

(2017) 07 BOM CK 0250
In the Bombay High Court
Case No : 252 of 2013

Dinesh Sahebrao Kadam

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 04-07-2017

Acts Referred:

[Constitution of India](#), [Article 20\(3\)](#) -
Protection in respect of conviction for offences
[Code of Criminal Procedure, 1973](#), [Section 313](#),
[Section 174](#),

Citation : (2017) 07 BOM CK 0250

Hon'ble Judges : R. M. Borde, A. M. Dhavale

Bench : DIVISON BENCH

Advocate : Joydeep Chatterji, K. S. Patil

Final Decision : Dismissed

Judgement

1. Accused No. 1-Dinesh, being aggrieved by the Judgment delivered by the learned Ad-hoc Additional Sessions Judge-1, Latur, in Sessions Case No. 49 of 2009, convicting him for the offences punishable u/s 302 and 309 of the Indian Penal Code, has preferred this appeal. The appellant was sentenced as follows:

Sr.No. Offence Substantive Fine In default

1 302 IPC Life Imprisonment 1000/- RI 1 month.

2 309 IPC SI 3 months.

Concurrent.

3 498A IPC Acquittal.

. In the said case, the parents and brother of the appellant were also prosecuted with additional charge u/s 498A r/w 34 of the IPC, but they have been acquitted.

2. Facts in brief, necessary for the decision of this Criminal Appeal may be stated

thus- Deceased Manisha, aged 29 years, was daughter of a farmer PW6, Haribhau, resident of Takalgaon, Tq. Renapur, Dist. Latur. Besides Manisha, Haribhau had three sons. In 1998, Manisha was given in marriage to accused No. 1 Dinesh (appellant), who is son of accused No. 2 Sahebrao and accused No. 4 Yamunabai. Accused No. 3 Kiran is younger brother of the appellant. They are also residence of same village Takalgaon. But Kiran shifted to Latur. After marriage, Manisha started cohabiting with her husband and she was blessed with two male children namely; Atul & Amar (PW7). The accused are also farmers, holding around 20 acres of land. Accused No. 1 Dinesh was admittedly addicted to liquor. There was partition between the accused inter se and, accused No. 1 Dinesh converted a cattle shed fallen to his share into a house and he was residing there separately along with Manisha and his two children. Relations between accused No. 1 and Manisha were strained. Manisha filed a suit bearing R.C.S. No. 725/2005, for partition on behalf of her two children in the court of Civil Judge Senior Division, Latur on 09.12.2005. Due to strained relations, Manisha was residing along with her children at her maternal house for about 78 months in 2005/06, but there is undisputed material showing that the differences were settled amicably and Manisha resumed cohabitation with accused No. 1 - Dinesh. Still the suit for partition was continued.

3. Accused No. 3 Kiran was residing at Latur. On 16.12.2008, he reported (Exh. 140) to the police of Renapur Police Station that on the very day at about 10:00 a.m., he had been to Takalgaon and found that, his brother accused No. 1 - Dinesh and brother's wife Manisha had consumed poison. Manisha was found dead and accused No. 1 Dinesh was found unconscious in their house. He had arranged to send accused No. 1 Dinesh to the hospital for treatment. Accused No. 1 Dinesh was produced at 12:30 noon before Dr. Dinkar Dandade (PW8) at Rural Hospital, Renapur. He was unconscious. He had consumed some unknown poison. He was later referred to Government Hospital at Latur. The police arrived on the spot and conducted inquiry into the accidental death case u/s 174 of the Code of Criminal Procedure (hereinafter referred to as "CRPC"). Another brother of the accused namely; Deepak showed the spot where the dead body of Manisha was lying. There was one empty bottle of Touchdown insecticide. On the spot, there was one cotton rope and a chit purportedly written by accused No. 1 Dinesh, stating therein that he had committed murder of his wife and he was committing suicide for which nobody should be held responsible. He blamed his motherinlaw and brotherinlaw for his acts. On the same day at about 8:00 p.m., father of deceased Manisha (PW6) lodged FIR at Renapur Police Station. He disclosed that, all the accused were insisting deceased Manisha to claim partition in the property of her father and subjected her to illtreatment, beating and starvation. Whenever Manisha used to visit her maternal house, she was disclosing these facts to her maternal relatives. Manisha had filed court proceedings for maintenance in the year 2006 and was residing at her paternal house. The accused promised to treat Manisha well and the matter was settled. Thereafter, Manisha resumed cohabitation, still Manisha was subjected to beating

& abuses. On 16.12.2008 at 11:00 am., PW6 learnt about the death of Manisha. He immediately rushed to her matrimonial house and found that she was dead and there was ligature mark on her neck. Her husband was inside the house (? unconscious condition) while other accused were outside the house. On the basis of FIR, crime was registered as C.R. No. 151/2008 for offences punishable u/s 302 & 498A r/w 34 of the IPC and was investigated into. Inquest panchanama was drawn on the dead body and autopsy was conducted on the next day at Rural Hospital, Renapur. Medical Officer opined that, Manisha died due to compression of neck. The investigation revealed that, PW7Amar, (son of accused and deceased - Manisha), had witnessed the incident at about 3:00 to 4:00 AM. He had seen his father sitting on the chest of Manisha and throttling her. Statement of Amar and his brother were recorded before the Judicial Magistrate First Class u/s 164 of the CRPC. All the accused were arrested. The Investigating Officer recorded statements of material witnesses. The articles found on the spot were seized and sent for chemical analysis. The chit found on the spot was sent to Handwriting Expert along with Specimen handwriting of the accused and there was report of Handwriting Expert (PW9) that chit was in the handwriting of accused No. 1. After completing investigation, the prosecution filed chargesheet with a case that, accused Nos. 1 to 4 had subjected Manisha to cruelty and all of them committed murder of Manisha.

4. In due course, the case was committed to the court of Sessions. The learned Addl. Sessions Judge framed charge u/s 302 & 498A r/w 34 of the IPC against all the accused. Later on, additional charge u/s 309 of the IPC was framed against accused No. 1. The accused pleaded not guilty.

5. The prosecution examined 14 witnesses. The accused in his statement u/s 313 has denied all the facts. He has not given any explanation about the incident. It is his defence that, Manisha's maternal relatives were insisting for partition and allotment of land to his sons and since the accused were not ready, they have been falsely implicated. In the cross, it was even suggested that Manisha committed suicide.

6. The learned Addl. Sessions Judge discarded the evidence of sole eyewitness Amar and also did not rely on the chit showing extrajudicial confession by accused No. 1 on technical ground and she relied on the circumstantial evidence of custodial death and provisions of Section 106 of Evidence Act to hold accused No. 1 alone guilty for offences u/s 302 and 309 of IPC and sentenced him as referred to above. Hence, this appeal.

7. Shri. Joydeep Chatterji, learned counsel appearing for the appellant has taken us through the evidence on record. He made following submissions.

(i) The learned trial Judge has rightly disbelieved PW7Amar as he is a tutored witness and whatever material facts he has deposed are by way of omissions. The first submission is that, once the prosecution proceeded on the footing that incident was witnessed by eyewitness and the eyewitness is disbelieved, the

prosecution cannot revert back to the presumption arising u/s 106 of the Evidence Act. In this regard, he relied on Murlidhar V/s State of Rajasthan, (2005) 11 SCC 133.

(ii) The second submission is that, there was no proper investigation. The Investigating Officer had selected the relatives of Manisha's father as panch witnesses. There are contradictions and suspicious circumstances in the evidence of all the witnesses. He submitted that the learned trial Judge has rightly discarded evidence in the form of chit of confession of accused No. 1, as the natural handwriting of the accused was not forwarded to the Handwriting Expert. In this regard, he and learned trial Judge relied on the ratio in Dipti Devasthale & Leena Devasthale Vs. State of Maharashtra 2009 ALL MR (Criminal) 3547.

(iii) He fairly submitted that, he was not challenging the conviction of the accused No. 1 u/s 309 of IPC and stated that the accused has already undergone the said sentence.

(iv) He argued that, PW6Haribhau and PW5Meghraj father and brother of deceased, respectively, have given admissions to show that the appellant was prosecuted as he did not transfer his land to his minor sons. Shri. Chatterji also argued that the injury of deceasedManisha could not have been caused by rope seized from the spot. He submitted that, in the light of these facts, the appeal be allowed and appellant be acquitted of the offence u/s 302 of the IPC.

8. The points for consideration with our findings thereon are as follows.

POINTS FINDINGS

(I) Whether Manisha met with homicidal death? In the affirmative.

(II) Whether the appellantDinesh has committed murder of Manisha? In the affirmative.

(III) Whether any interference is necessary in the conviction and/or sentence? In the negative.

(IV) What order? The appeal is dismissed.

9. The prosecution has examined 14 witnesses & relied on documents proved, which may be conveniently grouped as follows:

Group - I (Homicidal Death)

PW2 Dr. Anuradha Suryakant Male - Medical Officer, PHC, Janwal, who conducted postmortem.

PW11 Police Naik Kumbhar - who carried the sealed box of viscera of the deceased to Chemical Analyzer, Aurangabad.

Documents:

(i) Inquest panchanama dt. 16.12.2008 at 13:00 hrs. Exh. 45.

- (ii) Request letter for P.M. (Exh. 62).
- (iii) P.M. Notes dt. 17.12.2008 from 9:30 to 11:00 AM (Exh. 65).
- (iv) Letter to Chemical Analyzer dt. 23.12.2008 (Exh. 130).
- (v) C.A. Reports (Exhs. 63 & 64).
- (vi) C.A. Report of Viscera (Exh. 150 & 151).
- (vii) Accidental death report of accused No. 3 - Kiran dt. 16.12.2008 (Exh.140).

Group II (Previous illtreatment & disputes)

PW4 - Hanmant, witness to compromise.

PW5 - Meghraj, brother of deceased Manisha.

PW6 - Haribhau, father of deceased Manisha.

Documents:

- (i) FIR dt. 16.12.2008, 8:00 PM (Exh. 113).
- (ii) Certified copy of T.I. Application in R.C.S. No. 729/2005 (Exh. 156).
- (iii) Omissions of PW7 Amar proved by API Kamble at Exh. 154.
- (iv) Statement of Amar dt. 22.08.2008 (Exh. 164)

Group III (Eyewitness evidence)

PW7 Amar, son of deceased, aged 6 years.

Group IV (Evidence of written extrajudicial confession).

PW1 - Ramraje Deshmukh, Panch to spot panchanama at Exh. 58 and seizure of chit (Art. 83).

PW3-Bibhishan Tukaram Jadhav, Panch to specimen handwriting of the accused taken by police. Panchanama Exh.67 and specimen handwriting Exh. 68 to 74.

PW10 Head Constable Mr. Bhosale (Carrier).

PW14 PI Ranjankar Sender of documents to Handwriting Expert.

PW9 Sanjay Kathar (Handwriting Expert)

Document:

Opinion with reasons of Handwriting Expert (Exh. 125, 126 & 127).

Group V (Custodial Death)

PW1 Ramraje Deshmukh

PW4 Hanmant Landge

PW5 Meghraj, brother

PW6 Haribhau, father

PW7 Amar, son

PW8 Dr. Dinkar (evidence of poisoning & bottle of poison found in the house of accused).

PW12-Head Constable Vilas Malawade, who received report (Exh. 140) from accused No. 3 - Kiran. First report of death of Manisha.

10. Point No. 1 - Whether Manisha died a homicidal death?. There is consistent oral evidence of PW 1, 4, 6 & 7 that on 16.12.2008, in the morning, Manisha's dead body was found in the house of accused No.1 - Dinesh, with whom she was cohabiting in the same house. Accused No. 3 - Kiran has reported the matter to Police vide report (Exh. 140), which was received by Police Head Constable Vilas Malwade (PW12), at 1:15 p.m., at Renapur Police Station. In answer to questions No. 94 & 95, the accused has admitted that his brother had gone to Police Station and lodged report vide Exh. 140. There is no dispute as to the fact that dead body of Manisha was found in the house of accused on 16.12.2008, in morning. There is also oral evidence of several witnesses that there were ligature marks on the neck of deceased Manisha. PW7 Amar is son of accused & deceased Manisha. He was 6 years old at the relevant time. Though his evidence on material aspect of murder, as discussed later, is not reliable, he has also deposed and it is not disputed that his mother was lying dead and she had injury on her neck. This dead body was sent for postmortem and P.W. 2 - Dr. Anuradha has conducted postmortem at Rural Hospital, Renapur. Her postmortem note Exh. 65 shows that there were only two injuries on the person of Manisha, which are as follows: (i) Abraded contusion over neck, anterior aspect 3 cm below thyroid cartilage size 3x1 cm. horizontal in direction, reddish in colour on neck dissection, evidence of hemorrhage in muscles of neck corresponding to abraded contusion over neck site.

(ii) Abrasion to right leg near to lateral malleolus 1/2 x 1/2 cm. reddish in colour.

11. The second injury is minor and insignificant. The first injury is fatal one. The Medical Officer opined that "Manisha died due to compression of neck". The CA report of viscera shows no poisoning.

12. In cross examination, it is brought on record that the ligature marks were not around the entire neck. There was no injury to trachea & bronchi and no fracture to hyoid bone. Doctor opined that, in all cases of strangulation, damage to trachea & bronchi or fracture of hyoid bone is not a must.

13. In case of throttling, windpipe will be closed down and a person may die due to suffocation. The circumstances on record show that deceased Manisha met with death while she was sleeping in the house. She has no other injury except one insignificant abrasion to right leg. We agree with the opinion of the Doctor

that there can be suicide by strangulation but it cannot be accepted that there can be suicide by throttling. The nature of injury shows that the ligature mark was not around whole neck. It was only 3 cm in length. It can't be case of strangulation but it is a case of throttling and such throttling must be by some other person. We, therefore, agree with the findings recorded by the learned trial Judge that it is a case of homicidal death.

14. Point No. 2 : Whether the accused committed murder of Manisha?

The prosecution relied on following material.

(i) Evidence of eyewitness PW7 - Amar, aged 6 years, son of accused and the deceased Manisha.

(ii) Circumstantial evidence of custodial death.

(iii) The circumstantial evidence about previous disputes and ill treatment by accused No. 1 to deceased Manisha.

(iv) A confessional chit found on the spot written by accused.

15. As far as the first material is concerned, PW7 - Amar was aged 9 years at the time of his deposition in November 2012. Thus, in the year 2008, he was aged about 5 years. He is a child witness. Being a child witness, he can imagine certain things or he can be tutored or there can be lapse of memory or he can have false memory and, therefore, the evidence of child witness is to be appreciated with care and caution. In this regard, the learned trial Court has rightly relied upon Bhagwan Singh and others Vs. State of M.P. reported in AIR 2003 SC 1088.

16. PW7 - Amar has stated that, he was residing with his elder brother Atul and his parents. His father was addicted to liquor and he used to beat his mother whenever he was in drunken condition. As per his evidence, on the fateful night at about 3:00 to 4:00 am, he got up for urination. That time, electric bulb in the room was illuminating. He saw that, his father was sitting on the chest of his mother and he throttled her. Thereafter, he woke up in the morning. He stated that, his mother as well as father did not wake up in the morning. He came out of the house by opening the door. Learned Advocate Shri. Chatterji submitted that, evidence of PW7 is not acceptable. It has come in his cross examination that, in the morning PW7 Amar met his maternal uncle and grandparents as well as police. He did not disclose the incident to them. His statement was recorded after 23 days and his statement before Judicial Magistrate u/s 164 of CRPC was recorded on 22.12.2008 i.e. after six days of the incident. Learned advocate for the accused in trial Court has proved omissions regarding the entire material evidence of PW7 Amar. He has brought on record that, the evidence of PW7 that he got up for urination, the bulb in the room was illuminating that, he saw his father was sitting on chest & killing his mother by throttling, is all by way of omissions. These omissions are duly proved through I.O. P. W. 14 PI Ranjankar (Exh. 154). He did not raise shouts nor did he weep on watching the incident. At

the end he admitted that he did not know what happened in the night. As held in Bhagwan Singh's case (supra), in all probabilities, PW7 Amar was fast asleep, his brother did not wake up and so he also must not have waken up till the morning. He must not have seen the incident but after the death of his mother, he was in custody of his maternal uncle and maternal grandfather who were having strong grudge against accused No. 1. He appears to be a tutored witness. His evidence is rightly not relied upon by learned trial Judge. Previous disputes and enmity :

PW6, father of the deceased has deposed that Manisha was married to accused in 1998 and she was treated well initially for a period of two years. Thereafter, she was subjected to physical and mental harassment. She was not provided with food. She was asked to claim partition in the property of her father. She was beaten up by all the accused and driven out of the house. She was residing at her maternal house. She had filed a suit for maintenance. Thereafter there was mediation and accused No. 1 promised to treat Manisha well and he would not beat her. Hence, the proceedings for maintenance was withdrawn and Manisha resumed cohabitation. PW4 Hanmant has deposed that the meeting for resuming cohabitation took place in his presence. Manisha thereafter resumed cohabitation but he stated that the litigation between accused No. 1 and deceased Manisha was still pending. He has no personal knowledge about the same. The evidence of PW5, PW6 & PW7 that, the accused No. 1 was addicted to liquor, he used to drink liquor & pick up quarrels with Manisha has not been challenged. In fact, there are suggestions to that effect from the defence advocate to PW7Amar. P.W.5 Meghraj is brother of deceased Manisha. He has also supported his father on the point of illtreatment meted out to Manisha by accused No. 1 Dinesh. He deposed that, Manisha started residing in his house due to differences but after successful mediation, she resumed cohabitation. Even thereafter, she was subjected to illtreatment. In cross-examination of PW5, it has been brought on record that Dinesh had filed petition for restitution of conjugal rights u/s 9 of Hindu Marriage Act, while Manisha had filed suit for partition and separate possession of share of her sons. He was looking after both the matters. He admitted that none of the matters has been withdrawn from the Court. In 2007, fodder and cattle shed of accused no. 1 was set ablaze and accused No. 1 Dinesh had lodged report against PW5Meghraj for the same. Though PW5 denied this allegations that, he admitted that there was a case against him for outraging modesty of wife of uncle of accused No. 1 - Dinesh. There are admissions in the evidence of PW5 & PW6 that, they were demanding from accused no. 1 separate possession of shares of Atul & Amar, sons of accused No. 1 & Manisha. Though PW5 & PW6 have implicated accused Nos. 2 to 4 in the crime with hardly any material against them, I find that the facts undisputed disclose strained relations between deceasedManisha and accused No. 1 - Dinesh. Accused No. 1 - Dinesh had also strained relations with Manisha's brother and father. Thus, there was sufficient motive for accused No. 1 - Dinesh to commit murder of Manisha.

17. On discarding evidence of PW7Amar, the prosecution has relied on the

factum of custodial death. There is undisputed evidence of PW1, PW4, PW6 & PW7 to show that, accused No. 1 - Dinesh & deceased Manisha along with their two sons were residing in a house, separately from parents and brothers of accused No. 1. There is trustworthy evidence to show that, on 16.12.2008 in the morning the dead body of Manisha was found inside the house and accused No. 1 - Dinesh was lying there in unconscious condition. PW7 Amar's evidence that the door was latched from inside, he opened it & came out is not challenged. There is evidence of PW8 Dr. Dinkar that accused No. 1 was unconscious due to poisoning. One empty bottle of insecticide namely; Touchdown was found in the room. Accused No. 1 has been convicted for attempting to commit suicide and his conviction has not been challenged, therefore it is admitted fact that on that night accused No. 1 had attempted to commit suicide. It is a case of custodial death of Manisha, who died in the house which was occupied by her with her husband and her minor children. There is convincing material on record to show that it was a homicidal death. As already discussed, the minor sons of the accused must be fast asleep and they must not have seen anything. Thus, there was no eyewitness to the incident. In this situation, it was for the accused to explain as to how Manisha died inside the house and why has he attempted to commit suicide. The cross-examination of the prosecution witnesses, statement of accused No. 1 u/s 313 of CRPC, gives no explanation to these most incriminating facts. Section 106 of Evidence Act reads as follows:

106. Burden of proving fact especially within knowledge. -When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

18. The law of burden of proving a fact u/s 106 of Evidence Act in cases where the facts are especially within the knowledge of the accused, is laid down as follows:

(i) Trimukh Maruti Kirkan Vs. State of Maharashtra (2006) 10 SCC 681.

14. The question of burden of proof where some facts are within the personal knowledge of the accused was examined in State of West Bengal v. Mir Mohammad Omar & Ors. (2000) 8 SCC 382. In this case the assailants forcibly dragged the deceased Mahesh from the house where he was taking shelter on account of the fear of the accused and took him away at about 2.30 in the night. Next day in the morning his mangled body was found lying in the hospital.

This Court took note of the provisions of Section 106 of the Evidence Act and laid down the following principle in paras 31 to 34 of the reports : "31. The pristine

rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

34. When it is proved to the satisfaction of the court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the court what else happened to Mahesh at least until he was in their custody."Applying the aforesaid principle, this Court while maintaining the conviction under Section 364 read with Section 34 IPC reversed the order of acquittal under Section 302 read with Section 34 IPC and convicted the accused under the said provision and sentenced them to imprisonment for life.

15. In *Ram Gulam Chaudhary & Ors. v. State of Bihar* (2001) 8 SCC 311, the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for the absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they have murdered the boy. It was further observed that even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The accused by virtue of their special knowledge must offer an explanation which might lead the Court to draw a different inference.

It is also observed that, when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete.

22. Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.

(ii) State of Rajasthan Vs. Thakur Singh 2014(12) SCC 211

Dhapu Kavar wife of the accused died unnatural death while in a locked up room along with Thakursingh and their daughter. The door was broken open and Thakursingh was caught and tied by his brothers & other relatives. Thakursingh gave no explanation. One witness Gotusing though material was not examined and all other 14 material witnesses turned hostile. It was established that it was a case of custodial death.

The Apex Court again referred cases of Shambhunath, Trimukh Maruti and Dnyaneshwar vs State of Mah, Jagdish vs State of MP, Gyanachandra Vs State of Haryana to hold the accused guilty and allowed the appeal against Judgment of acquittal passed by the High Court.

(iii) Dhanaji Madne Vs State of Maharashtra 2014(3) BCR Cri. 394

Learned APP relied on following judgments.

The accused was prosecuted for committing murder of his wife Vandana for having illicit relations with one. The Sessions Judge, Sangli convicted him u/s 302 of IPC. The case was based on circumstantial evidence. PW5 Suvarna daughter of deceased and accused deposed that her father was addicted to liquor and used to abuse and beat her mother. On the fateful night also, her father consumed liquor and abused and beat her mother. The accused had illicit relations with Bitu and told her not to go to the field of Vitthal Kapse. Suvarna gave a ring to her maternal grandfather Hariba and informed the facts. Her father contrary to the regular practice forced his daughters to sleep in the courtyard. Her father and Vandana slept inside the house. Suvarna heard shouts of Vandana at night time. Suvarna sought help of PW9 Rajamma and other members to save her mother but in vain. The girls slept in the house of neighbour and on the next day found that, house was opened, blood was lying and dead body of her mother was lying on the road. The Division Bench of this Court relied on Gura Singh Vs. Vs State of Rajasthan 2001(2) SCC 205, State of Rajasthan Vs Teja Ram (1999)3 SCC 507, State of Rajasthan Vs Kashi Ram AIR 2007 SC 144, to hold the accused guilty.

(iv) Sunil Raut Vs. The St of Maharashtra (Criminal Appeal No. 212/13, decided on 25.10.2016).

In similar facts of custodial death, the accused was held guilty. It seems that, there were differences of opinion amongst two Judges of Division Bench as to what offence was made out. The matter was referred to the third Judge Justice T. V. Nalawade and he by Judgment dt. 14.12.2016 held that offence of murder was made out and is not a case of culpable homicide.

19. In Murlidhar's case, the facts were different. The prosecution came out with a case that the incident of murder was witnessed by four witnesses namely; Babulal, Ramratan, Isro & Govinda PW5, PW7, PW10 & PW13. The Apex Court found them wholly unreliable due to replete with contradiction and inherent

improbabilities. It was the case where there was other evidence available but it was not trustworthy. It means, the facts were not especially within the knowledge of accused as explained in Shambhunath Mehra's case. The word "especially" stresses, facts that are preeminently or exceptionally within his knowledge. Since it was not so, in Murlidhar's case, the Apex Court observed that the provisions of Section 106 cannot be invoked.

20. In the present case, the facts are different. The death took place inside the house of accused No. 1 where he was residing along with his wife Manisha and two minor sons. The material on record shows that the murder was committed so skillfully that there was no resistance, no shouts or cries by Manisha. Therefore, her two minor sons had no reason to get up and see the incident. PW7Amar has admitted that, he had no knowledge about what happened during the night. Still the prosecution made a lame attempt to pose PW7 as an eyewitness. It is a case of poor investigation, but the facts clearly indicate that there was no eyewitness to the incident and the facts were especially within special knowledge of the accused. We, therefore, find that the facts in Murlidhar's case are not applicable to the present case as the case is clearly distinguishable on facts. The accused has not given any explanation as to how Manisha died in the house. Manisha met with homicidal death in the house where she was residing with him and his failure to explain as to why he attempted to commit murder are sufficient to draw presumption u/s 106 of the Evidence Act. Ratio in Trimukh's case is squarely applicable. The facts referred herein above are sufficient to hold the appellant guilty for committing murder of Manisha.

21. There is no material whatsoever to show that the murder of Manisha by accused No. 1Dinesh would not amount to murder but culpable homicide not amounting to murder.

22. In view of our findings, the appeal against conviction u/s 302 of IPC deserves to be dismissed on the basis of above facts alone. However, we find that there is additional material in the form of written extrajudicial confession left by accused No. 1Dinesh in the house. The said evidence was discarded by learned trial Judge. We find that, the said evidence could not have been discarded.

23. PW1Ramraje Deshmukh is a spot panch. The panchanama was drawn at 3:45 p.m., which is at Exh. 58. It was drawn by PW13 API-Dilip Kamble. Both of them deposed that at the time of spot panchanama, one chit was found in the room of the accused which was purportedly written by accused No. 1 Dinesh. It was seized by police. At that time, accused No. 1 was unconscious as he had consumed poison. He was arrested later on 26.12.2008. Thereafter, the Investigating Officer recorded specimen handwritings of the accused in presence of PW3Bibhishan. The specimen handwritings are at Exh. 68 to 73. PW10Police ConstableBalwant Bhosle carried the disputed chit and specimen handwritings to Handwriting Expert at Aurangabad and obtained acknowledgement of delivery (Exh. 131). PW9Sanjay Kathar is the Handwriting Expert. He has examined the disputed handwriting and the specimen handwritings by using magnifying

devices such as simple lens, ultra lens and microscope. He examined those document with the help of various lighting conditions, such as direct light, oblique light and transmitted light and came to conclusion that the person who has written the contents of the specimen handwritings S1 to S6, has written the contents of disputed document marked as Exh. Q. He has accordingly submitted his opinion vide Exh. 126. It was transmitted by his Junior with a letter (Exh. 127) addressed to Superintendent of Police.

24. The crossexamination was directed to establish that there was difference about the disputed handwriting and specimen handwritings with respect to certain letters or words. In spite of minor differences noticed, the handwriting expert has given his specific opinion that the specimen handwritings as well as handwriting on chit was of the same person. He has stated that there was no differentiation of characteristics but natural variation. We have examined the disputed chit marked as Article No. 3 and the specimen handwritings (Exh. 68 to 73). The chit was written under the mood of committing suicide whereas; the admitted specimen handwritings are given knowingly well that the specimen handwriting will be used against him and if those are found as per the disputed chit (Article No. 3), he would be booked for murder. When any handwriting is to be examined, it is not expected that any two handwritings of a person would be identical but the characteristics of such handwriting shall be similar irrespective of the fact whether the writing is executed hurriedly or slowly.

25. It is true that, the Investigating Officer did not collect the natural handwriting of the accused for forwarding it along with the disputed chit and specimen handwritings to the Handwriting Expert. Exh. 74 is an application sent by accused No. 1 from jail but he might have got it written from somebody else and it was not exhibited on the basis of evidence on record. It is not natural handwriting. Exh. 74 application was sent by accused No. 1 much later on 11.08.2010.

26. The learned trial Judge relied on Dipti Devasthale & Leena Devasthale Vs. State of Maharashtra reported in 2009 ALL MR (Criminal) 3547.

27. In the present case, the confessional statement of accused No. 1 is not recorded by police as was the case in Dipti Devasthali's matter. This is a written extrajudicial confessional statement of accused No. 1 not made before the police officer and is very much admissible in evidence. In Dipti Devasthale's case, the police had recorded confessional statement of accused No. 2, which was hit by Section 25 of the Evidence Act and portion thereof was sent to the handwriting expert as a natural handwriting of accused No. 2. This practice was deprecated and on that ground the expert's opinion was discarded. If the confessional statement itself is a disputed document admissible in evidence, Investigating Officer is bound to send it for comparison of handwritings. In Dipti Devasthale's case, it has not been laid down that if the natural handwriting is not sent the report of handwriting expert cannot be taken into consideration. The learned trial Judge did not minutely consider the facts of the case of Dipti Devasthale and the

ratio laid down therein. As held in *State of Bombay Vs. Kathi Kalu Oghad* reported in AIR 1961 SC 1808 (Constitution Bench), taking of specimen handwriting of the accused is not compelling the accused to be witness against himself and is not hit by Art. 20(3) of the Constitution.

28. Apart from the above facts, we find that the facts in the particular case are very peculiar. It was disputed as to whether the chit was found in the house or not but we find that, there is no possibility of plantation of such chit by Manisha's maternal relatives. The chit was found in the house of Manisha and her husband. Manisha died at night time. Her son opened the door in the morning. Thereafter, accused No. 1 Dinesh's relatives first learnt about the murder of Manisha and attempt to commit suicide by accused No. 1. Manisha's father and brother came to know about the incident at 11:00 am. They immediately came to the spot and they must be in extreme grief and agony of losing their dear one. The police were intimated by accused No. 3 - Kiran and, suggestions to PW7 Amar disclosed that the police forwarded the accused No. 1 for medical treatment. The inquest panchanama was drawn at 3:00 pm and spot panchanama was drawn at 3:45 pm. All the relatives of the accused were very much present there only.

29. The chit (article No. 3) shows allegations against Manisha's mother and brother. The chit reads as under: "VERNACULAR MATTER OMITTED"

30. This chit cannot be said to be a suicide note as, accused No. 1 Dinesh failed in commission of suicide, therefore, it is not admissible as dying declaration, but the former part shows extrajudicial confession in writing. The sentence "VERNACULAR MATTER OMITTED" shows that, such statement would not have been made by any maternal relatives of the deceased Manisha. It was not known to relatives of Manisha that accused No. 1 - Dinesh had also attempted to commit suicide. It was extremely difficult for them to concoct such a story and write such a chit and plant it between 11:00 am to 3:00 pm. It is also found to be very much similar to the handwriting of accused No. 1 Dinesh. Considering the fact that this chit was seized from the house at about 3:45 pm and considering the mental condition of father, mother and brother of deceased Manisha, it is not possible that they could have written such a concocted story on a chit and planted the same in house.

31. The suicide note shows the word "fe" (I) written in the peculiar style as appears in the application tendered by accused No. 1 - Dinesh to the trial Judge on 09.05.2011 at Exh. 84. This chit shows the mind of a person committing suicide. He is worried about upbringing of his children and he suggests names who should do it. A person indulging in plantation will not be so careful. No other person had reason to plant such a chit. This chit was seized on the same day at 3:45 pm.

32. There are following additional circumstances supporting the factum of murder of Manisha by the accused.

(a) As per Postmortem notes, Manisha's postmortem was conducted on 17.12.2008 at 9:30 a.m. Her small and large intestines were partly loaded. She might have died after six hours of her last meals. The accused No. 1 was sleeping with her. He did not try to save her life. He did not take her to any Doctor nor did he intimate about her death to anybody. On the contrary, he himself consumed poison. He has no explanation as to why he attempted to commit suicide. The evidence of PW7 Amar shows that, he opened the door in the morning. Thus, there was no possibility of somebody else coming inside the house to commit murder of Manisha. Manisha's dead body was found with gold ornaments and she was not ravished. Therefore, there cannot be murder for sex or theft.

(b) There is material to show that accused No. 1 was in habit of consuming liquor and he used to quarrel with Manisha. PW7Amar can be believed that his father used to assault his mother. There was motive for accused No.1 to commit murder. There were property disputes and strained relations. Manisha had stayed at her maternal house for 810 months in 2006. When all these circumstances are taken together, we find that, any reasonable and prudent man will believe that the chit (article 13) was written none other than accused No. 1Dinesh only. Apart from the report of Handwriting Expert, the contents of the chit themselves disclose that it is recorded by accused No. 1 and none else. A document can be proved by the contents within. In this regard, we rely upon Mobarak Ali Ahmed v. State of Bombay reported in AIR 57 SC 857. It is held that, the proof the genuineness of a document is proof of the authorship of the document and is proof of a fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. It may consist of direct evidence of a person who saw the document being written or the signature being affixed. It may be proof of the handwriting of the contents, or of the signature, by one of the modes provided in Ss. 45 and 47 of the Evidence Act. It may also be proved by internal evidence afforded by the contents of the document. This last mode of proof by the contents may be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links in which are proved to the satisfaction of the Court. In such a situation the person who is the recipient of the document be it either a letter or a telegram, would be in a reasonably good position both with reference to his prior knowledge of the writing or the signature of the alleged sender limited though it may be, as also his knowledge of the subject matter of the chain of correspondence, to speak to its authorship. In an appropriate case the court may also be in a position to judge whether the document constitutes a genuine link in the chain of correspondence and thus to determine its authorship.

33. Relying on these facts & the above ratio, we disagree with learned trial Judge to hold that the chit (article 3) is also proved. The voluntary written extrajudicial confession is additional factor for us to confirm the sentence.

34. We agree with learned counsel Mr. Chatterji that the Investigating Officer has

committed so many mistakes. He selected PW1 & PW3 as panchas though they were related to father of deceased Manisha. He implicated accused Nos. 2 to 4 with hardly any material on record and he posed PW7 as eyewitness. However, we rely upon State of U.P. v. Hari Mohan and others reported in AIR 2001 SC 142 wherein it is observed as under :

"Before appreciating the circumstantial evidence in the case, we are at pain to place on record our displeasure regarding the conduct of the investigation in the case. The investigating officer appears to have left no stone unturned to help the accused respondents. It appears that the valuable evidence, though available, was not collected apparently for ulterior purposes. The conduct of the investigating officer SI D.P. Tiwari (PW7) was even noticed by the trial court. On 30th October, 1978 while recording his statement, the trial court observed that "it appears that the IO was negligent and an irresponsible investigating officer". It was noticed that "the witness giving aforesaid statement and it appears that he wants to damage the prosecution case". It is not disputed that during investigation it had come in evidence that respondent No.1 was possessed of a licensed gun which was stated to have been used by him on 15.3.1977, the alleged day of occurrence, yet no effort was made by the IO to seize the gun or get it examined by an expert to ascertain whether any shot was fired from its barrel. He also failed to have taken into custody the letter written by the deceased for a sufficiently long period though its mention was made by the PW1 in the FIR itself. However, the defective investigation cannot be made a basis for acquitting the accused if despite such defects and failures of the investigation, a case is made out against all the accused or anyone of them. It is unfortunate that no action can be taken against the IO at this stage who, in all probabilities, must have retired by now".

35. In spite of faulty investigation, we find that the chaff can be separated from the grain and the facts which are found to be trustworthy are sufficient to indicate only one possibility that it must be accused No.1 who has committed murder of deceased Manisha. The chain of circumstances is complete and there is additional circumstance of absence of explanation by the accused and false explanation that he did not attempt to commit suicide. Taking all the facts together, we have no hesitation to uphold the findings of learned trial Judge that accused No. 1 has committed murder of deceased Manisha.

36. There is no argument and nothing to be discussed about quantum of sentence awarded. The appeal deserves to be dismissed and is accordingly dismissed.