



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

CRIMINAL APPEAL NO. 24 OF 2020

Nilesh Laxmikant Vyas
Age: 30 years, Occu: Nil,
R/o: Ter Tq. & Dist. Osmanabad ... Appellant

Versus

1. The State of Maharashtra
Through the Police Inspector
Ter (Dhoki) Police Station,
Ter Tq. & Dist. Osmanabad

2. Sau. Anita Madansingh Thakur
Age: 45 yrs. Occu. Labour
R/o. Nanded Tq. & Dist. Nanded ... Respondents

...

Mr. Hemraj P. Kshirsagar (Appointed), Advocate for the
Appellant
Mr. B. B. Bhise, APP for the Respondent - State

...

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

Reserved on : 15th April, 2024

Pronounced on : 29th April, 2024

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

1. This is an Appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 [for short 'Cr.PC'] against the Judgment and Order dated 18.12.2015, passed by the learned Additional Sessions Judge, Osmanabad, in Sessions Case No.129/2014 convicting the Appellant for the offence punishable under Section 302 of the Indian Penal Code, 1860 [for short 'IPC'] and sentencing him to suffer imprisonment for life and to pay fine of Rs.1000/-, in default, to suffer rigorous imprisonment for three months.

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

(a) The Appellant, resident of village Ter, Taluka and District Osmanabad killed his wife – Neha @ Pooja (hereinafter referred as 'Deceased') by strangulation with the Janeu [Sacred Thread] at their home on 05.01.2014 when the other members of their house were not present. The motive behind killing his wife was that she was opposing the extra material relation of the Appellant with another woman. The mother of deceased i.e. Informant, was informed by the father of Appellant over telephone that, her daughter suffered attack. The Informant reached the village Ter. The Informant went to the Civil Hospital where the dead body was kept. She noticed ligature marks over the neck of Deceased. She lodged the Report with the concerned Police Station and Crime No.2/2014 came to be registered against the Appellant.

(b) The Investigating Officer conducted Inquest and referred the dead body for postmortem. The spot panchnama was prepared. The statements of witnesses came to be recorded. The Appellant came to be arrested. The Janeu which was used by the Appellant for commission of crime came to be seized at the instance of the Appellant. The postmortem report came to be collected. On completion of investigation, the Appellant came to be Charge-sheeted.

3. On committal, the learned Additional Sessions Judge framed the Charge against the Appellant for the offence punishable under Section 302 of IPC vide Exhibit - 4, to which, the Appellant pleaded not guilty and claimed to be

tried. To prove the Charge, the Prosecution examined in all seventeen (17) witnesses and brought on record the relevant documents. After the Prosecution closed its evidence, the Appellant's statement came to be recorded under Section 313(1)(b) of Cr.PC. The Appellant denied the Prosecution's case and evidence. On appreciation of the evidence, the learned Trial Court passed the aforementioned impugned Judgment.

4. It is submitted by the learned Advocate for the Appellant that the evidence available on record do not prove the Charge against the Appellant. He submitted that the Appellant's wife committed suicide as her marriage with the Appellant was against her wish. He submitted that merely because the Appellant's wife was found dead in her matrimonial home which was shared by in-laws, the Appellant cannot be convicted merely because he was the husband. He submitted that there is no evidence on record to show that the Appellant was at home at the time of incident or the deceased was lastly seen with the Appellant. He relied on the Judgment of Sikkim High Court in the case of **Garja Bir Rai Vs. State of Sikkim; LAWS(SIK)-2019-5-8** in support of his submissions. He submits that the Trial Court has erred in convicting the Appellant on the basis of insufficient evidence and the Appeal be allowed.

5. It is submitted by the learned APP that the Appellant was the husband of Deceased and death occurred in the Appellant's house. He submitted that the deceased - Pooja being the wife, was in the custody of the Appellant and therefore, the burden shifts on the Appellant by virtue of

Section 106 of the Evidence Act, 1872 [For short 'the Evidence Act']. He submitted that the Trial Court has rightly convicted the Appellant and the Appeal be dismissed.

6. There are no eye witnesses to the incident. The Prosecution's case is based on circumstantial evidence. As per the settled position in law, the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established, the circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused, the circumstances taken cumulatively should form a complete chain, which would lead to the only conclusion that in all probability, the crime is committed by the accused and rule out the hypothesis other than that of the guilt of the accused.

7. In the case in hand, the Prosecution relied on the following circumstances in support of the Charge;

- [i] Homicidal Death in the Matrimonial House.
- [ii] Motive.
- [iii] Discovery / Recovery of thread at the instance of Appellant

[i] Homicidal Death in the Matrimonial House

8. PW - 5 [Anita Madansingh Thakur] is the mother of deceased - Pooja @ Neha and she was the resident of Nanded. Deceased was married to the Appellant in the year 2012. After marriage, Deceased went to reside with the Appellant at Village Ter. On 05.01.2014, the father of Appellant [father-in-law of Deceased telephonically informed her around 3:00 pm

that, Deceased – Pooja suffered attack and asked her to come immediately. She reached village Ter at about 10:00 pm and went to the Appellant's house and inquired about Deceased. The mother of Appellant [mother-in-law of Deceased] informed her that Deceased was in the Hospital. She went to the Hospital and found Pooja in dead condition. She noticed scar on the right side of the neck of Pooja. She inquired with the Doctor, who told her that Deceased was killed by pressing the throat. She deposed of lodging the Report at Exhibit – 23 which culminated in registration of crime. She denied the suggestion that she was deposing false that she saw the scar on the right side of the neck of Pooja and the Doctor told her that Deceased died due to pressing of her throat.

9. PW – 6 [Asha Ramrao Jadhav] is the owner of the house where the Informant was residing as a tenant at Nanded. She knew the Appellant and Deceased. She deposed that, as PW – 5 [Anita Madansingh Thakur] received a phone call of father-in-law of Deceased that she suffered attack, mother of Pooja went to village Ter. Her further evidence show that she went to the Government Hospital and saw the Deceased. She saw a scar on the throat of Deceased. After the postmortem, funeral took place. Report was lodged by PW – 5 [Anita Madansingh Thakur] in the Police Station. Nothing has come in the cross-examination to disbelieve the said evidence of hers.

10. The evidence of PW – 15 [Dr. Khushalchand Brijlal Baheti] show that he was the resident of village Ter where the incident took place and was a practicing Doctor. He knew the Appellant. On 05.01.2014 in between 2:00 to 2:30 pm, he received a phone that the Appellant's wife had fallen down due to giddiness and he was asked to check her. Accordingly,

he went to the house of the Appellant where the patient was not seen. The patient was found in the vehicle. He did not check the patient. His evidence show that as he did not support the Prosecution, he was cross-examined by the learned APP. Nothing has come in his evidence to support the case of Prosecution.

11. PW - 16 [Dr. Mukund Parmeshwar Mane] was the Medical Officer at Rural Hospital, Ter at the relevant time since 31.01.2011. He received the dead body of Neha Vyas for postmortem on 05.01.2014. He performed the postmortem on 06.01.2014. The body was well nourished and rigor mortis present in all four limbs. He did not notice any external injury on genital area. On internal and external examination, he noticed the following external injuries;

“Horizontal mark on antirorior aspect of neck and right lateral aspect of name on thyroid cartilage of width 1cm size and length about 15 cm, on fine dissection ecchmosed sub cutaneous axolor tissue.”

He noticed fracture of hyoid bone. He noted the said injuries in Paragraph Nos.17 and 18 of the postmortem report, which was at Exhibit - 47. He gave the cause of death as **‘asphyxia due to strangulation’ [asphyxia secondary to strangulation]**. The injury no.17 was sufficient to cause the death due to asphyxia secondary to strangulation. He deposed that the injury noted in Paragraph No.17 of the postmortem report was possible by use of thread [Article - 1].

12. In the cross-examination, he denied the suggestion that in the case of hanging, there will be entire encircle mark around the neck. It has come in his cross-examination that in case of strangulation, struggle signs can be noted and while

strangulation, there may be marks of Mangalsutra, Bangle. The witness on his own [volunteered] that in case of strangulation due to sudden pressure on neck, there is vaginal strangulation and patient becomes unconscious and helpless and there may not be any sign of struggle. Only when the thread is put completely around the neck, only then there would be encircle mark around the neck. It has come that on examination of nail clipping of deceased, he did not notice marks of scratch or struggle. In case of hanging, there is rare possibility of fracture of hyoid bone. He accepted the defence version that in case of strangulation, fracture of hyoid bone usually occurs. He further accepted the version of defence that in case of hanging, there is less chance of fracture of neck bone. He denied the suggestion that he could not say definitely whether the death was caused due to strangulation or hanging. He also denied the suggestion that strangulation was not possible due to use of thread [Article - 1].

13. What is seen from the above discussed cross-examination is that, it is the defence version that Deceased committed suicide by hanging herself. However, the above discussed evidence of Medical Officer and the admissions given by him in the cross-examination rules out the possibility of suicidal death.

14. As discussed above in her evidence of PW - 5 [Anita Madansingh Thakur] was informed by the Appellant's father that Pooja suffered attack. However, there is nothing in the medical evidence that Deceased suffered attack.

15. The evidence on record show that the panch witness for spot panchnama - PW - 1 [Bhima Sampat Mane] did not support the Prosecution and therefore, he was cross-examined on behalf of the Prosecution. However, nothing could be elicited in favour of the Prosecution.

16. The evidence of PW - 12 [Balaji Digambar Samudre] show that at the relevant time, he was working as a Circle Officer at Ter and on the request of Ter Police Station, he prepared a sketch, which was at Exhibit - 32, of the place of incident, which was the house of Nilesh Shantanu Vyas [Appellant]. Not knowing the boundaries, length and width of the spot of incident is not expected from this witness. Nothing has come in his cross-examination to disbelieve him.

17. The evidence of PW - 17 [Rameshwar Bhagojirao Khanal] show that at the relevant time i.e. on 06.01.2014, he was Assistant Police Inspector [A.P.I] at Dhoki Police Station. On 05.01.2014, he performed the Inquest on the dead body under the accidental death [AD], which was at Exhibit - 51. His evidence show that on 06.01.2014, he conducted spot panchnama in the presence of two panchas, which was at Exhibit - 52. Except suggestion that he was not present for the Inquest and spot panchnama, nothing has come to discard the said evidence of the Investigating Officer.

18. From the above discussed evidence on record, the Prosecution has successfully established that Pooja died homicidal death in her matrimonial home. As such there is no

dispute in respect of death of Appellant's wife in her matrimonial house. Hence, the circumstance no.1 is proved.

[ii] Motive

19. In her evidence PW - 5 [Anita Madansingh Thakur] deposed that after marriage, Deceased was residing happily for nine [09] months and she used to phone her and inform that the Appellant was having illicit relations with a woman. She further deposed that Deceased told her that when she used to question the Appellant in that regard, Appellant used to abuse and beat her. She called the Appellant to her house and gave him understanding and the Appellant promised to maintain Deceased nicely, however, the Appellant continued his ill-treatment to the Deceased. As regards this evidence is concerned, except that she called the Appellant to her house and gave understanding, it would be in-admissible being hearsay.

20. In her evidence, PW - 6 [Asha Ramrao Jadhav] deposed that after the marriage with the Appellant, Deceased lived happily for eight to nine months at her matrimonial house. When she visited Nanded, she called Deceased and the Appellant to her house for tea. Deceased told her that the Appellant was having illicit relations with a Muslim woman and as the said woman used to give missed call on the phone of Appellant, she was feeling mentally harassed. Deceased told her that the Appellant asked her why she was creating hurdles. As regards this evidence is concerned, it would be in-admissible being hearsay.

21. The Prosecution examined PW - 8 [Mumtaz Wali Khan Tamboli]. She did not support the Prosecution and therefore, she was cross-examined by the learned APP. However, nothing has come in her evidence, which would further the case of Prosecution in any manner.

22. There is no substantive evidence on record to establish the illicit relations of the Appellant with a woman. Even the evidence of PW - 17 [Rameshwar Bhagojirao Khanal], who investigated the crime nowhere show that any Motive was unearthed during investigation. The evidence of this Investigating Officer is completely silent on the aspect of Motive. Mere suspicion is immaterial without there being positive evidence in support of the theory of illicit relations. Thus, we hold that the Prosecution has miserably failed to prove the Motive behind the crime.

[iii] Discovery / Recovery of thread at the instance of Appellant

23. Though the Prosecution examined PW - 4 [Imran Shaikh Hattiwale] as a panch witness to the discovery / recovery, his evidence show that there was accident of his vehicle and police told him that they have seized thread and showed him the Appellant and asked him to sign on the panchnama. His evidence show that as he did not support the Prosecution, he was cross-examined by the learned APP, however, nothing has come in his evidence which would further the case of Prosecution.

24. On this point, evidence of PW - 17 [Rameshwar Bhagojirao Khanal], Investigating Officer show that he

arrested the Appellant under the panchnama at Exhibit – 59. On 08.01.2014 while the Appellant was under the police custody remand, he gave statement to produce the thread which was kept in the house and the memorandum was drawn accordingly, which was at Exhibit – 60. Thereafter, the police, panch and Appellant went to village Ter in the vehicle, which was stopped at the square. The Appellant pointed towards his house and they entered inside the said house. The Appellant went inside the house, removed the thread and produced before them. The thread was having the steel key. It was seized under seizure panchnama at Exhibit – 61.

25. The aforementioned evidence is in respect of Discovery / Recovery pursuant to Section 27 of the Evidence Act, which reads as under:

“27. How much of information received from accused may be proved.—Provided that, when any fact is proved to be discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

26. In the recent decision of **Babu Sahebagouda Rudragoudar and Others Vs. State of Karnataka; MANU/SC/0329/2024**, the Hon’ble Apex Court considered the aforesaid provision in respect of discovery. The relevant Paragraphs are reproduced below;

“59. The statement of an accused recorded by a police officer under Section 27 of the Evidence Act is basically a memorandum of confession of the accused recorded by the Investigating Officer during interrogation which has been taken down in writing. The confessional part of such statement is inadmissible and only the part which distinctly leads to discovery of fact is admissible in evidence as laid down by this Court in the case of **State of Uttar Pradesh v. Deoman Upadhyaya**³.

60. Thus, when the Investigating Officer steps into the witness box for proving such disclosure statement, he would be required to

narrate what the accused stated to him. The Investigating Officer essentially testifies about the conversation held between himself and the accused which has been taken down into writing leading to the discovery of incriminating fact(s).

61. As per Section 60 of the Evidence Act, oral evidence in all cases must be direct. The section leaves no ambiguity and mandates that no secondary/hearsay evidence can be given in case of oral evidence, except for the circumstances enumerated in the section. In case of a person who asserts to have heard a fact, only his evidence must be given in respect of the same.

62. The manner of proving the disclosure statement under Section 27 of the Evidence Act has been the subject matter of consideration by this Court in various judgments, some of which are being referred to below.

63. In the case of **Mohd. Abdul Hafeez v. State of Andhra Pradesh**⁴, it was held by this Court as follows: -

“5.If evidence otherwise confessional in character is admissible under Section 27 of the Indian Evidence Act, it is obligatory upon the Investigating Officer to state and record who gave the information; when he is dealing with more than one accused, what words were used by him so that a recovery pursuant to the information received may be connected to the person giving the information so as to provide incriminating evidence against that person.”

64. Further, in the case of **Subramanya v. State of Karnataka**⁵, it was held as under: -

“82. Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:

“27. How much of information received from accused may be proved. —

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

83. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.

84. If, it is say of the investigating officer that the accused

appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses (panch-witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch-witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter.”
(emphasis supplied)

65. Similar view was taken by this Court in the case of **Ramanand @ Nandlal Bharti v. State of Uttar Pradesh**⁶, wherein this Court held that mere exhibiting of memorandum prepared by the Investigating Officer during investigation cannot tantamount to proof of its contents. While testifying on oath, the Investigating Officer would be required to narrate the sequence of events which transpired leading to the recording of the disclosure statement.”

27. There is no evidence that the house from where the said thread having the key was seized was in exclusive possession of the Appellant. The scrutiny of the above discussed evidence in respect of discovery / recovery in the light of the above

discussed legal position show that the discovery/recovery cannot be said to be in-consonance with the principles laid down in that regard. Even if the Prosecution's case in respect of discovery and seizure of the said thread [Article - 1] is accepted, there is no evidence to connect the said article with the crime. The opinion of PW - 16 [Dr. Mukund Parmeshwar Mane] that the injury noted in Paragraph No.17 of the postmortem report can occur due to use of the said thread [Article - 1], is merely an opinion and cannot form the basis to connect the said thread [Article - 1] with the crime. Thus, seizure of thread [Article - 1] is of no consequence to further the case of Prosecution in proving the Charge.

'Whether the burden would shift on the Appellant'

28. As discussed above the homicidal death of the Appellant's wife in her matrimonial house is established. What the evidence of PW - 5 [Anita Madansingh Thakur] show is that the Deceased was residing in her matrimonial house with the Appellant and her in-laws. PW - 11 [Laxmikant Shantanurao Vyas] is the father of Appellant. His evidence show that as he did not support the Prosecution, he was cross-examined by the learned APP. His evidence show that he, the Appellant and Deceased were residing together.

29. Part - III, Chapter - VII of the evidence Act is in respect of the burden of proof. As per Section 106 of the Evidence Act, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In the case of **Trimukh Maroti Kirkan Vs. The State of Maharashtra; (2006) 10 SCC 681**, following are the observations:

“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.*¹³ 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*¹⁴ 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.P.C. The mere denial of the prosecution case coupled with absence of any explanation were 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. In *State of U.P. v. Dr. Ravindra Prakash Mittal*⁹ the medical evidence disclosed that the wife died of strangulation during late night hours or early morning and her body was set on fire after sprinkling kerosene. The defence of the husband was that wife had committed suicide by burning herself and that he was not at home at that time. The letters written by the wife to her relatives showed that the husband ill-treated her and their relations were strained and further the evidence showed that both of them were in one room in the night. It was held that the chain of circumstances was complete and it was the husband who committed the murder of his wife by strangulation and accordingly this Court reversed the judgment of the High Court acquitting the accused and convicted him under Section 302 IPC. In *State of T. N. v. Rajendran*⁸ the wife was found dead in a hut which had caught fire. The evidence showed that the accused and his wife were seen together in the hut at about 9.00 p.m. and the accused came out in the morning through the roof when the hut had caught fire. His explanation was that it was a case of accidental fire which resulted in the death of his wife and a daughter. The medical evidence showed that the wife died due to asphyxia as a result of strangulation and not on account of burn injuries. It was held that there cannot be any hesitation to come to the conclusion that it was the accused (husband) who was the perpetrator of the crime.”

30. The said Judgment in the case of Trimukh Maroti Kirkan [*Supra*] has been considered in **Darshan Singh Vs. State of Punjab; (2024) 3 SCC 164**, wherein, it was the case of Prosecution that because of illicit relationship, the husband

and co-accused, administered poison in tea and intentionally caused death of wife inside the house. In this case, the presence of husband in his house where his wife was found dead was not proved by the Prosecution, as is seen from the observation in Paragraph No.35, which reads as under:

“35. However, we have come to the finding above that the circumstance of appellant and Rani Kaur being present in the house has not been convincingly proved beyond doubt.”

31. Further, reference to the relevant observations from the following authorities would not be out of context : -

(a) In **Sawal Das Vs. State of Bihar; (1974) 4 SCC 193**, wherein, it is observed thus:

“10. Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused. The crucial question in the case before us is has the prosecution discharged its initial or general and primary burden of proving the guilt of the appellant beyond reasonable doubt?

(b) In **Kalu Alias Laxminarayan Vs. State of Madhya Pradesh; (2019) 10 SCC 211**, wherein, it is observed thus;

“14. In *Tulshiram Sahadu Suryawanshi v. State of Maharashtra*⁶, this Court observed : (SCC pp. 381 – 82, para 23)

‘23. It is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above position is strengthened in view of [Section 114](#) of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in [Section 106](#) of the Evidence Act can also be utilised. We make it clear that this section is not intended to relieve the prosecution of its burden

to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. It is useful to quote the following observation in [State of W.B. v. Mir Mohammad Omar](#)⁷: (SCC p. 393, para 38)

‘38. Vivian Bose, J., had observed that [Section 106](#) of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In [Shambhu Nath Mehra v. State of Ajmer](#)² the learned Judge has stated the legal principle thus: (AIR p. 406, para 11)

‘11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and [Section 106](#) is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience.’

The word “especially” stresses that. It means facts that are preeminently or exceptionally within his knowledge.”

(c) In **Surendra Kumar and Another Vs. State of Uttar Pradesh; (2021) 20 SCC 430**, wherein, it is observed thus:

“17. We may now examine the role and conduct of the appellant No.1 Surendra Kumar who was escorting the deceased from her parental home on his scooter and is the last person seen in the company of the deceased. The Courts below however has relied upon [Section 106](#) of the Indian Evidence Act to connect him with the crime. This according to us was the incorrect approach inasmuch as the burden to prove the guilt is always on the prosecution and cannot be shifted to the accused by virtue of [Section 106](#) of the Evidence Act. This proposition of law on criminal jurisprudence stood the test of time since *Emperor V. Santa Singh*⁴ where Din Mohammad J., observed as under:- (SCC online Lah para 28)

‘28..... Section 106 of the Evidence Act, cannot be used to strengthen the evidence for the prosecution. The prosecution must stand or fall on the evidence adduced by it and until a prima facie case is established by such evidence, the onus does not shift on to the accused. Mere proof that an incriminating article is found in premises occupied by a number of persons does not in itself establish prima facie the guilt of any particular person or all of them jointly. That being so, they cannot be called upon after such evidence to establish their

innocence. They can only be called upon to do that when the evidence has established a prima facie case against any one or more of them or all of them'."

(d) In **P. Mani Vs. State of Tamil Nadu; (2006) 3 SCC 161**, wherein, it is observed thus:

"10. We do not agree with the High Court. In a criminal case, it was for the prosecution to prove the involvement of an accused beyond all reasonable doubt. It was not a case where both, husband and wife, were last seen together inside a room. The incident might have taken place in a room but the prosecution itself has brought out evidences to the effect that the children who had been witnessing television were asked to go out by the deceased and then she bolted the room from inside. As they saw smoke coming out from the room, they rushed towards the same and broke open the door. [Section 106](#) of the Evidence Act, to which reference was made by the High Court in the aforementioned situation, cannot be said to have any application whatsoever."

(e) In **Sohel Mehaboob Shaikh Vs. State of Maharashtra; 2009 (5) SCR 483**, wherein, it is observed thus:

"7. The three circumstances brought on record by the prosecution and highlighted by the Trial Court and High Court are as follows:

- '(i) Deceased Sofiya met with an unnatural death;
- (ii) Deceased Sofiya had died in the room which was solely and exclusively occupied by her and her husband i.e. accused No.1;
- (iii) The appellant has not offered any explanation in respect of the incident in which deceased Sofiya had sustained burns.'

8. We have gone through the evidence on record and we find that the High Court has arrived at some conclusions which, in our opinion, are based on surmises and conjectures, without there being any evidence to support the conclusions. That being so, we find that the charge against the appellant has not been established.

9. The first and third circumstances cannot be considered to be relevant either separately or collectively. So far as the second circumstance is concerned, there is no evidence to show circumstantially that accused was present in the room at the time of occurrence. The time of occurrence, even by approximation has not been established by the prosecution.

10. We, therefore, set aside the judgment of conviction recorded by the Trial Court and upheld by the High Court. The appeal is allowed."

32. Coming to the case in hand, though the place of incident was the matrimonial house of Deceased, there is no substantive evidence to establish that the Appellant was in the house at the relevant time, or he entered or left the house in close proximity to the time of incident. It has come in the evidence of PW - 5 [Anita Madansingh Thakur] that the Appellant was a Jeep Driver and he owned a Jeep and the Appellant once left the house in the morning, used to return home in the evening. Her evidence show that she volunteered that even he [Appellant] did not use to come home in the night. As seen from the evidence of PW - 5 [Anita Madansingh Thakur], the incident took place in the afternoon as she received a phone call around 3:00 pm. With this evidence on record, it was for the Prosecution to establish that the Appellant was present in his house, which was the place of incident. Unless the Prosecution proves that the Appellant was present in his house or he entered or came out of the house in the close proximity to the time of incident, the burden would not shift on the Appellant by virtue of Section 106 of the Evidence Act. It is not that the Appellant and Deceased were only residing at the place of incident. The place of incident was shared by in-laws of Deceased. However, the in-laws of Deceased were not the accused in this case.

33. In the case of Garja Bir Rai [*Supra*], relied by the Appellant's Advocate, the husband was Charged for commission of murder of his wife at his home. The decision is rendered on appreciation of the evidence available in that case.

34. As discussed above except the homicidal death of the Appellant's wife at her matrimonial home, the Prosecution failed to prove the other circumstance. When the chain of proved circumstance is not complete, the Charge fails. The circumstances brought on record by the Prosecution do not unerringly point to the involvement of the Appellant in the Homicidal Death of his wife. The evidence available on record do not conclusively establish the Charge against the Appellant. True it is that in his statement recorded under Section 313 of Cr.PC, the Appellant stated that their marriage was against wish of his deceased wife and therefore, she committed suicide by hanging, however, that cannot form the basis to confirm the conviction recorded by the learned Trial Court, as it is well settled position under the law that the statement of accused under Section 313 of Cr.PC is not the evidence because, firstly, it is not on oath and secondly, the other party i.e. the Prosecution does not get an opportunity to cross-examine the accused, as seen from the observations made in Paragraph No.37 of Darshan Singh [*Supra*]. All in all, the conviction of the Appellant recorded by the learned Trial Court cannot be allowed to sustain. Hence, we proceed to pass the following order:

ORDER

(i) Criminal Appeal is allowed.

(ii) The Judgment and Order dated 18.12.2015, passed by the learned Additional Sessions Judge, Osmanabad, in Sessions Case No.129/2014 convicting and sentencing the Appellant for the offence punishable under Sections 302 of IPC, is quashed and set aside.

(iii) The Appellant stands acquitted for the offence punishable under Sections 302 of IPC.

(iv) The Appellant be released, if not required in any other case.

(v) The fine amount, if deposited by the Appellant, be refunded to him.

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

(NEERAJ P. DHOTE, J.)

(R. G. AVACHAT, J.)

Sameer