IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.212 OF 2013

Sunil s/o. Vithal Raut,
Age: 28 Years, Occu: Labour,
R/o. Dhobi Galli, Waluj,
Taluka Gangapur,
District Aurangabad **APPELLANT**
(Orig.Accused)

VERSUS

The State of Maharashtra **RESPONDENT**

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Mr.S.S.Jadhavar, Advocate for the Appellant
Mr.K.S.Patil, APP for Respondent – State

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CORAM: S.S.SHINDE &
SANGITRAO S.PATIL,JJ.

Reserved on : 23.09.2016
Pronounced on : 25.10.2016

JUDGMENT: (Per S.S.Shinde, J.):

This Criminal Appeal is filed by the Appellant–Original accused no.3, challenging the judgment and Order dated 21.03.2013 passed by the Additional Sessions Judge, Vaijapur in Sessions Case No.277/2012 (Old No.319/2009), thereby convicting the

appellant for the offence punishable under Section 302 of the Indian Penal Code (for short 'IPC') and sentenced to suffer imprisonment for life and to pay a fine of Rs.2,000/- in default to suffer S.I. for 6 months.

Facts of prosecution case, in brief, are as under:

2. On 30.05.2009, accused no.1 Vitthal lodged the report at Police Station Waluj (Exh.60) alleging that his daughter-in-law deceased Swati has not woke up as usual in the morning, and when he tried to awaken her she was not responding, therefore, he took her to the Hospital where the Medical Officer found her dead. On his report, A.D. bearing No.15/2009 was registered.

3. PSI Suresh Bhale (PW5) conducted the inquiry of A.D. He sent dead body for post mortem examination and prepared inquest

panchanama (Exh.51). He visited the spot and prepared spot panchanama (Exh.52). He seized the cloths of deceased Swati vide seizure panchanama (Exh.53).

4. During inquiry of A.D., informant Machindra Vishwanath Sonule (PW1) lodged the report at Police Station Waluj on 02.06.2009 stating that deceased Swati was his daughter. Her marriage with the appellant was solemnized on 11.12.2008. It is alleged that the accused were subjecting her to cruelty and asking her to bring an amount of Rs.50,000/- from her parents. It is further alleged that Rs.50,000/- was paid to the accused prior to 2 days of the incident. On 30.05.2009, he received the phone call of neighbour of the accused, informing that his daughter is serious. Then, he went to the house of accused and found his daughter in a dead condition. He further alleged that the appellant was missing since night of

30.05.2009, and other accused persons in furtherance of their common intention committed the murder of his daughter Swati. On his report, offences punishable under Sections 302, 498-A r/w. 34 of the IPC vide Crime No.57/2009 was registered against the accused in the Waluj Police Station.

5. PSI Bhale (PW5) conducted the investigation of the said crime. During investigation, he arrested the accused and recorded the statements of the witnesses. He sent the seized article to C.A. for analysis and collected the P.M. report. The Medical Officer opined that the death of the deceased is due to head injury. During investigation, it is revealed that the accused subjected the deceased to cruelty and committed her murder. Therefore, after completion of the investigation, he submitted the charge-sheet before the Judicial Magistrate First Class, Gangapur.

6. After receipt of the charge-sheet, the learned Judicial Magistrate First Class, Gangapur noticed that the offence punishable under Section 302 of the IPC is exclusively triable by the Court of Session. Hence, the case was committed to the Court of Session vide order dated 15.09.2009.

7. The accused nos.1, 2, 4 and 5 appeared before the Court of Session. The charges were framed against the accused nos.1 to 5 for the offences punishable under Sections 498-A r/w. 34 of the IPC and under Sections 302 r/w. 34 of the IPC against the accused nos.1 to 3 and 5 (Exh.18) to which accused pleaded not guilty and claimed to be tried. In order to prove charges, the prosecution examined five witnesses.

8. The learned counsel Mr.S.S.Jadhavar appearing for the appellant submits that the prosecution has not proved that the appellant

was present in the house during intervening night between 29.05.2009 to 30.05.2009. The informant Machindra (PW1) lodged the FIR after 4 days from the date of incident. The trial Court found that the evidence of the prosecution witnesses is not sufficient, and they have admitted in the cross examination that Swati was leading happy married life, and therefore, the trial Court has rightly acquitted all the accused from the offences punishable under Section 498-A r/w. 34 of the IPC.

9. It is submitted that once accused are acquitted from the offences punishable under Sections 498-A r/w. 34 of the IPC, the prosecution has not brought on record other evidence to prove that the accused had motive to kill Swati. The entire case rests upon the circumstantial evidence, and therefore, the prosecution ought to have brought on record the evidence to establish motive for such

commission of offence. It is submitted that if the evidence of the prosecution witnesses is considered in its entirety, it suffers from the improvements, contradictions and omissions and the same is not sufficient to hold the appellant guilty. The Police Officer, who reduced the FIR in writing, is not examined by the prosecution. It is submitted that though the bedroom of the appellant and kitchen facility is separate in the house, but the appellant was required to go outside for answering natures call. It is also deserved to be appreciated that one day prior to the marriage of Ramdas, deceased Swati made phone call to PW1 and informed that they are coming for attending the marriage of Ramdas. The prosecution witness Prakash (PW3) stated in his evidence that, he handed over the amount of Rs.50,000/- to accused nos. 1 to 3, but said version is not appearing in his statement recorded by the

Police. Therefore, the prosecution has failed to prove any demand on behalf of the accused. The statement of the Dr.Sachin (PW4) does not reveal the exact cause of death and has only mentioned about the head injury. Dr.Sachin (PW4) has also not stated cause of head injury. The suggestion was given to the PW-4 that the head injury mentioned in the PM report is accidental. The spot panchanama (Exh.52) regarding description of the place of occurrence shows that there are clothes scattered around bed and the steel cupboard was also opened and Swati's clothes were lying on the ground and also on cot sarees and blouse were scattered, and it indicates that Swati and appellant were about to leave the house in the morning for attending the marriage of Ramdas i.e. the relative of the deceased Swati, and in the early morning, when she was removing the clothes, she had fallen from the cot while removing the

articles from the cupboard. Hence, the defence of the accused seems to be most probable in respect of death of deceased Swati. There is nothing incriminating against the accused in respect of inquest panchanama (Exh.51), spot panchanama (Exh.52) and seizure panchanama (Exh.53) and P.M. report (Exh.57).

10. We have considered the submissions of the learned counsel appearing for the appellant and the learned APP appearing for the respondent – State. With their able assistance, carefully perused the entire evidence. It has come on record that defence advocate admitted the document i.e. arrest panchanama (Exh.56 to 59), inquest panchanama (Exh.51), spot panchanama (Exh.52) and seizure panchanama of the clothes of the deceased Swati (Exh.53).

11. Since the prosecution case rests

upon the circumstantial evidence, the following circumstances can be deduced from the evidence brought on record by the prosecution:

i) On 29.05.2009, the appellant and the deceased Swati had gone to Ranjangaon at about 6.00 p.m. and they returned to the house at about 10.00 to 11.00 p.m. There was separate bedroom, and they had gone to sleep in their separate bedroom.

ii) The appellant and deceased Swati did not wake up as usual in the morning, therefore, Vithal went inside the bedroom. He noticed that the appellant (Sunil) is not present in the bedroom. Vithal tried to wake up Swati, however, she did not respond, therefore, she was taken to the Hospital wherein the Medical Officer declared her as dead.

iii) The appellant absconded from the house.

iv) The Medical Officer Dr.Sachin (PW4)

who performed the P.M. Examination expressed opinion that the injuries on the body of the Swati are ante-mortem in nature and death is homicidal.

v) When Machindra (PW1) went to the house of the accused, appellant was not present.

vi) Appellant did not offer any explanation in his defence under what circumstance Swati died.

12. Since the prosecution case solely rests upon the circumstantial evidence, this Court, while appreciating the evidence, has to bear in mind the exposition of law by the Supreme Court in the case of ***Hanuman Govind Nargundkar and another Vs.State of M.P.***[1] wherein it is held that conjecture or suspicion should not take place of the legal proof and each of the circumstances relied upon by the prosecution has to be established fully and further chain of the circumstances

1 AIR 1952 SC 343

is so complete which would lead to hypothesis of guilt of the accused. The circumstances should be of conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. It is also required to be borne in mind that the prosecution must establish each circumstance firmly.

13. In circumstantial evidence, an important circumstance is deceased last seen in the company of the accused. In the present case Vitthal lodged the A.D. (Exh.60) at Police Station Waluj. He stated that on 29.05.2009 at 6.00 p.m. his son i.e. appellant and daughter-in-law i.e Swati went to the village Pan Ranjangaon for festival. They returned back at 10.30 to 11.00 p.m. and slept in their bedroom. Today i.e. on 30.05.2009, when he woke up from sleep at 5.00 a.m., even after 6.00 a.m., the appellant and deceased Swati did not wake up

from sleep, he went in their bedroom. However, he found that Swati alone was sleeping and the appellant was not in the said bedroom. He called Swati, however, she did not respond. Therefore, he tried to wake up her by touching her, but she did not talk or respond. Therefore, she was taken to the Tirupati and Sai Hospital. In the Hospital, they came to know that she is dead. The dead body was taken to the house and accordingly message was sent to the relatives. It appears that the said A.D. was registered by him by visiting the Police Station Waluj, Taluka Gangapur, District Aurangabad at 10.50 a.m. on 30.05.2009. Shri Suresh Vasantrao Bhale (PW5), working as PSI, Police Station Kadim, Jalna, in his evidence has stated that, on 30.05.2009 A.D. bearing No.15/2009 was registered at Police Station Waluj, and he made inquiry of the said A.D. (Exh.59 and 60).

14. The question arises whether the contents of the said report are admissible in the evidence. The said issue is no more *res-integra* and the Supreme Court in the case of ***Faddi Vs. State of Madhya Pradesh***[2] in para 15 has held as under:

> "15. The report is not a confession of the appellant. It is not a statement made to Police Officer during the course of investigation. Section 25 of the Evidence Act and section 162 of the Code of Criminal Procedure do not bar its admissibility. The report is an admission by the accused of certain facts which have a bearing on the question to be determined by the Court, viz., how and by whom the murder of Gulab was committed, or whether the appellant's statement in Court denying the correctness of certain statements of the prosecution witnesses is correct or not. Admissions are admissible in evidence under section 21 of the

2 AIR 1964 SC 1850

> Act. Section 17, defines an admission to be a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, thereafter mentioned, in the Act. Section 21 provides that admissions are relevant and may be proved as against a person who makes them. Illustrations (c), (d) and (e) to section 21 are of the circumstances in which an accused could prove his own admissions which go in his favour in view of the exceptions mentioned in section 21 to the provision that admissions could not be proved by the person who makes them. It is therefore clear that admissions of an accused can be proved against him."

Therefore, in the light of the law laid down by the Supreme Court in the aforesaid authoritative pronouncement, which is followed in various subsequent judgments, the report lodged by the Vithal is not a

confession of the accused Vithal. It is not a statement made to the Police Officer during the course of investigation. Section 25 of the Evidence Act and section 162 of the Code of Criminal Procedure do not bar its admissibility.

15. In order to find out whether death of Swati was accidental, suicidal or homicidal, it is necessary to discuss the evidence of Medical Officer Dr.Sachin (PW4), who performed the P.M. examination on the dead body along with Dr.M.R.Sane and found that, there was contusion over right temporo parital region of size 6 c.m. x 5 c.m. irregular and reddish. There was also contusion over left temporal region of size 4 c.m. x 4 c.m. irregular and reddish. The said Medical Officer reserved his opinion about cause of death and after receipt of C.A. report, he found that no poison is detected. He gave final cause of death of deceased as

head injury (Exh.58). He has also mentioned that the injuries were ante mortem. Therefore, the evidence of the Medical Officer unequivocally indicates that the death of Swati was homicidal.

16. It is the submission of the learned counsel appearing for the appellant that there was delay of 4 days in filing FIR. It is not in dispute that the A.D. was already lodged by the father of the appellant i.e. Vithal, on very same day at 10.50 a.m. by visiting the Police Station Waluj. Machindra (PW1) in his evidence stated that on 30.05.2009, he received phone call and received information that his daughter was admitted in the Hospital. Thereafter, he himself, his wife including children went to the Waluj by vehicle. Then, they went to the Police Station Waluj. They have orally narrated the Police about receiving phone call about his daughter. Then they went at

the house of the accused. They came to know that his daughter is no more. The thumb of legs of his daughter have been tied and Odhani was tied to her stomach. There was head injury on back side of the head. All accused persons except the son-in-law i.e. appellant, other family members were present. He has made inquiry with accused about the incident but they did not state anything. The mother-in-law of his daughter told that Swati received attack. When he asked whereabouts of son-in-law Sunil, in-laws of Swati told that he had been absconding since said night, the dead body of Swati was taken for P.M. in GHATI Hospital, Aurangabad. Thereafter, they have taken dead body of his daughter to his village. On the same day, they performed funeral of his daughter. On next day, they performed religious ceremony by collecting ash of his daughter. Machindra (PW1) has specifically stated that when the dead body

of his daughter was taken at the Police Station, at the relevant time he requested to record his report but his report was not recorded by P.I. Bahugure. Therefore, Machindra (PW1) has offered satisfactory explanation explaining under which circumstance delay occurred in lodging the FIR.

17. The prosecution witnesses have stated in their evidence about the demand of Rs.50,000/- by the appellant. It is true that, the prosecution did not prove the offence punishable under Section 498-A of the IPC, and consequently all the accused have been acquitted from the said offence. However, the fact remains that the prosecution witnesses have stated in their evidence about the demand of Rs.50,000/- and also the said amount was paid to the accused.

18. So far proving motive for commission

of offence is concerned, it would be apt to make reference to the judgment of the Supreme Court in the case of ***Mulakh Raj and others Vs. Satish Kumar and other***[3] wherein in para 17 it is held, as under:

> "17. The question then is, who is the author of the murder? The contention of Sri Lalit is that the respondent had no motive and the High Court found as a fact that the evidence is not sufficient to establish motive. The case is based on circumstantial evidence and motive being absent, the prosecution failed to establish this important link in the chain of circumstances to connect the accused. We find no force in the contention. Undoubtedly in cases of circumstantial evidences motive bears important significance. Motive always locks up in the mind of the accused and some time it is difficult to unlock. People do not act wholly without motive. The

3 (1992) 3 SCC 43

failure to discover the motive of an offence does not signify its non-existence. The failure to prove motive is not fatal as a matter of law. Proof of motive is never an indispensable for conviction. When facts are clear it is immaterial that no motive has been proved. Therefore, absence of proof of motive does not break the link in the chain of circumstances connecting the accused with the crime, nor militates against the prosecution case. The question, therefore, is whether Satish Kumar alone committed the offence of murder of his wife? In this regard Sri Lalit pressed into service the evidence of DW 4, the uncle of the respondent who stated that respondent 1, his brother and father were in the shop at the relevant time and that the respondent also stated so in his statement under section 313 C.P.C. This evidence clearly establishes that the respondent was not at home when the occurrence had taken place.

This evidence has to be considered in the light of the attending circumstances and the conduct of Satish Kumar. It is established from the evidence that the deceased and the first respondent alone were living in the upstair room. The occurrence took place in the broad day time in their bed room. The deceased at that time was having three months old child. What had happened to the child at the time when the ghastly occurrence had taken place is anybody's guess. Normally three months child would be in the lap of the mother unless somebody takes into his/her lap for play. It is not the case. It would be probable that after the murder, the child must have been taken out and the dead body was burnt after pouring kerosene and litting fire. Therefore, the one who committed the offence must have removed the child later from the room. Admittedly the day of occurrence is a Sunday and that too in the afternoon. Therefore, the shops must have been

closed. DW 2, Post Office Superintendent, examined by the defence, categorically admitted that the handwriting of all the four telegrams was of the same person. Satish Kumar admitted that he issued two telegrams including the one to PW 15 and the two were issued by his father. Therefore, four telegrams were issued by respondent 1 alone. When the wife was practically charred to death an innocent and compassionate husband would be in a state of shock and would not move from the bedside of the deceased wife and others would attend to inform the relations. It is also his case that he phoned to the police station and informed of the occurrence. Evidence is other way about. An attempt was made to have the matter compromised, but failed. Thereafter they were found to be absconding. The evidence of DW 4 (maternal uncle) that respondent 1 was in the shop thus gets falsified and his is a perjured evidence. This false plea

is a relevant circumstance which militates against his innocence. The death took place in the bedroom of the spouse and the attempt to destroy the evidence of murder by burning the dead body; the unnatural conduct of Satish Kumar, immediately after the occurrence; the false pleas of suicide and absence from house are telling material relevant circumstances which would complete the chain of circumstantial evidence leading to only one conclusion that Satish Kumar alone committed the ghastly offence of murder of his wife, Shashi Bala."

19. The next question is, who is the author of death of the deceased Swati? As already observed, the deceased Swati was last seen in the company of the appellant at 10.30 to 11.00 p.m. on the said night. It has come on record that both of them entered the bedroom, which is separate and exclusive for the use of said couple. During said night, only appellant and Swati were in the said

bedroom. During morning hours, after 6.00 a.m., Vithal noticed that appellant was not present in the bedroom and he absconded. The prosecution has discharged the burden proving the presence of the appellant on the said night in the bedroom, even otherwise during night time it is presumed that the house members are bound to be there in the house unless any plausible explanation is offered for absence. The appellant did not offer any explanation or taken a defence that he was not present in the house during the said night.

20. The Supreme Court in the case of ***State of Rajasthan Vs. Thakur Singh***[4] while explaining the scheme of provisions of Sections 101 to 106 of the Evidence Act, 1872, and its scope in para 22 to 24 held thus:

22. The law, therefore, is quite

4 2014 (12) SCC 211

well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts.

23. Applying this principle to the facts of the case, since Dhapu Kunwar died an unnatural death in the room occupied by her and Thakur Singh, the cause of the unnatural death was known to Thakur Singh. There is no evidence that anybody else had entered their room or could have entered their room. Thakur Singh did not set up any case that he was not in their room or not in the vicinity of their room while the incident occurred nor did he set up any case that some other person entered the room and caused the

> unnatural death of his wife. The facts relevant to the cause of Dhapu Kunwar's death being known only to Thakur Singh, yet he chose not to disclose them or to explain them. The principle laid down in Section 106 of the Evidence Act is clearly applicable to the facts of the case and there is, therefore, a very strong presumption that Dhapu Kunwar was murdered by Thakur Singh.
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> 24. It is not that Thakur Singh was obliged to prove his innocence or prove that he had not committed any offence. All that was required of Thakur Singh was to explain the unusual situation, namely, of the unnatural death of his wife in their room, but he made no attempt to do this.

21. In the present case, the prosecution has discharged its burden of firmly establishing that the deceased Swati was last seen in the company of the appellant. The appellant did not offer any explanation how

the death of Swati has occurred. The said facts were within the special knowledge of the appellant. There are also no circumstances on record that anybody else had enmity with the deceased who could have committed murder of Swati. The appellant did not set up any case that he was not in their room while incident occurred nor did he set up any case that some other person entered the room and caused the unnatural death of his wife.

22. In the light of the discussion in the foregoing paragraphs, it will have to be held that the prosecution has firmly proved the case beyond reasonable doubt. All the circumstances collectively and also independently have been firmly established by the prosecution. The chain of circumstances is so complete which unequivocally indicated the involvement of the appellant alone. Therefore, the view taken by the trial Court

cannot be said to be perverse or contrary to the evidence on record. The circumstances so relied upon by the prosecution and appreciated by the trial Court in the light of the evidence brought on record unerringly point out the guilt of the appellant.

23. At this stage, the learned counsel appearing for the appellant submits that since there are only two internal injuries and one injury over right breast 1 c.m. medial to right nipple of size 1 c.m. x 1 c.m. the appellant's case may be considered under exception 4 of Section 300 of the IPC.

24. In support of the aforesaid contention, the learned counsel for the appellant placed reliance on the decisions in the cases of *Kusha Laxman Waghmare Vs. State of Maharashtra*[5], *Kallu @ Kalyan Atmaram Patil Vs. State of Maharashtra*[6], *Santhanam Vs.*

5 AIR 2014 SC 3839
6 AIR 2009 SC (Supp) 970

State of T.N.[7], *Ramachami Vs. State Rep.by state Prosecutor*[8], *Ramesh Kumar @ Toni Vs. State of Haryana*[9] *and Sompal Singh and anr. Vs. State of U.P.*[10]

25. It is not possible to accept the said submission for the simple reasons that, the appellant caused injuries on the head of the deceased Swati in the night of the incident. After causing her injuries, instead of making necessary arrangement for her medical treatment immediately, he fled away from his house. There is no plausible explanation offered by the accused on record under which circumstances Swati died. The fact that the appellant fled away from his house on the said night, was very unusual and unnatural conduct of the appellant. The circumstances brought on record by the prosecution unequivocally indicate that not

7 AIR 2009 SC (Supp) 1085
8 AIR 2009 SC 712
9 AIR 2009 SC 2447
10 AIR 2014 SC (Suppl) 510

only that Swati is killed by the appellant, but thereafter he fled away. Therefore, reasonable inference can be drawn on the basis of circumstances brought on record that it was cold-blooded act and behaviour of the appellant. There is presumption that the husband is custodian of the wife. He has to maintain his wife properly and with high degree of dignity. When the deceased Swati was in the exclusive custody of the appellant during night time, the act committed by the appellant had serious consequence and deserves to be punished by awarding appropriate punishments keeping in view the social interest and consciousness of the society. It is also necessary to mention here that, death of Swati occurred within one year of marriage. Marriage of the appellant was solemnized with Swati on 11.02.2008 and incident has taken place on 30.05.2009. Therefore, undue sympathy to impose

inadequate sentence would do more harm to the public.

26. The trial Court, after taking into consideration the entire evidence brought on record, has appropriately punished the appellant by awarding life imprisonment. Taking different or lenient view would send wrong signal to the society and would result into travesty of justice.

The Supreme Court in the case of *Jai Kumar Vs. State of M.P.*[11] while considering various theories of punishment, observed that justice is supreme and justice ought to be beneficial for the society so that the society is placed in a better off situation. Law courts exist for the society and ought to rise up to the occasion to do the needful in the matter, and as such ought to act in a manner so as to sub-serve the basic requirement of the society. It is a

11 (1999) 5 SCC 1

requirement of the society and the law must respond to its need. The greatest virtue of law is its flexibility and its adaptability, it must change from time to time so that it answers the cry of the people, the need of the hour and the order of the day.

(Underlines added)

27. Yet in another authoritative pronouncement in the case of Mohd. Jamiludin Nasir Vs. State of West Bengal[12] in para 175 it is observed that, the sentence to be awarded should achieve twin objectives: [a] Deterrence, [b] Correction. The court should consider social interest and consciousness of the society for awarding appropriate punishment. Seriousness of the crime and the criminal history of the accused is yet another factor. Graver the offence longer the criminal record should result severity in the punishment. Undue sympathy to impose inadequate sentence would do more harm to the

12. [2014] 7 SCC 443

public. Imposition of inadequate sentence would undermine the public confidence in the efficacy of law and society cannot endure such threats.

(Underlines added)

28. In the light of discussion in the foregoing paragraphs, there is no substance in the appeal, hence, the Criminal Appeal stands dismissed. The accused be given set-off vide section 428 of the Criminal Procedure Code.

[SANGITRAO S.PATIL]
JUDGE

[S.S.SHINDE]
JUDGE

DDC