JOSE @ PAPPACHAN

v.

THE SUB-INSPECTOR OF POLICE, KOYILANDY & ANOTHER

(Criminal Appeal No. 919 of 2013)

OCTOBER 03, 2016

[PINAKI CHANDRA GHOSE AND AMITAVA ROY, JJ.]

Penal Code, 1860: s.302 – Death of appellant's wife by hanging – Prosecution case that appellant along with his brother murdered his wife – Conviction of appellant only u/s.302 – Acquittal of appellant and brother-accused u/s.498-A – Conviction challenged by appellant – Held: The evidence of witnesses when considered in conjunction with the testimony of the doctor did not link the appellant directly or indirectly with the actual act leading to the unnatural death of the deceased – The circumstantial evidence adduced by the prosecution fell short of the requirement in law to return a finding of guilt against the appellant without any element of doubt whatsoever – The fact that both the accused persons were exonerated of the charge of cruelty u/s. 498A and that the co-accused, who allegedly had assisted the appellant in the perpetration of the crime had been fully acquitted by the courts below of all the charges also weakens the prosecution case – The facts and circumstances admit of a reasonable doubt in favour of appellant – Benefit of doubt granted to him.

Criminal jurisprudence: Suspicion of commission of crime – Held: Suspicion however grave cannot take the place of proof – Prosecution in order to succeed on a criminal charge cannot afford to lodge its case in the realm of "may be true" but has to essentially elevate it to the grade of "must be true".

Allowing the appeal, the Court

HELD: 1. Admittedly there is no eye-witness to the incident. The testimony of PWs 1, 6 and 7 would evince that when the persons sent by the appellant had reached the house of the appellant to fetch the medical records of his brother, they found the door open and when the deceased did not respond to their

A call, they entered through the door and found her in a hanging posture with movements, whereupon they raised alarm for which the appellant and others rushed to the place and the body of the deceased was brought down by cutting the saree. Though the conduct and the movements of the appellant prior thereto had been somewhat unusual and disoriented, the same per se does not irrefutably establish his culpability. The medical evidence also does not decisively establish the case to be of homicidal hanging. The unchallenged expositions of the doctor performing the post-mortem examination highlighting the absence of the characteristic attributes attendant on death due to homicidal hanging following strangulation further reinforce the possibility of suicide. The absence of definite medical opinion about the homicidal death of the deceased is a serious set back to the prosecution. [Paras 45, 47 and 48] [132-G; 133-E-G]

2. The evidence of the witnesses when considered in conjunction with the testimony of the doctor does not link the appellant directly or indirectly with the actual act leading to the unnatural death of the deceased. In 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. The consistent testimony of the appellant and his son to the effect that after alighting from the bus on their return from Pota, the deceased was made to accompany DW1 back home while the appellant did go in search of labourers for works in his compound on the next day and that thereafter till the time DW1 had departed for his ancestral house, the appellant did not return home, consolidates the defence plea of innocence of the appellant. This version of the appellant and his son is in accord with the statement made by the appellant under Section 313 Cr.P.C. as well. The reasoning of the courts below to dismiss the testimony of DW1 as untrustworthy on the ground that he feigned ignorance about the lady with whom his father allegedly had extra marital affairs and towards the appellant and thus insensitive to the death of his mother cannot be accepted. This witness at the time of his deposition was a major with the required maturity in the life's perspectives, and expectedly would not have lied for the appellant,

his father, only to see him through, though knowing him to be the real perpetrator of the crime. This is more so when the deceased was his own mother. [Paras 49, 50][133-H; 134-A-E]

3. The prosecution plea that the appellant had resigned from the service in the police department to move out to Jeddah/Saudi Arabia with the intention to perpetuate his illicit association with the lady thereat and that in a way he had deserted the deceased and the children, is also not borne out definitively by the materials on record. On the other hand, a plain perusal of the letters written by the deceased to the appellant while he was abroad, do not reveal anguished outbursts of a wife otherwise expected in such a situation or any fervent insistence for early return. Instead the contents thereof reveal narration of mundane happenings of day to day life, emphasis on the need for his required stay thereat for enhanced savings together with somewhat intimate feelings expected of a married couple physically estranged by compulsion of circumstances. The letters for the least, do not suggest any bitterness, disappointment, frustration and seething indignation of the deceased for the appellant being away at Jeddah/Saudi Arabia and allegedly with the lady. Instead there are traces of cheer for his expected return in near future. The authenticity of these letters and also of the records relied upon by the defence to demonstrate that the appellant while abroad used to remit money for the sustenance of the family, has not been impeached. On an overall consideration of the evidence available on record, it would be wholly unsafe to hold the appellant guilty of the charge of murder of his wife. The circumstantial evidence adduced by the prosecution falls short of the requirement in law to return a finding of guilt against the appellant without any element of doubt whatsoever. The fact that both the accused persons had been exonerated of the charge of cruelty under Section 498A IPC and that the co-accused, who allegedly had assisted the appellant in the perpetration of the crime had been fully acquitted by the courts below of all the charges also takes away the wind from the sails of the prosecution. [Paras 51, 52][134-F-H; 135-A-D]

4. In a criminal prosecution, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof and in a situation where a reasonable doubt is entertained

A **in the backdrop of the evidence available, to prevent miscarriage of justice, benefit of doubt is to be extended to the accused. Such a doubt essentially has to be reasonable and not imaginary, fanciful, intangible or non-existent but as entertainable by an impartial, prudent and analytical mind, judged on the touch stone of reason and common sense. It is also a primary postulation in criminal jurisprudence that if two views are possible on the evidence available, one pointing to the guilt of the accused and the other to his innocence, the one favourable to the accused ought to be adopted.The facts as obtained in the present case present a jigsaw puzzle in which several frames are missing to permit an unreserved opinion of the complicity of the appellant. The evidence adduced by the prosecution constituting circumstantial evidence in support of the charge does not furnish an unassailable basis to hold the appellant guilty of the charge of murder levelled against him. The facts and circumstances admit of a reasonable doubt in his favour. The circumstances brought forth by the prosecution do not rule out in absolute terms the hypothesis of the innocence of the appellant. It is wholly unsafe to maintain his conviction as recorded by the courts below. Therefore he is extended benefit of doubt to him. [Paras 53, 54,62 and 63][135-E-H; 138-E-F]**

E *Sharad Birdhichand Sarda v. State of Maharashtra* **(1984) 4 SCC 116 : 1985 (1) SCR 88;** *R. Rajendran Nair v. State of Kerala* **(1998) SCC (Crl.) 254;** *Sujit Biswas v. State of Assam* **(2013) 12 SCC 406 : 2013 (3) SCR 830;** *Dhan Raj @ Dhand v. State of Haryana* F **(2014) 6 SCC 745 : 2014 (7) SCR 476 – referred to.**

Case Law Reference

1985 (1) SCR 88	**referred to**	**Para 43**
(1998) SCC (Crl.) 254	**referred to**	**Para 43**
G **2013 (3) SCR 830**	**referred to**	**Para 60**
2014 (7) SCR 476	**referred to**	**Para 61**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 919 of 2013.

H From the Judgment and Order dated 21.11.2012 of the High Court

of Kerala at Ernakulam, in Criminal Appeal No. 668 of 2008. A

Basant R., Raghenth Basant, M. F. Philip, Kartik Ashok, Abhishek Tiwari (For Senthil Jagadeesan), Advs. for the Appellant.

G. Prakash, Jishnu M. L., Mrs. Priyanka Prakash, Mrs. Beena Prakash, Manu Srinath, Nishe Rajen Shonker, Advs. for the Respondents. B

The Judgment of the Court was delivered by

AMITAVA ROY, J. 1. The appellant stands sequentially convicted by the both the Courts below under Section 302 of the Indian Penal code (for short, hereinafter to be referred to as "IPC") and resultantly sentenced to suffer imprisonment for life and also to pay fine C of Rs. 10000/-.

2. At the trial, he along with his brother Benny Joseph, were indicted under Sections 498A/Section 302 IPC read with Section 34 IPC for having murdered his wife Neena. The Trial Court however acquitted both of them of the charge under Section 498A IPC. The co- D accused was also acquitted of the other charge. To reiterate, the conviction of the appellant under Section 302 IPC having been sustained by the High Court, he seeks panacean intervention in the instant appeal.

3. We have heard Mr. Basant R., learned senior counsel for the appellant and Mr. G. Prakash, learned counsel for the respondents. E

4. To appropriately outline the factual premise, apt it would be at the threshold to present the fascicule of the rival projections.

5. The appellant was a police constable at the time of marriage with the deceased on 19.6.1986 as per their customary rites whereafter they set up their matrimonial home to start with at their family house and F thereafter at the places of his postings in service. Allegedly, he developed an extra-marital relationship with one lady named Darly for which he used to ill-treat and harass his wife both physically and mentally whenever she used to express her reservations and objections to such alliance. According to the prosecution, under the influence of the said lady, the G appellant even resigned from his job and proceeded for Jeddah in the year 1997 where he and the said Darly lived as husband and wife. It is alleged that in order to legalise the relationship, the appellant plotted to eliminate the deceased and with that end in view, returned to India on 22.8.2000. He thereafter accompanied Neena, the deceased, for a

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A spiritual retreat to "Potta Divine Retreat Centre" but abruptly cut short their stay thereat and returned home on 19.9.2000. The accusation is that after their return on that date, sometime in between 6.30 to 8.30 p.m., the appellant smothered the deceased inside the room of his house, strangulated her by using a plastic rope and then hanged her from a B hook of the roof of the work area of the house by using a saree and thus brutally murdered her. The prosecution has imputed that in this heinous act, the co-accused his brother, who since has been acquitted, had assisted him.

6. The information of this incident was lodged by Mr. Cheriyan @ C Papputy with the Koonachundu Police Station whereafter the the appellant and the co-accused, his brother were arrested on 21.9.2000 and 15.11.2000 respectively. On the closure of the investigation, charge-sheet was laid against both the accused persons under Sections 498A/ 302 read with Section 34 IPC and eventually, the case was committed for trial to the Sessions Court, Kozhikod.

D 7. The accused persons denied the charge and claimed to be tried, whereafter the prosecution examined 25 witnesses including the doctor, who performed the post-mortem examination on the dead body as well as the investigating officer. Several documents were also proved and exhibited. The accused persons were examined under Section 313 Cr.P.C. E They stood by their denial and refuted the correctness of the incriminating circumstances with which they were confronted. They also examined three witnesses in defence.

8. The Trial Court, to reiterate, on a scrutiny of the evidence of the record and after analysing the rival contentions, acquitted both of F them of the charge under Section 498A but held the appellant guilty of the offence of murder of his wife Neena and convicted him under Section 302 IPC and sentenced him as above. The co-accused was exonerated of the charge under Section 302 IPC as well. The appellant failed to secure his acquittal before the High Court, which by the verdict impugned, has sustained the determination of the Trial Court.

G 9. Before adverting to the evidence adduced, it would be expedient to notice the defence plea for a purposeful appreciation thereof.

10. It is the assertion of the appellant that being compelled by financial distress and with the consent and approval of the deceased, he H had gone to Saudi Arabia on 12.9.1997 in search of better pastures,

after resigning from his service from the State Police Department. He claimed that his relationship with his wife had always remained very fond and affectionate and that out of the wedlock, they had two sons. To endorse this contention, he referred amongst others to the letters written by the deceased in particular to him while he was abroad. He maintained that he used to remit finances for the sustenance of the deceased and the children and that on his return to the country, he on the request of the deceased had accompanied to a divine retreat on 16.9.2000 to Potta, wherefrom they returned on 19.9.2000.

11. According to him, they alighted from the bus from Potta at their destination at about 7.30 pm. when they saw their elder son going for purchase of house hold articles. He then sent the deceased home with his son and he went in search for labourers to work on his property on the next day. He mentioned that in the process, he met Mullakkara Kunhumon, Sainaba, Jameela and Palliparambil Thankan and finalised with them for such work. According to him, he thereafter with Thankan went to the house of Edattankuzhi Jose and Cheriyan @ Papputty but found that Jose was away for a meeting. He thereafter proceeded towards his house and on the way was pushed down by two persons hurriedly coming from the opposite direction. On his hue and cry, persons from the locality rushed to the place and searched for these two persons, but in vain. As in the process, the co-accused, his brother suffered chest pain, the appellant requested Joy (PW7) and Cheriyan @ Papputty (PW1) to bring the necessary medical documents from his wife.

12. These two persons after reaching the house of the appellant, raised alarm and on hearing the cry, he (appellant) along with Anikkal Babu and Thankan, who were present there, rushed to his (appellant) house whereupon they saw Neena in a hanging posture from a hook in the roof of the work area of the house and that Joy and Cheriyan @ Papputty were holding her legs to lift the body upwards. The appellant thereafter took a knife (koduval) from his kitchen and brought down the body by snapping the saree by which the body was hanging. They then rushed Neena to the Medical College Hospital where she was declared to be dead. The appellant while insisting that he was innocent, laid the blame on the relations of the deceased to have foisted a false case against him.

13. As referred to hereinabove, the First Information Report was lodged by Cheriyan @ Papputty at 9.30 a.m. on the next day i.e.

A 20.9.2000, his version being that about 10 P.M. on 19.9.2000, while Benny (co-accused and brother of the appellant) was sitting in the tea shop of Pulluparambil Mathew (PW6), he suffered an epileptic attack for which he along with Mathew, on being requested by the appellant, went to his house to secure the medical papers from Neena. It was mentioned that when they reached the house, they found the door open with a lantern lit inside. As on their calls, the deceased Neena did not respond, they entered the house and found her in a hanging position from the hook on the ceiling at the work area at the rear side of the house and that she was struggling for life. They having raised alarm by that sight, the appellant and his neighbourers including Kunjumon, Regi and Thankan arrived at the spot, whereafter the appellant cut the saree by which Neena was hanging and took her in a jeep to a Medical College Hospital where she was declared dead.

14. In course of the investigation, the police conducted the inquest of the dead body and in the process also recorded the statement of PW6 Mathew who was present. His statement, as recorded on the date of the inquest i.e. 20.9.2000, is to the effect that on 19.9.2000 at about 9 p.m., while he was preparing to sleep, the appellant loudly called him as well as his brother Benny to come hurriedly. When the witness reached the place from where the appellant had shouted, he found the appellant asking somebody to stop and also abusing someone. When enquired, the appellant, stated to have seen two persons who had pushed him down and had ran away. They thereafter engaged themselves in search of the persons refereed to by the appellant but in vain. According to the witness, the appellant's brother Benny started feeling sick for which Kunjumon, who was present, was asked by the appellant to call a jeep to take him to the hospital. The appellant simultaneously asked the witness to go to his house and fetch the medical prescription from his wife Neena. The witness along with PW1 Cheriyan @ Papputty then went to the house of the appellant and when Neena did not respond to their calls, they open the door which was not bolted and on reaching the kitchen area, they found the deceased in a hanging position from a hook atop the kitchen veranda by a saree, but was gasping for breath. On seeing this, both of them loudly raised alarm and raised Neena upwards by holding her legs. The witness further stated that by that time, the appellant and others came running by hearing their cries and the appellant brought a knife from the kitchen, cut the saree, brought down the body and then

they took Neena thereafter in a jeep to Thalayada Hospital where the nurse there recommended that she be taken to the Medical College Hospital, They did so, but the doctor there declared her to be dead. A

15. The version in the FIR and the version of the informant,PW1 Cheriyan @ Papputty and PW6 Mathew, made at the earliest point of time after the incident, to start with, appear to be substantially consistent. B

16. PW1 Cheriyan @ Papputty testified that at 9.30 p.m. on 19.9.2000, he had gone to sleep after dinner, when he was awakened by PW7 Joy to be told that Neena had committed suicide. PW7, according to the witness, then was accompanied by the appellant and PW6 Mathew. He confirmed that prior to the date, the appellant and Neena had gone C together for retreat at Potta, leaving their children at their ancestral house. On being questioned, the appellant divulged that they had returned the same evening as Neena was adamant to come back.

17. The witness stated that on getting the news, he along with those present, including the appellant, ran to his house and on the way, D the appellant stopped a car that was passing and sent in it, the co-accused Benny, his brother. The appellant thereafter sent Joy to bring a jeep. When they reached the work area of the back of the house of the appellant, they found Neena hanging from the hook attached to the ceiling by a saree. The appellant brought a knife from the kitchen, cut the saree and brought the body down with the help of others. The E witness stated that in the meantime, Joy had come with the Jeep. They all carried Neena firstly to a private hospital where a nurse, on being told that it was a case of suicide, advised that the patient be taken to the Medical College Hospital. When they reached the hospital, the doctor on examining the Neena declared her to be brought dead. F

18. The witness mentioned about the injuries above the nose and side of the eyebrow and also swelling on the forehead of the Neena. When the witness asked about the injuries, the appellant told him that those might have been caused in the process of cutting the saree to bring the body down. The information about the incident was lodged on G the next day by him and he proved the same as Ex. P-1. The witness also confirmed that the appellant had later married one lady named Darly and that he had been living with her thereafter.

19. In the cross-examination, this witness disclosed that about 3/ 1/2 years before the incident, the appellant had resigned from his service H

A in the police department and had gone to the Gulf leaving behind Neena and children in the house built by him. He also mentioned about the ancestral house of the father of the appellant about 200 meters away from his house. The witness admitted as well that the co-accused Benny, brother of the appellant, had been then suffering from epilepsy and on the date of the incident as well, he had a bout of attack thereof.

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20. In the course of the cross-examination, this witness was sought to be discredited by referring to his earlier statements made in the course of the investigation. This was, as imputed by the defence as the principal witnesses PW1 Cheriyan, PW6 Mathew and PW7 Joy had been examined twice by the police, the last being on 22.1.2004 on the eve of submission of the charge-sheet, with an endeavour to highlight that the earlier statements had been tailored as desired and suggested by the appellant. Noticeably, the time lag between the date of the incident and that of the second recording of the statement of these witnesses on 22.1.2004, is nearly four years.

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21. PW6 Mathew deposed on oath that at the relevant time, he was running a tea shop in the locality which was very near the house where the appellant and the deceased used to reside. According to this witness, on the date of the incident at about 7 p.m., he had closed his shop to attend a meeting from where he returned at about 8.30 p.m. He found present at the shop, Jose, (nephew of the appellant) along with others. After some time they dispersed therefrom.

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22. According to the witness, later in the evening, when he had gone to sleep, the appellant came to his house at about 9 p.m. and called him. He also called his brother Benny and seemed to shout abuses at someone. The witness along with Jose ran towards the appellant and by that time, they reached the place, they found others gathered as well. The appellant disclosed to him that while he was returning to his house, he was pushed down by two persons on the way. The group assembled there, then tried to search for these persons but could not trace them. At that time, Benny, the brother of the appellant developed chest pain and he was taken to the shop of the witness. The appellant then requested the witness to go to his ancestral house to fetch tablets for Benny whereupon he along with Jackson did so. While passing by the front of the house of appellant, they noticed that the lantern inside was lit but the door was open. They did not see any movement in the house. The witness stated that when he returned with the tablets, the appellant

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enquired about the admit card and prescription for extending treatment to Benny. On the request of the appellant thereafter, the witness along with Joy PW7 went to the house of the appellant and when they reached there, they called out for Neena, but she did not respond. On this, they entered the house and found Neena hanging from hook in the roof of the work area at the rear end of the house. He and Joy thereafter ran back to the shop to inform about the incident, whereupon the appellant and PW1 accompanied them back to the house. The appellant asked Joy PW7 to bring a jeep to take Neena to the hospital. They then retrieved the body and took Neena to the hospital where she was declared dead. The witness mentioned that he had given the earlier statement as per the instructions of the appellant and that when he was interrogated by the Investigating Officer for the second time, he stated the correct facts.

23. In the cross-examination, the witness was confronted with the earlier statement that when he and PW6 had first seen Neena hanging, she was struggling and that they raised her upward and raised alarm on listening which the appellant and others had come running. He however denied the suggestion that he had departed from the earlier statement on being influenced by the family members of the Neena.

24. PW7 Joy was a taxi driver at the relevant time and had a jeep. This witness stated as well that at about 10 p.m. in the fateful night, while he was sleeping in his house, two persons namely; Kunjumon and Palliparambil called him and on being asked, requested him to come with his jeep as Benny, brother of the appellant was unwell. On this, the witness reached the shop by PW6 Mathew with his jeep and found Benny sitting on the bench with the support on the desk. He met the appellant who told him that Jackson and Mathew had gone to fetch tablets for Benny and on their return, he (Benny) would be taken for medical treatment. The witness further stated that when Jackson and Mathew returned with the medicines, the appellant enquired of them about the admit card and prescription which they stated had not been brought. On this, the appellant requested them to get those papers from his house, whereupon the witness and PW6 proceeded towards the house of the appellant. This witness stated that on reaching the house of the appellant, they saw the front door thereof to be half open but the kerosene lantern inside was alight. As Neena did not respond to their calls, the witness and PW6 entered the house and eventually found Neena hanging from the roof of the service area with a saree. The witness stated that

A they ran back, by seeing this to the shop of Mathew where they informed the appellant about the incident. On hearing this, the witness, PW1 and PW6 rushed to the house of the appellant. On the way, the appellant stopped a car and sent Benny together with Jackson and others to the Medical College Hospital. The witness stated that at that point of time, the appellant asked him to bring the jeep to his house whereafter PW1, B the appellant and others took Neena in his jeep to the hospital where she was declared dead. This witness admitted that the Investigating Officer had recorded his statement twice. He conceded that in the earlier statement, he disclosed that it was PW1 who had first seen Neena in a hanging position. He added that such a statement was made on the C instruction of the appellant.

25. In cross-examination, this witness stated that his first statement was recorded on 22/23.9.2000 at the Police Station and by then the appellant had been arrested on 21.9.2000. This witness too was confronted with his earlier statements.

D 26. PW20 Dr. Hitesh Sankar had conducted the post-mortem examination on the dead body and recorded swelling on the left side of the forehead together with dried blood stains on the upper part of the nose. Apart from pressure abrasion on the neck and fracture of the greater horn of hyoid bone of the left side, he deposed about contusions E and abrasions on the forehead, eye brow, nose and jaw. He mentioned about scalp contusions as internal injuries.

27. In his opinion, as expressed in his examination in chief, the findings in the post mortem were consistent with death due to strangulation followed by hanging and further that the facial injuries were F suggestive of attempted smothering. He thereafter answered in the affirmative to various leading questions to indicate amongst others that the linear abrasion under the neck could be caused by applying a plastic rope as per the material exhibit shown to him. He also responded to one of the leading queries that the fracture of thyroid bone could be due to strangulation.

G 28. In his cross-examination, the witness however in categorical terms conceded that he could not say as to whether it was a case of suicidal or homicidal hanging. The witness conceded that he had not noticed any blood stain on the material exhibit i.e. plastic rope or any stretch mark thereon. He also admitted of not noticing any fibre particle

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on the rope or on the neck of the deceased. He conceded as well that there was no contusion/laceration on the inner aspect of the lips which are normal feature in the case of smothering. He also negatived the presence of other attendant signs in case of death due to asphyxia preceded by smothering. He however affirmed that the ligature mark or the abrasion found on the neck was suggestive of hanging. He admitted as well that hyoid and thyroid fracture could be caused due to pull up of heightened noose moving up during hanging. He admitted of not having mentioned any injury of nail mark in the post-mortem certificate.

29. Apart from the fact that the nylon rope Ex.MO4 and the broken pieces of glass bangles had been recovered and seized from under a cot in the dining room, away from the site of hanging, the report of the chemical examiner Ex.P20 did not disclose any blood stain on the plastic rope. Though was indicated presence of hairs of human origin on the said rope, it was clarified that no definite opinion could be given as to whether the hairs belonged to a male or a female. To reiterate, the doctor, PW20 also had affirmed that he did not notice any blood stain on the nylon rope and instead added that neither was there any stretch mark thereon nor did he notice any fibre particle thereof on the neck of the deceased.

30. Though the prosecution had examined several other witnesses, their testimony being not of any decisive relevance would not be dilated upon. The Investigating Officer of the case, however, in his evidence amongst others admitted that the nylon rope and the bangle pieces were recovered from the dining room. This also finds support from the seizure list Ex. P-4.

31. The appellant in his statement under Section 313 Cr.P.C., in reply to the incriminating circumstances laid before him, stated that he had resigned from police service as per the wishes of Neena and due to financial stringency and had gone to Saudi Arabia on 12.9.1997 and had returned on 21.8.2000. According to him, there was an abiding and affectionate relationship between the couple and that they had two sons Akhil and Nikhil. He referred to the letters written by Neena to him while he was abroad, amongst others to demonstrate the veracity of his statement about the warm relationship which he shared with Neena. He also asserted to have sent money to Neena and the children for their sustenance and also referred to the relevant documents in endorsement thereof. He mentioned about their visit to Potta on 16.9.2000 and their

A return on 19.9.2000. He narrated the defence version as adverted to herienabove and claimed that death of Neena had occurred due to suicide committed by her and denied the charge levelled against him and his brother Benny. He however admitted that after six years of the incident, on the insistence of his parents, he had married with one lady named Anna. He alleged that the prosecution had been launched by her in-laws who were hostile towards him.

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32. The appellant in his defence, examined his son Akhil as DW1, who at the relevant time, had finished his studies and was working in the production section at Fortune Hotel, Kozhikode. He deposed on oath that during his academic years, he resided with his mother and his younger brother named Nikhil. He stated that the appellant, his father was initially in the police service from where he resigned and went to Gulf for work in the year 1997 and had returned in August, 2000. He deposed that during the time his father was away, he used to stay with his mother and younger brother in their house at Edattankuzhiyil. He confirmed that the relationship between his mother and father was very cordial. He denied the appellant's association with a lady named Darly and as a matter of fact expressed ignorance about her. The witness admitted that the appellant used to send money while he was away by drafts and that he along with his mother used to go to the bank for that purpose. He also affirmed that the appellant used to be in touch with them through letters and phone calls. The witness proved two letters marked Ex D4 & D4A which he admitted to have been written by his mother to the appellant. He testified that as well that even after the return of the appellant from the Gulf, his dealings with the mother and vice versa were warm and endearing.

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33. This witness endorsed the fact as well that he met his parents on 19.9.2000 at about 7.30 p.m. when they alighted from the bus from Potta and were proceeding towards their house. He stated that at that point of time, he was also returning home with some household articles and thus he accompanied his mother back home while his father, the appellant went in search of labourers for the next day work in his compound. The witness stated that on their return, his mother prepared snacks, whereafter she told her to carry some articles to the ancestral house and accordingly he did so. The witness however added that though he waited for his parents to come to the ancestral house, they did not do so and he came to learn about the death of his mother in the

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next morning. A

34. In cross-examination, though this witness categorically denied the suggestions put on behalf of the prosecution to project him to be untruthful, he disclosed that on the date of the incident, he found his mother to be under some mental stress. He however, in definite terms, denied that when he met the appellant and his mother together for the B last time, there did not appear to be any strained feelings between them.

35. The testimony of the appellant on oath as DW2 is the replication of the defence version as already outlined and does not call for reiteration. He however proved the two letters dated 28.2.2000 and C 7.6.2000 written by the deceased to him and marked as Ex. D4 and D4A. He however mentioned that Neena was not happy for the early return from the divine retreat and repeated that having disembarked from the bus at 7.30 p.m., he sent Neena with his elder son Akhil back home, while he went in search of labourers for the next day's work. He stated that while he was proceeding towards his house later in the evening, D two persons came from the opposite direction, whom he failed to identify, pushed him down for which he suffered injuries on his hand. He thereafter shouted to attract people so as to apprehend these persons, but in vain. He referred to the illness of his brother at that point of time and repeated the facts pertaining to the events that occurred thereafter leading to the E discovery that Neena had hanged herself from the hook of the ceiling of the work area of their house.

36. In cross-examination, amongst others, he admitted to have brought down Neena by cutting the noose with the help of other persons. He admitted as well his second marriage with Anna @ Darly. F

37. DW3 Babu stated about the search made in the evening of the date of the incident of the persons, who according to the appellant, had pushed him down on his way to his house. He also stated about the chest pain of Benny, brother of the appellant while the search was in progress. G

38. As the impugned judgement would disclose, the High Court took note amongst others of the factum of second marriage of the appellant with the lady Anna @ Darly as stated to be proved by the evidence adduced. It also took note of the fact that the couple had gone for the divine retreat for a week by arranging the stay of the children at H

A the ancestral house but returned early. It disbelieved the testimony of DW1, the son of the appellant, construing it to be partisan in favour of the appellant in order to save him, in the circumstances. His testimony was discarded as not of a prudent son otherwise expected to be sensitive to the death of his mother. The High Court denounced the DW1 to be
B untruthful, for having expressing his ignorance about the second wife of the appellant Anna @ Darly. It thus concluded that sans the evidence of DW1, there is nothing on record to demonstrate that the appellant did not accompany his wife to the house that evening, whereafter she was not found alive.

C 39. Apart from the "last seen together" index, the High Court accepted the other perceived incriminating circumstances against the appellant namely his illicit intimacy with Anna@ Darly, absence of explanation of his whereabouts after 7 P.M. till his presence in the shop of PW6 Mathew, recovery of broken bangles of the deceased from the dining room indicating a struggle, nail mark found on the forehead of
D the appellant suggesting resistance from the deceased and want of satisfactory explanation as to under what circumstances the deceased was found hanging in the house of the couple.

40. The High Court rejected the defence story of two persons pushing the appellant down on his way to his house in the evening and
E also commented on his conduct of not rushing to the house as a prudent husband and instead arranging for the conveyance of his brother to take him to the hospital even after being told that his wife had been found hanging in the house. On a consideration of the totality of the circumstances, the High Court thus deduced that the death of Neena was homicidal and affirmed the conviction of the appellant as recorded
F by the Trial Court.

41. In this contentious backdrop, Mr. Basant has emphatically urged that in the absence of any eye witness of the occurrence and a convincing and complete chain of circumstantial evidence unerringly attesting the guilt of the appellant, his conviction for murder, in the teeth
G of the acquittal of the co-accused Benny, his brother, is patently illegal. Asserting that the evidence as a whole does unmistakably demonstrate that the deceased had committed suicide, the learned senior counsel has urged that the acquittal of the appellant and his co-accused of the charge under Section 498A IPC also belies the imputation of his extra-marital
H association with the lady Darly as alleged by the prosecution. According

to him, the narration in the first information report authored by PW1 and the statement of PW6 in the inquest report at the earliest point of time though authenticate the correct state of affairs, the attempt on the part of the investigating agency to improve thereon by re-recording of the statements of these witnesses along with that of PW7 was only to frame the appellant in particular at the behest of his in-laws.

42. In any view of the matter, Mr. Basant has urged that the interrogation of these witnesses after time lag of almost four years and too on the eve of submission of the charge-sheet, lays-bare the stratagem of the investigating agency to prosecute him on otherwise unfounded allegations. The learned senior counsel has insisted that not only the testimony of PW1, PW6, PW7 and PW20, the doctor who had performed the post-mortem examination is consistent with the innocence of the appellant, it is apparent from the documentary evidence more particularly the letters Ex. D4 and D4A written by the deceased to him that there was a subsisting loving and affectionate relationship between them till the demise of the former. He has argued that the medical evidence having failed to convincingly prove that the deceased had died of homicidal hanging, the seizure of the nylon rope and broken pieces of bangles from under the cot of the adjoining dining room pales into insignificance. It has been urged that the evidence of the son of the appellant, who was a major at the time of his deposition with the desired maturity of understanding, overwhelmingly establishes his innocence, there being no persuasive reason for the witness to lie in his favour and against his mother.

43. According to Mr. Basant, the courts below grossly erred in discarding his evidence being unworthy of credit, branding him to be insensitive to the death of his mother and pretentious in faking ignorance of the lady named Anna @ Darly and her alleged extra-marital relationship with the appellant. The learned senior counsel has maintained that in absence of any concrete evidence of the alleged illicit nexus between the appellant and the lady named Anna @ Darly, his marriage with her did not ipso facto establish the imputation. Mr. Basant has urged that the circumstantial evidence relied upon by the prosecution is incoherent and insufficient in form, continuity and content and falls short of the legally prescribed standards to return a finding of guilt on the basis thereof. Reliance has been placed on the decisions of this Court in ***Sharad Birdhichand Sarda vs. State of Maharashtra*** (1984)4

A SCC 116 and ***R. Rajendran Nair vs. State of Kerala*** *(*1998) SCC (Crl.) 254

44. In refutation, the learned counsel for the respondents has maintained that the circumstantial evidence available on the record does amply establish the complicity of the appellant in the gruesome murder B of the deceased, his wife by strangulation with the aid of a nylon rope seized and then suspending her from the roof of the work area by using a saree as a ligature. The guilt of the appellant, according to the learned state counsel, inter alia is unerringly deducible from his unusual conduct of not rushing back home even after being informed of the incident and instead in arranging for a conveyance for his brother to the hospital. C Further, he did not act as a prudent husband, even if his story of being pushed down by two strangers is believed in not hurrying back to his house to ensure the safety of his wife, the deceased. It has been argued that deceased was seen alive last in the company of the appellant when they alighted from the bus at 7.30 p.m. in the same evening. According D to the learned state counsel, the testimony of DW1, the son of the appellant is wholly untrustworthy, it being partisan and untruthful and in that view of the matter, the mishap having occurred inside the house in which the couple used to live, the appellant, in absence of any explanation for the episode, has been rightly held to be guilty of the offence charged by both the courts below. It has been argued that the medical evidence fully E substantiates the charge of murder levelled against the appellant and the prosecution having been able to prove that the motive therefor being to eliminate the deceased in order to facilitate the consummation of the otherwise illicit relationship of his with Anna @ Darly, no interference with his conviction is warranted in the facts and circumstances of the F case. The fact that the appellant eventually married the said lady, amply establishes the charge as well, he urged.

45. The arguments exchanged have received our anxious consideration cumulatively with the evidence on record. Admittedly there is no eye-witness to the incident. The endeavour of the prosecution, G however has been to demonstrate that after the couple had returned from Pota in the evening of the date of the episode, they returned home and thereafter the appellant had committed the murder of his wife Neena by first strangulating her with the nylon rope that was recovered from under the cot in the dining room and then had hanged her from the hook of the roof of the service area by using a saree as a ligature. This H

inference, according to the prosecution, is inevitable from the attendant facts and circumstances. The quality and the decisiveness of such evidence, therefore, would be of determinative relevance. A

46. Aside the aspect that PWs 1, 6 and 7 had been examined twice by the investigating agency at the interval of almost four years, we have been left unconvinced by the peripheral variations in their statements so as to infer the complicity of the appellant on the basis of their attempted departure from their versions recorded at the earliest point of time. Though these witnesses have been sought to be discredited by the prosecution vis-a-vis their earlier statements allegedly made at the behest of the appellant, the essence of their testimony qua the incident and the attendant facts and circumstances has remained the same barring a few inconsequential inconsistencies. Noticeably, there is no reason forthcoming for re-examining these witnesses after almost four years and on the verge of the submission of the charge-sheet. The plea of false implication at the instance of the inimical members of the family of the deceased in this context thus assumes significance. B C D

47. Suffice it to recount that the testimony of PWs 1, 6 and 7 would evince that when the persons sent by the appellant had reached the house of the appellant to fetch the medical records of his brother Benny, they found the door open and when the deceased did not respond to their call, they entered through the door and found her in a hanging posture with movements, whereupon they raised alarm for which the appellant and others rushed to the place and the body of the deceased was brought down by cutting the saree. Though the conduct and the movements of the appellant prior thereto had been somewhat unusual and disoriented, the same per se in our estimate does not irrefutably establish his culpability. E F

48. The medical evidence as elaborated hereinabove also does not decisively establish the case to be of homicidal hanging. The unchallenged expositions of the doctor performing the post- mortem examination highlighting the absence of the characteristic attributes attendant on death due to homicidal hanging following strangulation further reinforce the possibility of suicide. The absence of definite medical opinion about the homicidal death of the deceased in our comprehension is a serious set back to the prosecution. G

49. The evidence of the eye-witnesses when considered in H

A conjunction with the testimony of the doctor does not link the appellant directly or indirectly with the actual act leading to the unnatural death of the deceased. In 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. The consistent testimony of the appellant and his son to the effect that after alighting from the bus on their return from Pota, the deceased was made to accompany DW1 back home while the appellant did go in search of labourers for works in his compound on the next day and that thereafter till the time DW1 had departed for his ancestral house, the appellant did not return home, consolidates the defence plea of innocence of the appellant.

50. This version of the appellant and his son is in accord with the statement made by the appellant under Section 313 Cr.P.C. as well. Though the courts below have dismissed the testimony of DW1 as untrustworthy, he having feigned ignorance about the lady Darly with whom his father allegedly had extra marital affairs and was construed to be partisan towards the appellant and insensitive to the death of his mother, we are unable to lend our concurrence to these reasonings. This witness at the time of his deposition was a major with the required maturity in the life's perspectives, and in our assessment expectedly would not have lied for the appellant, his father, only to see him through, though knowing him to be the real perpetrator of the crime. This is more so when the deceased was his own mother.

51. The prosecution plea that the appellant had resigned from the service in the police department to move out to Jeddah/Saudi Arabia with the intention to perpetuate his illicit association with the lady Darly thereat and that in a way he had deserted the deceased and the children, is also not borne out definitively by the materials on record. On the other hand, a plain perusal of the letters Ex. D4 and Ex.D4A written by the deceased to the appellant while he was abroad, do not reveal anguished outbursts of a wife otherwise expected in such a situation or any fervent insistence for early return. Instead the contents thereof reveal narration of mundane happenings of day to day life, emphasis on the need for his required stay thereat for enhanced savings together with somewhat intimate feelings expected of a married couple physically estranged by compulsion of circumstances. The letters for the least, do not suggest any bitterness, disappointment, frustration and seething

indignation of the deceased for the appellant being away at Jeddah/ Saudi Arabia and allegedly with the lady, Darly. Instead there are traces of cheer for his expected return in near future. The authenticity of these letters and also of the records relied upon by the defence to demonstrate that the appellant while abroad used to remit money for the sustenance of the family, has not been impeached. A B

52. On an overall consideration of the evidence available on record, it would be, in our view, wholly unsafe to hold the appellant guilty of the charge of murder of his wife by strangulating her with the nylon rope as seized and then hanging her from the roof with the saree to complete the act. The circumstantial evidence adduced by the prosecution in our assessment falls short of the requirement in law to return a finding of guilt against the appellant without any element of doubt whatsoever. The fact that both the accused persons had been exonerated of the charge of cruelty under Section 498A IPC and that the co-accused, who allegedly had assisted the appellant in the perpetration of the crime had been fully acquitted by the courts below of all the charges also takes away the wind from the sails of the prosecution. C D

53. It is a trite proposition of law, that suspicion however grave, it cannot take the place of proof and that the prosecution in order to succeed on a criminal charge cannot afford to lodge its case in the realm of "may be true" but has to essentially elevate it to the grade of "must be true". In a criminal prosecution, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof and in a situation where a reasonable doubt is entertained in the backdrop of the evidence available, to prevent miscarriage of justice, benefit of doubt is to be extended to the accused. Such a doubt essentially has to be reasonable and not imaginary, fanciful, intangible or non-existent but as entertainable by an impartial, prudent and analytical mind, judged on the touch stone of reason and common sense. It is also a primary postulation in criminal jurisprudence that if two views are possible on the evidence available, one pointing to the guilt of the accused and the other to his innocence, the one favourable to the accused ought to be adopted. E F G

54. The facts as obtained in the present case present a jigsaw puzzle in which several frames are missing to permit an unreserved opinion of the complicity of the appellant.

55. The inalienable interface of presumption of innocence and the H

A burden of proof in a criminal case on the prosecution has been succinctly expounded in the following passage from the treatise "***The Law of Evidence***" fifth edition by Ian Dennis at page 445:

> "The presumption of innocence states that a person is presumed to be innocent until proven guilty. In one sense
> B this simply restates in different language the rule that the burden of proof in a criminal case is on the prosecution to prove the defendant's guilt. As explained above, the burden of proof rule has a number of functions, one of which is to provide a rule of decision for the factfinder in a situation of uncertainty. Another function is to allocate the risk of
> C misdecision in criminal trials. Because the outcome of wrongful conviction is regarded as a significantly worse harm than wrongful acquittal the rule is constructed so as to minimise the risk of the former. The burden of overcoming a presumption that the defendant is innocent
> D therefore requires the state to prove the defendant's guilt."

56. The above quote thus seemingly concede a preference to wrongful acquittal compared to the risk of wrongful conviction. Such is the abiding jurisprudential concern to eschew even the remotest possibility of unmerited conviction.

E 57. This applies with full force particularly in fact situations where the charge is the sought to be established by circumstantial evidence. These enunciations are so well entrenched that we do not wish to burden the present narration by referring to the decisions of this Court in this regard.

F 58. Addressing this aspect, however, is the following extract also from the same treatise "***The Law of Evidence***" fifth edition by Ian Dennis at page 483:

> "Where the case against the accused depends wholly or partly on inferences from circumstantial evidence, factfinders cannot logically convict unless they are sure
> G that inferences of guilt are the only ones that can reasonably be drawn. If they think that there are possible innocent explanations for circumstantial evidence that are not "merely fanciful", it must follow that there is a reasonable doubt about guilt. There is no rule, however, that judges must

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direct juries in terms not to convict unless they are sure that the evidence bears no other explanation than guilt. It is sufficient to direct simply that the burden on the prosecution is to satisfy the jury beyond reasonable doubt, or so that they are sure.

The very high standard of proof required in criminal cases minimises the risk of a wrongful conviction. It means that someone whom, on the evidence, the factfinder believes is "probably" guilty, or "likely" to be guilty will be acquitted, since these judgements of probability necessarily admit that the factfinder is not "sure". It is generally accepted that some at least of these acquittals will be of persons who are in fact guilty of the offences charged, and who would be convicted if the standard of proof were the lower civil standard of the balance of probabilities. Such acquittals are the price paid for the safeguard provided by the "beyond reasonable doubt" standard against wrongful conviction."

59. A reference in the passing however to the of quoted decision in ***Sharad Birdhichand Sarda*** (supra) construed to be *locus classicus* on the relevance and decisiveness of circumstantial evidence as a proof of the charge of a criminal offence would not be out of place. The relevant excerpts from paragraph 153 of the decision is extracted herein below.

"153.(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused...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.

* * *

(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

A by the accused."

60. As recent as in ***Sujit Biswas vs. State of Assam*** (2013) 12 SCC 406, this Court also in the contextual facts constituting circumstantial evidence ruled that in judging the culpability of an accused, the circumstances adduced when collectively considered must lead to the B only irresistible conclusion that the accused alone is the perpetrator of a crime in question and the circumstances established must be of a conclusive nature consistent only with the hypothesis of the guilt of the accused.

61. In ***Dhan Raj @ Dhand vs. State of Haryana*** (2014) 6 SCC C 745, one of us (Hon. Ghose,J.) while dwelling on the imperatives of circumstantial evidence ruled that the same has to be of highest order to satisfy the test of proof in a criminal prosecution. It was underlined that such circumstantial evidence should establish a complete unbroken chain of events so that only one inference of guilt of the accused would ensue by excluding all possible hypothesis of his innocence. It was held D further that in case of circumstantial evidence, each circumstance must be proved beyond reasonable doubt by independent evidence excluding any chance of surmise or conjecture.

62. Judged on the above parameters, we are of the unhesitant opinion that the evidence adduced by the prosecution constituting E circumstantial evidence in support of the charge does not furnish an unassailable basis to hold the appellant guilty of the charge of murder levelled against him. The facts and circumstances admit of a reasonable doubt in his favour.

63. The circumstances brought forth by the prosecution do not F rule out in absolute terms the hypothesis of the innocence of the appellant. We thus consider it to be wholly unsafe to maintain his conviction as recorded by the courts below. We are therefore inclined to extend benefit of doubt to him. The conclusions drawn by the courts below are not tenable on the basis of the evidence available. The appeal is thus allowed and the conviction and sentence recorded by the courts below is hereby G set aside. The appellant be released from the jail forthwith if he is not required in any other case.

Devika Gujral Appeal allowed.

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