
(2019) 06 GUJ CK 0054
In the Gujarat High Court
Case No : R/Criminal Appeal No. 695 Of 2016

Madhavsinh Udesinh Solanki	Vs	APPELLANT
State Of Gujarat		RESPONDENT

Date of Decision : 18-06-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 313, 313(1)(a), 342, 374
Indian Penal Code, 1860 — Section 300, 302, 303, 304, 304B, 304I, 304II, 498A
Gujarat Police Act, 1951 — Section 37(1), 135
Evidence Act, 1872 — Section 101, 106, 114

Citation : (2019) 06 GUJ CK 0054

Hon'ble Judges : Harsha Devani, J; V. B. Mayani, J

Bench : Division Bench

Advocate : Pratik B Barot, Himanshu Patel

Final Decision : Allowed

Judgement

Harsha Devani, J

1. This appeal under section 374 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") has been filed by the appellant -

Madhavsinh Udesinh Solanki challenging the judgment and order of conviction and sentence dated 31.3.2016 passed by the learned Additional

Sessions Judge, Anand in Sessions Case No.6 of 2014.

2. A first information report came to be lodged by one Dilipbhai Ramanbhai Parmar, inter alia, stating that his elder sister Shakuben was married about

twelve years ago to Madhavsinh Udesinh Solanki of Kathana Khumanpura as per the customs of their community. His sister had three children. The

eldest is Ajay, aged 11 years, thereafter younger to him is Nikita, aged 10 years and the youngest is Arjun, aged 6 years. His sister was initially treated

well for the first about five years and thereafter, his brother-in-law used to wrongly suspect his sister, and time and again used to subject her to mental and physical harassment and beat her up, whereupon his sister would inform them about the same and with a view to see that her matrimonial life is not spoilt, he used to drop her back at her matrimonial home, despite which his brother-in-law wrongly suspected his sister and continued to beat her. Thereafter, on 15.3.2012, they had executed a compromise deed and whereafter they had sent his sister. Subsequently, for a short time, he had treated her well. Thereafter, he continued the said activity and hence, once again on 8.8.2013, a compromise was arrived at, at the house of his maternal uncle's son Rajeshbhai Arvindbhai Solanki, whereafter his sister was sent to her matrimonial home. Thereafter, he came to know that his brother-in-law was still harassing his sister and hence, about ten days prior thereto, he had gone to stay at his sister's place and was staying there.

2.1 On the previous night in the evening at around 8 o'clock after they had dinner, he and his brother-in-law Madhavsinh, his sister Shaku and three children were sleeping in the courtyard of the house and early in the morning on that day at about 5 o'clock, while he was sleeping, he heard shouts of "help ... help", and suddenly got up and upon looking at the bed next to him, he could not find his sister and brother-in-law and the door of his sister's house was closed and the light was on inside and the sound of his sister crying "help ... help" was coming from inside, whereupon he immediately went near the door. Upon hearing the shouts, his sister's brother-in-law Rajeshbhai Udesinh and his aunt Dakshaben etc. also came there, and he knocked at the door and tried to open it, whereupon all of a sudden the door opened from inside and they all went inside, and saw brother-in-law was standing in the house with a thick stick in his hand and the front part of the stick was bloodstained. He saw that his sister was bleeding from the head as well as from near the mouth and fatal injuries had been inflicted on her head and she was in a semi conscious condition. He had asked her as to why his brother-in-law had beaten her, whereupon his sister had told him that she had got up early in the morning and had gone to fetch her datun (stem to brush the teeth), whereupon her husband had followed her and was abusing her and asked her as to why she

was not improving and why she was not staying under his control and that he would kill her today and saying so, he took a thick wooden stick lying in the house and indiscriminately inflicted blows on her head and on her face and felled her, and when she fell down, he had inflicted two to three blows on the back of her head, whereupon he had asked his brother-in-law that why he had indiscriminately beaten his sister; whereupon his brother-in-law informed him that what was to happen has happened and saying this, he took the wooden stick and went away. Thereafter, Rajeshbhai Udesinh called a 108 ambulance and all of them immediately took his sister to the Karamsad Hospital for treatment and that his sister was admitted in the I.C.U.

2.2 The first information report came to be registered as Virsad Police Station I â?" C.R. No.43/2013.

3. Upon the first information report being lodged, the Investigating Officer commenced the investigation and recorded the statements of witnesses and drew various panchnamas. Upon conclusion of the investigation, having found that there was sufficient material against the accused, the Investigating Officer submitted a charge-sheet in the court of the learned Judicial Magistrate First Class, at Borsad, where it came to be registered as Criminal Case No.1532 of 2013. The case being exclusively triable by a Court of Sessions, it came to be committed to the Sessions Court, Anand where it was registered as Sessions Case No.6 of 2014.

4. The charge came to be framed at Exhibit 7. The contents of the charge as translated into English read thus:

â??The marriage between deceased Shakuben, sister place about twelve years accordingly, the accused the appellant and the of the first informant, took prior to the incident and was the husband of the deceased. The accused treated the deceased well in the beginning for about five years and thereafter, harbouring wrong suspicions, the accused had subjected her to mental and physical harassment and beat her up and drove her away and thus, the conduct of the accused was wilful and of such nature as was likely to drive her to commit suicide or to cause grave injury or danger to her life or health and thereby, committed the offence under section 498A of the Indian Penal Code.

Moreover, as a part of the above conduct, on 15.9.2013, early in the morning at 5 oâ??clock, the accused, in the kitchen of his house which is

situated at mouje Kathana, near the Khumanpura canal, hurled abuses at the deceased and told her that she was not within his control and that today

he would kill her. After saying so, he took a thick stick lying in the kitchen and indiscriminately inflicted blows on the head and face of deceased

Shakuben and caused grievous fatal injuries and upon taking her to the hospital for treatment and admitting her there, she passed away during the

course of treatment on 16.9.2013 at 6:50 hours at the hospital. Thus, the accused had caused grievous injuries to the deceased, which were sufficient

in the ordinary course of nature to cause death and by doing so, the accused had intentionally caused the death of the deceased, viz., his wife

Shakuben and murdered her and thereby, committed the offence under section 302 of the Indian Penal Code.

The accused has further been charged with the offence under section 135 of the Gujarat Police Act as he was wielding a deadly weapon in violation

of the circular issued by the Additional District Magistrate, Anand under section 37(1) of the said Act and using the same for commission of an

offence.â??

5. The Charge came to be read over to the accused, who pleaded not guilty and asked for a trial.

6. Before the trial court, the prosecution examined in all sixteen witnesses and produced certain documentary evidence on record. The trial court, after

appreciating the evidence on record, found that the prosecution had proved the charge against the accused beyond reasonable doubt and convicted

him of the offences punishable under sections 302 and 498A of the Indian penal Code and under section 135 of the Gujarat Police Act, and sentenced

him to life imprisonment and fine of Rs.5,000/- and in default of payment of fine, to undergo further simple imprisonment for a period of three months

for the offence under section 302, IPC; to three years simple imprisonment and fine of Rs.2,500/-, and in default of payment of fine, to undergo further

simple imprisonment for a period of 30 days for the offence under section 498A, IPC; and to four months simple imprisonment and fine of Rs.500/-,

and in default of payment of fine, to undergo further simple imprisonment for a period of 15 days for the offence punishable under section 135 of the

Gujarat Police Act. All the sentences are ordered to run concurrently.

7. Mr. Pratik Barot, learned advocate for the appellant, submitted that the

evidence of the witnesses show that the incident took place within the confines of the house. It was submitted that there is no substantive piece of direct evidence and that this is a case of no legal evidence. It was submitted that the first information report came to be lodged by PW-1 Dilipbhai Ramanbhai Parmar, who, however, has not supported the prosecution case and has been declared hostile. Referring to the testimony of PW 4 Ramanbhai Dahyabhai Parmar, namely, the father of the deceased, it was submitted that his testimony is based upon what Dilipbhai told him. Therefore, when Dilipbhai does not support the prosecution case, no reliance can be placed upon the testimony of PW 4 which is based upon what Dilipbhai told him. It was submitted that when Dilipbhai does not stand by his statement, the question of his statement being corroborated by other witnesses would not arise.

7.1 It was submitted that the conviction is bad in law and facts and is not sustainable. It was submitted that as none of the prosecution witnesses who arrived at the scene of offence immediately after the incident, have supported the prosecution case and that the very substratum of the prosecution case does not lead the case anywhere. It was submitted that there is no eyewitness and no other legal evidence on the basis of which the conviction could be based. It was contended that under section 106 of the Indian Evidence Act, 1872, the burden of proof would fall upon the accused provided the prosecution first proves its case. Firstly, the burden is upon the prosecution under section 101 of the Evidence Act and that in absence of the prosecution having discharged its burden, the question of invoking section 106 of the Evidence Act would not arise.

7.2 It was submitted that there is a grey area as to whether the appellant was inside the house when the incident took place and that the appellant-accused has chosen to remain silent. Reference was made to the decision of the Supreme Court in the case of Joydeb Patra and others v. State of West Bengal, AIR 2013 SC 2878, for the proposition that the burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution and it is only when this burden is discharged that the accused could prove any fact within his special knowledge under section 106 of the Evidence Act to establish that he was not guilty. Mr. Barot submitted that in the facts of the present case, the prosecution has been failed to prove the guilt of the

accused beyond reasonable doubt, the burden of proving any fact within his special knowledge under section 106 of the Evidence Act has not shifted upon the accused.

7.3 Reliance was also placed upon the decision of the Supreme Court in the case of *Reena Hazarika v. State of Assam*, 2009 Cri. L.J. 388, for the

proposition that in a case of circumstantial evidence, the prosecution is required to establish the continuity in the links in the chain of circumstances, so

as to lead to the only inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the innocence of the accused. Mere

invocation of the last seen theory, sans the facts and evidence in a case, will not suffice to shift the onus upon the accused under section 106 of the

Evidence Act, 1872 unless the prosecution first establishes a prima facie case. If the links in the chain of circumstances itself is not complete, and the

prosecution is unable to establish a prima facie case, leaving open the possibility that the occurrence may have taken place in some other manner, the

onus will not shift to the accused, the benefit of doubt will have to be given. Reliance was also placed upon the decision of the Supreme Court in the

case of *Jose v. Sub-Inspector of Police*, (2016) 10 SCC 519, wherein the court held that in the absence of any persuasive evidence to hold that at the

relevant time the appellant was present in the house, it would also be impermissible to cast any burden on him as contemplated under section 106 of

the Evidence Act.

7.4 Strong reliance was placed upon the decision of the Supreme Court in the case of *Subramaniam v. State of T.N.*, (2009) 14 SCC 415, wherein the

court observed that so far as the circumstance that they had been living together is concerned, indisputably, the entirety of the situation should be

taken into consideration. Ordinarily when the husband and wife remained within the four walls of a house and a death by homicide takes place, it will

be for the husband to explain the circumstances in which she might have died. However, one cannot lose sight of the fact that although the same may

be considered to be a strong circumstance, but that by alone in the absence of any evidence of violence on the deceased cannot be held to be

conclusive. It may be difficult to arrive at a conclusion that the husband and the husband alone was responsible therefor.

7.5 The learned advocate for the appellant contended that only if certain

circumstances are established against the accused, can the accused be called upon to explain under section 106 of the Evidence Act. It was submitted that section 106 of the Evidence Act can be a basis for conviction by linking it up with other corroborative circumstances. It was argued that in the facts of the present case, the prosecution has to first establish its case whereafter the burden shifts on the appellant husband to explain. However, there is nothing available with the prosecution which can be said to be evidence under section 101 of the Evidence Act.

7.6 It was submitted that the only circumstance against the accused is discovery of a weapon viz. stick; however, the panchas have not supported the panchnama and hence, the contents thereof have not been proved. It was submitted that the Investigating Officer also has failed to prove the discovery panchnama as required in law. In support of such submission, the learned advocate placed reliance upon the decision of a Division Bench of this court in the case of Rameshbhai Hajabhai Chachiya v. State of Gujarat, 2012 (3) GLH 350.

7.7 Next, it was submitted that the prosecution has also placed reliance upon the serological report of the Forensic Science Laboratory; however, the circumstance of such report has not been put to the accused while recording his statement under section 313 of the Code. It was submitted that the serological report is an important incriminating circumstance and in the absence of such incriminating circumstance having been put to the accused, serious prejudice is caused to the appellant. In support of such submission, the learned advocate placed reliance upon the decision of the Supreme Court in the case of Prakash v. State of Karnataka, (2014)12 SCC 133, wherein it was contended that the report of the serologist was not put to the accused when he was examined under section 313 of the Code. The High Court held that even assuming that the report of the serologist had not been put to the accused in his statement recorded under section 313, the same cannot be said to be fatal to the prosecution, more so, when the same had not prejudiced the accused in any way. The Supreme Court held that it is one thing to say that no prejudice was caused to the accused by not affording him an opportunity to explain the serological report, it is quite another thing to put the report to his learned counsel in appeal and give him an opportunity to explain the report of the serologist.

7.8 Reliance was also placed upon the decision of the Supreme Court in the case of *Inspector of Customs v. Yashpal*, (2009) 4 SCC 769, wherein the court held thus:

18. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that

it is for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him. In *Jai Dev v. State*

of Punjab, AIR 1963 SC 612, Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining

whether the provision has been fairly complied with. He observed thus:

21. The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to inquire whether,

having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it

appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious

infirmity.

19. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final

conclusion.

20. At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary

principle of natural justice enshrined in the maxim *audi alteram partem*. The word 'may' in clause (a) of sub-section (1) in Section 313 of the

Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But

if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately

claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about

which the accused was not asked to explain cannot be used against him.

7.9 Reliance was also placed upon the decision of the Supreme Court in the case of *Tara Singh v. State*, AIR 1951 SC 441, wherein the court held

that the whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The

questioning must, therefore, be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand.

Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is, therefore, in no fit position

to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately

in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. Referring to the statement of the

accused recorded under section 313 of the Code, it was pointed out that the trial court had merely asked the accused as to what he wanted to say

with regard to various panchamas produced by the prosecution and that the serological report has not been put to the accused in true essence. It was

submitted that by not pointing out the circumstances of serological report in a proper manner, the trial court has failed to comply with the provisions of

section 313 of the Code and that serious prejudice is caused to the appellant herein. It was submitted that the fact regarding blood stains having been

found on the stick having been proved by the serological report, is not put to the appellant. It was submitted that there is no iota of legal evidence

against the accused and that the conviction cannot be sustained and that the appellant is required to be acquitted.

7.10 Next, it was contended that the panchas have not supported the discovery panchnama. Elaborating upon the said contention, it was submitted that

the mode and manner in which the panchnama has been proved by the Investigating Officer is not proper. It was submitted that the Investigating

Officer, in his evidence, is required to state the exact words uttered by the accused leading to the discovery of something whereas in the facts of the

present case the Investigating Officer has also not stated anything about the willingness of the accused to show the weapon used in the commission of

the offence nor has he stated exactly what the accused had said, and hence, the discovery panchnama cannot be said to be proved in legal terms. In

support of such submission, the learned advocate placed reliance upon the decision of this court in Rameshbhai Hajabhai Chachiya v. State of Gujarat

(supra).

7.11 Alternatively, the learned advocate for the appellant submitted that if the court is not inclined to acquit the appellant-accused and upon

appreciation of the evidence comes to the conclusion that a clear case of acquittal is not made out, the conviction of the accused under section 302 of

the Indian Penal Code is required to be converted to a conviction under section 304, Part II of the Indian Penal Code. It was submitted that the

relationship between the accused and the deceased has been established, namely, that they are husband and wife. There was no deep rooted enmity

between the two and that the husband had no motive to do away with his wife. It was submitted that the weapon in question is a stick which was

something handy which he picked up and in a fit of fury inflicted some injury. None of the injuries is independently sufficient to kill the deceased, but it

is cumulative effect which caused the death. It was submitted that it is only upon seeing the corresponding internal injuries that the injuries inflicted

become serious. Moreover, the deceased was admitted in the hospital at 7:50 hours in the morning and she passed away at 6:50 hours on the next day

morning. It was submitted that considering the nature of the injuries sustained by the deceased, it cannot be said that the appellant-husband has chosen

any vital part of the body to cause death. Moreover, the Medical Officer has not opined as to whether the injuries sustained by the deceased were

sufficient in the ordinary course of nature to cause death. It was submitted that when the weapon alleged to have been used in the commission of the

offence is not a very deadly weapon, such opinion ought to have been elicited from the Medical Officer. It was submitted that having regard to the

overall facts of the case, if at all the court finds that this is not a clear case for acquittal, the case should be brought down from an offence under

section 302, IPC to section 304, IPC. In support of such submission, the learned advocate placed reliance upon the decision of the Supreme Court in

the case of Nankaunoo v. State of U.P., (2016) 3 SCC 317, wherein the court held thus:

â??11. Intention is different from motive. It is the intention with which the act is done that makes a difference in arriving at a conclusion whether the

offence is culpable homicide or murder. The third clause of Section 300 IPC consists of two parts. Under the first part it must be proved that there

was an intention to inflict the injury that is present and under the second part it must be proved that the injury was sufficient in the ordinary course of

nature to cause death. Considering clause Thirdly of Section 300 IPC and reiterating the principles stated in Virsa Singh case, AIR 1958 SC 465, in Jai

Prakash v. State (Delhi Admn.), (1991) 2 SCC 32, para 12, this Court held as under:

12. Referring to these observations, Division Bench of this Court in Jagrup Singh case, (1981) 3 SCC 616, observed thus:

7. These observations of Vivian Bose, J. have become locus classicus. The test laid down in Virsa Singh case, for the applicability of clause

Thirdly is now ingrained in our legal system and has become part of the rule of law.

The Division Bench also further held that the decision in Virsa Singh case has throughout been followed as laying down the guiding principles. In both

these cases it is clearly laid down that the prosecution must prove (1) that the body injury is present, (2) that the injury is sufficient in the ordinary

course of nature to cause death, (3) that the accused intended to inflict that particular injury, that is to say it was not accidental or unintentional or that

some other kind of injury was intended. In other words clause Thirdly consists of two parts. The first part is that there was an intention to inflict the

injury that is found to be present and the second part that the said injury is sufficient to cause death in the ordinary course of nature. Under the first

part the prosecution has to prove from the given facts and circumstances that the intention of the accused was to cause that particular injury.

Whereas under the second part whether it was sufficient to cause death, is an objective enquiry and it is a matter of inference or deduction from the

particulars of the injury. The language of clause Thirdly of Section 300 speaks of intention at two places and in each the sequence is to be established

by the prosecution before the case can fall in that clause. The intention and knowledge of the accused are subjective and invisible

states of mind and their existence has to be gathered from the circumstances, such as the weapon used, the ferocity of attack, multiplicity of injuries

and all other surrounding circumstances. The framers of the Code designedly used the words intention and knowledge and it is

accepted that the knowledge of the consequences which may result in doing an act is not the same thing as the intention that such consequences

should ensue. Firstly, when an act is done by a person, it is presumed that he must have been aware that certain specified harmful consequences

would or could follow. But that knowledge is bare awareness and not the same thing as intention that such consequences should ensue. As compared

to 'knowledge', 'intention' requires something more than the mere foresight of the consequences, namely, the purposeful doing of a thing to achieve a particular end.

12. The emphasis in clause three of Section 300 IPC is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary course of nature. When the sufficiency exists and death follows, causing of such injury is intended and causing of such offence is murder. For ascertaining the sufficiency of the injury, sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused and sometimes both are relevant. Depending on the nature of weapon used and situs of the injury, in some cases, the sufficiency of injury to cause death in the ordinary course of nature must be proved and cannot be inferred from the fact that death has, in fact, taken place.

13. Keeping in view the above principles, when we examine the facts of the present case, the deceased sustained gunshot wound of entry 1½" —

1½" on the back and inner part of left thigh, six gunshot wounds of exit each 1½" — in size in front and middle left thigh. Due to the occurrence

in the morning at the barber shop of the deceased, the appellant emerged from the northern side of the grove carrying pistol in his hand and fired at the

deceased. The weapon used and the manner in which attack was made and the injury was inflicted due to premeditation clearly establish that the

appellant intended to cause the injury. Once it is established that the accused intentionally inflicted the injury, then the offence would be murder, if it is

sufficient in the ordinary course of nature to cause death. We find substance in the contention of the learned counsel for the appellant that the injury

was on the inner part of left thigh, which is a non-vital organ. Having regard to the facts and circumstances of the case that the gunshot injury was

caused in the inner part of left thigh, the sufficiency of injury to cause death must be proved and cannot be inferred from the fact that death has taken

place. But the prosecution has not elicited from the doctors that the gunshot injury on the inner part of left thigh caused rupture of any important blood

vessel and that it was sufficient in the ordinary course of nature to cause death. Keeping in view the situs and nature of injury and in the absence of

evidence elicited from the doctor that the said injury was sufficient in the

ordinary course of nature to cause death, we are of the view that it is a fit case where the conviction of the appellant under Section 302 IPC should be under Section 304 Part I IPC.â??

7.12 Reliance was also placed upon the decision of the Supreme Court in the case of Surinder Kumar v. Union Territory, Chandigarh, (1989) 2 SCC

217, wherein the court held thus:

â??6. Exception 4 to Section 300 reads as under:

â??Exception 4.â?"Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden

quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation.â?"It is immaterial in such cases which party offers the provocation or commits the first assault.â??

7. To invoke this exception four requirements must be satisfied, namely, (i) it was a sudden fight; (ii) there was no premeditation; (iii) the act was done

in a heat of passion; and (iv) the assailant had not taken any undue advantage or acted in a cruel manner. The cause of the quarrel is not relevant nor

is it relevant who offered the provocation or started the assault. The number of wounds caused during the occurrence is not a decisive factor but what

is important is that the occurrence must have been sudden and unpremeditated and the offender must have acted in a fit of anger. Of course, the

offender must not have taken any undue advantage or acted in a cruel manner. Where, on a sudden quarrel, a person in the heat of the moment picks

up a weapon which is handy and causes injuries, one of which proves fatal, he would be entitled to the benefit of this exception provided he has not

acted cruelly.

7.13 Reliance was also placed upon the decision of the Supreme Court in the case of Lavghanbhai Devjibhai Vasava v. State of Gujarat, (2018) 4

SCC 329, wherein the court has referred to the parameters which are required to be taken into consideration while deciding the question as to whether

the case falls under section 302 or section 304 of the Indian Penal Code, and held thus:

â??7. This Court in Dhirendra Kumar v. State of Uttarakhand has laid down the parameters which are to be taken into consideration while deciding

the question as to whether a case falls under Section 302 IPC or Section 304

IPC, which are the following:

- (a) The circumstances in which the incident took place;
- (b) The nature of weapon used;
- (c) Whether the weapon was carried or was taken from the spot;
- (d) Whether the assault was aimed on vital part of body;
- (e) The amount of the force used;
- (f) Whether the deceased participated in the sudden fight.
- (g) Whether there was any previous enmity;
- (h) Whether there was any sudden provocation.
- (i) Whether the person inflicting the injury took any undue advantage or acted in the cruel or unusual manner.

8. Keeping in view the aforesaid factors it becomes evident that the case of the appellant would fall under Section 304 IPC as the incident took place

due to a sudden altercation which was a result of delay in preparing lunch by the deceased. The appellant picked up a wooden object and hit the

deceased. The medical evidence shows that not much force was used in inflicting the blow to the deceased. The prosecution has not set up any case

suggesting that relationship between the husband and wife was not cordial, otherwise. Manifestly, the incident took place due to sudden provocation

and in a heat of passion the appellant had struck a blow on his wife, without taking any undue advantage. We are, therefore, of the opinion that it was

an offence which would be covered by Section 304 Part II IPC and not Section 302 IPC.â??

7.14 Reference was also made to the decision of the Supreme Court in the case of Madanayya v. State of Maharashtra, (2017) 13 SCC 485, wherein

the court observed that upon going through the postmortem report, there was no doubt that there were number of injuries on the body of the deceased.

None of the injuries by itself was sufficient for causing death. The cumulative effect of the injuries is that the deceased died. The court observed that

the issue that arises is whether the accused had the intention of causing death of the deceased. In the facts of the said case, the court found it difficult

to impute the intention to kill to the appellant therein and therefore, converted the conviction of the accused from one under section 302 to section 304

Part II, IPC.

7.15 It was, accordingly, urged that having regard to the weak nature of the evidence on record and the fact that the prosecution has failed to prove

the chain of circumstances to establish conclusively that it is the appellant alone who is responsible for the death of the deceased, the impugned

judgment and order of conviction and sentence cannot be sustained and deserves to be set aside.

8. Vehemently opposing the appeal, Mr. Himanshu Patel, learned Additional Public Prosecutor for the respondent, submitted that the murder of the

deceased took place within the confines of the house wherein the deceased was residing along with the accused and their children. It was submitted

that the deceased has not taken any defence that he was not present at the time of the offence or that he was elsewhere. It was submitted that the

prosecution has established beyond reasonable doubt that the relation between the deceased and the accused was strained; therefore, there was a

motive on the part of the accused to commit the murder.

8.1 It was submitted that there are several circumstances against the accused which establish conclusively that he alone is responsible for the death of

the deceased; namely, the deceased and the accused were residing together in the same house; there is a discovery of a weapon at the instance of the

appellant-accused which has been duly proved through the evidence of the Investigating Officer; the discovery of the weapon used in the commission

of the offence has been made from a place which was exclusively within the knowledge of the accused alone; the weapon was in the nature of a

thick stick which was found to be stained with blood; the blood stains on the clothes of the deceased as well as sample of the blood of the deceased

and the stick used in the commission of the offence were sent to the Forensic Science Laboratory for analysis and the serological report shows that

the blood found on the stick bears the same group as that of the deceased. It was submitted that the chain of circumstances is, therefore, duly

established which unerringly point towards the guilt of the appellant.

8.2 It was contended that the conduct of the accused post the incident also points towards his guilt inasmuch as the accused could have taken the

deceased to the hospital, but he was not present at the time of funeral rites of the deceased and had only presented himself at the police station on the

next day at 8:30 p.m. after the deceased had passed away. It was submitted

that the incident took place within the four corners of the house of the accused in the early hours at 5:00 a.m. in the morning. No explanation has been put forth by the accused as to under what circumstances the death took place except for pleading innocence and false implication. It was submitted that in view of the provisions of section 106 of the Evidence Act, it was for the appellant to explain the circumstances under which his wife was found dead within the confines of his house.

8.3 Insofar as the incriminating circumstances of the serological report not having been put to the appellant-convict is concerned, reference was made to the statement of the accused recorded under section 313 of the Code, to point out that the circumstance with regard to the clothes of the deceased as well as discovery panchnama etc. had been duly put to the accused and thereafter, the circumstances of the different panchnamas, including serological report have been put to him. It was submitted that the provisions of section 313 of the Code have been substantially complied with and that the appellant has failed to point out as to what prejudice has been caused to him by not putting such circumstances to him in a particular way. In support of such submission, reliance was placed upon the decision of the Supreme Court in the case of State of A.P. v. Patchimala Vigneswarudu, (2016) 4 SCC 611, wherein the court held thus:

â??18. Succinctly stated, the following circumstances are found to have been proved on record:

(i) Admittedly, the deceased was the wife of the accused and they had strained relations.

(ii) The accused was suffering from venereal disease which he suspected to have sexually transmitted through his wife.

(iii) On 5-8-2001, the accused had gone to his in-lawsâ?? house and took his wife with him.

(iv) The deceased and the accused were last seen in the midnight (intervening night of 5-8-2001 and 6-8-2001) going together from cinema hall after night show, towards Village Ayinavilli.

(v) The accused was last seen returning alone from Village Ayinavilli, after midnight at about 12.30 a.m. i.e. 0030 hrs on 6-8-2001.

(vi) The dead body of the deceased was recovered next morning on 6-8-2001 from Village Ayinavilli.

(vii) The deceased had died homicidal death and cause of her death was asphyxia due to strangulation.

(viii) It is also established that the accused absconded from the village after the incident.

19. In our opinion, the above chain of circumstances is complete and leads only to the conclusion that it was the respondent-accused and he alone,

who committed murder of the deceased. The view taken by the High Court that the chain of circumstances is not complete merely for the reason that

drunkenness of the accused is not established, and that the accused cannot be said to have got sexually transmitted disease through his wife, is the

view based on irrelevant considerations and could not have been taken in the present case after reappreciating the evidence on record. It is proved on

the record by PW 11 Dr Venkata Reddy that the accused was suffering from balanoposthitis, and PW 1 Jithuka Nagooru and PW 2 Jithuka

Veeramma have proved the fact that the accused suspected that it might have been transmitted to him through his wife. What is more important is

that in his statement under Section 313 of the Code of Criminal Procedure, when above evidence was put to the accused, he has accepted the said

fact. What he denied is that he did not go to take his wife to her parents' house. He further denied that he did not take her to night show of any

movie, nor committed her murder. In the above circumstances, we are of the opinion that in the present case the only view possible was the one taken

by the trial court. As such, it is a fit case where order of acquittal recorded by the High Court requires interference. Therefore, on the basis of the

discussion on evidence, as above, we are of the view that this appeal deserves to be allowed.

8.4 Reliance was placed upon the decision of the Supreme Court in the case of Nar Singh v. State of Haryana, (2015) 1 SCC 496, for the proposition

that so far as section 313 CrPC is concerned, undoubtedly, the attention of the accused must specifically be brought to inculpable pieces of evidence

to give him an opportunity to offer an explanation, if he chooses to do so. The court held that the question whether a trial is vitiated or not depends

upon the degree of the error and the accused must show that non-compliance with section 313 CrPC has materially prejudiced him or is likely to cause

prejudice to him. Merely because of defective questioning under section 313 CrPC, it cannot be inferred that any prejudice had been caused to the

accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that the accused has suffered some disability or detriment in relation to the safeguard given to him under section 313 CrPC. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the court may draw an inference of such prejudice. The facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused. It was submitted that in the facts of the present case, except for pleading prejudice, nothing has been pointed out as to why the appellant has been prejudiced on account of not putting certain circumstances in a particular way to him. It was pointed out that in the above decision, certain incriminating circumstances had not been put to the accused despite which, the court held that it is for the accused to establish the prejudice and that had occasioned failure of justice to him, whereas in the facts of the present case, incriminating circumstance of serological report has, in fact, been put to the accused, but it is only not in the manner suggested by the learned advocate for the appellant. Moreover, the appellant has not established the prejudice on account of the circumstance not having been put to him in the manner suggested.

8.5 Reliance was placed upon the decision of the Supreme Court in the case of Harijan Bhala Teja v. State of Gujarat, 2016 (2) GLH 57 (2016) 12

SCC 665, wherein the court held thus:

13. Now, we come to the evidence on record examined by us. Admittedly, the deceased was the wife of the appellant. It is also not denied that the appellant and the deceased were living together in the house when the death of appellant's wife occurred. It is also not disputed fact that no post-mortem examination was got done, nor was any information given to the police regarding the death of the deceased, by the appellant. Of course, in the case of natural death there is no such necessity. However, even in the case of natural death, the normal conduct on the part of a husband would be to inform the relatives of parental side of the deceased wife, and then to

perform the last rites. It is evident from the record that the appellant who used to live with his wife (deceased) did not bother to inform his father-in-law or anyone in his family. In reply to Questions 24 and 37 recorded by the trial court under Section 313 of the Code of Criminal Procedure, the appellant has stated that his wife died during delivery, but record would show otherwise.

19. Section 106 of the Evidence Act, 1872 provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Since it is proved on the record that it was only the appellant who was staying with his wife at the time of her death, it is for him to show as to in what manner she died, particularly, when the prosecution has successfully proved that she died homicidal death.â??

8.6 It was submitted that through the evidence of the witnesses as well as through the circumstances of discovery of weapon panchnama and the serological report, the prosecution has duly established the charge against the accused. It was submitted that the above circumstances having been established against the appellant, it was for him to discharge the burden under section 106 of the Evidence Act; he, however, has chosen to remain totally silent and hence, an adverse inference is required to be drawn against him.

8.7 Reliance was also placed upon the decision of the Supreme Court in the case of Santosh Kumar Singh v. State, (2010) 9 SCC 747, wherein the court held thus:

92. We see that the facts of each case have to be examined but the broad principle is that all incriminating material circumstances must be put to an accused while recording his statement under Section 313 of the Code, but if any material circumstance has been left out that would not ipso facto result in the exclusion of that evidence from consideration unless it could further be shown by the accused that prejudice and miscarriage of justice had been sustained by him. We see from the case in hand that not only were the questions pertaining to the helmet and the ligature marks on the neck put to the doctor and even in a way to the appellant but the defence counsel had raised comprehensive arguments on these core issues not only before the trial court and the High Court but before us as well. The defence was, therefore, alive to the circumstances against the appellant. No prejudice or

miscarriage of justice has, thus, been occasioned.

8.8 Reliance was placed upon the decision of the Supreme Court in the case of State of U.P. v. Raghuvir, (2018) 13 SCC 732, wherein the court held

thus:

“11. Moreover, for relying upon the opinion of the ballistic expert, the High Court observed that no question was put to the accused under Section

313 CrPC about ballistic expert report (Ext. A-14). The object of Section 313 CrPC is to put a circumstance against the accused so that he may meet

out the prosecution case and explain the circumstances brought out by the prosecution to implicate him in the commission of the offence. If any

circumstance had not been put to the accused in his statement, the same shall be excluded from consideration. Of course, this is subject to a rider

whether omission to put the question under Section 313 CrPC has caused miscarriage of justice or prejudice to the accused. As pointed out earlier, in

the case in hand, recovery of gun from the accused Prem Yadav and the ballistic expert’s opinion (Ext. A-14) is only a corroborative piece of

evidence strengthening the prosecution case as established by the oral testimony of eyewitnesses PW 1 and PW 2. Even assuming that the question

regarding the ballistic expert’s evidence has not been put to the accused under Section 313 CrPC, in the facts and circumstances of the case in

hand, it must be held that it has caused no prejudice to the accused. In our considered view, the High Court was not right in brushing aside this

formidable circumstance against accused Prem Yadav.”

It was submitted that in that case no question was put to the accused regarding the report of the ballistic expert, despite which the court had held that

no prejudice is caused to the accused, whereas in this case the circumstance of serological report has been put to the accused, but only not in the

manner suggested by the learned advocate for the appellant.

8.9 Reliance was also placed upon the decision of the Supreme Court in the case of Baleshwar Mahto v. State of Bihar, (2017) 3 SCC 153, wherein

the court held thus:

“8. We may mention, in the first instance, that in the statement of the appellants recorded under Section 313 of the Code of Criminal Procedure

(CrPC), the defence taken was that of the total denial of the occurrence. It was stated that because of the longstanding land dispute they were falsely

implicated in this case. On the contrary, according to these appellants, they were attacked by the complainant party for which the accused party had

got PS Case No. 117/1982 registered against them and the case in question was nothing but a counterblast. This defence is not only against the record

but not even argued or pleaded by the counsel for the appellants. On the contrary, the entire focus of the appellants' argument is that on the basis that

due to the land dispute, a sudden quarrel and scuffle took place between the two parties wherein both were injured. This is clearly contrary to the

stand taken by the appellants in their statements given under Section 313 CrPC where they completely denied the occurrence itself.â??

8.9 It was, accordingly, urged that the prosecution has duly established the charge against the appellant-convict and that the trial court, therefore, did

not commit any error in convicting him for the offence punishable under section 302 as well as under section 498A of the Indian Penal Code and that

there is no warrant for interference by this court.

9. In the backdrop of the facts and contentions noted hereinabove, reference may be made to the evidence of the witnesses examined by the

respective parties.

10. PW 1 Dilipbhai Ramanbhai Parmar has been examined at Exhibit 24. He has, inter alia, deposed that he has one brother and one sister and that

sister Shakuben was the eldest and was married about twelve years ago to Madhavsinh Udesinh Solanki of Kathana Khumanpura as per the customs

of the community. She had three children. The eldest being Ajay who was eleven years old at the time of the incident, thereafter Nikita aged ten and

the youngest Arjun aged six years. His sister was treated well for five years and thereafter, there were quarrels between them. The witness was

residing at Harkhapura and one day approximately one year ago, his neighbour made a phone call to him at 5 oâ??clock in the morning and informed

him that his sister Shaku had died and hence, he went to his sisterâ??s house and there his sister was lying dead but his brother-in-law had gone out

of station and thereafter, he had taken his sister to Karamsad Medical Hospital, where he was informed that his sister is dead. The postmortem was

conducted at Karamsad and thereafter, the custody of the dead body was handed over to him and he had taken the dead body and returned to

Harkhapura and thereafter, lodged the complaint against his brother-in-law. He

has further deposed that prior to her death, his sister, time and again used to come to their house and their family members used to get a compromise recorded in writing and send his sister to her matrimonial home. Such writings were recorded twice in the past. He has further stated that the place of incident was shown by his nephew and has stated that he does not have any knowledge as to how and with what his sister was injured, and that he had seen his sister lying in the interior room in the house. He has stated that apart from that, he had not seen anything and that his sister's body was identified by his paternal uncle's son Ranchhodbhai. He has further stated that at the time of the compromise, Ranchhodbhai Gordhanbhai, Harishbhai Bhikhabhai, Udesinh Chandubhai had been called. He does not remember who else was there. While the witness has identified his thumb impression on the first information report, he has not supported the prosecution case and with the permission of the court, he has been cross-examined by the learned Public Prosecutor, however, nothing substantial has been elicited during the course of his cross-examination.

10.1 Thus, while this witness has not supported the prosecution case and has been declared hostile, from his testimony it emerges that the deceased and the accused used to quarrel with each other and that on two occasions, written compromises were executed whereafter, the deceased had returned to her matrimonial home. Further that, she was injured in the early morning hours inside her house; that he had taken her to the hospital and that the dead body was handed over to him and he had taken it to Harkhapura, that is, his village. Since the witness has not admitted the contents of the first information report, no reliance can be placed upon the contents thereof.

11. PW 2 Dr. Swapnil Sudhirkumar Agrawal is the Medical Officer who has conducted the autopsy of the dead body of the deceased. This witness has deposed that upon examining the dead body, the following injuries could be noticed:

EXTERNAL INJURIES :

(1) Oblique lacerated wounds present over R side of neck over temporal parietal region 7 cm R to midline as one R ear 6 x 1.5 cm x 8 skull cap deep.

(2) Stitched lacerated wound present over (L) side face starting from inner ear to (L) eyes row going upward to middle of (L) frontal region 9 cm,

long with 10 black thread stitches over it; on opening, margins are irregular, wound bone deep; underlying bone fractured.

(3) Stitched lacerated wound starting from middle of injury No.2, going downwards towards (L) temporal region, 8 cm long 6 black stitches over it; on

opening the stitches, measuring irregular wound bone deep; underlying bone fractured palpable fracture of nasal bone and both sides frontal area of

skull bone present. Above injuries are ante mortem in date, fresh and possible by application of hard blunt impact.

(4) Irregular stitched lacerated wound present over (L) side face, starting 2 cm below (L) eye moving upwards obliquely towards upper end of (L)

ear, 11 cm long with 8 black thread stitches over it; on opening, measuring irregular wound maxilla bone deep.

(5) Stitched lacerated wound present over middle of (L) side upper lip; 1 cm long with 2 black thread stitches over it.

(6) Stitched lacerated wound present over ® chest, 2 cm below ® eye, 1 cm long with 1 black thread stitched over it; surrounding area shows red

abrasion.

(7) Stitched lacerated wound present over ® side forehead, starting from middle of forehead in middle, going downwards, extending upto outer end

of ® eyebrow, 7 cm long with 9 stitches over it; on opening the stitches, margins irregular wound bone deep; underlying skull bone fractured.

(8) Bluish-red contusion present over face of M/3 of ® forearm, 5x3 cm size.

(9) Blush-red contusion present over front of U/3 (L) arm, 6x3 cm size.

(10) Bluish-red contusion present over back of U/3 of (L) forearm, 9x4 cm size with overlying abrasion, red in colour, 2 x 0.5 cm size

(11) Back of (L) hand swollen.

(12) Bluish-red contusion present over front red abrasion of U/2 of (L) 14 x 8 cm size with overlying red abrasion of 7 x 3 cm size.

(13) Surgical venesection wound present over inner aspect of ® ankle.??

11.1 The witness has further deposed that his investigation revealed that there were fractures on both sides of the forehead as well as the nose. He

has further deposed that the injuries could be caused by a hard blunt substance. Upon internal examination of the dead body, he has found the

following injuries:

INTERNAL EXAMINATION:

Injuries present corresponding to external injuries No.1, 2, 3 and 7 with diffuse extra vesaction undermath scalp. Depressed fracture of (L) fronto-

parietal temporal bone present in area of 10 x 5 cm corresponding to external injury No.2, 3. Depressed sergeant punctured into multiple pieces.

Radiating fractures from above depression present automatically extending into roof of

(L) orbit upto sella torcica backwards and downwards upto (L) petrous temporal bone. Depressed fracture of ® frontal bone present corresponding

to external injury No.7; bone fractured into multiple pieces; joining fractures on (L) side and extending into roof of ® orbit upto sella torcica. External

clots present over (L) frontal region 12x9 cm size and ® frontal and region 9x5 cm meanies intact; Diffuse subdual and sub arachnoid high present;

Brain soft and ocdematous; ventricles contain blood stored CSF. Transverse fracture of bone of skull present from (L) to ® size over petrons

leaporal bones passing though sella torcica; both roof of orbit fractured into multiple pieces; Brain congested, wt. 1010 grams. Supra steroyal area

contused, pleuta intact; No asaornal fluid collection. Pale respiratory passages. Both lungs pale; weight R ®" 261 and L ®" 222 grams; Pericardium

intact; Heart weight 202 grams, chansens contain postucortem clots coronaries patent.®?

11.2 He has further deposed that as per his opinion, the cause of death of the deceased was ®?Due to intracranial injury following blunt trauma to

head®?. The witness has deposed that injuries No.1 to 7 shown in column 17 of the postmortem note and the corresponding internal injuries were

grievous injuries. Nothing substantial has been brought out in the cross-examination of this witness to affect his credibility.

11.3 Thus, from the evidence of this witness, it emerges that injuries No.1 to 7 reflected in column 17 of the postmortem report together with the

corresponding internal injuries were grievous in nature. However, the Medical Officer has not deposed that such injuries are sufficient in the ordinary

course of nature to cause death. In terms of the cause of death, the cause of death is ®?Due to intracranial injury following blunt trauma to head®?.

12. PW 3 Rajendrabhai Udesinh Solanki, brother of the accused has been examined at Exhibit 35. He has not supported the prosecution case and has

been declared hostile. However, from his evidence, it emerges that he and his brother Madhavsinh and his wife Shakuben were residing separately.

The incident took place about one and a half years prior thereto. His elder brother Madhavsinh's children were crying aloud and, hence, he, his

wife Rekha and his paternal aunt Dakshaben had gone to his brother's house. At his brother's place, he saw his sister-in-law Shakuben in the

room lying in an unconscious condition. Thereafter, they called a

108 Ambulance and took his sister-in-law to the hospital.

13. PW 4 Ramanbhai Dahyabhai Parmar, father of the deceased, has been examined at Exhibit 37. He has deposed that he has one son and one

daughter. His son's name is Dilip and the daughter is named Shakuben. Shakuben was married to Madhavsinh Udesinh Solanki of Khumanpura

Kathana about 25 to 27 years ago. His daughter Shakuben had three children, viz., two sons and one daughter. After her marriage, his daughter used

to visit his house. However, after her marriage she did not speak about anything. Her married life was going on well. However, after their children

were born, her husband Madhavsinh used to harass her, due to which his daughter used to get offended and return to his house, and would come and

inform him. Thereafter, they had got a deed executed at Borsad. They had gathered at Borsad court. Prior to the incident, they had met at the court.

Devjibhai Vankar, Natubhai Dhulabhai and he as well as his son-in-law and other persons were there. The interveners had also signed the deed. The

deed was typed and in the compromise deed, he had got it recorded that Shakuben would not be harassed and thereafter, he had signed. The witness

has deposed that the incident took place about one and a half years prior thereto. His son Dilip had gone to his daughter's house as a guest. At

that time, there was a quarrel. His son was present there and at that time, the quarrel had taken place. In the morning, Dilip made a phone call to them

and they had gone to Karamsad Medical Hospital. His daughter had been admitted for treatment; however, he had not seen her. His son had informed

him on phone that Madhavsinh had beaten her with a weapon viz. stick. At the time of the incident, his son, his daughter and her husband and three

children were staying at his daughter's house. He is not aware as to why and in respect of which dispute, his daughter had been beaten. His son

Dilip had lodged a complaint in connection with the incident. The police had not

examined him or recorded his statement. The witness has produced the compromise deed on a rupees fifty stamp paper, which according to him has been executed in the court at Borsad, which bears his signature and it is a xerox copy.

13.1 In his cross-examination, the witness has admitted that a compromise was arrived at and thereafter, his daughter was sent from Borsad and that she had been sent from the house of his brother-in-law. He has admitted that he was not present at that time. He has stated that on the next day of the incident, he was at home and he did not have any personal knowledge about the incident. The witness has denied the suggestion that his son Dilip was at his house on the day of the incident.

13.2 Thus, from the testimony of this witness it emerges that PW I Dilipbhai Ramanbhai Parmar was residing with the deceased at the time of the incident and it was he who had informed him about the incident. From his testimony it is also established that there were disputes between the accused and the deceased and that the deceased was sent to her matrimonial home after executing a compromise in writing.

14. PW 5 Rameshbhai Shanabhai Solanki, who has a relative of the deceased, has been examined at Exhibit 38. He has deposed regarding the compromise arrived at between the deceased and the accused. From his evidence, it comes out that the incident took place about two to three months after Shakuben was sent back after recording the compromise. He has not supported the prosecution case and has been declared hostile.

15. PW 6 Rajeshbhai Arvindbhai Solanki, Exhibit 39, is a nephew of PW 4, that is, father of the deceased. This witness has deposed that his uncle Ramanbhai Dahyabhai Solanki had two children; the elder one was Shakuben and then, Dilip. Shakuben was married to Madhavsinh Udesinh and had three children. There were some disputes in her married life. There were quarrels between Shakuben and Madhavsinh, and Shakuben used to come to her father's place and on one occasion, she had also come to his house. Since there were disputes, a compromise was recorded in writing in the year 2013 and it was recorded in the presence of panchas that there would be no more quarrels with respect to Shakuben's children. He has further deposed that quarrels between Shakuben and Madhavsinh were on account of suspicion and doubt. Madhavsinh used to suspect Shakuben,

due to which there were disputes. He has deposed that at the time of the incident, he was at home and his uncle's son Dilip had made a phone call

that there was violence (maramari) between Madhavsinh and Shakuben and she was taken to Karamsad Hospital and hence, he and his uncle

Rameshbhai had both gone there. Dilip was standing outside the hospital. The witness has stated that at the time of the incident, Dilip was residing

with Shakuben. The witness has, thereafter, not supported the prosecution case and has been cross-examined by the learned Public Prosecutor. In his

cross-examination, he has admitted that the police had recorded his statement. He has also admitted the contents of his police statement.

15.1 Thus, the testimony of this witness corroborates the testimony of PW 4 Ramanbhai Dahyabhai Parmar "the father of the deceased to the

effect that there were quarrels between the accused and the deceased and that the deceased had returned to her matrimonial home after recording a

compromise in writing; and that PW 1 Dilipbhai had made a phone call and informed them about the incident whereafter he and PW 4 had gone to the

hospital at Karamsad.

16. PW 7 Dakshaben Khumansinh Solanki has been examined at Exhibit 41. She is the paternal aunt of the accused. She has deposed that at the time

of the incident, she and her husband were at home. Her nephew Madhavsinh's children had started shouting. It was 6 o'clock in the morning.

Upon hearing commotion, she went to her nephew Madhavsinh's house. At that time, Shakuben was inside the house in a room. Shakuben was

lying unconscious. She was injured on the head and blood was oozing out. She has further deposed that Shakuben's husband, her two sons and her

daughter as well as her brother Dilip were residing at Shakuben's house. Thereafter, her nephew called a 108 Ambulance and took her to the

hospital. Shakuben passed away and on the next day, her dead body was handed over. Her last rites were performed at her village Harkhapura. The

witness has not supported the prosecution case and has been declared hostile.

16.1 From the testimony of this witness two facts are established. Firstly that the incident took place inside the house where the accused and the

deceased were residing together and the children were at home and that the last rites of the deceased were performed at her paternal home at

Harkhapura.

17. PW 8 Rekhaben Rajendrabhai Solanki, who is the sister-in-law of the accused, has been examined at Exhibit 42. She has deposed that at the time of the incident, she was at home. Shakuben's children started shouting at around 7 o'clock in the morning. Hence, she came to know and went to Shakuben's house. She and her husband had gone there. Shakuben was in the room and was unconscious. She was injured on the head and bleeding was oozing out. The door was open. When she went to Shakuben's house, she and her children were there. She did not have any conversation with Shakuben, nor did she have any talk with her husband. She has further deposed that a 108 Ambulance was called and Shakuben was taken to Karamsad Hospital. Shakuben's funeral rites were performed at her paternal home at Harkhapura. The witness has thereafter not supported the prosecution case and has been declared hostile.

17.1 The testimony of this witness corroborates the testimony of PW 7 to the effect that the children were shouting and upon hearing them they went to the house. Shakuben was injured inside the house and that her last rites were performed at her paternal home at Harkhapura.

18. PW 9 Ajaykumar Madhavsinh Solanki has been examined at Exhibit 45. He is the son of the deceased and has not supported the prosecution case.

19. PW 10 Solanki Pravinsinh Mahipatsinh and PW 11 Gokalbhai Ramabhai, are the panchas of the scene of offence panchnama. Both the witnesses have not supported the prosecution case and have been declared hostile. They, however, have identified their signatures on the panchnama.

20. PW 12 Mohanbhai Shivabhai Patel and PW 13 Ghanshyambhai Babarabhai Bhoi, are witnesses of the clothes of the accused panchnama, discovery panchnama and the clothes of the deceased panchnama. Both the witnesses have not supported the prosecution case and have been declared hostile, but they have identified their signatures on the panchnamas as well as the slips.

21. PW 15 Chimanbhai Ranchhodbhai Rohit, Exhibit 60 has deposed that he was discharging duties as Head Constable at Virsad Police Station and that the investigation regarding Virsad Police Station I â" C.R. No.42/2013 was being carried out by their P.S.I. Shri N. V. Bharwad. The witness has deposed that during the course of investigation, on 17.9.2013, at the time

when he was discharging duties as P.S.O., Bharatbhai Ghanshyambhai got his sister admitted for treatment and the clothes which she was wearing at the time of the incident were handed over by the Medical Officer in a sealed box to him. The witness has deposed that he had taken custody of the said muddamal in the presence of panchas and a panchnama came to be drawn which is exhibited as Exhibit 53.

22. PW-16, Nitinbhai Vihabhai Bharwad, who is the Investigating Officer in this case, has been examined at Exhibit 63. The said witness has deposed that from 16.7.2013 to 20.5.2015, he was discharging duties at Virsad Police Station. On 15.9.2013, when he was present at the police station, the complainant in this case Dilipbhai Ramanbhai Parmar, resident of Harkhapura had come before him and stated the contents of his complaint before him. He has further deposed that the complaint was taken in the handwriting of his writer in terms of what was stated by the complainant. The complaint was read over to him and the complainant had admitted the contents thereof and thereafter, his left thumb impression was taken thereon and he (the witness) had put signature to the effect that the complaint was recorded before him. The witness has produced on record various panchnamas and other documentary evidence which had been drawn during the course of investigation. From his deposition, it further emerges that the accused Madhavsinh Udesinh Solanki had presented himself at the police station on 16.9.2013 at 20:15 hours. The witness has deposed that from 20:30 to 21:00 hours, the arrest panchnama recording the physical condition of the accused etc. came to be drawn in the presence of panchas and the T-Shirt as well as pant worn by him came to be seized. The panchnama, Exhibit-51 is shown to the witness and he has stated that it bears his signature as well as signatures of the panchas. The witness has further deposed that thereafter, the accused having shown willingness to show the weapon used in the commission of the offence, he kept two panchas present and drew a preliminary panchnama and as shown by the accused, together with two panchas, set off from Virsad and via Jantral and Delhi Chakla halted the vehicle near the house of the accused at Kathana Gumanpura canal and the accused had shown the scene of offence and had also pointed out the weapon being a stick which he had thrown on the tin roof next to his house, which came to be seized in the presence of panchas. The

preliminary panchnama was drawn at the police station and the remaining part of the panchnama was drawn where the muddamal was seized and the panchnama was read over to the panchas and they had signed it in his presence. He is shown the panchnama Exhibit 52 which he has stated is the same panchnama. He has further deposed that the custody of the clothes of deceased Shakuben had been taken by the Medical Officer at the time of post-mortem and the panchnama thereof was drawn through Shri C.R. Rohit and is produced at Exhibit 54. He has further deposed that the muddamal articles 1 to 5 were seized under a panchnama which was drawn in terms of what was stated by the panchas and was signed in his presence and he has also affixed his signature thereon. The witness has produced the yadi for drawing the inquest (Exhibit 65), the posthumous form (Exhibit 66), the letter to collect the clothes of the deceased (Exhibit 67), the forwarding letter with which the muddamal was sent to the Forensic Science Laboratory (Exhibit 68), the receipt issued by the Forensic Science Laboratory acknowledging the receipt thereof (Exhibit 69), the Forensic Science Laboratory report (Exhibit 70), the serological report forwarded by the Forensic Science Laboratory (Exhibit 71), the letter of the Forensic Science Laboratory returning the muddamal (Exhibit 72) and various other yadis and documents, all of which have been exhibited.

22.1 The witness is shown the first information report Exhibit 25 and he has stated that it was written as stated by the informant and that he has signed the same. He has further stated that the same bears the left hand thumb impression of the informant Dilipbhai. The witness is shown the panchnama Exhibit 48 and he has stated that the same is in terms of what the panchas had dictated and the panchas had signed in his presence and that he has signed the same. The witness has been cross-examined by the defence, however, nothing substantial has been elicited during his cross-examination so as to dent the credibility of the witness.

23. It is in the light of the above evidence that the culpability or otherwise of the appellant has to be examined.

24. From the evidence on record, it emerges that there is no eyewitness to the incident. The children of the deceased were at home at the time when the incident took place. The eldest of them Ajay has been examined by the prosecution, but he has not supported the prosecution case and there is

nothing in his evidence which can be relied upon.

25. One set of prosecution witnesses are those who claim to have arrived at the scene of offence immediately after the incident, viz., PW 1 Dilipbhai

Ramanbhai Parmar - the brother of the deceased, PW 3 Rajendrabhai Udesinh Solanki - brother of the accused, PW 7 Dakshaben Khumansingh

Solanki - paternal aunt of the accused, PW 8 Rekhaben Rajendrabhai Solanki - sister-in-law of the accused and wife of PW 3. Though these

witnesses have not supported the prosecution case and have been declared hostile, from their testimonies, it emerges that the incident took place inside

the house of the accused as the deceased Shakuben was lying in an injured condition in a room inside the house; the children were at home as it was

upon hearing their cries that the witnesses arrived at the scene of incident; a 108 ambulance was called and Shakuben was taken to the Karamsad

Hospital where she passed away on the next day; the dead body of the deceased was handed over to PW 1- the brother of the deceased and the

cremation took place at her parental home and not at the place of the accused. From the testimony of PW 7, it emerges that PW 1 Dilipbhai was

residing with the deceased and her family.

26. It may be noted that though it was PW 1 Dilipbhai who had lodged the first information report, he has not supported the prosecution case and not

admitted the contents of the first information report though he has admitted that he had lodged a first information report and has identified his thumb

impression thereon. In his testimony, this witness claims to have been residing with his father and has stated that he arrived at the scene of offence

upon receiving a phone call from a neighbour and that thereafter, he took his sister to the Karamsad Hospital. However, PW 4 Ramanbhai Dahyabhai

Parmar - father of the deceased and PW 1, had deposed that his son Dilipbhai was staying with his daughter as a guest at the time when the incident

took place. He has further deposed that it was PW 1 Dilipbhai who has made a phone call to him in the morning and informed him that Madhavsinh

had inflicted stick blows. In his cross-examination, he has denied that his son was at his house at the time of the incident and that upon receiving a

phone call from his daughter, he and Dilip had gone there.

27. Thus, though in the first information report, PW 1 has stated that he was residing with his sister at the time of the incident, he has denied the

contents thereof and in his testimony, he has claimed that he was staying with his father at the time of the incident; however, such fact is belied by the testimony of his father PW 4 Ramanbhai and the testimony of PW 7 Dakshaben, who had categorically stated that Dilip was residing with the deceased and her family. Evidently therefore, PW 1 Dilipbhai has subsequently changed his version with a view to protect the accused.

28. From the testimony of PW 1 Dilipbhai, it emerges that for the first five years after her marriage, Shakuben was treated well, but thereafter there

were quarrels between the accused and Shakuben. From the testimony of PW 4, father of the deceased, it emerges that for the first five years,

Shakuben was treated well, however after the children were born, her husband used to harass her and hence, Shakuben used to leave her matrimonial

home and come to her parental home. It further emerges that a compromise in writing was executed at the court at Borsad in the presence of the

persons named by him and as per the compromise, it was agreed that the accused would not harass Shakuben and thereafter, Shakuben was sent with

him. Through the testimony of PW 5 Rameshbhai, it emerges that there were marriage related disputes between the deceased and the accused, due to

which the accused had come to fetch Shakuben and at that time, a compromise in writing was executed wherein it was stated that he would not

subject Shakuben to physical violence. The incident took place three months after Shakuben was sent to her matrimonial home. From the testimony of

PW 6 Rajeshbhai Arvindbhai Solanki also, it is established that there were quarrels between Shakuben and the accused, and Shakuben used to return

to her parental home and on one occasion, she had come to his house. On account of the disputes, a compromise in writing was executed in the year

2013 in the presence of panchas to the effect that for the sake of their children, he would not quarrel with Shakuben. It further emerges that the

accused used to suspect Shakuben and used to quarrel with her because of such suspicion.

29. Thus, from the testimonies of these witnesses, the prosecution has established that there were quarrels/disputes between the accused and

deceased on account of the accused harbouring suspicion against the deceased, due to which the deceased had returned to her parental home, and on

two occasions, she was sent back to her matrimonial home after recording settlements in writing. One such compromise was recorded in the Borsad

Court when Devjibhai Vankar, Natubhai Dhulabhai and the father of the deceased and the accused were present. A copy of one such compromise

dated 15.3.2012 has been produced on record by PW 4 - the father of the deceased. PW 4 Ramanbhai Parmar has deposed that in the compromise

deed, it was recorded that the accused would not harass Shakuben and thereafter, he had sent Shakuben to her matrimonial home. From the cross-

examination of this witness, it appears that the defence has admitted that there was a compromise, inasmuch as a question has been put to him that

after such compromise had been recorded, his daughter had been sent to Borsad from his brother-in-law's house. The witness has not been cross-

examined as regards such compromise and the contents thereof. Thus, the prosecution has duly established by leading cogent and reliable evidence

that the deceased was being subjected to mental and physical harassment by the appellant on account of which time and again she used to return to

her parental home and it was only after recording a written compromise that she was sent back to the appellant's home. The charge under section

498A of the Indian Penal Code has been duly proved.

30. In this case, all the panch witnesses have not supported the prosecution case and have been declared hostile. However, the panchnamas have

been proved through the testimony of PW 16 - the Investigating Officer in whose presence such panchnamas came to be drawn. One panchnama

Exhibit 53 came to be drawn in the presence of PW 15 Chimanbhai Ranchhodbhai Rohit, who has duly proved the said panchnama in his testimony.

From the testimony of the Investigating Officer, it emerges that the custody of clothes of the deceased was handed over by the Medical Officer in the

presence of the panchas and the same were sealed and forwarded to the Forensic Science Laboratory. The Investigating Officer has also proved the

discovery panchnama, whereby the accused had stated that he wanted to show the weapon used in the commission of the offence and has led the

police party together with panchas to his house at Kathana and had shown the stick used in the commission of the offence which was lying on the tin

roof adjoining his house which was seized in the presence of the panchas. The Investigating Officer has produced on record the forwarding letters

whereby the seized articles, including blood sample of the deceased, had been sent to the Forensic Science Laboratory for analysis and has also

produced the serological report on record, which shows that the blood group of the deceased was 'A' group and the blood stains found on the

clothes of the deceased as well as on the stick were of 'A' group.

31. On behalf of the appellant, it has been contended that the discovery panchnama has not been proved in accordance with law. In this regard,

reliance has been placed upon the decision of a Division Bench of this court in the case of Rameshbhai Hajabhai Chachiya v. State of Gujarat (supra),

wherein in the facts of the said case, the court had recorded that the Investigating Officer for the purpose of discovery called two panchas and is said

to have drawn the discovery panchnama, thereby showing discovery of weapon at the instance of the accused. Both the panch witnesses did not

support the case of the prosecution and failed to prove the contents of the discovery panchnama of the weapon of offence. The court observed that

the question is as to what would be the evidentiary value of such a piece of circumstance sought to be relied upon by the prosecution, more

particularly, when two independent witnesses to the panchnama did not support the prosecution. The court found that from the deposition of the

Investigating Officer, he has not proved the contents of both the discovery panchnama and all that he has deposed is that as the accused was willing

to point out the weapon of offence, the same was recovered under a panchnama. The court observed that the same is the statement so far as the

discovery of valuables is concerned. The court had minutely gone through this part of the evidence of the Investigating Officer and was convinced

that by no stretch of imagination it could be said that the Investigating Officer had proved the contents of both the discovery panchnamas. The court

observed that in order to enable the court to safely rely on the evidence of the Investigating Officer, it is necessary that the exact words attributed to

an accused, as statement made by him, be brought on record and, for this purpose, the Investigating officer is obliged to depose in his evidence the

exact statement and not by merely saying that a discovery panchnama of weapon of offence was drawn as the accused was willing to take it out from

a particular place.

32. Examining the facts of the present case in the light of the above decision, this is not a case where the Investigating Officer in his testimony has

merely stated that as the accused was willing to point out the weapon of the

offence, the same was recovered under a panchnama. In the facts of the present case, the Investigating Officer has stated that the accused had shown willingness to show the weapon used in the commission of the offence, he had kept two panchas present and drawn a preliminary panchnama and as shown by the accused, together with two panchas, set off from Virsad and via Jantral and Delhi Chakla halted the vehicle near the house of the accused at Kathana Gumanpura canal and the accused had shown the scene of offence and had also pointed out the weapon being a stick which he had thrown on the tin roof next to his house, which came to be seized in the presence of panchas. The preliminary panchnama was drawn at the police station and the remaining part of the panchnama was drawn where the muddamal was seized and the panchnama was read over to the panchas and they had signed it in his presence. Thus, the witness has substantially proved the panchnama Exhibit 52, namely, the panchnama whereby the weapon used in the commission of the offence came to be recovered at the instance of the accused. In the opinion of this court, the above decision is distinguishable on facts and would have no applicability to the facts of the present case. The contention that the discovery panchnama has not been proved in accordance with law, therefore, does not merit acceptance.

33. Thus, from the evidence adduced by it, the prosecution has succeeded in proving certain circumstances against the accused, namely, that there were disputes between him and his wife; that a written compromise was executed whereafter Shakuben was sent with him; Shakuben died during the morning hours when the accused would normally be expected to be at home; Shakuben was injured inside the house and was found lying in a grievously injured condition inside the house; her dead body was handed over to her brother and the last rites were performed at her parental home and not at the house of the accused; there is nothing on record to show presence of the appellant at the hospital or during the last rites of the deceased and he had presented himself at the police station on the next day in the evening after Shakuben had passed away; the appellant-accused had shown willingness to show the weapon used in the commission of the offence and has led the police party together with panchas to his house at Kathana and had shown the stick used in the commission of the offence which was lying on the tin roof next to his house. From the testimony of the Medical

Officer, it is established that the deceased died a homicidal death; the clothes of the deceased together with the blood sample of the deceased and with the muddamal weapon were sent to the Forensic Science Laboratory and the serological report reveals that that blood group of the deceased and the blood group on the clothes of the deceased as well as the blood group of the bloodstains found on the muddamal stick, were of A group, viz., the blood group of the deceased.

34. In the light of the above circumstances which have been established against the appellant-accused, the burden of proof lay upon the appellant-accused to show as to under what circumstances the deceased had died inside the house. The appellant-accused, in his statement recorded under section 313 of the Code, has not stated as to where he was when the incident took place. He has neither stated that he was present at the time of the incident, nor has he stated that he was elsewhere, but has chosen to remain totally silent. Though during the cross-examination of the witnesses who are related to the accused, it has been sought to be brought out by the defence that the accused was out of station at the time of the incident, in his statement under section 313 of the Code, the appellant has chosen to maintain total silent.

35. From the evidence on record, it emerges that there is no eyewitness to the incident. The witnesses, who reached the house of the deceased immediately after the incident, have not supported the prosecution case and have been declared hostile. However, it is any established fact that the incident took place at the house of the accused in the early hours in the morning, at which point of time, ordinarily the accused would be at home. In his statement under section 313 of the Code, the appellant-accused has not taken a stand that he was not at home when the incident took place. The deceased who is the wife of the accused, was found in a grievously injured condition inside the house, therefore, as to how she was injured would be a fact especially within the knowledge of the appellant and hence, in view of the provisions of section 106 of the Evidence Act, the burden lay upon the accused to explain as to how she had sustained such injury. He, however, has failed to discharge such burden.

36. On behalf of the appellant, reliance has been placed upon the decision of the Supreme Court in the case of Joydeb Patra v. State of W.B., (supra),

for the proposition that the burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution and it is only when this burden is discharged that the accused could prove any fact within his special knowledge under section 106 of the Evidence Act to establish that he was not guilty. Reliance was also placed upon the decision of the Supreme Court in the case of *Reena Hazarika v. State of Assam* (supra), for the proposition that in a case of circumstantial evidence, the prosecution is required to establish the continuity in the links in the chain of circumstances, so as to lead to the only inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the innocence of the accused. Mere invocation of the last seen theory, sans the facts and evidence in a case, will not suffice to shift the onus upon the accused under section 106 of the Evidence Act, 1872 unless the prosecution first establishes a prima facie case. Reliance was also placed upon the decision of the Supreme Court in the case of *Jose v. Sub-Inspector of Police* (supra), wherein the court held that in the absence of any persuasive evidence to hold that at the relevant time the appellant was present in the house, it would also be impermissible to cast any burden on him as contemplated under section 106 of the Evidence Act. In the facts of the said case, the appellant had, by examining the witnesses, established that he had not returned home on that day. Reliance was also placed upon the decision of the Supreme Court in the case of *Subramaniam v. State of T.N.* (supra), wherein the court observed that so far as the circumstance that they had been living together is concerned, indisputably, the entirety of the situation should be taken into consideration. Ordinarily when the husband and wife remained within the four walls of a house and a death by homicide takes place, it will be for the husband to explain the circumstances in which she might have died. However, one cannot lose sight of the fact that although the same may be considered to be a strong circumstance, but that by alone in the absence of any evidence of violence on the deceased cannot be held to be conclusive. It may be difficult to arrive at a conclusion that the husband and the husband alone was responsible therefor.

37. In the opinion of this court, for the reasons recorded hereinabove, the above decisions would not be applicable to the facts of the present case,

inasmuch as the prosecution had proved various circumstances against the appellant-accused and since the incident had taken place inside the house

of the appellant, it was for the appellant to explain as to how the deceased had died inside the house. It may be pertinent to note that in *Subramaniam*

v. State of T.N. (supra), there was no evidence of violence on the deceased, whereas in the facts of the present case the deceased has sustained

several injuries and it is established that her death was a homicidal one.

38. At this juncture reference may be made to certain decisions of the Supreme Court in cases where the incident took place inside the house where

the deceased and her husband were residing together. In *Ratnesh Kumar Pandey v. State of Uttar Pradesh*, (2015) 3 SCC 53,6 the Supreme Court

held thus:

“10. The question for consideration is: whether the chain of circumstances noted and found proved against the appellant leads to the only

hypothesis in respect of the guilt alleged against the appellant? With that perspective in mind, when we consider the circumstances noted by the trial

court which we have in *seriatim* referred to in the earlier part of the judgment we find that when the appellant and the deceased were living together

immediately before the death of the deceased the whole burden was upon the appellant to show as to who else was responsible for the killing of the

deceased. Except the evidence relating to the prior grievances expressed on behalf of the deceased to PW 1 as regards the beatings inflicted on her

by the in-laws of the deceased there was no other version placed before the court for implicating anybody else to have any grievance as against the

deceased. Keeping the said situation in mind when we consider the circumstances noted by the courts below which were duly supported by the legally

acceptable evidence on record, it will have to be stated that the burden was heavily upon the appellant to show that he had nothing to do with the

killing of the deceased.

11. The plea of the appellant that he was away from the spot on the intervening night of 30-1-2001 and 31-1-2001 was disbelieved by the trial court by

rejecting the evidence of DW 1. When we examined the said conclusion of the trial court, we are convinced that the reasoning of the trial court for

not accepting the version of DW 1 cannot be found fault with. The trial court has given more than one reason why the version of DW 1 cannot be

accepted and we do not find any flaw in the said reasons. Therefore, once the

said plea of alibi put forth on behalf of the appellant is ruled out, then it will be for the appellant to satisfactorily show as to who else was responsible for the killing of the deceased. Though other co-accused including the co-accused who were related to the appellant were arrayed along with one other friend of the appellant by name Ramzan, it has come out in evidence that none of them were in any way responsible for the killing of the deceased. In the said background, the various circumstances narrated in the earlier part of the judgment found a complete chain without any break in its links and the said set of circumstances conclusively proved that it was the appellant and the appellant alone who alone could have committed the crime of the killing of the deceased as concluded by the trial court and as confirmed by the High Court in the impugned judgment¹. We have no reason to take a different view than what has been held by the trial court as well as by the High Court with regard to various circumstances which ultimately persuaded the courts below to find the appellant guilty of the alleged offence.

12. As far as the contention that the High Court found everything in order in the bedroom is concerned, the same will have to be taken in the sense that there was no indication of any attempt to steal or rob any of the valuables from the bedroom. When the deceased was found dead with as many as 20 injuries all over her body, the said observation of the High Court will have to be read objectively and not superficially. As far as the contention of referring to a mere blood spot in Ext. 6 (sweater) is concerned, when the FSL Report, Ext. K-23 confirmed the similar blood group in Exts. 1 and 6, it is immaterial whether the blood content in Ext. 6 was less or more. The said contention also does not merit any consideration. As far as the contention that the police foisted a case when he returned back home after his trip to Gonda at 9.00 a.m. is concerned, when his plea of alibi was disbelieved, on that very ground that stand will fail. Except the ipse dixit to claim that he was arrested and the case was foisted against him, he did not make any attempt to support the said version.

13. Mr Aggarwal in his submissions lastly contended that the appellant has already suffered more than 10 years's imprisonment and subsequently got married when he was on bail and that he has also got children after such marriage, therefore, the offence can be modified into one under Section

304-B and a lesser punishment can be awarded. However persuasive such submission may be on behalf of the appellant, when we considered the injuries found on the body of the deceased, we find that the deceased had suffered as many as 20 injuries and all of them were incised wounds caused by Ext. 1, the knife used by the appellant for the killing. The deceased was assaulted in such a manner that the body was like minced meat in the process of her killing. Therefore, that very fact dissuades us from showing any lenience to the appellant for showing any sympathy in the matter of punishment. Therefore, we do not find any scope to modify the sentence imposed on the appellant. Consequently the appeal fails and the same is dismissed.â??

38.1 In Babu v. State of T.N., (2013) 8 SCC 60, the Supreme Court held thus:

â??21. It is also pertinent to note that PW 5 Dr Rajabalan stated that the injuries sustained by the deceased could have been caused 10 to 12 hours

prior to the post-mortem. We have already stated that the post-mortem was conducted at 5.00 p.m. Thus, the death occurred around 6.00 a.m. The

death occurred in the house where the deceased resided with A-1 Babu. Presence of the accused at 6.00 a.m. in the house is natural. Besides, it is

not contended by A-1 Babu that he was not present in the house when the incident occurred. To this fact situation, Section 106 of the Evidence Act is

attracted. As to how the deceased received injuries to her head and how she died must be within the exclusive personal knowledge of A-1 Babu. It

was for him to explain how the death occurred. He has not given any plausible explanation for the death of the deceased in such suspicious

circumstances in the house in which he resided with her and when he was admittedly present in the house at the material time. This circumstance

must be kept in mind while dealing with this case. We are mindful of the fact that this would not relieve the prosecution of its burden of proving its

case. But, it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding

the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, has offered an explanation which

might drive the court to draw a different inference. In this case, in our opinion, the prosecution has succeeded in proving facts from which reasonable

inference can be drawn that the death of the deceased was homicidal and A-1

Babu was responsible for it. A-1 Babu could have by virtue of his special knowledge regarding the said facts offered an explanation from which a different inference could have been drawn. Since he has not done so, this circumstance adds up to other circumstances which substantiate the prosecution case.

22. In *Tulshiram Sahadu Suryawanshi v. State of Maharashtra*, (2012) 10 SCC 373, while dealing with Section 106 of the Evidence Act, this Court observed as under:

“A fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as to the most probable position. The above position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilised. Section 106 however is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, has offered an explanation which might drive the court to draw a different inference.”

38.2 Thus, the Supreme Court has held that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as to the most probable position. The above position is strengthened in view of section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in section 106 of the Evidence Act can also be utilised. Section 106, however, is not intended to relieve the prosecution of its burden to prove the

guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, has offered an explanation which might drive the court to draw a different inference. In the facts of the present case, the prosecution has duly established that the incident took place in the morning hours inside the house where the appellant and the deceased were residing together with their children; that there were disputes and quarrels between the appellant and the deceased; that the deceased had died a homicidal death; that after the postmortem came to be performed, the dead body was handed over to the brother of the deceased and the last rites took place at her paternal home. Once the prosecution has established that the deceased was subjected to violence inside her home in the early morning hours when the appellant would ordinarily be at home, it was for the appellant to explain as to how she had sustained such injuries or to establish that he was not present at home when such incident took place. However, the appellant has chosen to maintain total silence in this regard. Moreover, certain other factors also point to the guilt of the accused, inasmuch as if he was innocent, upon hearing of the incident he would have rushed home and would have been present at the hospital where the deceased was admitted after the incident and would have taken custody of the dead body and performed the last rites of the deceased, however, it has been proved that the dead body was handed over to the brother of the deceased and the last rites had been performed at her parental home. Moreover, none of the witnesses refer to his presence at the hospital or anytime thereafter till he presented himself at the police station after his wife passed away. Thus, the fact that the appellant in his statement under section 313 of the Code has not come up with any explanation as to how and under what circumstances Shakuben had died inside the house where they were residing together as well as the fact that he has not stated as to where he was at the time of the incident and his conduct after the incident, leads the court to draw an adverse inference against the accused. Considering the other evidence which has come on record, which reveals that there were disputes between the accused and the deceased and that the deceased had come to her matrimonial home after a compromise

had been executed by the accused stating that he would not harass her any longer, the accused had also motive for commission of the offence.

39. On behalf of the appellant, it has been contended that the provisions of section 313 of the Code have not been duly complied with, inasmuch as the

circumstance of the serological report has not been put to the accused in a proper manner. In this regard, a perusal of the statement of the accused

recorded under section 313 of the Code reveals that the trial court had put the circumstance with regard to the panchnamas drawn by the

Investigating Officer and had stated with regard to forwarding of the samples seized under the panchnamas to the Forensic Science Laboratory.

Thereafter, the trial court has stated that various documents being Exhibits 65 to 84 have been produced by the Investigating Officer and had called

upon the accused to say as to what he wanted to say in this regard. According to the learned advocate for the appellant, the circumstance of the

serological report, namely, that the same reflected that the blood group of the deceased was 'A' group and that the bloodstains found on the

weapon namely stick, allegedly used in the commission of the offence was also of 'A' group, was not specifically put to the accused.

39.1 Reliance was placed upon the decision of the Supreme Court in the case of Tara Singh v. State (supra) for the proposition that the whole object

of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must,

therefore, be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an

accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is, therefore, in no fit position to understand

the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that

an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. The court, however, has thereafter proceeded to state

that it does not suggest that every error or omission in this behalf would necessarily vitiate a trial because, in the opinion of the court, errors of this

type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether

prejudice has been occasioned or is likely to have been occasioned. Various decisions of the Supreme Court as referred to hereinabove have also

been cited for a similar proposition of law.

39.2 On behalf of the prosecution, the learned Additional Public Prosecutor has placed reliance upon the decision of the Supreme Court in the case of

Nar Singh v. State of Haryana (supra), wherein the court has observed that so far as section 313 CrPC is concerned, undoubtedly, the attention of the

accused must specifically be brought to inculcable pieces of evidence to give him an opportunity to offer an explanation, if he chooses to do so. The

court held that the question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance

with section 313 CrPC has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under section 313

CrPC, it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the

prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that the accused has suffered some disability or

detriment in relation to the safeguard given to him under section 313 CrPC. Such prejudice should also demonstrate that it has occasioned failure of

justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case,

such prejudice may be implicit and the court may draw an inference of such prejudice. Various other decisions for a similar proposition of law have

been relied upon on behalf the prosecution.

39.3 Examining the facts of the present case in the light of the principles of law as noted hereinabove, it is not as if the serological report has not been

put to the accused at all. The only thing is that it has not been put in the manner suggested by the learned advocate for the appellant, viz., the appellant

has not been specifically told that the serological report reflects that the blood of the deceased and the bloodstains found on the clothes of the

deceased and on the stick allegedly used in the commission of the offence, are all of A group. However, the fact regarding obtaining the blood

samples, recovery of clothes of the deceased, discovery panchnama, serological report, etc., have, in fact, been put to the accused. Though the

learned advocate for the appellant has stated that the provisions of section 313 of the Code have not been duly complied with in the manner laid down

by the Supreme Court in the case of Tara Singh v. State (supra), he has not been

able to point out as to how non-compliance of section 313 of the Code has materially prejudiced the accused. The Supreme Court in *Nar Singh v. State of Haryana* (supra) has held that even assuming that some incriminating circumstances in the prosecution case had been left out, it cannot be inferred that any prejudice had been caused to the accused. It is for the accused to show that he has suffered some disability or detriment in relation to the safeguard given to him under section 313 of the Code and such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The present case stands on a better footing than in the case of *Nar Singh* (supra) inasmuch as the circumstances have been put to the accused; but the same have not been put in the manner suggested by the learned advocate for the appellant. However, on behalf of the appellant accused nothing has been shown to establish that the accused suffered from disability or detriment in relation to the safeguard given to him under section 313 of the Code, nor has it been demonstrated that such prejudice has occasioned failure of justice to the accused. As held by the Supreme Court in *Nar Singh v. State of Haryana* (supra), the burden is upon the accused to prove the prejudice that has been caused to him, whereas in the present case, the accused has failed to do so. Moreover, in the facts and circumstances of the case, such prejudice is not implicit that the court may draw an adverse inference. Under the circumstances, the contention that the provisions of section 313 of the Code have not been properly followed does not merit acceptance.

40. On behalf of the appellant it has been alternatively contended that the conviction of the accused under section 302 of the Indian Penal Code is required to be converted to a conviction under section 304, Part II of the Indian Penal Code for the reason that the relationship between the accused and the deceased has been established, namely, that they are husband and wife; there was no deep rooted enmity between the two and that the husband had no motive to do away with his wife; the weapon in question is a stick which was something handy which he picked up and in a fit of fury inflicted some injury; and that none of the injuries is independently sufficient to kill the deceased, but it is cumulative effect which caused the death.

40.1 In this regard it may be noted that the medical evidence as referred to hereinabove reveals that the deceased had sustained several injuries which

were grievous in nature, most of which were on the head and the face and which included fractures. Thus, this is not a case of a single blow inflicted

in the spur of the moment, but the deceased appears to have been mercilessly beaten up. Moreover, the appellant has not pleaded that the incident had

happened in the spur of the moment and has maintained silence as regards his presence at the scene of incident. Under the circumstances, it is not

possible to hold that the appellant is guilty of the lighter offence under section 304 Part II of the Code.

41. In the light of the above discussion, the court is of the view that the prosecution has duly proved the chain of circumstances which unerringly point

towards the guilt of the appellant-accused. The prosecution has duly proved the charge for the offences under section 498A and 302 of the Indian

Penal Code. However, insofar as the charge under section 135 of the Gujarat Police Act is concerned, the weapon used is a stick which may normally

be found in the house. The offence has taken place inside the house and therefore, it cannot be said that there was any violation of notification issued

by the District Magistrate Anand. The conviction of the appellant for the offence under section 135 of the Gujarat Police Act therefore, cannot be

sustained.

42. For the foregoing reasons, this court does not find any reason to interfere with the impugned judgment and order or conviction and sentence,

except to the extent the appellant has been held guilty of the offence under section 135 of the Gujarat Police Act.

43. In the light of the above discussion, the appeal partly succeeds and is accordingly allowed to the following extent. While maintaining the judgment

and order of conviction and sentence dated 31.3.2016 passed by the learned Additional Sessions Judge, Anand in Sessions Case No.6 of 2014 insofar

as the offences punishable under section 302 and 498A of the Indian Penal Code are concerned, the same is set aside to the extent the appellant has

been convicted and sentenced for the offence punishable under section 135 of the Gujarat Police Act.

44. The record and proceedings be forthwith sent back to the concerned trial court.