



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.1253 OF 2019

Hariomdas Govinddas Bainade
Age : 37 yrs, occ : labour
R/o Kathor Bazar, Tal. Bhokardan,
District Jalna.

At Present r/o Plot No. 18,
Marutinagar, Mayurpark,
Harsool, Aurangabad.

Appellant

Versus

The State of Maharashtra

Respondent

...

Mr. S.G. Ladda, Advocate holding for Mr. Sagar S. Ladda,
Advocate for the appellant.
Mrs. Uma Bhosale, A.P.P. for respondent – State.

...

**CORAM : NITIN B. SURYAWANSHI AND
SANDIPKUMAR C. MORE, JJ.**

Reserved on : 14.08.2025
Pronounced on: 01.10.2025

Judgment (Per Sandipkumar C. More, J.) :

1. By way of this appeal, the appellant Hariomdas Govinddas Bainade i.e. the original sole accused, is challenging his conviction recorded by the learned Additional Sessions Judge, Aurangabad (hereinafter referred to as, “learned trial Judge”) for the offences punishable under Sections 302 and 309 of the Indian Penal Code (“I.P.C.” for

short) in Sessions Case No. 26 of 2018, under judgment and order dated 06.11.2019. Learned trial Judge has convicted the appellant for the offence punishable under Section 302 of I.P.C. and sentenced him to undergo imprisonment of life and to pay fine of Rs. 1,000/- i/d to suffer rigorous imprisonment for six months. The appellant is also convicted for the offence punishable under Section 309 of I.P.C. whereby he is sentenced to undergo rigorous imprisonment for two months and to pay fine of Rs. 500/-, i/d to suffer rigorous imprisonment for three months.

2. According to prosecution case, one Gendabai Laxman Pawar i.e. PW-2 lodged report with Harsul Police Station on 05.10.2017 alleging that she was residing in rented premises at Marutinagar, Mayur Park, Harsool, Aurangabad. Her younger daughter Kalpana got married with appellant/accused in the year 2004 and gave birth to two daughters and one son. Kalpana was residing with the appellant and children in a rented premises of one Bakal i.e. PW-7 at Marutinagar, Mayurpark. Appellant/accused was Mason by profession, whereas Kalpana was Sweeper in Sai Hospital. Appellant/accused used to suspect about chastity of his wife. On that count he used to beat Kalpana frequently.

3. In the intervening night of 04.10.2017 and 05.10.2017 at about 2.00 a.m. informant Gendabai received telephonic call from her grand daughter Netal i.e. daughter of Kalpana and Netal told her that the appellant hit hammer on the head of Kalpana and also tried to cut his own throat by means of marble cutter machine. Netal further informed that blood was oozing from the head injury of Kalpana and injury sustained by the appellant. After receiving such information, Gendabai immediately rushed to the spot of incident where she saw her daughter Kalpana and son-in-law i.e. the appellant/accused lying in injured condition on the bed. On making enquiry with Netal, she told that on 04.10.2017 at about 6.00 p.m. appellant returned home by finishing his work. At the relevant time, Kalpana told the appellant that she was to attend certain work by visiting Hedgewar Hospital in early morning at about 6.00 a.m. On this count appellant got angry and quarreled with Kalpana. He made telephonic call to his brother and told him that Kalpana had destroyed his matrimonial relations and he did not want to live. Appellant then without having meal, went to sleep. However, during the night Netal heard shout of victim, and therefore, she, her sister and brother woke up from the sleep. The quarrel between Kalpana and appellant was going on and

appellant was holding iron hammer in his hand. Appellant told Netal to keep her mouth shut. Blood was oozing from the mouth, nose and head of Kalpana. Thereafter appellant took marble cutting machine and made an attempt to cut his throat. Eventually some part of throat of the appellant was cut in that attempt. Meanwhile a call was received from police on the mobile handset possessed by Netal and the informant Gendabai went near Maruti temple and brought police to the spot of incident. Police then immediately shifted the victim and appellant to Ghati Hospital by calling ambulance. However, Gendabai then learnt that her daughter Kalpana died in Ghati Hospital.

4. On lodging report by Gendabai Pawar, Harsul police station authorities registered Crime No. 123/2017 against the appellant for the offence punishable under Sections 302 and 309 of I.P.C. P.S.I. Kailas Pawar (PW-9) took over investigation of the said crime. During investigation he prepared inquest panchnama, spot panchnama and referred the dead body for postmortem. He also seized the hammer, marble cutting machine, blood mixed soil, simple soil and one blood stained bed sheet from the spot of incident. He also seized clothes of deceased and clothes of appellant/accused.

The seized articles were referred for chemical analysis and statements of witnesses were also recorded. On completion of investigation, appellant/accused was charge-sheeted for the aforesaid offence.

5. Learned trial Judge, after committal of case, conducted trial and convicted the appellant as mentioned above. Appellant had come with defence of total denial and his false implication at the hands of one Deelip Pawar i.e. PW-6.

6. Learned counsel for the appellant/accused submits that the trial Judge has definitely erred in appreciating the evidence on record and by drawing inference, convicted the appellant. According to him, the prosecution has examined Netal i.e. daughter of deceased Kalpana as an eye witness, but Netal (PW-5) has not supported the case of prosecution. He pointed out that the only eye witness to the incident has thus resiled from her statement, and therefore, her confessional statement recorded by police under Section 164 of the Code of Criminal Procedure, cannot be read in evidence. According to him, the learned trial Judge used the same as evidence of the guilt of appellant by ignoring vital provision of law that such statement is only having

corroborative value and cannot be treated as evidence. He pointed out that the landlord Devidas Bakal i.e. PW-7 has not stated anything about the presence of Gendabai i.e. the informant, PW-6 Deelip or PW-5 Netal on the spot of incident when he visited the spot just after the incident. He made specific reference to the statement made by A.S.I. Jadhav i.e. PW-4, who had taken deceased and appellant to Ghati Hospital.

7. Learned counsel for the appellant categorically pointed out that A.S.I. Jadhav has stated that he received information that one person had inflicted injuries on the person of deceased Kalpana and appellant accused. He further submitted that the alleged murder weapon hammer was not shown to PW-10 Dr. Ganakwar who conducted postmortem of the deceased. Further, according to the learned counsel for the appellant, Dr. Ganakwar has also not stated that the injuries sustained by deceased Kalpana was not in ordinary course of time likely to cause death which is necessary ingredient of the definition of murder. He further pointed out that PW-11 Dr. Meghna, who had examined the appellant, was not certain as to whether the injury sustained by the appellant, was self inflicted. The cutter machine with

which it was caused, was not shown to PW-11 Dr. Meghna and the nature of injury sustained by the appellant was also not disclosed. He pointed out that the prosecution suppressed further treatment of the appellant and cause of his injury. Thus, he submitted that merely on the basis of postmortem examination, the learned trial Judge erroneously held that the appellant committed murder of his wife.

8. Leaned counsel for the appellant further submitted that the injury found on the head of Kalpana was not possible by hammer. According to him, the learned trial Judge erred in drawing inference that PW-5 Netal was tutored and therefore she did not support the case of prosecution. He further submitted that the informant Gendabai i.e. PW-2 has deposed on the basis of information gathered from Netal, and therefore, her evidence is only hearsay evidence which is not admissible. Thus, while summing up, the learned counsel for the appellant submitted that the prosecution could not eliminate all the possibilities to come at a conclusion that there was no intervention of any third person. He also pointed out certain contradictions in the evidence of PW-2 Gendabai and PW-6 Deelip, who are close relatives of the deceased. Thus, he prayed for clear-cut acquittal of the

appellant/accused since the eye witness did not support the prosecution and the prosecution could not establish the chain of circumstances against the appellant/accused. Lastly, he submitted that no aid of Section 106 of Indian Evidence Act can be taken for conviction of the appellant/accused. He relied on the following judgments :

- (i) Shankarlal Gyarsilal Dixit vs State of Maharashtra (1981) 2 Supreme Court Cases 35*
- (ii) Sharad Birdhichand Sarda vs State of Maharashtra (1984) 4 Supreme Court Cases 116*
- (iii) Shambhu Nath Mehra vs State of Ajmer 1956 SCC Online SC 27*
- (iv) Nagendra Sah vs State of Bihar, (2021) 10 SCC 725*
- (v) Murlidhar and others vs State of Rajasthan, (2005) 11 Supreme Court Cases 133*
- (vi) George and others vs State of Kerala and another (1998) 4 Supreme Court Cases 605*
- (vii) Guruvindapalli Anna Rao vs State of Andhra Pradesh 2003 SCC OnLine AP 1231*
- (viii) Sheo Raj vs State of UP, 19063 SCC OnLine All 123*
- (ix) Suo Moto Writ (Cri.) No. 1 of 2017 (Supreme Court)*
- (x) Purushottam Ishvar Amin vs Emperor, AIR 1921 Bom.3*
- (xi) State of Karnataka vs P. Ravikumar @ Ravi and others (2018) 9 Supreme Court Cases 614*
- (xii) Chandigarh Administration, Chandigarh vs Dharamsing 1985 Supp. Supreme Court Cases 266*
- (xiii) State of Punjab vs Pritam Singh; (1077) 4 SCC 56*

(xiv) Koli Trikram Jivraj vs State of Gujrat; 1969 Cri LJ 409

9. On the contrary, learned A.P.P. supported the conviction of appellant/accused under the impugned judgment. According to her, the prosecution has definitely established the chain of circumstances pointing towards guilt of accused. According to her, as soon as Gendabai received information of the crime, she immediately lodged the report. Further, the inquest panchnama speaks about head injury and postmortem conducted by PW-10 Dr. Ganakwar has also supported the cause of death i.e. due to head injury. She further pointed out that it would only the daughter of deceased i.e. PW-5 Netal must have informed about the incident to Gendabai, otherwise there was no chance of getting knowledge in respect of incident at such odd hours, to Gendabai. According to learned A.P.P., PW-2 and PW-6 namely Gendabai and Deelip have corroborated each other on the point that they received information about the incident from PW-5 Netal. Moreover, PW-4 A.S.I. Jadhav also stated that call of information about the incident was also received at control room. So far as scientific evidence is concerned, she pointed out that human blood was found on all the articles and specifically blood of deceased was found on towel

seized from the spot. She further pointed out that human blood was also found on the cutter machine leading towards guilt of accused. She specifically pointed out that the defence taken by appellant/accused is most improbable and there was no intervention of third person as there was no possibility of theft, since cupboard in the house remained unopened. According to her, the attempt of appellant to commit suicide by cutting his throat, itself indicates his guilty mind and the appellant also failed to give plausible explanation about the death of Kalpana taking place within four walls of the house. She thus prayed for dismissal of the appeal by maintaining conviction of the appellant. She also relied on the following judgments.

*(i) Vijaya Singh abnd another vs State of Uttarakhand
2024 SCC OnLine SC 3510*

*(ii) Balvir Singh vs State of Uttarakhand,
AIR Online SC 836*

10. Heard rival submissions. Perused documents on record alongwith impugned judgment and citations. Also perused the original record and proceeding of Sessions Case No. 26 of 2018.

11. In short, the prosecution is contending that the deceased i.e. Kalpana, wife of appellant, was sleeping in her

house where appellant and her children were also present. The appellant, on account of his suspicion regarding her chastity, committed murder of his wife Kalpana by assaulting her on head with an iron hammer and thereafter also attempted to commit suicide by cutting his own throat with the help of marble cutting machine.

12. It has been alleged by the prosecution that the elder daughter of deceased and appellant by name Netal had witnessed the incident. Though Netal (PW-5) has not supported the case of prosecution and resiled from her earlier statement, but according to learned counsel for the appellant, the learned trial Judge treated her statement recorded under Section 164 of the Code of Criminal Procedure (for short, "Cr.P.C.") as substantive piece of evidence. He also relied on the observation in the case of *George vs State of Kerla*, *Sheo Raj vs State of UP*, *Suo Moto Writ (Cri) Petition No. 1 of 2017* and *Purushottam Ishwar Amin vs Emperor* (supra). On going through the aforesaid judgments carefully, it appears that sum and substance of these judgments is that, a statement recorded under Section 164 of Cr.P.C. cannot be a piece of substantive evidence under the provisions of Indian Evidence Act, but it is only to be used for corroboration or

contradiction. On this background, if we peruse the testimony of PW-5 Netal, it reveals that she has not supported the prosecution case by stating that she did not witness the incident at all. So far as her statement under Section 164 of Cr.P.C. is concerned, it has come on record in her cross-examination taken by the learned Prosecutor that she gone through the said statement and admitted it to be true. However, the cross-examination further indicates that there was intervention of the advocate of appellant/accused and thereafter she again stated that she did not recollect the contents of her statement under Section 164 of Cr.P.C. It is to be noted that by recording the conduct of PW-5 Netal, the learned trial Judge made observation that she was actually won over by the appellant/accused and thereafter her statement under Section 164 of Cr.P.C. was exhibited at Exh.68 after giving full opportunity of hearing to both sides. Learned counsel for the appellant, thus, submitted that use of statement recorded under Section 164 of Cr.P.C. is limited only for corroboration and contradiction.

13. Though the learned counsel for the appellant vehemently argued that how such statement cannot be used as evidence, but after going through the entire judgment, we

do not find anything that the learned trial Judge has convicted the appellant by considering the statement recorded under Section 164 of Cr.P.C. of PW-5 Netal as substantive piece of evidence. On the contrary, learned trial Judge has also observed that if the witness has not supported the contents of her statement under Section 164 of Cr.P.C. then it is only to be used for the purpose of corroboration and contradiction. Therefore, the submission of learned counsel for the appellant in respect of use of such statement wholly unnecessary, since the learned trial Judge has not based his conviction on this statement.

14. Admittedly, when the alleged eye witness has not supported the case of prosecution, then the nature of case changes to the case based on circumstantial evidence. Learned counsel for the appellant relied on judgments in the cases namely ***Shankarlal vs State of Maharashtra*** and ***Sharad Sarda vs State of Maharashtra*** (supra). In the case of ***Shankarlal***, it has been observed that, “*in a case of circumstantial evidence, the circumstances on which the prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. In the test as to whether cumulative effect of the circumstances establishes*

the guilt of the accused beyond the “shadow of doubt”, the “shadow of doubt”, even in the cases which depend on direct evidence, is shadow of “reasonable” doubt. Secondly in its practical application, the test which requires the exclusion of other alternative hypotheses is far more rigorous than the test of proof beyond reasonable doubt”.

Moreover, in the case of **Sharad Sarda**, the Hon’ble Apex Court has laid down five golden principles :

- 1. The circumstances from which the conclusion of guilt is to be drawn should be fully established;*
- 2. The facts so established should be consistent with the hypothesis of guilt and the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
- 3. The circumstances should be of a conclusive nature and tendency;*
- 4. They should exclude every possible hypothesis except the one to be proved; and*
- 5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*

The aforesaid observations are not in dispute and it is settled position that in cases resting solely on the circumstantial evidence, the prosecution must establish a complete chain of circumstances consistent only with the

guilt of accused.

15. It has come in the evidence of PW-1 Dattatraya Gawali, who is panch of the seizure of clothes of appellant/accused and also a panch of the spot panchanama, that he was called by Harsul police under a letter issued to his Manager. Accordingly he alongwith other panch Samadhan Patil went to Harsul Police Station and from there to Ghati Hospital, Ward No.18 alongwith the police. Police then seized ash coloured pant and one underwear from the person of the appellant, who was admitted there. He has further deposed that on the same day at about 3.30 to 4.00 p.m. they were called by police at Mayur Park, Plot No.18, Maruti Nagar, Harsul i.e. the place of residence of appellant and deceased. He stated that complainant Gendabai i.e. the mother of deceased was present there, who showed them the place of incident which was situated at the ground floor hall. He found a bed with pink coloured cover, stained with blood. According to him, the police seized following articles at the time of preparing spot panchnama (Exh.16):

1. Pink coloured bed cover with blood stains.
2. Faint green coloured towel having blood stains.
3. Faint yellow coloured pillow with blood stains.

4. One steel knife with plastic handle stained with blood.
5. Iron hammer with wooden handle, stained with blood.
6. Marble cutter machine with plastic handle stained with blood.

He further deposed that police then took ten photographs of the spot which are at Article Nos.A to J and he also identified the aforesaid articles seized from the spot in open Court, being Article Nos.1 to 6. Nothing adverse to the case of prosecution has been elicited in his cross-examination. Thus, the seizure and condition of spot as stated by this witness, cannot be doubted.

16. Further, the evidence of PW-3 Parvati Shantilal Gaikwad, who is panch on the inquest panchnama of deceased, indicates that on 05.10.2017 police had called her to Ghati Hospital to inspect the dead body of deceased. She found the deceased wearing red coloured top and brown coloured legging, both soaked in blood. According to her, there was head injury to the deceased and blood was oozing from the said injury above the right ear. She also noticed blood coming out from nose and mouth of the deceased and there was swelling on her right wrist. She admitted the contents of inquest panchnama which is at Exh.22. Though

she admitted in the cross-examination that she and deceased used to reside in the same locality and her family was on visiting terms with the deceased family, but nothing adverse to the case of prosecution has come on record in her cross-examination.

17. Further, if the evidence of PW-7 Devidas Bhaurao Bakal, the landlord of the appellant, is perused, then it is evident that he had rented two rooms on first floor to Gendabai on monthly rent of Rs. 3,000/- wherein deceased and appellant were residing alongwith their children. This fact is not seriously disputed by the appellant. This witness has categorically stated that on 05.10.2017 at about 1.30 to 2.30 a.m. he heard someone shouting as "Bakal, Bakal" from downstairs. When he went to gallery, he realized that police were calling him. He further stated that when he went down and entered the room of appellant, he saw appellant and his wife lying unconscious on the bed and blood was spread in the room. Thus, he alongwith police took both of them to Ghati Hospital in Ambulance. Though he stated that Gendabai told him that appellant killed her daughter, but he has not witnessed the actual incident in respect of the alleged criminal act of appellant. However, his evidence definitely

indicates that the appellant and deceased were lying on the bed in injured condition and there was blood spread in the room. He also identified the photographs taken by police on the spot of incident. Moreover, he also identified the appellant in the court as son in law of Gendabai. Though the evidence of this witness is not helpful in respect of the alleged criminal act of the appellant, but at least it establishes the fact that the appellant and deceased were found lying on the spot of incident in injured condition.

18. On perusal of the evidence of PW-10 Dr. Amul Garibdas Ganakwar i.e. the Medical Officer, who conducted autopsy of deceased Kalpana, it is evident that when the deceased was brought to him on 05.10.2017, he was working in Mortuary as resident doctor in Government Hospital, Aurangabad. He has stated that clothes of deceased comprising red coloured Kurta, purple coloured bra, cream coloured Pajama with white dots, purple coloured panty with gray coloured panty used as sanitary pad were sealed and handed over to Investigating Officer. According to him, there were blood stains on Kurta, Pajama and bra at various places. He found "C" shaped lacerated wound over right fronto parieto occipital region of size 18 cm x 3 cm. brain tissue deep on the

person of deceased and brain matter was exposed. There was under-scalp contusion of size 25 cm x 28 cm, dark red in colour. He also observed depressed, displaced multiple comminuted fractures on right fronto temporal occipital bone. He found another injury in the form of contusion of size 3 cm x 2 cm, red in colour over posterior medial aspect of left forearm (upper one-third). Accordingly he has mentioned the said injuries in column No.17 of the postmortem report which is at Exh.64. He also found head injuries as mentioned in column No.19 of the postmortem report. As such, he opined that deceased died due to head injury which was caused by hard and blunt object when hit hard. In the cross-examination, he has specially denied the suggestions given on behalf of the appellant that the injuries found on the person of deceased were possible in ordinary course or by accident or suicide or if a person running fast, fell on hard and sharp object. He has opined that the injuries sustained by the deceased, in ordinary course, were sufficient to cause death. Thus, his evidence indicates that the deceased died due to violent assault and not by any accidental fall.

19. Besides, there is evidence of PW-2 Gendabai Pawar i.e. the mother of deceased, who had occasion to see Kalpana

and the appellant in injured condition on the spot of incident. Therefore, from the evidence of PW-1, PW-2, PW-3, PW-7 and PW-10 Medical officer, it has been clearly established that death of Kalpana was unnatural and not accidental or suicidal.

20. It is alleged by the prosecution that the deceased and the appellant were residing in a rented house where the incident had taken place. Admittedly, the appellant was Mason by profession and deceased used to work in Sai Hospital. Further, it is the case of prosecution that the appellant used to pick up quarrel on account of his suspicion on the character of his wife Kalpana and on the day of incident also when Kalpana told him that she searched the work of Hegdewar Hospital and for that she was to go to the said hospital early in the morning at 6.00 a.m. on the next day, the appellant picked up quarrel with her and thereafter in the intervening night of 04.10.2017 and 05.10.2017 at about 1.30 a.m. the appellant committed murder of his wife Kalpana by inflicting blow of iron hammer on her head and then attempted to cut his own throat with marble cutter machine. Therefore, we now have to see the circumstances leading to the guilt of appellant/accused on the basis of the

evidence on record.

21. It has come in the evidence of PW-2 Gendabai that Kalpana was her younger daughter who got married with the appellant in the year 2004 and they were having two daughters and a son. Admittedly, the deceased was residing with the appellant at Mayur Park, Harsul and the appellant was doing mason work, whereas deceased was Sweeper in the hospital. PW-2 Gendabai has stated that there were strained relations between deceased Kalpana and appellant since the appellant was suspecting about her chastity and also used to harass her. This witness has stated that she tried to convince her daughter that one day there will be improvement in the behaviour of appellant towards her. She has specifically stated that the incident took place on 05.10.2017 and at about 1.30 a.m. she received call from her grand-daughter Netal i.e. PW-5 who informed her that the appellant assaulted Kalpana with hammer on her head. Accordingly, she rushed to the spot of incident and noticed that Kalpana had received head injury and blood was oozing from it and also from her nose and mouth. According to her, Netal further told her that the appellant suspected the character of Kalpana and assaulted her with hammer. Thereafter police van came to

the spot of incident and they took Kalpana and appellant in the Ambulance to Ghati Hospital. It is also mentioned in her evidence that the appellant himself cut his throat by means of marble cutter machine. Thereafter it is stated by her that the victim died in hospital and she then lodged report of the incident on 05.10.2017 as per Exh.18. She also stated that Special Judicial Magistrate recorded her statement under Section 164 of Cr.P.C. as per Exh.19.

22. Though PW-2 Gendabai had not witnessed the actual incident, but her evidence has established the fact that the appellant and deceased Kalpana were there in the house together and that the fact of suspecting character of Kalpana by the appellant. It is to be noted that this witness in her cross-examination has denied the suggestions given by defence counsel that on the day of incident the appellant, after consuming medicinal tablets had become unconscious and Kalpana herself inflicted blow of hammer and fell down. Further, it was also suggested that she alongwith her son Deelip had demanded amount from the appellant and on non payment of the same, they filed false case against him, to which she denied. Thus, the evidence of this witness is not shattered during the searching cross-examination. No

material omission or contradiction is there in her cross-examination to discredit her version.

23. PW-4 Namdeo Jadhav is the witness who was on patrolling duty on Mobile van from 09.00 p.m. of 04.10.2017 to 09.00 a.m. of 05.10.2017. As per his evidence, on receiving information he visited the spot of incident, took injured Kalpana and appellant from the spot of incident to Ghati Hospital in Ambulance van. There is nothing doubtful in the evidence of this witness as his evidence corroborates with the fact that the deceased Kalpana and accused were lying in the injured condition on the spot of incident. Further, the evidence of PW-6 Deelip Pawar, who is brother of deceased Kalpana, indicates that Kalpana and the appellant were residing at Mayur Park, Harsul, Aurangabad at the relevant time and the appellant was doing work of installation of floor, whereas Kalpana was doing job in the hospital. It has come on record in his evidence that the appellant was suspecting the character of Kalpana and used to beat her on that count. Further, it has also come on record that there were two lanes between his house and the house of Kalpana and appellant. According to him, Netal made telephonic call to him and told that the appellant inflicted blow of hammer on the head of

Kalpana resulting bleeding injury to her head. He also learnt that the victim was lying on the bed and appellant also tried to cut his throat. He stated that after the incident all the children of Kalpana and appellant were residing with the brother of appellant.

24. Though PW-2 Gendabai and PW-6 Deelip had not witnessed the incident, but their evidence is consistent on the point that they came to know about the actual incident from PW-5 Netal. Further, despite searching cross-examination, no vital admissions are elicited which could shatter the case of prosecution. On the contrary, it has come on record during the evidence of these witnesses that Kalpana was found in her own house with the appellant and both were in injured condition, especially Kalpana was having head injury, which according to PW-10 Dr. Ghanakwar, was possible by hard and blunt object. Thus, it has been already established that death of Kalpana took place in suspicious condition. Prosecution is claiming that the appellant, by doubting the character of Kalpana, assaulted her with iron hammer and inflicted its blow on her head resulting into her death. The spot panchnama (Exh.16) is indicative of the fact that Kalpana had sustained head injury and was lying on the bed

after the incident in pool of blood. It is extremely important to note that PW-1 Dattatraya Gawali i.e. panch of spot panchnama has established the fact that one iron hammer with wooden handle stained with blood was seized from the spot of incident. According to him, one marble cutter machine with plastic handle which was also stained with blood, was seized. It is to be noted that the appellant has not disputed his job of Mason, and therefore, presence of these articles in his house, cannot be said unnatural. Further, the evidence of Dr. Amul Ganakwar i.e. PW-10 is also supportive to the fact that the injury sustained by Kalpana on her head was possible due to hard and blunt object. As such, iron hammer found on the spot of incident is definitely hard and blunt object which could cause head injury to Kalpana. Though the learned counsel for the appellant raised objection that "C" shaped injury was not possible by the hammer seized from the spot, however no such suggestion was given to the Medical Officer PW-10 Dr. Ganakwar as to whether the injury, specially "C" shaped injury, was not possible by the hammer at Article No.5. Therefore, such objection on the part of the appellant has no force. It is to be noted that human blood has been found on the iron hammer suggestive of the fact that the appellant must have given blow of the said hammer

on the head of deceased.

25. Learned A.P.P. argued that when the death in the instant case had taken place within four walls of the house occupied by deceased and the appellant, then as per Section 106 of the Indian Evidence Act, the appellant/accused is under obligation to give proper explanation in what circumstances the deceased had sustained such fatal injury. For that purpose she relied on the judgment of of the Hon'ble Apex Court in the case of ***Balvir Singh vs State of Uttarkhand*** (supra) wherein it is held that, "*until a prima facie case is established by the prosecution, the onus does not shift to the accused. If the accused does not give any explanation or gives a false or unacceptable explanation, that by itself will a circumstance against the accused and it would then be an additional link that completes the chain of circumstantial evidence*". As against this, the learned counsel for the appellant has relied on the judgments of the Hon'ble Apex Court discussing the scope of Section 106 of the Evidence Act.

26. In the case of ***Shambhunath Mehra vs State of Ajmer*** (supra) it is observed that, "*purpose of Section 106 is only for exceptional situations where facts are especially*

*within the knowledge of the accused and it cannot override the settled rule that the burden of proving guilt is always on the prosecution except in very exceptional cases". In the case of **Nagendra Shah vs State of Bihar** (supra) the Hon'ble Apex Court observed that, "Section 106 of Indian Evidence Act applies only where the prosecution has first established facts from which a reasonable inference can be drawn about the existence of certain other facts lying within the special knowledge of the accused. If the accused fails to offer a proper explanation, the Court may draw an adverse inference. In cases based on circumstantial evidence, such failure of the accused may provide an additional link in the chain of circumstances, but if the prosecution has not established a complete chain, silence of accused or falsity of defence cannot by itself justify the conviction".*

27. Further, in the case of **Murlidhar vs State of Rajasthan** (supra) it has been held that, "*burden of proving guilt always lies on the prosecution. Section 106 of Evidence Act does not dilute or shift this obligation. It merely supplements it in certain limited situations*". It is further observed that, "*High Court wrongly relied on Section 106 since the prosecution case was not built on the facts*

exclusively within the knowledge of accused but rather on the testimony of eye witnesses. Therefore, the principle under Section 106 of Indian Evidence Act was inapplicable to the facts of the case". Thus, the learned counsel for the appellant, by relying on the aforesaid observations of the Hon'ble Apex Court, submitted that in the instant case also the burden never shifted to accused, and therefore, aid of Section 106 of Indian Evidence Act cannot be taken, since the prosecution has failed to establish the complete chain.

28. The evidence on record in this case indicates that the appellant and deceased were in the house where the incident took place. It is settled that part of the evidence of hostile witness can be considered if found beneficial to the prosecution. Even if we go by the theory put up by PW-5 Netal, who did not support the prosecution in her cross-examination on behalf of the appellant/accused, then also it is evident that she had stated, that after arrival of appellant in the night of 04.10.2017 in their house her mother Kalpana i.e. the deceased, after having meal, dropped Netal alongwith her brother and sister at the house of her maternal uncle i.e. PW-6 Deelip and returned back to their house i.e. the place where the incident had taken place. The other witnesses

namely PW-2 Gendabai and PW-6 Deelip have already stated that the appellant was there on the spot of incident where Kalpana was found in injured condition. Thus, it has been clearly established by the prosecution that at the time of incident appellant and deceased Kalpana were present in the house. Under such circumstances and in view of the observation of the Hon'ble Apex Court in the case of **Balvir Singh** (supra), the appellant is under obligation to offer plausible explanation as to how the deceased Kalpana sustained fatal injury to her head.

29. Let us consider the defence of the appellant/accused to ascertain whether the appellant has succeeded in giving such acceptable explanation which absolves him from the crime. On perusal of cross-examination of PW-2 it has come on record that that defence counsel had suggested her that on the day of incident appellant / accused consumed medicinal tablets, fell down and became unconscious and thereafter victim herself inflicted the injury to her head by hammer and she fell down. Such type of defence is highly improbable considering the fact that how the victim was able to inflict such severe blow of hammer on her own head which led to her death. Further, the appellant had also taken

defence as reflected from his statement under Section 313 of Cr.P.C. that when he took the medicine, his wife went to the house of Krishna i.e. the son of Deelip and thereafter he heard noise of uplifting glass on the ground. Somebody entered in his house and hit the glass on his throat and caused injury to his throat. Thereafter he fell down and received injury on his forearm. He claimed that he did not know anything what happened to his wife. By any stretch of imagination such type of defence cannot be digested, specially when both appellant and deceased Kalpana were found in injured condition on the spot of incident by prosecution witnesses. Even if it is presumed that some intruder might have entered in their house, but that must be with an intention of theft. However, nothing is there on record to indicate that somebody had committed theft of articles kept in their house, especially in cupboard. As such, it can be said that the appellant has definitely failed to give acceptable explanation as to how his wife received head injury leading to her death. Thus, in view of the observation in the case of ***Balvir Singh*** (supra), failure of accused to give plausible explanation about the aforesaid circumstance itself is an additional link against him in the chain of circumstantial evidence.

30. Prosecution is claiming that the appellant was doubting the character of his wife Kalpana and perhaps that was the motive for him to commit her murder. It has already come on record in the evidence of PW-2 Gendabai and PW-6 Deelip, who are respectively mother and brother of the deceased, that there were quarrels between appellant and Kalpana on that count. Moreover, learned trial Judge has also opined that motive for doing a criminal act is generally out of ire and one cannot normally see in the mind of another. It is further observed that motive is the emotion to do a particular act and many murders have been committed without any known or prominent motive. There are number of judgments indicating that motive is hidden in the mind of perpetrator, and therefore, it is very difficult for the prosecution to adduce evidence about the same. However, in this case, the fact come on record that there were disputes between the appellant and deceased since the appellant used to doubt on character of deceased. Under such circumstances, it can safely be inferred that the appellant was having grudge against her wife.

31. Further, it appears that the appellant has also been convicted for the offence under Section 309 of I.P.C.

Learned counsel for the appellant submitted that Section 309 of I.P.C. was in fact deleted. However, it is a matter of fact that it has been restored back. The evidence of PW-11 Dr. Megha Bangar, who had examined the appellant, indicates that on 05.10.2017 she examined the appellant in Ghati Hospital being a medical officer working there and found incised wound over anterior aspect of his neck of size 6 x 1.5 cm. According to her, it was fresh injury and it might have been caused by sharp cutting object. She stated that the said injury was simple in nature. She has specifically stated that possibility of self inflicted injury could not be ruled out. In view of such evidence, the possibility of cutting his own throat by the appellant with marble cutter machine, can be inferred, especially when no other plausible explanation is coming from the appellant himself about the same.

32. Considering all these aspects, the prosecution has established the following incriminating circumstances against the appellant/accused :

- (i) That, at the time of incident the appellant and his wife were present in their house.
- (ii) The wife of the appellant was found in injured condition, particularly having injury to her head which

was possible by hard and blunt object like hammer.

- (iii) Blood stained hammer as well as marble cutting machine which was also stained with blood, were found on the spot of incident. The presence of said articles considering the profession of Mason of the appellant, was very much natural on the spot. The appellant was also having cut injury to his throat which was possible by the said marble cutting machine.
- (iv) The appellant was doubting the character of his wife and there were frequent quarrels between them on that count.
- (v) Inability of the appellant to give acceptable explanation as to how his wife sustained such fatal injury since his defence is found highly probable.

Thus, by establishing all these incriminating circumstances, the prosecution has succeeded in establishing the complete chain of circumstances leading to the guilt of accused only. Though the learned counsel for the appellant submits that the prosecution establishing guilt of accused in the case based on circumstantial evidence has to exclude all the alternative hypotheses, but such type of expectation is highly impossible. On the contrary, if a complete chain is

established, the the accused is under obligation to give acceptable and plausible explanation. Therefore, what is disclosed from the entire evidence on record, that the prosecution has proved all the incriminating circumstances against the appellant accused in respect of his guilt. Moreover, no any other inference except the criminal act of the appellant, can be drawn. Thus, it appears that the learned trial Judge has rightly convicted the appellant by properly appreciating the evidence on record.

33. In view of the above, we do not find any merit in the appeal and the same is therefore dismissed.

(SANDIPKUMAR C. MORE)
JUDGE

(NITIN B. SURYAWANSHI)
JUDGE