



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.380 OF 2017

Maroti s/o Vitthal Honrao,
Age: 31 years, Occu.: Agri.,
R/o. Marshivani, Tq. Kandhar,
Dist. Nanded.

.. Appellant

Versus

The State of Maharashtra
Through Police Station, Kandhar,
Tq. Kandhar, Dist. Nanded.

.. Respondent

...
Mr. A. M. Gaikwad, Advocate for the appellant.
Mr. S. J. Salgare, APP for the respondent – State.
...

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

DATE : 5th September, 2023

JUDGMENT [Per Smt. Vibha Kankanwadi, J.] :-

. Present appeal has been filed by the original accused challenging his conviction by learned Additional Sessions Judge, Kandhar, District Nanded on 11.07.2017 after holding him guilty of committing offence punishable under Section 302 of Indian Penal Code in Sessions Case No.06 of 2016. The accused has been convicted for allegedly committing murder of his own daughter aged three months.

2. It is not in dispute that P.W.1 Annapurna is the wife of accused. They were blessed with son Shyam and daughter Shivkanya. Accused was an agriculturist. They were resident of village Marshivni, Taluka Kandhar, District, Nanded.

3. The prosecution has come with the case that P.W.1 Annapurna lodged report with police on 22.11.2015 stating that she had returned from her parents house on 13.11.2015 with daughter Shivkanya, who was then aged three months. On 20.11.2015 around 10.00 a.m., she had made Shivkanya to sleep on cot in the house (locally called as *Baaj*). Accused was at home. He told her that she should go to field and bring firewood. Therefore, she went to field. She came back around 11.30 a.m. The girl was groaning and therefore, she tried to take the girl, but accused was resisting her. She tried to breastfeed the girl, but the girl was not taking the milk. Therefore, she untied the cap tied to the neck of the girl (the cap is locally called as *Kunchi/Kulai/Topda*). Then she realized that there was scar like strangulating the neck. Thereupon she asked husband as to why he has done it, at that time, he told that the girl fell down from the cot (*Baaj*) and he has not strangulated her. Annapurna then raised shouts, as a result of which nephew came, then she herself, nephew and accused took the girl in Jeep for treatment at Dr. Jadhav's hospital, at Kandhar, however, he had not admitted the girl and, therefore, they went to Government Hospital,

Vishnupuri, Nanded. After the Doctor examined Shivkanya, it was told that as the strangulation has been done, she is unable to breathe and, therefore, she was admitted, however, she expired at about 8.15 a.m. on 22.11.2015. On the basis of said FIR, offence vide Crime No.141 of 2015 was registered for the offence punishable under Section 302 of Indian Penal Code with Kandhar Police Station and further investigation was taken up.

4. It appears that on the basis of Medico Legal Certificate, inquest panchanama was executed with the help of two panchas and the dead body was sent for postmortem. After the registration of the offence, panchanama of the spot was got executed and statements of witnesses were recorded. Accused came to be arrested. After the completion of the investigation, charge-sheet was filed. The accused was not released on bail.

5. After the committal of the case, the learned Additional Sessions Judge, Kandhar has framed charge at Exhibit-04. The prosecution has in all examined eight witnesses to bring home the guilt of the accused, after the accused pleaded not guilty. Taking into consideration the incriminating circumstances, the statement under Section 313 of the Code of Criminal Procedure has been recorded. The defence of the accused is of total denial. After hearing both sides and perusing the evidence on record, the learned Trial Judge has held that the prosecution has proved the offence beyond reasonable doubt and, therefore, the accused has been sentenced to suffer

imprisonment for life and to pay fine of Rs.5,000/-, in default, to suffer simple imprisonment for four months for the offence punishable under Section 302 of Indian Penal Code. Set off has been granted under Section 428 of the Code of Criminal Procedure. This is the order challenged in the present appeal.

6. Heard learned Advocate Mr. A. M. Gaikwad for the appellant and learned APP Mr. S. J. Salgare for the respondent – State.

7. It has been vehemently submitted on behalf of the appellant that the learned Trial Judge has not appreciated the evidence properly. Though the prosecution had come with the case that P.W.1 Annapurna had lodged the report, yet she had turned hostile. The contents of the FIR were not proved at all by her. The admissions given by her in her cross-examination taken on behalf of the accused have not been considered at all. After she was declared hostile, permission was granted to the prosecution to put the questions in the nature of cross. Those facts which she admitted were never put to the accused in his statement under Section 313 of the Code of Criminal Procedure. Therefore, the accused has been deprived of offering the explanation to those circumstances and, therefore, those circumstances which had come on record by way of cross by learned APP ought not to have been used against the accused. Same is the case with the testimony of P.W.3 Vishnu Honrao and P.W.4 Dnyanoba Jadhav. Both have turned hostile.

They have allegedly given admissions in the cross taken by the prosecution, but those circumstances were never put to the accused. The prosecution has examined the autopsy doctor P.W.6 Dr. Maroti Dake, who has stated that the cause of death was “asphyxia due to ligature strangulation.” He has not clearly stated that it was a case of homicidal death by ruling out the possibility of accident. P.W.6 Dr. Dake has stated that he had found two shallow, brownish, complete ligature marks around the neck one above the other at a distance of 0.3 cm apart from one another. Here, the prosecution is coming with the case that a small strip of cloth has been used to strangle deceased, then the question arises as to how two marks were present and in spite of those two strangulation marks, the girl had not died instantaneously though she was aged three months, but she died after two days. Therefore, the opinion given by P.W.6 Dr. Dake is doubtful.

8. It has been submitted on behalf of the appellant that the learned Trial Judge has not considered that P.W.1 Annapurna, P.W.3 Vishnu and P.W.4 Dnyanoba have admitted in their cross taken on behalf of the accused that when they went inside the house, at that time, the accused was not present. P.W.1 Annapurna rather says that her mother-in-law came when she raised shouts and told her that the accused has gone for answering nature's call. She has specifically stated that there is no arrangement of W.C. or bathroom in their house. Even P.W.3 Vishnu says that accused arrived

after about 15 to 20 minutes. When the accused was not present when it was realized that something has occurred to the girl, then the Trial Court was not justified in invoking the theory under Section 106 of the Indian Evidence Act. P.W.5 Kailash Jadhav is the person who had taken accused, P.W.1 Annapurna and the child in his vehicle to hospital at Kandhar and then to Nanded. He has also turned hostile, thereby his testimony cannot be used. Though the spot panchanama is not seriously challenged by the accused, yet the fact remains is that there was nothing at the spot which can be said to be incriminating against the accused and the spot panchanama has also been executed on 22.11.2015, when the alleged incident has taken place on 20.11.2015. The alleged murder weapon that is the strip of the cloth was found lying on the cot. There is no evidence on record adduced by the prosecution to prove that the spot of the incident was secured. P.W.7 Police Head Constable Ramsinha Bayas is the police officer, who had executed inquest panchanama and P.W.8 PSI Kalpana Chavan is the investigating officer. With this kind of evidence, the learned Trial Judge ought not to have convicted the accused.

9. Learned APP strongly opposed the appeal and supported the reasons given by the learned Trial Judge. He submitted that though the informant P.W.1 Annapurna has turned hostile, yet it is the settled legal position that entire evidence of a hostile witness need not be discarded. Same is the rule

as regards the testimony of P.W.3 Vishnu and P.W.4 Dnyanoba and P.W.5 Kailash. All of them have given admissions in their cross taken on behalf of the prosecution. P.W.1 Annapurna was firm in her examination-in-chief in saying that on the day of incident, she herself and son had gone out of the house. She had made Shivkanya to lie on the cot and had instructed the accused to look after her. Further, after she was declared hostile and her cross has been taken by the learned APP, she has admitted that after her return, she found Shivkanya was groaning. When she tried to breastfeed her, accused prevented her, but when still she attempted, the girl was not in a position to take the milk. Therefore, she had untied *Kulai*, tied around her neck and she found abrasions on the neck. Accused had replied that the girl had fallen down from the cot and he has not strangulated her. It has been observed on this point by the learned Trial Judge that if the accused was not present at all in the house as per the defence, then it was not necessary for him to give explanation to the wife in such a manner. When P.W.1 Annapurna left, the girl was alive in the company of father, but unfortunately, the father has committed murder of the daughter. As regards motive also, the learned Trial Judge has said that it is not always necessary to prove the motive even in the cases based on circumstantial evidence. Here, it might be that the girl has been born and then he will have to make arrangements for her marriage. The testimony of P.W.6 Dr. Dake would prove that it is a homicidal death. In all three injuries were found

externally. Therefore, the conclusion of the learned Trial Court that the case was proved beyond reasonable doubt needs to be upheld.

10. Before we proceed to appreciate the evidence from record, we are constrained to observe that the learned Trial judge, who has recorded the evidence, has not followed the parameters as to when the permission can be given under Section 154 of the Indian Evidence Act. It appears that merely because it is asked on behalf of the prosecution, the said permission has been granted. Only one sentence not supporting the prosecution case will not give right to the prosecution to seek permission under Section 154 of the Evidence Act.

The scheme of Section 154 of the Indian Evidence Act actually permits the party who calls a witness to put any questions which might be put in cross-examination by the adverse party. Therefore, something more is required than the mere denial of the earlier statement for the Courts to exercise the said discretion regarding granting such permission. It is expected that while granting such permission Court should assign certain reasons. We would like to rely on the decision in **Sri Rabindra Kumar Dey Vs. State of Orissa, [(1976) 4 SCC 233]**, wherein guidelines have been stated where the discretion to permit cross-examination can be granted and it has been held that :-

“Section 154 confers a judicial discretion on the Court to permit cross-examination and does not contain any conditions or principles which may govern the exercise of such discretion. The discretion must be judiciously and properly exercised in the interest of justice. The law on the subject is well-settled that a party will not normally be allowed to cross-examine its own witness and declare the same hostile, unless the Court is satisfied that the statement of the witness exhibits an element of hostility or that he has resiled from a material statement which he made before an earlier authority or where the Court is satisfied that the witness is made before an earlier authority or where the Court is satisfied that the witness is not speaking the truth and it may be necessary to cross-examine him to get out the truth. One such instance is where the witness resiles from a very material statement regarding the manner in which the accused committed the offence. Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the discretion to allow the party concerned to cross-examine its own witnesses cannot be allowed.

... In other words a witness should be regarded as adverse and liable to be cross-examined by the party calling him only when the Court is satisfied that the witness bears hostile animus against the party for which he is deposing or that he does not appear to be willing to tell the truth. In order to ascertain the intention of the witness or his conduct, the Judge concerned may look into the statements made by the witness before the Investigating Officer or the previous authorities to find out as to whether or not there is any

indication of the witness making a statement inconsistent on a most material point with the one which he gave before the previous authorities. The Court must however distinguish between the statement made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention. **Hence, the Court must scan and weigh the circumstances properly and should not exercise its discretion in a casual or routine manner.** The matter will largely depend on the facts and circumstances of each case and on the satisfaction of the Court on the basis of those circumstances.”

[Stress supplied]

Further, we would also like to rely on the decision in **Gura Singh Vs. State of Rajasthan, [(2001) 2 SCC 205]**, wherein it has been held that :-

“11. There appears to be a misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. This Court in **Bhagwan Singh Vs. State of Haryana, (1976) 1 SCC 389** held that merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely effect his evidence. The evidence remains admissible in the trial and there is no legal bar to base the conviction upon the testimony of such witness. In **Rabindra Kumar Dey (Supra)**, it was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile.

Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the Court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the Court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy.”

It has been further held in **Gura Singh (Supra)** that “on facts we find that said witness was wrongly permitted to be cross-examined. It was only on a post event detail that he did not concur with the suggestion made by the Public Prosecutor. That single point in our opinion was too insufficient for the Public Prosecutor to proclaim that the witness was made a volte-face and became totally hostile to the prosecution.”

Therefore, allowing a party to cross-examine its own witness without recording any reason for doing so cannot be taken as a valid exercise of discretion under Section 154 of the Indian Evidence Act.

11. PW.1 Annapurna, the informant, has deposed that her daughter Shivkanya was aged three months at the time of death, on the day of

incident which had taken place about a year prior to her deposition. She had gone along with her son out of the house. Shivkanya was in a sleep and she had put her on cot by instructing the accused to look after her. Thereafter, she returned to the house and she says that nothing had happened in between Shivkanya and accused. When this sentence has been stated, immediately the prayer was made to declare her hostile and permission was sought to cross-examine her and immediately the permission has been granted. This is not contemplated as per the above settled law. Thereafter the questions have been put in the nature of cross by learned APP and then she has denied that she had gone along with her son out of the house at about 8.00 a.m. This suggestion itself is wrong taking into consideration the FIR. In the FIR, it was 10.00 a.m. when she went out of the house. That means, even the learned APP had not studied the case properly, nor the Presiding Officer, who was recording the evidence, was not vigilant. P.W.1 Annapurna has then admitted that when she returned to the house, Shivkanya was groaning and when she wanted to breastfeed her, at that time, he prevented her from feeding daughter. Now, here the care ought to have been taken to state that it was the accused who was preventing P.W.1 Annapurna. Merely by using word 'he' the suggestion ought not to have been taken. When the girl was not taking the milk, she had loosen the *Kulai* and she found abrasions on the neck. Then she says that she had not asked accused as to why he had done. Then

again she answers that accused replied that daughter had fallen down from the cot and he had not strangulated her. P.W.1 Annapurna states that she started shouting and then her cousin came (as per FIR, he is the nephew and not cousin), then with accused and Vishnu, she took daughter to Dr. Jadhav and as he refused to admit her, they went to Civil Hospital, Nanded. P.W.1 Annapurna denied the suggestion that the doctor told her that Shivkanya was having difficulty in breathing on account of strangulation. Informant then admitted that Shivkanya was admitted in ward No.6 and died after two days. She says that her statement was recorded by police in Civil Hospital, Nanded. She has denied the thumb impression on the FIR as that of her own thumb and, thereafter, the suggestions have been put which she has denied. It appears that she has made a statement that matter was settled in between them out of Court and then she denied the suggestion that on that count in order to save the accused from the punishment, she was deposing falsely. Before we proceed to appreciate her cross taken on behalf of accused, we would like to say that all those admissions or circumstances which were in favour of the prosecution, were not put to the accused in his statement under Section 313 of the Code of Criminal Procedure. We would like to deal with that aspect taking into consideration the cross of P.W.3 Vishnu, P.W.4 Dnyanoba and P.W.5 Kailash at a later point of time.

12. PW.1 Annapurna in her cross taken on behalf of the accused has admitted that there is a partition made from Tatta in between the house of accused and house of Kishan, who is her elder brother-in-law, meaning thereby the two houses are adjacent to each other and separated by partition, which can be said to be a temporary partition. Her in-laws used to stay sometimes in her house and sometimes with the elder brother-in-law. On the day of incident, the in-laws were residing with the elder brother-in-law. As regards the day of incident is concerned, she states that when she had gone for picking firewood sticks and returned, he could not see the accused at home. When she took the daughter in her hand, the daughter started crying and then she saw the abrasions around her neck and, therefore, she started shouting. On hearing shouts, her in-laws came. Her cousin brother-in-law Vishnu and Dnyanoba arrived there and she made inquiry with them as to where the accused is. Her mother-in-law informed her that the accused had gone for answering nature's call. There is no facility of latrine in their house. She then says that they are required to go to their field which is about a kilometer away for answering nature's call. Accused arrived after about 15 minutes and she asked him also about the same and received the same answer. She has admitted that the husband and sister-in-law had taken active role in admitting Shivkanya to Civil Hospital, Nanded. She herself had not stated anything to police, but the police had recorded the statement as stated by the husband of her

sister-in-law. She has given answers to the income of her husband and says that they were cohabiting happily. Important point to be noted is that the learned Trial Judge has not considered all these answers in proper perspective. Only pick and choose method appears to have been adopted. When the contents of the FIR were not proved, then heavy burden was on the prosecution to prove those contents of the FIR and also the other circumstances beyond reasonable doubt.

13. At this stage itself, we would consider the testimony of P.W.3 Vishnu and P.W.4 Dnyanoba Jadhav. As aforesaid only after one sentence, P.W.3 Vishnu has been declared hostile and after three sentences P.W.4 Dnyanoba has been declared hostile. This procedure itself is therefore not adopted properly and, therefore, the admissions so called extracted by utilizing Section 154 of the Indian Evidence Act cannot be considered at all. They both have stated that they went to the house of accused after they heard shouts of Annapurna. The learned Trial Judge is very much harping upon the admission that has been given by both of them that when they were present, accused told Annapurna that he has not strangulated Shivkanya. In this context, the learned Trial Judge says that if at all he was not present, he ought not to have offered the explanation. This admission ought not to have been considered in isolation. In **Paramjeet Singh Alias Pamma Vs. State of Uttarakhand**, [(2010) 10 SCC 439], after taking note of the

observations in **State of Gujarat Vs. Anirudhsingh**, [(1997) 6 SCC 514] and based on the decision in **State of Rajasthan Vs. Bhavani**, [2003 (7) SCC 291], it has been observed that :-

“16. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the Court has to be very careful, as *prima facie*, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The Court should be slow to act on the testimony of such a witness; normally, it should look for corroboration to his testimony.”

Further, taking into consideration earlier decisions of the Hon’ble Supreme Court, it has been further observed that :-

“20. In view of the above, it is evidence that the evidence of a person does not become effaced from the record merely because he turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.”

14. Therefore, taking into consideration this legal position, though it can be said that the entire testimony of these three witnesses cannot be discarded, yet the learned Trial Court was not justified in considering their

cross taken by learned APP only. Whether that cross has been further shattered in the cross taken by the accused ought to have been considered. PW.3 and PW.4 have both admitted in the cross-examination that accused was not present when they came to the house of accused and he arrived after about 15 to 20 minutes. Therefore, the so called admission in the cross of learned APP that accused told Annapurna that he has not strangled Shivkanya's neck, he was not at all present as per his defence, then explanation ought not to have been offered; should not have been so interpreted by the learned Trial Judge.

15. Now, turning towards the point that, the facts, which had come in the cross by learned APP (after the exercise of powers by the learned Trial Court under Section 154 of the Indian Evidence Act), questions were not put in statement under Section 313 of the Code of Criminal Procedure, in **Sharad Birdhichand Sarda Vs. State of Maharashtra**, [(1984) 4 SCC 116], it has been held that, "the provisions of Section 313 of the Code of Criminal Procedure especially the second part is mandatory in nature. The Court is under legal obligation to put the incriminating circumstances before the accused and solicit his response. Circumstances which were not put to the accused in his examination under Section 313 of the Code of Criminal Procedure cannot be used against him and have to be excluded from consideration." Further in **S. Harnam Singh Vs. State (Delhi Administration)**, [(1976) 2 SCC 819], Hon'ble Apex Court has held that

“non-indication of inculpatory material and its relevant facts by the Trial Court to the accused adds to the vulnerability of the prosecution case. The recording of the statement of the accused under Section 313 of the Code of Criminal Procedure is not a purposeless exercise.” Similar view was taken in **Ashraf Ali Vs. State of Assam**, [(2008) 16 SCC 328], however, in **Shivaji Sahabrao Bobade Vs. State of Maharashtra**, [(1973) 2 SCC 793], it has been held :-

“16. ... It is trite law, nevertheless fundamental, that the prisoner’s attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate Court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate Court any plausible or reasonable explanation of such circumstances, the Court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial Court he would not have been able to furnish any good ground to get out of the circumstances on which the trial Court had relied for his conviction.”

16. It is well settled principle that the exercise required to be undertaken while putting questions as contemplated under Section 313 of the Code of Criminal Procedure is not an empty formality. It, in fact, gives an opportunity to the accused to explain the circumstances, which may be used against him. In **Paramjeet Singh (Supra)**, it has been observed that an improper examination/inadequate question under Section 313 of the Code of Criminal Procedure amounts to a serious lapse on the part of the Trial Court and is a ground for interference with conviction. However, in **Paramjeet Singh (Supra)** itself it is held that the accused will have to show as to what prejudice has been caused to him. The said point was summed up with the following observations :-

“13. Though a conviction may be based solely on circumstantial evidence, this is something that the court must bear in mind while deciding a case involving the commission of a serious offence in a gruesome manner. In **Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622**, this Court observed that it is well settled that the prosecution's case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence put up by the accused. However, a false defence may be called into aid only to lend assurance to the court where various links in the chain of circumstantial evidence are in themselves complete. This Court also discussed the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone and held as under :-

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

17. Here, in this case, as aforesaid, all these three witnesses had turned hostile and certain admissions were extracted in the cross taken by the learned APP, however, those circumstances have not been put to the accused in his statement under Section 313 of the Code of Criminal Procedure. Only question No.2 relates to what the informant P.W.1 Annapurna has stated in her examination-in-chief. There is absolutely no reference to the testimony of P.W.3 and P.W.4. Thus, absolutely no opportunity was given to the accused to put forth his say and then those admissions in the cross-examination have been used against the accused. If that opportunity would have been given, the accused might have given

some explanation and then the Trial Court might have interpreted the said explanation. The learned Trial Court has made reference to Section 106 of the Evidence Act which attributes to the fact within the knowledge of a person, but here the fact that emerged was that in her examination-in-chief PW.1 Annapurna only stated that when she left the house she had asked accused to look after the daughter and thereafter she has turned hostile. She has not supported the prosecution story. In her cross-examination by the accused she has given so many admissions, especially that when she returned the accused was not present and the mother-in-law told that accused had gone for answering nature's call. Possibility is that all these answers coming on record after the alleged compromise or with an intention to save the accused were given, yet we cannot give a go-by to the legal principles and the procedure. Therefore, non-examination of the accused in his statement under Section 313 of the Code of Criminal Procedure on the point of admissions extracted in view of the questions, which were put in the nature of cross after seeking permission under Section 154 of the Evidence Act, have caused prejudice to the accused and, therefore, trial has vitiated. Courts are bound to put each and every circumstance which may be used against the accused/incriminating against the accused or which is capable of incriminating him in his statement under Section 313 of the Code of Criminal Procedure.

18. Important point further to be noted is that a doubt is created in the mind of this Court as to whether the suggestion that was put to P.W.3 Vishnu and P.W.4 Dnyanoba by learned APP that accused told Annapurna that he has not strangulated Shivkanya was properly conveying the prosecution story. Prosecution story is that accused had strangulated his daughter. It was not suggesting or has not coming on record that on his own the accused was saying that he has not strangulated Shivkanya. If we read the contents of the FIR, then it is said that after the *Kulai* was untied by Annapurna, she saw the strangulation mark and thereupon she asked the accused as to why he has done the act. Thereupon that was the answer, but that is not the sequence that was put to P.W.3 Vishnu and P.W.4 Dnyanoba. As per the FIR Annapurna raised shouts, After this statement by the accused and then P.W.3 Vishnu came. In the FIR, there is no mention of arrival of P.W.4 Dnyanoba Jadhav. FIR is not the encyclopedia, but the said sequence of arrival of P.W.3 Vishnu and P.W.4 Dnyanoba has not been sought from P.W.1 Annapurna. If they had not arrived when the alleged statement was made by the accused to Annapurna, then where was the question of hearing the said statement by these two witnesses, but unnecessarily the learned Trial Judge has given much importance to the said circumstance and inferred that if accused was not present, then why he should give explanation that daughter fell down from the cot and he has not strangulated her. The said inference is absurd and prejudicial without

giving any opportunity to the accused to give his explanation on the same.

19. PW.6 Dr. Maroti Dake had noticed two strangulation marks. There is no explanation by the prosecution as to what could have been the possibility of two strangulation marks. The distance between two marks was 0.3 cm and it has been so noticed though the girl was only three months old. We can imagine the size of neck. In his examination-in-chief, he has stated that the strangulation is possible by Article No.1 i.e. strip of cloth, but then he says that the said strip of cloth should have been twisted. Important point to be noted is that the investigation appears to be not fair as the *Kulai* i.e. the cap which was around the neck of the girl was not seized by the prosecution. The said cap is always to be tied with the help of strips and if the cap is made up of wool, then it will have the twisting marks. The said *Kulai* was never shown to PW.6 Dr. Dake. If the said strip of *Kulai* or cap was already in the neck, why another strip would have been used, if at all the girl was to be killed. In his cross-examination, PW.5 Dr. Dake has admitted that width of Article No.1 is approximately 3 to 4 inch. He had not noted the width of the ligature mark of 3 to 4 inch in the postmortem report. He volunteered that he has already explained while describing injury No.1 in column No.17. The description of injury No.1 does not make a mention of the width. The maximum width of upper mark is said to be 1.00 cm. on the right side of neck and he has given different

dimensions, but mostly are the length. Nothing is corresponding to 3 to 4 inches. If he would have been shown the Kulai, he would have given a better opinion, but the investigation as well as the prosecution has not laid proper evidence. The expert has then tried to volunteer by saying that there must be two rounds taken around the neck of deceased. This is the explanation to ligature marks which has come as a voluntary thing at a later point of time. Even if we consider that the death of Shivkanya is homicidal in nature, yet as aforesaid there was no cogent and conclusive evidence against the accused.

20. Now, turning to the most important point regarding motive, the prosecution has not brought on record what was the motive or what could have been the motive for the accused to commit the crime. The learned Trial Judge has relied on the decision in **Narayan Vs. State of Maharashtra, [AIR 1971 SC 1656]** and **Rajendra Kumar Vs. State of Punjab, [AIR 1966 SC 1322]**. We do not want to dispute the ratio, however, it is one of the circumstance that is required to be considered in a case based on circumstantial evidence that if the evidence led by the prosecution though circumstantial in nature is unerringly pointing out towards the accused as culprit i.e. based on the golden principles laid down in **Sharad Birdhichand Sarda Vs. State of Maharashtra, [(1984) 4 SCC 116]**, then in that case, the ratio laid down in **Narayan (Supra)** and **Rajendra Kumar (Supra)** would be

helpful. Here, in this case, the girl was only three months old. P.W.1 Annapurna has not stated or it has not been extracted from her as to whether the accused was not happy with the birth of the daughter, was worried about her, expressed anguish. Here, the accused has a son and, therefore, unless it would have been pointed out that the accused was not happy with the birth of the daughter, why he would have thought of committing murder of his own daughter, is a question. Further, as per the FIR Exhibit-30 itself, Annapurna had returned from her parents house on 13.11.2015 and incident has taken place on 20.11.2015. No doubt, it has not been brought on record that she had gone for delivery at the time of Shivkanya and had returned only seven days prior to the incident. If that is so then it is hard to believe that within a period of seven days, the accused would have thought of committing murder of his own daughter. The prosecution has not proved the story beyond reasonable doubt. The evidence adduced by the prosecution was not sufficient to convict the accused and as aforesaid, because of the procedure that was undertaken, the trial has got vitiated and, therefore, the appeal deserves to be allowed. Hence, the following order :-

ORDER

1. The appeal is hereby allowed.

2. The conviction awarded to the appellant by learned Additional Sessions Judge, Kandhar, Dist. Nanded in Sessions Case No.6 of 2016 after holding him guilty for the offence punishable under Section 302 of the Indian Penal Code stands quashed and set aside.
3. The appellant stands acquitted of the offence punishable under Section 302 of the Indian Penal Code.
4. He be set at liberty, if not required in any other case.
5. The fine amount deposited, if any, be refunded to the appellant after the statutory period.
6. We clarify that there is no change as regards the order in respect of disposal of muddemal.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

scm