



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 268 OF 2016

Kailas @ Kalyan Badrinath Pawar,
Age : 33 years, Occupation Business,
R/o. C/o. Dilip Chormale,
House No.5-1-769, Naregaon,
Aurangabad.

... Appellant

Versus

The State of Maharashtra

... Respondent

...
Mr. Nilesh S. Ghanekar, Advocate for Appellant.
Mr. S. J. Salgare, APP for Respondent – State.

.....
**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 14th June, 2023

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. This appeal is directed against the judgment and order passed by the learned Additional Sessions Judge, Aurangabad dated 01-04-2016 in Sessions Case No.51 of 2013, holding appellant Kailas guilty for the offence punishable under Section 302 of the Indian Penal Code (IPC) and sentenced him to suffer imprisonment for life and to pay fine of Rs.2,000/-.

FACTS OF THE CASE IN NUTSHELL

2. Deceased Rupali, sister of PW1 Bhaginath Vishnu Chavan, was married to appellant Kailas in 2005. In 2009, accused, while staying with deceased,

started suspecting her fidelity and on such count he beat her. On information received from deceased, accused was given understanding. Four months prior to death of Rupali, she had returned back to her maternal house alleging beating by accused on chest. After 15 days, on assurance of good treatment, she went back to cohabit with accused and they started residing in a rented room owned by **PW3** Dilip Chormale. On 17-12-2012 informant brother received a telephonic message that some untoward incident has taken place in the house of his sister and so he rushed to her house and found dead-body of his sister. Accused was not present there. Police prepared inquest and referred body for post mortem and thereafter, informant brother set law into motion, on the strength of which, crime No.I-169 of 2012 was registered with MIDC Cidco Police Station, District Aurangabad for the offence punishable under Sections 302 and 498-A of the Indian Penal Code (IPC).

After completion of investigation and after being charge-sheeted, trial commenced and on its conclusion after hearing both the sides, learned trial Judge reached to a finding that prosecution has established that death of Rupali was homicidal one and accused strangled her and intentionally committed her murder and hence, convicted the appellant and sentenced him to suffer imprisonment for life and to pay fine of Rs.2,000/-.

3. We have heard both the sides.

GROUNDS FOR APPEAL

4. Here learned Advocate for the appellant put-forth following grounds while assailing the impugned judgment.

I) **Firstly** there is no iota of evidence either in support of so called direct evidence or circumstantial evidence.

(II) **Secondly** when on same set of circumstances and evidence, accused has been acquitted from the charge under Section 498-A of the IPC and therefore, conviction ought not to have been recorded even for offence under Section 302 of IPC.

(III) **Thirdly**, informant has hear say information which is allegedly received from the landlord. However, even landlord was out of the house for night duty and therefore, he is unaware of the events which took place in the house of accused. Therefore, his evidence ought not to have been relied and accepted by the learned trial Judge.

(IV) **Fourthly** important witness like son of landlord namely Ashok, who claimed to have seen accused just after midnight, is not examined. Even wife of landlord, who was material witness, is not examined.

(V) **Fifthly** case is not proved beyond reasonable doubt. Rather it was a perfect case for benefit of doubt.

SUBMISSION ON BEHALF OF STATE

5. Per contra, while supporting the impugned judgment passed by the

learned trial Judge, it is submitted by the learned APP that there is clear and clinching evidence about mal-treatment to deceased on account of suspicion of her character. Brother, parents and relatives of deceased are unequivocal about such treatment meted out to deceased. That accused was the only person in the company of deceased and it is confirmed by none other than landlord. Appellant ought to have discharged the burden of establishing the circumstances which led to unnatural death of his wife. Autopsy Doctor has confirmed death of deceased due to strangulation. Therefore, involvement of none other than accused is cogently proved. In the light of such evidence on record, it is put-forth that no fault could be found whatsoever in the conclusion reached by the learned trial Court. Consequently, learned APP prays for dismissal of the appeal.

6. It transpires from the papers before the trial Court that in all 11 witnesses were examined. Their status and role could be categorized and summarized as under :

PW1 Bhaginath Vishnu Chavan is brother of the deceased and informant. His evidence is at Exh.20.

PW2 Rekha Bhaskar Lahane is panch to inquest. Her evidence is at Exh.23.

PW3 Dilip Bhagwanrao Chormale is landlord. His evidence is at Exh.27.

PW4 Vishnu Laxman Chavan is father of deceased. His evidence is at Exh.37.

PW5 Ganesh Bansi Barwal is witness. His evidence is at Exh.41.

PW6 Mangal Vishnu Chavan is mother of the deceased. Her evidence is at Exh.46.

PW7 Shivaji Dashrath Bhosale is maternal uncle of deceased. His evidence is at Exh.47.

PW8 Rahul Kailas Ravale is panch to seizure. His evidence is at Exh.50.

PW9 Kailas Ukhardaji Zine is Autopsy Doctor. His evidence is at Exh.55.

PW10 Kadarsha Umarsha is panch to seizure. His evidence is at Exh.57.

PW11 Dr.Ganpat Harischandra Darade is the Investigating Officer. His evidence is at Exh.65.

7. As expected, this being First Appellate Court, in view of law laid down in the case of *Ishvarbhai Fujibhai Patni v. State of Gujarat; (1995) 1 SCC (Cri.) 222* and also in *Geeta Devi v. State of UP and others; 2022 SCC OnLine SC 57*, we have to undertake exercise of re-appreciating, re-analyzing and re-examining the entire evidence before the learned trial Judge to test the findings and conclusion reached at by the learned trial Judge. We have therefore carefully re-examined both oral and and documentary evidence on record.

SUM AND SUBSTANCE OF EVIDENCE OF PROSECUTION

8. It seems that **PW1** Bhaginath – informant is the brother of deceased. It is his version that accused suspected character of his sister, beat her and so she come to his house. After giving understanding to accused, deceased went back to cohabit with him. On 17-12-2012 he got news of her death and after

reaching her house, he saw her lying in the house with a saree entangled to her neck.

9. **PW2** Rekha is panch to inquest. She spoke about seeing saree entangled around neck of deceased and white froth oozing from her mouth. Inquest panchanama is at Exh.24.

10. **PW3** Dilip is the landlord. His evidence is that accused and deceased lived in his rented room. He knew them since previously and he also knew that there used to quarrel between them and ill-treatment to deceased in backdrop of suspicion of character. According to him, on 16-10-2012 at 10:45 p.m. he had seen accused on the road and had asked him to go back in his house to sleep. In the next morning, on request of wife of this witness, he went to woke up deceased and at that time he realized that deceased was lying on the floor in the house. He informed Corporator, Police and relatives.

11. **PW4** Vishnu is the father, **PW6** Mangal is the mother and **PW7** Shivaji is maternal uncle of the deceased. They all speak about marriage of Rupali with accused and she being beaten and appellant suspecting her character and about receiving a message and thereafter they visiting Ghati Hospital. **PW8** Rahul is panch to seizure of ornaments on the person of deceased on 10-11-2012. **PW9** Kailas is the Autopsy Doctor, who has conducted post
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mortem. **PW10** Kadarsha is panch to seizure. Seizure panchanama is at Exh.58. **PW11** Dr.Ganpat is the Investigating Officer.

Thus, on the strength of oral evidence of above 11 witnesses and documentary evidence, prosecution has tried to establish their case.

12. Now let us proceed to examine as to whether at the outset, prosecution has demonstrated that deceased died homicidal death and it was as a result of ligature strangulation as claimed by the prosecution. In the light of such accusations, it is imperative on our part to see whether medical evidence clearly suggest death of Rupali to be only and only homicidal one and not otherwise.

PW9 Kailas, Autopsy Doctor, has stated that he is serving as professor in Forensic Medicines at Government Medical College, Aurangabad. That on 17.10.2012 he was on duty. Dead body of deceased Rupali was referred for postmortem examination. He himself with Dr. V.M.Rathod and Dr. V.G.Kamble collectively conducted postmortem during 01.15 p.m. to 03.30 p.m. It was a female body of about 25 years. It is stated that facial feature was congested, eyes were closed, tongue was inside the mouth, whitish fluid was oozing from nostrils and nails and nail beds of fingers of both hands cyanosed. That on examination, following injuries were noticed :

External injuries :

- 1) Ligature mark around the neck **horizontal at the level** of thyroid

cartilage running **backwards deficient posteriorly** on the nape of neck, seen as groove of length 20 c.m. and width varies from 2 c.m. to 2.5 c.m. reddish brown in colour. Neck circumference is 32 c.m. length of groove is 20 c.m. 6 c.m. from the chin, 10 c.m. from left mastoid, 10 c.m. from right mastoid.

2) **Abrasion at the root of nose** 2 c.m. x 1 c.m. **reddish swelling and redness present at tip of nose.**

3) Multiple abraded contusion present at the inner aspect of upper and lower lips 2 c.m. x 1 c.m. to 1 c.m. x 1 c.m. reddish in colour.

4) **Abrasion over** the left upper chest 4 c.m. lateral to sternum, 2 c.m., reddish.

5) **Abrasion over** right sub mandibular region 2 c.m. reddish. All the above injuries were ante-mortem in nature.

6) **On neck dissection**, no evidence of fracture of hyoid bone or thyroid cartilage. No evidence of injury to neck muscle, contusion present over upper 1/3rd part of Oesophagus 4 c.m. x 2 c.m. reddish. Its corresponding injury to injury No.1 in mentioned in column no.17.

Internal Injury :

1) **Injuries under the scalp:-** Under-scalp contusion present over both the right and left temporal region 6 c.m. x 2 c.m. (right) and 10 c.m. x 4 c.m. (left) dark red in colour.

Opinion of **PW9** Kailas, Autopsy Doctor is that probable cause of death is due to “asphyxia due to ligature strangulation”. Manner of death is homicidal. He further stated that injury no.1 and its corresponding injury noted in column no.17 is possible by constriction of saree.

In **cross-examination** at the hands of learned Advocate for the appellant, **PW9** Kailas has answered that body was in naked condition. He admitted that injury nos.2 to 5 to be possible during sexual assault. He admitted that in case of ligature mark or strangulation, dead body is required to be referred for autopsy alongwith ligature and if ligature is accompanied then it is necessary to examine the material of the ligature alongwith its knot. He answered that they enquired about ligature material in this case. Then he answered that age of injury or time of death is by approximation and that exact time cannot be opined.

13. The above discussed evidence of medical expert clearly shows that death is due to strangulation. Though witnesses speak about seeing deceased lying with a saree entangled to her neck and testimony of Inquest Panch suggests that saree was seized in her presence at the time of inquest itself, but answer given by **PW9** Autopsy Doctor in cross-examination in paragraph no.7 goes to show that autopsy was done on naked dead body and saree was not confronted to him to seek opinion whether strangulation was by use of said saree. However, evidence of Autopsy Doctor shows death is due to strangulation and we are convinced that there is no reason to discard or disbelieve the evidence of medical expert on the point of death to be homicidal.

ANALYSIS AND CONCLUSION

14. Now the question that needs to be answered is that who is responsible for strangulation. According to prosecution, appellant - accused husband is responsible. Here appellant is shown to be residing in the house of landlord PW3 Dilip. Therefore, his evidence assumes importance and it needs to be scrutinized minutely. We have already discussed sum and substance of his evidence in the aforesaid paragraphs. According to him, on 16-10-2012, he left to attend his duty at around 10:45 p.m. At such time, he claims that he saw accused on the road and he allegedly told accused to go inside his own house and sleep and then, he went. According to this witness, thereafter wife of this witness closed the door of his own house and went to sleep. He states that on the next day at 07:00 a.m. when he returned from duty, after taking bath while he was doing Pooja, his wife asked him to wake up deceased Rupali and he allegedly told his wife that he would wake her up after Pooja is over. Then he claims that he went to the room of deceased and pushed the door of room, where he found that deceased Rupali was lying on the floor. He stated that saree was around her neck and white froth was oozing from her mouth. He stated that she was dead. He stated that he informed to the Corporator, Dahihande and he informed Police, who reached to the spot. Then he stated that he informed relatives including brother and uncle of deceased and brother of deceased came there and Police also came there. He further stated that when he came to the house in the next morning, his son Ashok told him that

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when Ashok came to the house at around 12:30 midnight, at that time the door of their house was latched from outside and that his son Ashok had also told him that at that time accused was standing in his own house and when being questioned on that count, accused allegedly told his son that he was waiting for him.

Above witness in **cross-examination** has answered that when brother of Rupali came, he gave information to the effect that he had seen accused at 10:45 p.m. on 16-10-2012. However, in examination-in-chief, **PW1** Bhaginath - informant has not uttered a single word about **PW3** Dilip informing him about seeing accused on 16-10-2012 at 10:45 p.m. He even answered in cross-examination in paragraph no.6 that landlord and his son Ashok met him at the spot and he had talks with them. Rather he stated that he made no enquiry with them about incident and that no one gave information to him in respect of incident at the spot. In further cross-examination, **PW3** Dilip has answered that on 17-10-2012, he met Ashok, in the morning i.e. when he came to house. Then he answered that he was not knowing that Ashok had seen accused Kailas at 12:30 midnight on 16-10-2012.

PW3 Dilip has further admitted in cross-examination that he had stated before Police for the first time on 18-10-2012 i.e. when his statement was recorded that on 16-10-2012 he saw accused at 10:45 p.m.

Therefore, this witness has apparently improved his version or trying to built up a story. In further cross-examination, he has specified that on that

day, he saw Rupali lying on the ground at 07:30 a.m. i.e. when he returned from his duty. Then he answered that Police had reached to spot of incident at 07:45 a.m. Then he answered that at around 07:30 he came to know that Rupali died. Again he stated that at 08:30 a.m. he went for taking bath and at around 09:00 a.m. he claims to had been to the house of Corporator. Therefore, such answers create serious doubt about his seeing accused at around 10:45 p.m. on 16-10-2012 and then on his suggestion accused went to his own house to sleep.

Though **PW3** Dilip claims that his wife shut the door of his own house, unfortunately she is not examined. In our opinion, she too was a important witness because she had taken accused inside the premises and when accused went to his own room, thereafter, she shut the door of her own house.

Similarly, as pointed out by learned Advocate for the appellant, another crucial witness Ashok, son of **PW3** Dilip - landlord, for the best reasons known to the prosecution, has not been examined and made to testify before the learned trial Court.

15. Resultantly, taking into account the above discussed evidence of so called star witness for prosecution, it cannot be said with certainty that accused was there and he was in the company of deceased at the time of incident. Another aspect which cannot be overlooked is that **PW9** Kailas - Autopsy Doctor, has admitted that injuries on the person of deceased are

possible during sexual assault. Therefore, there is substance in the argument of learned Advocate for the appellant that possibility of other person entering the house, cannot be ruled out. Here though Autopsy Doctor has been examined, time since death is also not opined even by approximation and age of injuries noted is also not given by Autopsy Doctor. Therefore, only on the strength of such testimony of **PW3** Dilip – landlord, in the light of answers solicited from him by learned defence Advocate, in our considered opinion, it is unsafe to rely on testimony of such witness.

16. It is true that accused being husband, by virtue of Section 106 of the Evidence Act, he can be accountable for the said death, but unless it is demonstrated that accused was the only person in the company of deceased, it cannot be said that he is responsible for the homicidal strangulation. Mere failure on his part to deny such material while answering questions under Section 313 of the Code of Criminal Procedure (Cr.P.C.) itself is not sufficient to infer that he has failed to give plausible explanation and hence, he is guilty. Infact it was for the prosecution to prove and establish guilt beyond reasonable doubt and to stand on its own leg rather to take recourse to answers given under Section 313 of the Cr.P.C. We may rely on the decisions in *Gargi v. State of Haryana; (2019) 9 SCC 738* and *Shivaji Chintappa Patil v. State of Maharashtra; (2021) 3 SCALE 384* to support our view. In these decisions as well as reiterating it in *Md.Anowar Hussain v. State of Assam;*

2022 SCC OnLine SC 1399 Hon'ble Supreme Court has held that non-explanation or falsity in explanation to be given under Section 106 of the Evidence Act by itself cannot be a ground of conviction. In **Gargi** (supra), Hon'ble Supreme Court held that provision of Section 106 of the Evidence Act does not absolve the prosecution of its primary burden. It has been observed *"In so far as the 'last seen theory' is connected, there is no doubt the appellant being none other than the wife of the deceased was seen with. However, such companionship of the deceased and the appellant, by itself, does not mean that a presumption of guilt of the appellant is to be drawn. The trial Court and the High Court have proceeded on the assumption that Section 106 of the Evidence Act directly operates against appellant. In our view, such an approach has also not been free from error where it was omitted to be considered that Section 106 of the Evidence Act does not absolve the prosecution of its primary burden."*

17. Here in the light of above discussion, it cannot be said that prosecution has proved the case against appellant accused beyond reasonable doubt. There are infirmities and major discrepancies in the testimonies of prosecution witnesses. Several important questions have remained unanswered. Therefore, prosecution not having discharged its burden by leading full-proof case, we are inclined to interfere.

18. Having gone through the judgment under challenge, in our view,

testimony of **PW3** Dilip - landlord is the sole basis for accepting the case of prosecution. The above shortfalls noted and discussed by us in aforesaid paragraphs render his evidence unworthy of credence. Learned trial Judge has not taken into account above shortfalls before recording guilt. Hence, appellant succeeds. Consequently, we proceed to pass following order :

ORDER

- i) Criminal Appeal stands allowed.
- ii) The conviction awarded to the appellant Kailas @ Kalyan Badrinath Pawar by the learned Additional Sessions Judge, Aurangabad on 01-04-2016 in Sessions Case No.51 of 2013, for the offence punishable under Section 302 of the Indian Penal Code stands set aside. Appellant stands acquitted of the offence punishable under Section 302 of the Indian Penal Code.
- iii) Appellant be set at liberty, if not required in any other case.
- iv) Fine amount deposited, if any, be refunded to the appellant after statutory period.
- v) It is clarified that there is no change in the order passed by the learned Additional Sessions Judge, Aurangabad regarding disposal of Muddemal.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

SPT