this case. In the case of Hanging, the ligature mark of the article is noticed. In the case of throttling, there is no ligature mark. In the case of Hanging, the tongue gets caught between the teeth and it was found in this case. The Post-mortem Report corroborates the testimony of this Medical Officer.

12. Though Prosecution came up with the case of Homicidal Death of Appellant's wife, the medical evidence, which has much

significance shows the cause of death was '*Asphyxia due to Hanging*'. The Medical Officer was not firm or certain in his opinion about Homicidal Death. The medical evidence shows that the signs or symptoms or the findings were not suggestive of death due to Strangulation. The medical evidence, is suggestive of death by Hanging. The medical evidence, therefore, is of no help for Prosecution to prove that the death was Homicidal.

13. Another aspect as is clear from the above discussed evidence of the witnesses and the Policeman is that, the body was in kneel down position on the cot and hanged with the help of Saree. The Medical Officer expressed the possibility that the hanging can be achieved in the kneeling position. The evidence of PW11 - Sudhir Arjun Chavan shows that when he verified the dead body, her (Deceased's) tongue was between the teeth. According to PW10 – Shivraj Uttamrao Mane, Medical Officer, in case of Hanging, the tongue is caught between the teeth. Admittedly, initially the ADR was registered on the report lodged by PW1 - Shaikh Wasim Chand and thereafter on the next day i.e. 26.07.2016 he lodged the Report against Appellant for abatement to commit suicide which resulted in registration of Crime for the offence punishable under Sections 498-A and 306 of the I.P.C.

14. Prosecution examined the son of Deceased and Appellant namely Taufiq Farid Shaikh (PW5), as the eye witness to the incident of Murder. At the time of recording his evidence, which was in February 2018, he gave his age as 13 years and the incident was of July 2016. This shows that at the time of the incident he was aged between 11 to 12 years. According to this witness, in the evening before the incident he along with Appellant and Deceased went to his maternal aunt's house by name Shabnam. While returning, Appellant purchased liquor. On reaching home, Appellant consumed liquor and started abusing and beating Deceased by suspecting her character and on the ground of Deceased's visiting her mother's house. Thereafter, he went to sleep. He heard the noise of beating, therefore, he intervened. At that time, Appellant gave blow of Latana (लाटण - wooden rolling pin). Deceased was crying and Appellant was watching television by sitting in the chair. After some time Deceased went to sleep on the cot. Appellant was watching T.V. serial by name 'Savdhan India'. Deceased was snoring. After some time, Appellant raised the volume of T.V. and he went to sleep near Deceased. After some time, he saw that Appellant was sitting on Deceased with his knees on her forearm and he saw that the hands and legs of Deceased were moving and after some time the movement stopped. Thereafter, Appellant took one Saree from the cupboard, prepared the knot in the Saree, tied the knot to the hook, made Deceased to sit and tied her neck with the Saree. Thereafter, Appellant switched off

the light and television and by opening the door, he went out. He deposed that he was pretending that he was sleeping. After some time, his maternal uncle came there and screamed and so, he came out and went to his maternal grandparents house. His paternal grandmother was also there. He told her what had happened upon which her paternal grandmother told him not to tell anybody, otherwise the Police will take him. He deposed that the Police recorded his statement and thereafter his statement under Section 164 of the Cr.P.C. was recorded. The evidence of PW5 - Taufiq Farid Shaikh that Appellant hit him with Latan (लाटण - wooden rolling pin), was an omission in his previous statement.

15. It is settled position under the law that the evidence of a child witness is required to be considered with great care and caution, as a child is susceptible to tutoring. It has come in the cross-examination of the child witness i.e. PW5 – Taufiq Farid Shaikh that, his statement was recorded by the Police after 4 (four) to 5 (five) days after the death of his mother. It is also seen from the cross-examination of PW12 – Manoj Ankushrao Shinde, the Investigating Officer, who recorded the statements of witnesses that the statement of PW5 – Taufiq Farid Shaikh was recorded after 5 (five) days from the date of the incident. The defence has sought the explanation from the Investigating Officer regarding delay in recording the statement of PW5 – Taufiq Farid Shaikh. According to the Investigating Officer, the child witness stated that his paternal

grandmother had given threats to him and therefore, he did not disclose the same till recording his statement before the Court. His further evidence shows that the statement of PW5 – Taufiq Farid Shaikh under Section 164 of the Cr.P.C. was recorded on 03.09.2016 and his supplementary statement was recorded on 05.09.2016. This indicates that PW5 – Taufiq Farid Shaikh disclosed that he has witnessed the act of Murder of his mother by Appellant for the first time in his statement under Section 164 of the Cr.P.C., which was recorded after about 40 (Forty) days. Though PW5 – Taufiq Farid Shaikh in his examination-in-chief deposed that his paternal grandmother was also there, the evidence of PW1 -Shaikh Wasim Chand i.e. Informant and maternal uncle of PW5 – Taufiq Farid Shaikh shows that, on the date of incident the parents of the Accused i.e. paternal grandfather and paternal grandmother of PW5 – Taufiq Farid Shaikh were at Osmanabad. The suggestion, which was denied, that the parents of Appellant were not present at the time of the cremation, will not *Ipso Facto* establish the presence of paternal grandmother of PW5 – Taufiq Farid Shaikh in the morning immediately after the incident. PW1 - Shaikh Wasim Chand admitted in the cross-examination that the parents of the Accused did not come to take their grandchildren after the incident. His evidence further shows that PW5 – Taufiq Farid Shaikh told him after 1 ½ (One and Half) Month from the incident that Appellant committed Murder of his mother. His evidence shows that after the incident, children of Deceased and Appellant were

staying with him. It is confirmed from the evidence of PW6 – Sana Farid Shaikh who was the daughter of Deceased and Appellant that after the death of their mother, she along with her brother and sister i.e. PW5 – Taufiq Farid Shaikh and Muskan, respectively, were staying at the house of their maternal grandmother.

16. The above evidence shows that, there was exorbitant delay in recording the statement of child witness i.e. PW5 - Taufiq Farid Shaikh. This delay is certainly fatal for Prosecution. Though, the child witness deposed that, due to the pressure or instruction from his paternal grandmother, he did not disclose as to what he witnessed in the night, does not appear to be probable for the reason that, he was residing with his maternal grandparents. Had he really witnessed that, Appellant Murdered his mother, he would have in all probability informed his sister i.e. PW6 – Sana Farid Shaikh immediately, who was elder to him. They were siblings. Normal human tendency in such tender age is to share with the siblings. Consequently, it is not possible to accept his testimony without any further corroboration. Being in the care and protection of the maternal grandparents, the possibility of his tutoring cannot be ruled out. Suggestion is given in his cross-examination that he was deposing false at the instance of his maternal grandparents and maternal uncle. It is only after the statement of PW5 – Taufiq Farid Shaikh recorded under Section 164 of the Cr.P.C., the Investigating Officer on 17.10.2016 moved the

concerned Magistrate for permission to include the offence punishable under Section 302 of the I.P.C. in the Crime, which was at Exh.61. The testimony of child witness i.e. PW5 – Taufiq Farid Shaikh do not appear to be truthful and is discarded.

17. The evidence of PW3 – Najeen Mohsin Saudagar, who was residing next to the place of incident, shows that in the night of 24.07.2016 she heard the quarrel between Appellant and Deceased up to 01:00 a.m. and she ignored as it was the routine. The cross-examination confirms that the voice in one room was audible in another room.

18. The evidence of PW6 – Sana Farid Shaikh, the daughter of Deceased and Appellant shows that she was residing with her parents. In the evening before the incident, when Appellant, Deceased and her brother - Taufiq (PW5) came home from the house of maternal aunt, Appellant quarreled with Deceased. After her dinner, she went to sleep at the house of the neighbour called Gausiya aunty which was adjacent to the room where Deceased and Appellant were residing. Her further evidence shows that she heard the quarrel between her parents and so, she went to her house and knocked the door, at that time Appellant asked her to go for sleep and so, she went to sleep. Her evidence shows that when she was going for sleep, Deceased stated to her that, today was the last day and there would be no trouble from the next day. The said statement was indicative of putting an end to the life which would

consequently be an end of the trouble. The said oral statement by Deceased to this witness was before the Death and falls within the ambit of Section 32 (1) of the Indian Evidence Act (hereinafter referred to as the 'Evidence Act'). This evidence of PW6 – Sana Farid Shaikh if considered with the medical evidence as discussed above, leaves no doubt that Appellant's wife died Suicidal Death.

19. The above discussed evidence on record does not establish the death of Appellant's wife as Homicidal. The evidence shows that Appellant's wife met with Suicidal Death. This is the only conclusion which gets culled out from the evaluation of the evidence available on record. Finding of pieces of Bangles on the spot of incidence could be the result of beating of Deceased by the Appellant. The abrasion was old one. The medical evidence rules out the possibility of Throttling.

20. As seen above from the evidence of PW3 – Najeen Mohsin Saudagar and PW6 – Sana Farid Shaikh, there was quarrel between Appellant and Deceased in the night of the incident. The evidence of PW6 – Sana Farid Shaikh shows that Appellant beat Deceased in the night of incident. Her evidence goes to show that Appellant used to quarrel and beat Deceased by suspecting her character. He used to not provide money to Deceased for household expenses. Her maternal uncle used to provide money for household expenses. Due to the harassment when

they were staying at Osmanabad, her maternal uncle shifted them to Latur, however, there was no change in the behaviour of Appellant and the ill-treatment to Deceased at the hands of Appellant continued. At the cost of repeatation, the evidence of PW6 – Sana Farid Shaikh shows that before the incident Deceased told her while she going for sleep that, it was the last day and there would be no trouble from the next day. Her evidence further shows that Appellant used to tell Deceased that it was easy to die by hanging herself to fan and that she was shameless and why she was not dying.

21. The evidence of PW7 – Yasmin Azim Mulani who was the younger Sister of Deceased shows that Deceased told her about the harassment at the hands of Appellant when she had come to her home on 24.07.2016 i.e. on the day of the incident. Evidence of PW8 – Chand Nawaj Shaikh shows that Deceased was his daughter. When Appellant and Deceased were residing at Osmanabad, he used to visit their house frequently after 2 (two) to 3 (three) days and so, he was aware of the ill-treatment to Deceased by Appellant. He witnessed the mark of assault on the face of his daughter and Deceased told him about the beating by Appellant to her. Due to the harassment they shifted Appellant and Deceased with their family to Latur, however there was no improvement in Appellant's behaviour. The evidence of these witnesses though hearsay evidence, would be relevant pursuant to second part of Section 32 (1) of

the Evidence Act. Useful reference can be made on this point on the Judgment in **Sharad Birdhichand Sarda vs State of Maharashtra, (1984) 4 SCC 116**, which is further referred in several judgments. In **Amar Singh vs. State of Rajasthan, (2010) 9 SCC 64**, the said pronouncement is considered and held as under in Paragraph Nos. 19 and 20.

“19. *In **Pakala Narayana Swami v. King Emperor** [AIR 1939 PC 47] Lord Atkin held that circumstances of the transaction which resulted in the death of the declarant will be admissible if such circumstances have some proximate relation to the actual occurrence. The test laid down by Lord Atkin has been quoted in the judgment of Fazal Ali, J. in **Sharad Birdhichand Sarda v. State of Maharashtra** (supra) and His Lordship has held that Section 32 of the Indian Evidence Act is an exception to the rule of hearsay evidence and in view of the peculiar conditions in the Indian Society has widen the sphere to avoid injustice. His Lordship has held that 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 statements would clearly fall within the four corners of Section 32 and, therefore, admissible and the distance of time alone in such cases would not make the statements irrelevant.*

20. *The difference in the English Law and the Indian Law has been reiterated in **Rattan Singh v. State of H. P.** (supra) and it has been held therein that even if the deceased was nowhere near expectation of death, still her statement would become admissible under Section 32 (1) of the Indian Evidence Act, though not as a dying declaration as such, provided it satisfies one of the two conditions set forth in this sub-section. The argument of Mr. Sharma, therefore, that the evidence of PW-4 and PW-5 regarding the statements made by the deceased before them are hearsay and are not admissible is misconceived.”*

22. From the above discussed evidence available on record, it is more than clear that Deceased was subjected to continuous ill-treatment by Appellant. One of the conviction is for the offence punishable under

Section 498-A of the I.P.C. Explanation (a) to the said Section reads as under :-

Explanation.—For the purposes of this section, "cruelty means"—

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b)

22.1. The essential ingredient for the offence punishable under Section 498-A are satisfied. We do not see that the learned Trial Court has committed any error in convicting Appellant for the offence punishable under Section 498-A of the I.P.C.

23. As seen from the above discussed evidence it is clear that the Suicidal Death of Appellant's wife was the result of continued harassment by Appellant. The harassment as seen from the evidence was Suspecting the character of Deceased. The above discussed evidence shows that Deceased had no respect or value in the eyes of Appellant and she was subjected to cruelty. This gives rise to the inference that, Deceased chose the way of ending her life than to live with Appellant. The clear evidence discussed above shows that, Appellant abetted the commission of suicide by his Wife. The abatement is explained under Section 107 of the I.P.C. The evidence gives rise to the only conclusion that the harassment by Appellant to Deceased was with the intention that, she should

take the extreme step of eliminating herself. The evidence on record clearly established the abatement by the Appellant to commit Suicide. The evidence on record makes out the offence punishable under Section 306 of the I.P.C. against Appellant.

24. The next question, which falls for consideration is that, one of the Charge and Conviction is for the offence punishable under Section 302 of the I.P.C. There was no Charge against Appellant for the offence punishable under Section 306 of the I.P.C. Admittedly, the offence punishable under Sections 302 and 306 are distinct. In **Dalbir Singh vs. State of U.P., AIR 2004 SC 1990** the Three Judge Bench of the Hon'ble Apex Court had the occasion to consider the issue, '*Whether in a given case is it possible to convict the accused for the offence punishable under Section 306 of IPC if a charge for the said offence has not been framed against him*'. The said issue was before the said Three Judge Bench in view of conflicting opinion in two decisions of the Hon'ble Apex Court, one in *Lakhjit Singh & Anr vs. State of Punjab*, 1994 Supp. (1) SCC 173 and other in *Sangarabonia Sreenu v. State of A.P.*, 1997 (5) SCC 348. The Hon'ble Apex Court considered both the said decisions and decision in *Willie (William) Slaney v. State of Madhya Pradesh*, AIR 1956 SC 116 which was the Constitution Bench Judgment and the Judgment in *Gurbachan Singh v. State of Punjab*, AIR 1957 SC

623 which was of Three Judge Bench. The Hon'ble Apex Court held as under :-

“17. There are a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to each one of them. Therefore, in view of Section 464 Cr.PC., it is possible for the appellate or revisional Court to convict an accused for an offence for which no charge was framed unless the Court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. We are, therefore, of the opinion that Sangarabonia Sreenu (supra) was not correctly decided as it purports to lay down as a principle of law that where the accused is charged under Section 302 IPC, he cannot be convicted for the offence under Section 306 IPC.”

25. The Judgment relied upon by learned Advocate for the Appellant in **Shivaji Chintappa Patil vs. State of Maharashtra** cited (*supra*), the Hon'ble Apex Court observed that, *‘the Prosecution failed to prove beyond reasonable doubt that the death was Homicidal’*. It is further observed that *‘it is well-settled principle of law, that false explanation or non-explanation can only be used as an additional circumstance, when the prosecution has proved the chain of circumstances leading to no other conclusion than the guilt of the accused. However, it cannot be used as a link to complete the chain’*. It is further observed that, *‘it is more than settled principle of law that if two views are possible, the benefit shall always go to the accused’*.

26. Coming to the case on hand, though one of the Charge and Conviction against the Appellant was for the offence punishable under Section 302 of the I.P.C., the same is not established. The death of Appellant's wife is established to the Suicidal and the offence punishable under Section 306 of the I.P.C. is established against Appellant from the evidence on record. Appellant is also convicted for the offence punishable under Section 498-A of I.P.C. As seen from the cross-examination of the witnesses done on behalf of Appellant, it was the case of Appellant himself that, his wife committed suicide. Even in his written statement under Section 313 (1)(b) of the Cr.P.C. which is enclosed with the statement recorded by the learned Trial Court at Exh.0/12, it is the contention of Appellant that his wife committed suicide for which his in-laws were responsible. All the witnesses were cross-examined by Appellant. He got full and fair opportunity to defend himself. Under such facts and circumstances of the case, we are fully convinced that no prejudice would cause to Appellant and no failure of justice would cause, if the conviction is modified to Section 306 of the I.P.C. from Section 302 of I.P.C.

27. The Appellant is behind bars for a period of 8 (Eight) Years, 4 (Four) Months and 19 (Nineteen) Days. It appears from the endorsement on record that he has not paid the fine imposed

by the learned Trial Court. He was the Truck Driver. Considering all the aspects, the punishment of imprisonment for 8 (Eight) Years with fine of Rs.5,000/- (Rs.Five Thousand), in default to undergo Imprisonment for 1 (One) Month for the offence punishable under Section 306 of I.P.C. would meet the ends of justice. The conviction for the offence punishable under Section 498-A of I.P.C. is maintained. Hence, we proceed to pass the following order.

ORDER

- (i) The Appeal is partly allowed.
- (ii) The Conviction of Appellant namely Farid s/o. Ahamad Shaikh recorded by the learned Sessions Judge, Latur in Sessions Case No.85 of 2016 *vide* the Judgment and Order dated 11.04.2019 for the offence punishable under Section 302 of the I.P.C. and consequent sentence, is quashed and set aside.
- (iii) Appellant namely Farid s/o. Ahamad Shaikh is convicted for the offence punishable under Section 306 of the I.P.C. and is sentenced to suffer Imprisonment for 8 (Eight) Years and fine of Rs.5,000/- (Rs. Five Thousand Only), in default to undergo Imprisonment for 1 (One) Month. In case, Appellant has paid the fine imposed for the offence of Murder, it be adjusted with the above fine amount and the remaining be returned to him.

(iv) Appellant's conviction and sentence for the offence punishable under Section 498-A of I.P.C. recorded by the learned Trial Court is maintained.

(v) As the Appellant has already undergone the said period of imprisonment and default sentence, he be released forthwith, if not required in any other offence.

(vi) The Record and Proceedings be sent back to the learned Trial Court.

(NEERAJ P. DHOTE, J.)

(R. G. AVACHAT, J.)