
(2022) 02 BOM CK 0045

In the Bombay High Court

Case No : Criminal Appeal No. 1026 Of 2017, Interim Application No.1723 Of 2021

Bargalsidhha Dharmanna Padwale And Others

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 21-02-2022

Acts Referred:

Indian Penal Code, 1860 — Section 34, 120B, 302, 498A
Code Of Criminal Procedure, 1973 — Section 161, 209, 313, 437A
Evidence Act, 1872 — Section 113A, 113B

Citation : (2022) 02 BOM CK 0045

Hon'ble Judges : S. S. Shinde, J;N. R. Borkar, J

Bench : Division Bench

Advocate : Ritesh Thobde, S.S. Hulke

Final Decision : Allowed

Judgement

S.S. Shinde, J

1. The present appeal is directed against the judgment and order dated 28.11.2017 passed by Additional Sessions Judge, Solapur, thereby convicting the appellants-original accused for the offence punishable under under Sections 302, 498-A read with 34 of the Indian Penal Code, 1860 (for short "IPC").

2. The complainant Sangita Bansiddha Deshmukh is the mother of deceased Ashwini. Ashwini was the wife of accused No.1 Bargalsiddha Dharmanna Padwale resident of Mandrup, Taluka South-Solapur. The accused No.1 married with Ashwini on 29.05.2013 at Mandrup. Their marriage was performed as per religion rites by giving all honour and gifts. After marriage, Ashwini went to cohabit at the house of accused. Accused No.2 Sugalabai is the mother-in-law, accused No.3 Dharmanna is father-in-law, accused No.4 Shivaji is brother-in-law and accused No.5 Kushalabai is grandmother-in-law of deceased Ashwini.

All accused were residing together and Ashwini was cohabiting in their house.

After marriage Ashwini was treated well for about one month. Thereafter, all accused started ill-treating and harassing her on the ground that, she does not know cooking, household work and work in the field. Ashwini used to inform her mother and relatives about mental harassment and ill-treatment given to her on phone. When Sangita (Complainant) came to know about ill-treatment and harassment to Ashwini, she informed said fact to her relatives from both sides. Sangita and her brother-in-law Amogi Madappa Deshmukh, Limbaji Madappa Deshmukh, relative Suresh Arjun Khandekar, Rangnath Siddhu Kokare etc. went to convince the accused for not ill-treating and harassing Ashwini. However, their efforts went in-vain. Accused No.2 Sugalabai and accused No.5 Kushalabai told them that, Ashwini does not know the agriculture work, however her husband has knowledge of driving, therefore, they should purchase one vehicle called 'Tumtum' for accused No.1. They used to continuously harass Ashwini for purchasing Tumtum. They also used to beat her. The complainant and her family members came to know about beating to Ashwini. The informant and her husband went to the house of accused. At that time all accused were present in the house, they again made demand of Tumtum and accused No. 1 threatened them if demand is not fulfilled he will kill Ashwini.

3. On 05.06.2014 at about 6.00 a.m. complainant Sangita received information on phone that, Ashwini had sustained burn injuries in the house of accused No.5 Kushalabai Kore. Informant and her relatives went to the house of accused No.5, at that time people were gathered in front of the house. Informant with her relative entered in the house of accused No.5.

They saw that Ashwini was completely burnt and was lying in dead condition in bathroom. The informant and her relatives realized that accused poured kerosene and set her ablaze and killed her for non fulfillment of their demand of Tumtum for the benefit of Accused No. 1. Therefore, complainant went to Police Station and lodged complaint which was registered vide C.R. No.70 of 2014 under section 498-A, 302 read with 34 of the I.P.C. on 05.06.2014.

4. Mr. Prakash Raskar, then API Mandrup Police Station went to the spot of incident. The victim was completely burnt and lying in dead condition. He has sent the dead body to Rural Hospital, Mandrup. He has carried out inquest panchanama at Rural Hospital, Mandrup in presence of panchas. Thereafter, he went to spot of incident and carried out spot panchanama in presence of panchas. He seized one plastic can having one liter kerosene having black cork and jute thread, so also plain soil, soil contain with kerosene, half burnt match stick. He also seized muddemal articles under panchanamas. He recorded statements of witnesses. He tried to search accused, however they were not traced out. He seized ornaments, and green colour bangles of deceased.

5. On 06.06.2014 he received an information that accused have come in their field, therefore, he went there in the field and arrested accused and thereafter under panchnama Exh. 59 to 63 brought them to the police station. Meanwhile, postmortem was carried out and dead body was handed over to relatives of

deceased. The cause of death of deceased is death due to 100% burn, however viscera was preserved. The Investigating Officer sent seized muddemal property, and viscera to Chemical Analyzer, Pune. He has collected postmortem notes as well as advance death certificate. After completion of the investigation, he has filed charge sheet before Chief Judicial Magistrate on 01.09.2014, which was registered as RCC No. 863 of 2014.

6. As the offence punishable under Section 302 of the IPC is exclusively triable by Sessions Court, the Chief Judicial Magistrate was pleased to commit the case to the Court of Session under Section 209 of Code of Criminal Procedure (for short 'Cr.P.C.') vide order dated 22.09.2014.

7. After a full fledged trial, the trial Court convicted the appellants by judgment and order dated 28.11.2017, hence this appeal.

8. Mr. Rithesh Thobde, learned counsel appearing for the appellant submits that the prosecution case is based on circumstantial evidence and there is no direct evidence against the appellant. The learned Sessions Court failed to apply cardinal principals laid down by the superior Courts in various cases based upon circumstantial evidence viz., the circumstances from which the conclusion is drawn should be fully proved, the circumstance should be conclusive in nature, all facts so established should be consistent only with the hypothesis of guilt and inconsistent with innocence of the accused and the circumstances should be a certainty and exclude the possibility of guilt of any person other than the accused. He submits that the learned trial Court ought to have considered that the prosecution failed to establish such a chain of circumstances as there was no motive for the accused to commit the alleged crime. The prosecution witnesses deposed that there was harrassment. However, what was the nature of harrassment is not stated by any witnesses. The demand of tumtum is attributed to accused no. 2- Suglabai and accused no. 5-Kaushalabai. However, by no stretch of imagination this demand can be equated with the motive of killing the deceased. He further submits that the best possible evidence is not brought before the Court by the prosecution. The report of finger print expert who examined the seized articles viz., Kerosene can and match box from the spot of incident would have been able to throw much light on the perpetrator of the crime, if any. The learned trial Court grossly erred in convicting the appellants under Section 302, 498A of IPC based on conjectures and surmises. The learned trial Court ignored the settled principle of law that the burden to prove the presence of accused at the spot of offence lies on the prosecution. The burden would not be lessened by mere fact that the accused has adopted the defence of alibi. The prosecution has not brought on record any cogent evidence to show that the accused persons were present at the spot of incident on the relevant date and time. The persons who informed PW2 about the body of deceased in burning condition have also not been examined by the prosecution, despite their statements under Section 161 Cr.P.C. being recorded by the investigating officer. Thus, the prosecution has suppressed the best possible evidence that was

available. The circumstances so brought on record do not conclusively establish the accused persons are the authors of the crime. There are more than reasonable gaps in the chain of circumstances in the light of evidence on record.

There is no cogent and reliable evidence on record to conclusively prove that the accused persons were the perpetrator of the crime. There is a possibility of death due to 100% burns, however, it can be either be homicidal, suicidal or accidental. The evidence on record suggesting the fact that the deceased was an educated lady whereas her husband was a labourer. Psychological factors such as these and feelings of hopelessness about the future, anxiety and worry are some of the important symptoms of an intention to commit suicide. It is submitted that there is also no cogent evidence on record to show that the deceased was soon before her death was subjected to cruelty or harassment, for or in connection with any demand for dowry. An alleged demand of vehicle called tumtum cannot be equated with dowry as defined under the Dowry Prohibition Act. Nonetheless, the said allegations are attributed to only Accused No. 2 and Accused No. 5. The fact that the accused no. 2 was residing at Mumbai is also brought on record through the evidence of investigating officer. Accused No. 1 is in custody since 06.06.2014, and thus he has completed more than 8 years imprisonment. The Accused Nos. 2 to 5 were on bail throughout the trial and they have been released on bail by suspending their substantive sentence. Therefore, learned counsel for the appellant submits that the appeal may be allowed.

9. Learned APP appearing for Respondent-State invites attention of this Court to the deposition of prosecution witnesses and in particular the informant who is mother of Ashwini (deceased), and submits that the prosecution has proved the case against the appellants beyond reasonable doubt. The informant immediately rushed to the spot on receiving information and saw that the accused were present at the spot of incident and body of her daughter was in flames. The evidence of PW2 gets support from the evidence of other witnesses and also from the medical evidence. It is submitted that the prosecution has duly proved demand of vehicle tumtum and further on not fulfilling the said demand ill-treatment and harassment given by the accused to the Ashwini. All the accused hatched criminal conspiracy and designed a plan to kill Ashwini (deceased).

Therefore, relying upon the evidence of prosecution witnesses, learned APP submits that the findings recorded by the trial Court are in consonance with the evidence brought on record, and therefore, appeal may be dismissed.

10. We have given careful consideration to the rival submission. With the able assistance of learned counsel appearing for appellants and learned APP for Respondent-State, we have perused entire notes of evidence. It appears that the trial Court framed charge under Section 120-B, 498-A, 302 read with 34 of IPC and held that the appellants conspired with each other, and shared common intention to kill Ashwini. However, the trial Court held that the prosecution did not bring sufficient evidence to prove the charge under Section 120-B of IPC. The said findings are recorded by the trial Court mainly in Para 85 of the impugned

judgment. The trial Court from Para 73 to 84 has discussed the evidence available on record against the accused, their role in commission of offence and accordingly recorded its findings.

11. Upon perusal of statement of PW2 and other prosecution witnesses, it appears that the accused and prosecution witnesses except the investigating officer and medical officer, all other witnesses are resident of same village i.e. Mandrup. The house where the incident had taken place and the house of complainant PW2 are situate on 30 minutes distance by road as stated by PW2 in her deposition. PW2 has also stated that the police station is in center of her house, and the house where the incident had taken place. It has also come in the evidence of prosecution witnesses that population of said village is about 15 to 20 thousand. It has also come in the evidence of PW2 and other witnesses that the house where the incident had taken place is situate in crowded area and nearby said house one road is passing through.

12. PW2 in her deposition before the Court deposed that Ashwini (deceased) was her daughter. Her marriage was performed with accused No. 1 on 29.05.2013 at Mandrup. She was residing at her matrimonial house with her husband, mother-in-law, father-in-law, brother-in-law and grandmother of accused no. 1. All accused and her daughter were residing at Kore wada. Ashwini was treated well about one month after her marriage, and thereafter, accused started ill treating and harassing her. As and when she visited house of her parents she stated about ill treatment given by the accused. She deposed that accused Sugalabai and Kaushalabai started demanding money for purchasing vehicle 'tuntum' as accused no. 1 had knowledge of driving. On the previous day of 05.06.2014, the complainant, her husband and relatives went to the house of accused for convincing them that they should stop ill-treating and harassing Ashwini. At that time all accused were present in the house. Accused No. 1 was saying Ashwini does not know household work and work in the field. Accused No. 1 told her to purchase vehicle 'tuntum' and give it to him. In case said demand is not fulfilled, he would kill Ashwini and thereafter prefer to stay in jail.

It is further deposed that on 05.06.2014 accused killed her daughter by setting her on fire. At about 6.00 am, she received a phone call from Malsidha Kore, the maternal uncle of Accused No. 1, and he informed PW2 that Ashwini has sustained burn injuries, and hence they should come immediately to the spot. They immediately reached to the house of Ashwini, all accused were present in the house. PW2 saw that Ashwini was burning. By seeing the said scene PW2 and her husband went to the police station and lodged complaint. Police recorded her statement. When the police along with PW2 and her husband arrived at the spot, the body of Ashwini was burning and police personnel poured water on the body of Ashwini and then prepared panchnama. The police also seized kerosene can, matchbox, sample of plain soil and soil with kerosene.

13. PW2 was cross examined by the advocate for accused. In her cross examination she admitted that Article 1 and Article 2 i.e. Kerosene can and

matchbox are easily available in market. Her parents and brother came on spot of incident at about 7.00 am. She admitted a suggestion that Balasaheb Babu Deshmukh had also made a phone call to them on that day of incident.

She further stated that she has studied up to 4th standard and her daughter Ashwini studied up to 12th standard. It requires half an hour walking from her house to reach to the house of Ashwini. She accepted a suggestion that between her house and house of Ashwini there is a police station.

14. She was further cross examined on next day. She stated that in Kore wada there were two parts, one is at the eastern side of the road and another is at western side of the road. She accepted the suggestion that the house constructed to the eastern side of the road is constructed house and it consist of one room. An arrangement of kitchen was in the room situate to the eastern side of the road. To the western side of the road there was no arrangement of kitchen. On the side of road there is constructed wall and on the other three sides there is wall and above to it there are tin roof. In both the house situate to the west and east side of the road, only Kushalabai Kore, from Kore family is residing. However, PW2 volunteers that accused are also residing in the same house. She admitted in her cross that the place of incident is situated in the house of Kore. However, she denied the suggestion that she is deposing false that all accused are residing in the house of Kore. She further admitted that the house of accused is situate at Bhandarkavathe road, Vithai Nagar road. She denied the suggestion that the house situate at Bhandarkavathe road is consists of six room and having slab. She denied the suggestion that accused Dharmanna Padwale is serving at Mumbai since last 20 to 25 years. She did not know whether accused Dharmanna and Sugalabai were residing at Mumbai. She was aware that accused Dharmanna and Sugalabai were residing at Karanja, Uran, Dist. Raigad. She admitted in her cross that Accused No. 4 Shivaji is having a tailoring shop at Mandrup. She denied the suggestion that Accused No. 1 was doing labour work, whenever it was available. She did not know exactly the qualification of accused No. 1. She heard that, the Accused No. 1 is educated up to 9th standard.

15. PW2 denied the suggestion that marriage of Ashwni was performed with Accused No. 1 against her will. She deposed that she stated to the police that, at that time her daughter was residing with her husband Bargalsidha, mother-in-law Sugalabai, father-in-law Dharmanna, brother-in-law Shivaji and grandmother of accused no. 1 Kushala Kore, all accused and her daughter were residing at Kore wada. She has stated to the police that accused Sugalabai and Kushalabi were demanding money for purchasing tumtum. She has stated to the police that, the efforts were in vain and ill treatment and harassment was continued. She has also stated to the police that on the previous day of 05.06.2014 she herself, Amogi Deshmukh, Limbaji Deshmukh and her husband went to the house of accused for convincing them, at that time all accused were present in the house, at that time accused no. 1 told them that, her daughter does not

know household work and work in field, therefore, they should purchase a tumtum otherwise the accused will kill her daughter and can prefer to stay in jail. She further stated before the police that, she immediately reached to the house of Ashwini, all accused were present in the house. She stated that by seeing the said scene she herself, her husband went to the police station and lodged the complaint. She further stated that she herself and police went to the spot of incident, even at that time body of Ashwini was in burning condition. The police poured water on the body of Ashwini and then prepared the panchnama. She stated that all the said facts are not mentioned in her complaint and she cannot assign any reason why it is not mentioned in her complaint.

16. She deposed that Portion mark 'A' in her complaint was not read over to her. In cross examination again she reiterated that on hearing news of incident they immediately reached to the house of Ashwini, all accused were present in the house, and she saw Ashwini was burning, and thereafter, they went to the police station to lodge the complaint.

17. In order to find out correctness of her deposition before the Court, we have perused the evidence of Prakash Raskar (PW6), the then investigating officer. He stated that the complainant and her husband came to the police station to lodge the complaint. Upon receiving complaint he registered FIR at about 7.35 am on 05.06.2014. Then, he went to the spot and saw that Ashwini was completely burnt and is lying in dead condition. The body was sent to Rural Hospital. Then he went to the Rural Hospital and carried out inquest panchnama. Again he came to the spot and carried out spot panchnama in presence of two panchas. He stated that the spot of incident was the house of Bahirappa Kore having entrance at eastern side. The door of the said house was opened. The complainant went inside and they followed her. The said room consist of tin roof as well as tin walls having height of four and half feet. In the same room at the eastern corner, there were two tiles, however, there was no roof above the said tiles. There was plastic board kept in front of said portion. Beside the said board one plastic can of kerosene was lying, plastic can was having capacity to store quantity of five liters. One liter kerosene was remained in the said can having black colour cork with jute thread. The kerosene was lying on the said tiles as well some drops of kerosene spread over the board. One drum containing water was lying at about two and half feet away from the said tiles. Near the said drum one matchbox was lying. He collected the sample of plain soil as well as soil containing kerosene from the spot of incident. The muddemal was seized in presence of panchas and he prepared panchnamas in their presence. Then panchas signed the panchnama and he also signed the same.

18. He further deposed that he recorded statement of complainant's family member and came to know the names of accused from them. He tried to take search of the accused, however, they were not traced out. It appears that one police constable deposited ornaments of deceased, which were seized during the visit of investigating officer. The panchnama of seizure of those ornaments was

carried out. He arrested the accused persons from their field on 06.06.2014. He has stated in detail the manner in which further investigation was carried out.

19. During his cross examination he stated that the extract of station dairy was not produced by him on record, neither same was brought on the date of recording his evidence. He stated that he saw that crowd about 50 to 100 people gathered near the spot of incident. Therefore, he shifted dead body somewhere else and inquest panchnama was carried out. He further deposed that when he reached to the spot there was fire surrounding the stomach of Ashwini. Before he reached to the spot of incident the fire was not douse by pouring water on body of Ashwini. He did not immediately record the statement of witnesses from the crowd.

20. He deposed that the spot of incident is situate at western side of main road little inside near Jamadar Hospital. He does not know, whether the house of Kore is divided into two part one is towards eastern side and the spot of incident is towards eastern side. He admitted that the spot of incident consists of kitchen and bathroom and kitchen articles i.e. stove and other articles were lying in the kitchen. There is gap between two tin sheets used as wall. He denied the suggestion that western side i.e. back side to the spot of incident there is agricultural land. He also denied the suggestion that in the said open space there are bushes. He admitted that on the internal road there is locality. Surrounding the spot of incident there are houses. To the southern side of spot of incident, there is house of Balasaheb Deshmukh. He admitted that Bansidha Kore and Balasaheb Deshmukh informed the complainant. He recorded their statements. He denied that he is deposing false that he has not seized plain soil and soil mixed with kerosene seized from the spot of incident. He also denied that the complainant came to the police station at about 7.00 am and he recorded her statement.

He further stated that the land of accused is situate two kilometer away from Mandrup. He admitted in his cross that accused Dharmanna and Sugalabai made an application for anticipatory bail wherein it was mentioned that, at the time of incident they were residing at Mumbai, and he was directed to verify/investigate the said fact. Accordingly, he visited the spot and brought the extract of muster of Dharmanna. He admitted that from the said record it was revealed that Dharmanna was on duty on 05.06.2014 till 12.30 pm. The travelling distance between Mumbai to Solapur is about eight hours by railway.

21. In her deposition PW2 did not say that, she herself or her husband tried to pour water on the body of Ashwini to douse the fire. It is evident from reading the cross examination of PW6 that, though PW2 claims she has stated to the investigating officer that at the time of incident accused were present at the spot of incident. However, in the cross examination of PW6, he stated that, PW2 while giving complaint has not stated before him that accused were present at the spot of incident. PW2 also stated in her cross examination that she herself, Amogi Deshmukh, Limbaji Deshmukh and her husband on 05.06.2014 went to the

house of accused for convincing them, at that time all accused were present in the house. But, PW6 in his cross examination stated the PW2 has not told said fact to him at the time of recording of statement under Section 161 of Cr.P.C. or complaint. Therefore, the contention of PW2 that, when they i.e. she herself and her husband went to said house, the accused were present in the said house where the incident had taken place on the relevant date and time, cannot be accepted and read as evidence. Said portion in PW2's deposition is by way of omissions, in the light of evidence of the investigating officer.

22. The prosecution has examined Dr. Nilam Ghogare (PW4), who was at the relevant time attached to Kandalgaon, Primary Health Center. In her examination-in-chief she deposed that on the day of incident, she received information from police station as well as Rural Hospital Mandrup about said incident and that she has to perform post mortem of dead body and they are in need of lady Medical Officer for conducting post mortem. Accordingly, she went to Rural Hospital Mandrup. Along with her another Dr. N.M. Bhosale was also present. They started postmortem at 1.00 pm, and completed the same at 2.00 pm. The dead body was received along with inquest panchnama. It was body of Ashwini Bargalsidha Padwale. On examination she noticed that, the dead body was completely burnt i.e. 100%. There was no evidence of any bone fracture. In larynx and trachea mucos membrane congested contain. Ash particles were found therein. She found semi digested food in the stomach, therefore, she opined that death must have been caused within six hours after the last meal. As per Rule 09 of relevant Rules specifications are given pertaining to burn injury in column no. 17. All injuries were ante- mortem. In her opinion cause of death was due to 100% burn. The postmortem was prepared by herself and Dr. Bhosale and they signed the same.

23. During cross examination, PW4 stated that she herself and Dr. Bhosale were present at the time of postmortem. Simultaneously, Dr. Bhosale was taking note. Rigor mortis, food particles in the stomach and cooling of body, post mortem lividity are important factors to ascertain the time of death. She admitted that merely writing rigor mortis present is not sufficient to ascertain the time of death. From the status of food in stomach time of death cannot be ascertained as it depends upon the type of food consumed and aged of the victim. She also admitted that semi digested food found in the stomach. She denied the suggestion that the finding on point no. 11 and 21 are contradictory with their opinion in respect of the time of death. She further stated that there is smell in burn substance. She denied that, it is true to say that shock can be caused due to fear. She further stated that due to the smoke, and asphyxia a death can be caused.

24. Upon careful perusal of evidence of PW4, cause of death of Ashwini is due to 100% burn. However, she has not stated any injuries or marks or assault on body except burn injuries. Though, the trial Court has expressed possibility of strangulation by accused, nevertheless the finding recorded by the medical

officer does not support the said finding. It can not be gathered from the evidence of PW 4 that the death of Ashwini was homicidal. As already observed though PW2 has stated that she saw accused no. 1 to 4 in the house where the incident had taken place, nevertheless, the investigating officer in his cross examination stated that, PW2 did not tell him the said fact while recording complaint that she saw accused no. 1 to 4 in the house. In case five accused persons were involved in alleged commission of offence of setting Ashwini ablaze, naturally some injuries caused by them at least abrasions ought to have been appeared and noticed by PW4. It has come in the evidence of PW6, the investigating officer that when accused Dharmanna and Sugalabai filed an application for anticipatory bail, he was directed by the Court to find out, whether as stated by those accused, they are residing in Mumbai or somewhere else or at the place where the incident had happened. In his cross examination he stated that on inquiry he found that accused Dharmanna and Sugalabai were residing at Mumbai. If those two accused are residing in Mumbai, therefore, their presence in the said house on that date is ruled out. If their presence is ruled out, the entire prosecution case that five accused were present in the house where the incident had taken place and prosecution witnesses saw those accused in the said house when they visited the said house wherein alleged incident had taken place, will have to be considered as totally false and witnesses are not speaking truth. Ultimately, the evidence of witnesses has to be tested and considered in its entirety and in case, if the witnesses have falsely deposed that they have seen accused Dharmanna and Sugalabai in the said house, though they are resident of Mumbai, the testimony of such witnesses cannot be believed and deserves to be rejected outright.

25. From the evidence of PW2 it can be safely gathered that no specific instances of ill-treatment or harassment has been stated in her deposition. There are vague allegations of harassment and ill-treatment roping in all five accused persons in the alleged commission of offence. There is no complaint prior to the said incident filed by the parents of Ashwini (deceased) against any one of the accused for alleged ill-treatment or harassment. The contention of PW2 that, prior to the date of incident she alongwith others went to the house of accused and accused no. 1 stated that Ashwini does not know household and field work and threatened to kill her in case vehicle tumtum is not given to accused no. 1, does not get support from the evidence of investigating officer (PW6). The investigating officer in his deposition has stated that the specific date of their visit to the house of accused has not been told by the PW2 or any other witnesses while recording the complaint and statement under Section 161 of Cr.P.C. Therefore, it will have to be seen and appreciated that within proximity of time and date of said incident, whether there are any overt acts attributable qua accused persons?

26. Upon scrutiny of evidence of prosecution witnesses, we are of the opinion that, there are no specific instances or material collected by the prosecution which would specifically indicate the involvement of the accused in the alleged

commission of offence soon before the death i.e. within proximate time and date of the incident. It can be gathered from the evidence of panch witnesses that all of them have seen kerosene can having one liter kerosene available in the said can and smell of kerosene on the floor of bathroom and on surrounding area. It has also come in the evidence of panch witnesses that the said house is situated in crowded area, and nearby one road is passing through and also there is one hospital. Keeping in view the attending circumstances so also, the evidence of witnesses the possibility of committing suicide by Ashwini (deceased) cannot be ruled out.

In so far as test laid down for appreciating circumstantial evidence including theory of last seen together is concerned, a useful reference could be made to the judgment of Supreme Court in the matter of Sharad Birdhichand Sarda v/s. State of Maharashtra (1984) 4 SCC 116 the Apex Court in paragraphs 153 and 154 has observed as under :-

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the following observations were made.

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

In paragraph 143 of the said Judgment, the Supreme Court observed that it is important that any circumstance adverse to the accused must be put to him in his statement under Section 313, CrPC 1973; otherwise it must be completely excluded from consideration because the appellant did not have any chance to explain them.

27. In aforesaid Sharad Birdhichand Sarda's case (supra) in paragraphs 162 and 613 the Supreme Court has also considered the aspect as to when the benefit of doubt can be given to the accused. In the said paragraphs 162 and 163 it is observed thus :-

"162 Moreover, in M.G. Agarwal's case (supra) this Court while reiterating the principles enunciated in Hanumant's case observed thus:

If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt.

"In Shankarlal's (supra) this Court reiterated the same view thus:

"Legal principles are not magic incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment".

163. We then pass on to another important point which seems to have been completely missed by the High Court. It is well settled that where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. In Kali Ram v. State of Himachal Pradesh, this Court made the following observations.

"Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence."

In the concluding paragraph 218, the Supreme Court observed as under :-"218 In view of the fact that this is a case of circumstantial evidence and further in view of the fact that two views are possible on the evidence on record, one pointing to the guilt of the accused and the other his innocence, the accused is entitled to have the benefit of one which is favourable to him. In that view of the matter I agree with my learned brothers that the guilt of the accused has not been proved beyond all reasonable doubt."

28. The prosecution has examined Amoghi Deshmukh (PW3). She in her deposition stated that deceased Ashwini was her niece. After one and half month of marriage, accused started ill-treating Ashwini saying that she does not know cooking , household and field work. They used to beat her and abuse her. She

herself, her brother, brother's wife and other relatives went to the house of accused and convinced them for not ill-treating and harassing Ashwini. Even thereafter, accused no. 2 to 5 were harassing Ashwini and told her parents to purchase vehicle tumtum for accused No. 1. On 4th June, 2014 again they went to the house of accused and tried to convince them, not to harass Ashwini. On 5th June, 2014 between 5 to 6 am, her brother received phone call from Malsidhna Bhairappa Kore. He informed that Ashwini sustained burn injuries and he should immediately come to the house of Kushalabai i.e. accused no. 5. All three brothers and sister-in-law immediately went to the house of Kushalabai. When they reached there, they saw Ashwini in burning condition in bathroom, and there was little fire under her stomach. Ashwini was in dead condition.

Immediately, they went to the police station and lodged the FIR.

29. PW3 was extensively cross examined by the defence counsel. She deposed that, she narrated to the police that, Ashwini used to tell about ill-treatment and harassment to her whenever, she used to go to market. This fact is not mentioned in her statement and she cannot assign any reason why the said fact is not mentioned in her statement. She further stated to the police that on previous day of incident they went to the house of accused. However, she does not know why word 'previous day' is not mentioned in her statement recorded before the police. She denied the suggestion that on 05.06.2014 she received phone call from Malsidhappa Kore and Balasaheb Deshmukh. It appears that during cross examination portion mark 'A' from police statement was read over to her, and she stated to the police that they went house of Kushalabai, all accused were present in the house, but this fact is not mentioned in her statement. She admitted in her cross examination that they did not try to extinguish fire by pouring water as Ashwini was dead. There was crowd gathered in front of house. They reached to the house of Kushalabai at 6.10 am. She had taken complainant to the police station, and thereafter police came to the spot. She cannot tell whether police tried to douse the fire or not. She denied the suggestion that accused Dharamana and Suglabai were residing at Mumbai at the relevant time.

30. Upon perusal of evidence of PW2 and PW3, there are substantial discrepancies inasmuch as PW2 in her evidence stated that, they went to the house of accused, where the incident had taken place at 7.00 am, however, this witness i.e. PW3 says that they went to the house of accused at about 6.10 am. PW2 has nowhere referred that PW3 also accompanied them and present when they came to the spot of incident, and when they went to the police station. However, PW3 claims that all of them went to the spot of incident, so also the police station. Though, she stated that they saw accused no. 1 to 4 in the house where the incident had taken place, however, said fact has not been mentioned in her police statement. It is clearly revealed during the cross examination that the investigating officer i.e. PW6 wherein he stated that PW3 has not stated before him that Ashwini used to tell about ill-treatment and harassment to her, whenever PW3 used to go to the market. So also, it is stated by PW6 that, PW3

has not stated to him that on previous day of incident they went to the house of accused for convincing them not to ill-treat and harass Ashwini. PW3 has not stated that they went to the house of Kushalabai and all accused were present in the house to the PW6 while recording her statement. Therefore, in the light of discussion herein above, the evidence of PW2 and PW3 that, they visited house of accused on previous day of the incident and they saw accused in the house where incident had taken place on relevant date in the morning has to be discarded and consequently cannot be relied upon.

31. Both the witnesses to whom PW3 has named in her statement before the police has not been examined by the prosecution. Though, PW3 stated in her deposition that the accused no. 1 to 4 were present when they went to the house of Kushalbai in the morning on the date of incident, but no any other prosecution witnesses have stated about presence of PW3 at the spot in the morning where the incident had happened or thereafter at the police station.

32. While summarizing the judgment, the trial Court in Para 80 held as under:-

"80 While summarizing this judgment, I would like to repeat again that the prosecution has proved its case against all accused. As far as Sections 302 and 498A of the Indian Penal Code is concern.

1 The prosecution has proved the basic facts i.e. death of Ashwini is homicidal. It is neither suicidal or accidental Ashwini died in the house of accused No. 5.

2 Accused No. 1 and 4 have admitted that they used to keep Ashwini at the house of accused No. 5.

3 The incident took place between 4 to 6 am when most of the people are in deep sleep.

4 PW-2 and 3 have stated that there was quarrel on the previous day and there is no plausible reason to disbelieve their testimony.

5 Another strong circumstance against accused is that they have not come forward to take the dead body. Neither they attended the funeral.

6 They have not given any convincing reason as to why they ran away. This conduct of the accused is unnatural because, deceased was the wife of accused No. 1 and daughter-in-law of accused No. 2, 3 and 5 and sister-in-law of accused No. 4.

7 All accused were found together in their field at the time of their arrest.

8 And lastly that the death occurred within a period of 7 years of marriage and within the custody of accused for which accused have not offered any plausible, convincing, just and satisfactory reason."

33. The trial Court in Para 80 in Clause 1, held that the death of Ashwini was homicidal and Ashwini died in the house of accused No. 5. So far finding of fact recorded by the trial Court that Ashwini died in the house of accused No. 5 is

concerned, the said fact is not denied by the defence.

34. So far fact stated in para 80 (2) in the trial Court judgment is concerned, the same can not be considered as incriminating circumstance, since it is not in dispute that the alleged incident had taken place in the house of accused no. 5. It is mentioned in para 80 (3) of the trial Court judgment that the incident took place between 4 to 6 am when most of the people are in deep sleep and further it is stated that PW 2 and PW3 deposed that, there was quarrel on previous day and there was no plausible reason to disbelieve their testimony.

Upon careful perusal of evidence of all prosecution witnesses in its entirety, there is no cogent, convincing and reliable evidence has been brought on record by the prosecution to accept that there was quarrel between accused and Ashwini. As already observed that PW2 and PW3 claimed in their deposition that one day prior to the date of incident all of them went to the house of accused, nevertheless said version that one day prior to the date of incident i.e. 04.05.2014, they went to the house of accused is not mentioned in the complaint and in their statements recorded under Section 161 of Cr.P.C. before PW6, as it is evident from the evidence of PW6 the investigating officer. Therefore, the finding that circumstance/fact which PW2 and PW3 have stated in their deposition that there was quarrel on previous date and there was no plausible reason to disbelieve their testimony, by the trial Court, appears to be contrary to the evidence brought on record by the prosecution.

35. Another circumstance relied upon by the trial Court is that the accused persons have not come forward to take the dead body, neither they attended the funeral and they have not given any convincing reason as to why they ran away. In this respect, it has come in the evidence of prosecution witnesses that 50-100 people gathered near the house where the incident had taken place, and therefore, there was tense atmosphere and due to possibility of breach of peace, the investigating officer was required to remove dead body from said house and take somewhere else, accordingly dead body was taken at some other place and at the said place the investigating officer carried out inquest panchnama and thereafter body was sent to the postmortem. That itself shows that the accused/appellants might be apprehensive of attack by the mob. Importantly, the parents of Ashwini and some other relatives reside in same town where the matrimonial house of Ashwini is situate, and therefore, merely because, accused did not come forward to take the dead body or attended the funeral, cannot be considered as incriminating circumstance, in the aforestated facts of the present case.

36. The trial Court has relied upon another circumstance that, all the accused were found together in their field at the time of their arrest. The accused persons found together in their field that itself, cannot be considered as incriminating circumstance in relation to actual participation in the alleged incident. As already observed the prosecution has failed to prove that the accused persons were present in the house on the relevant date and time of the incident. Although, PW2 and PW3 have deposed that, they saw accused in the said house where the

incident had taken place in the morning when they went to the said house upon knowing that Ashwini was burnt, the said portion appeared in their deposition will have to be treated by way of 'omission', as the investigating officer i.e. PW6 stated in his deposition that the PW2 and PW3 in their complaint statement before the police have not stated that, on the previous day of incident they went to the house of accused for convincing them and there were quarrel between the accused and Ashwini and accused persons were ill-treating and harassing Ashwini.

37. Lastly, the trial Court held that death occurred within a period of 7 years of marriage and within custody of accused for which accused have not offered any plausible, convincing, just and satisfactory reason.

It is true that death of Ashwini occurred within a period of 7 years of marriage. However, the prosecution has utterly failed to prove that at the relevant time of incident, the accused No. 1 to 4 were present in the house of accused no. 5, wherein in bathroom of the house the alleged incident had taken place.

38. It is well established that, the presumption under Section 113A and 113B of Indian Evidence Act, is rebuttable presumption. The prosecution, before onus would shift on defence, is obliged to discharge its burden to bring on record cogent, satisfactory and convincing evidence showing that within proximity of time and date there were positive overt acts attributable to the accused in commission of crime. In the present case, as already observed, so far alleged demand of vehicle tumtum is concerned, neither the prosecution has led any specific evidence by quoting specific instances, nor they brought on record any earlier complaint filed about alleged ill-treatment and harassment at the hands of accused to Ashwini, on account of non fulfilling their demand of purchasing vehicle tumtum for the benefit of accused No. 1. The prosecution has failed to bring on record the presence of accused no. 1 to 4 on the relevant date and time of incident. In absence of such evidence merely because death has occurred within 7 years of marriage would not automatically fasten criminal liability on accused.

39. On the whole, the prosecution has utterly failed to bring on record sufficient, satisfactory, clinching and specific evidence to prove that Ashwini was ill-treated and harassed by the accused for not fulfilling alleged demand of vehicle tumtum for the benefit of accused no. 1. When the investigating officer himself admitted in the cross examination that at the time of considering anticipatory bail application, the concerned court asked him to find out where accused Dharmanna and Sugalabai are residing. On inquiry he found that accused Dharmanna and Sugalabai are residing at Mumbai. Therefore, the prosecution case that Accused No. 2 and 3 along with other co-accused were present at the time of incident does not get support from the evidence available on record, and therefore, as a corollary, it will have to be concluded that the prosecution failed to prove presence of accused within proximity of time and date of the incident.

40. As already observed, the prosecution has failed to prove the presence of

accused No. 1 to 4 at the spot of incident on the relevant date and time and further, it has come in the evidence of PW2 that accused no. 1 to 4 are separately residing and accused no. 5 was residing in the house where alleged incident had taken place. She has categorically deposed about two parts of Kore wada. Therefore, merely, because accused have not given explanation that, at the relevant date and time they were at which place, would not relieve prosecution from bringing on record the evidence to show the presence of accused within proximity of time and date of incident. The trial Court has observed in paragraph 82 that accused did not bring on record the place where they were at the relevant time and date of incident, and therefore, said ambiguity gets strong suspicion about their presence at the spot of incident.

In the present case admittedly there is no eye witness to the actual incident. In the case based upon circumstantial evidence an accused can not be convicted merely on the basis of suspicion. The Supreme Court in the case of Sharad Birdhichand Sarda (supra) taking into consideration exposition of law in earlier judgment of the Supreme Court in the case of Shivaji Sahabrao Bobade Vs. State of Maharashtra 1972 AIR 2622 , wherein the Supreme Court has observed that, "certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

In the case based upon circumstantial evidence, the Court is legally obliged to record definite findings in conformity with the evidence brought on record by the prosecution and defence. There is no scope for recording findings merely on the basis of suspicion. It is true that accused no. 5, a old lady, admitted that she was in the house, however, the prosecution failed to attribute any overt act qua said accused no. 5.

41. Therefore, upon re-appreciating the entire evidence brought on record, an inevitable conclusion is that the impugned judgment and order passed by the trial Court, cannot legally sustain and same deserves to be quashed and set aside.

42. It appears that during the pendency of Trial and present Appeal, keeping in view the chain of evidence, the accused No. 2 to 5 were released on bail by the concerned Courts. As on date only Accused No. 1 is in jail.

43. In the light of detail discussion and reasons recorded by us in foregoing paragraphs, we pass the following order:-

ORDER

a] Criminal Appeal is allowed.

b] The impugned judgment and order dated 28.11.2017 passed by Additional Sessions Judge, Solapur in Sessions Case No. 285 of 2014 is set aside.

c] The appellants are acquitted of the offence punishable under Section 302 and

498A read with 34 of the Indian Penal Code, 1860.

d] The appellant no. 1 is in jail. He shall be released forthwith, if not required in any other case.

e] The bail bonds, if any, of appellant no. 2 to 5 stands cancelled.

f] The appellants shall, within 4 (Four) weeks from release, furnish a bail in terms of Section 437-A of Code of Criminal Procedure, 1973 in the sum of Rs. 15,000/- (Rupees Twenty Five Thousand) each with one surety in the like amount before the concerned Trial Court.

g] In view of disposal of appeal, nothing survives for consideration in Interim Application No. 1723 of 2021, accordingly same stands disposed of.