

State of Maharashtra

Vs

Manglya Dhavu Kongil

Criminal Appeal No. 43 of 1969

(P. Jagmohan Reddy, D. G. Palekar JJ)

07.01.1972

JUDGMENT

PALEKAR, J. -

1. This is an appeal by special leave by the State from an Order of acquittal passed by the High Court of Bombay. The respondent Manglya Dhavu Kongil had been convicted under Section 302 and Section 376, read with Section 511, I.P.C., by the Second Additional Sessions Judge, Thana on April 27, 1968, and sentenced to death for the first offence. The High Court has acquitted him in appeal and hence the present appeal by the State.

2. The victim of the crime was an unmarried woman named Kamlabai Gangadhar Vaidya. She was about twenty-six years old. She was working as a Field Worker in the Family Planning Department and was attached, at the material time, to the Medical Dispensary at Kudus - a village in the interior of Thana District. This village has several hamlets, far flung from each other. Each hamlet consisted of a few huts belonging to Adivasi residents of the village. One such was Malanpada. The respondent is a resident of Malanpada. His father and brother Janu lived in one hut and the respondent himself lived in another hut. The deceased Kamlabai used to reside in another village named Chinchghar which is four furlongs away from Kudus. For the purpose of her work she had to visit several hamlets round about. A vasectomy camp was to be held at the Taluka place, Wada, 10 miles away on January 30, 1968, and Kamlabai had been instructed to collect as many cases as she could get for vasectomy or for insertion of loops. On the afternoon of January 26, 1968, at about 4.00 or 4.30 p.m. she was going to one of the hamlets to see one Pandu and his wife for telling them about the vasectomy camp. At that time she was accompanied by the respondent, the latter being her guide to the several houses. Their way lay along a foot track which passed near the cattle-shed of one Balu Bhau Patil, P.W. 1. With Balu Bhau Patil, there were some other persons including Dagdu, P.W. 6, the uncle of the respondent. Dagdu asked Kamlabai where she was going and the latter told him that she was going to Pandu and his wife to book their cases. The Pandu happened to be in the service of Dagdu who knew that Pandu and his wife were not at home. So he told Kamlabai that Pandu and his wife were away and she would not be able to find them. Thereupon Kamlabai turned back and went towards the west with her guide the respondent. She had turned back either to go to Kudus or to some other place in order to book more case. Their way to the west was through a hilly jungle area known as Aricha Dongar. The place in full of trees and bushes. Perhaps that was a short cut. Sometimes after they had departed, witness Balu Bhau Patil proceeded to another field of his which was to the north of the hill. He had gone there to fetch his bullocks. On the way he heard the cries of a female coming from the direction in which the respondent and Kamlabai had gone. The female was crying "Manglya leave me, why are you catching me". So Balu Bhau proceeded in the direction of the cries and from a distance of about 40 or 50 paces he saw that Manglya, the

respondent, was molesting Kamlabai. Kamlabai was lying on the ground and the respondent was attempting to lift her legs. Balu Bhau shouted to the respondent that he should leave the lady. The respondent then left her. He then picked up a stone with a view to throw it at Balu Bhau. So Balu Bhau rushed away from the place. Since the house of the respondent's father was at the foot of the hill hardly a furlong away, he ran towards that side to request the father to do something to prevent further molestation of the lady. At the house of respondent's father he met respondent's elder brother Janu Kongil and told him what was happening. Janu Kongil then went away in the direction indicated by Balu Bhau. Another Adivasi Ziparya who was living close by asked Balu Bhau what the matter was. On being told by him, Ziparya also went that side. Balu Bhau himself did not go because he felt tired by the effort.

3. While Balu Bhau remained below near the huts, his nephew Ganpat, P.W. 5 and Ziparya's brother Janu Marad came to him and asked him what the matter was. He told them what had happened. Then he waited for sometime for Janu Kongil and Ziparya to return. But since they did not return, the three of them namely Balu Bhau, Ganpat and Janu Marad went towards the place where Balu Bhau had seen the molestation of the lady. On going to the spot, however, they did not see anybody. So they returned to the huts. Ganpat went to Kudus village to contact the Dispensary Doctor Choudhary, P.W. 9. He met Dr. Choudhary and told him what Balu Bhau had told him. Then he returned to the huts. In the meantime Ziparya returned. He called Balu Bhau inside the hut and told him that the woman was dead and they were in for trouble. Then guided by Ziparya, they again went up the hill and there, some distance away from the place where Balu Bhau had seen the molestation, they saw the dead body of Kamlabai under a teak tree near the bushes. Balu Bhau then went to inform the Sarpanch of the village Kudus. But he was told there that the Sarpanch was not at home. So Balu Bhau went to his house.

4. Dr. Choudhary, P.W. 9, who had been already informed by Ganpat, made enquiries to ascertain whether Kamlabai had returned and on finding that she had not returned went to the Taluka town, Wada, and contacted police Sub-Inspector Pagare, P.W. 16 and gave him a report in which he merely mentioned that Kamlabai had been missing. This was at about 6.30 p.m. The Sub-Inspector came to Kudus village at 7.30 p.m. and started making a search for the lady. During the course of the enquiries he came to know that Balu Bhau Patil had some information in the matter. So he called him and recorded his statement at about 10.30 p.m. That statement is Ext. 32 and is treated as the First Information Report in this case. Then in the company of Balu Bhau, P.S.I. Pagare and party went to the place where the dead body of Kamlabai was lying. He saw the dead body and then kept a watch at the place because further investigation could not be made at night.

5. Next morning P.S.I. Pagare made an inquest panchnama, Ext. 5 and a scene of offence panchnama Ext. 6 and searched for the respondent. The respondent was not found in the village. The P.S.I. made preparations for sending the body for post-mortem examination to Wada. But it appears that the villagers insisted that the post-mortem examination may be made in the village itself and the Wada Medical Officer Dr. Khatri, P.W. 11 may be called to the village. Accordingly, Dr. Khatri under whose control Kamlabai was working, came to Kudus and performed the post-mortem examination. The reluctance of the villagers to the post-mortem examination being made at Wada seems to have stemmed from the fact that no body knew where her near relations were living and the villagers, with whom the deceased was quite popular, wanted to give her a decent funeral at Kudus itself. The evidence shows that hundreds of villagers attended the cremation.

6. Dr. Khatri after performing the post-mortem examination noted a number of injury marks on the face, neck and other parts of the body and was of the opinion that the cause of death was asphyxia

due to throttling. He had noted, in all, about 11 injuries the first three of which are : (1) marks of fingers with skin abrasion on right side of the neck with sub-cutaneous hemorrhage 1" X 1", (2) marks of fingers on right chin 1 1/2" X 1 1/2" with subcutaneous haemorrhage, (3) marks of fingers with sub-cutaneous haemorrhage on left side of the neck three in number 1" X 1/2" each. Injury No. 11 was haemorrhage under the skin of the neck. In the opinion of Dr. Khatri the first three injuries referred to above were possible by the pressure of the fingers on the neck. In the post-mortem examination the woman's body is described as thin. It is, therefore, clear that the victim was of thin build.

7. It is already stated that the accused had absconded from the village. Next morning at about noon he was caught in a Hotel near Ambadi Naka which is six miles away from village Kudus. At the time of the arrest, Sub-Inspector Pagare found that there was an abrasion on the respondent's left knee and this is confirmed by the Medical Officer Khatri, P.W. 11 who says that when he examined the respondent on the evening of January 27, 1968, there was one skin abrasion on the left knee joint 1/2" X 1/2". On the next day i.e. on January 28, 1968, the respondent was produced before the Judicial Magistrate who remanded him to magisterial custody for seven days. The Investigating Officer had learnt that the respondent was wanting to make a confessional statement and so on January 29, 1968, he sent a memo to the Taluka Magistrate Mr. Vishwasrao Bhagwantrao Ahirrao, P.W. 10 that the respondent was in judicial custody and that after procuring his presence before him the Taluka Magistrate may record his confession. The Investigating Officer also wrote to the Judicial Magistrate, First Class, Jawhar to make the respondent available to the Taluka Magistrate Mr. Vishwasrao Bhagwantrao Ahirrao for recording his confession. The Judicial Magistrate forwarded the respondent to the Taluka Magistrate on January 30, 1968, who after observing the necessary formalities, recorded the confession on January 31, 1968. In this confessional statement the respondent admitted that while going with Kamlabai through the jungle he tried to criminally assault the woman and since she started crying, he throttled her.

8. When charged for the murder, the respondent pleaded not guilty. He made a long statement when questioned under Section 342, Criminal Procedure Code. He denied that he had made any confession though he admitted that he had signed the same. He said his signature was taken to the confession without the same being read over to him. He, however, admitted that he was with Kamlabai at the material time on January 26, 1968, and that they had intended to go to the house of Pandu. On the way he had met Balu Bhau Patil and Dagdu and when Dagdu told her that Pandu was not at home they turned back to go to the west. After they had walked about half a furlong, Kamlabai complained that she was feeling giddy and sat down. He asked her what the matter was and she replied that Dr. Choudhary had given her an injection and that seems to have affected her. He advised her to go with him slowly. But she did not open her eyes. Within a short time he saw witness Balu Bhau Patil and he called him to come near. He requested Balu Bhau Patil to see what was wrong with the woman. Balu Bhau tried to speak to her but she said nothing. He thereupon asked Balu Bhau to wait there near the lady and told him that he would go to inform the Doctor. So leaving her in charge of Balu Bhau, he went to the Dispensary at Kudus. On reaching there, he learnt that Dr. Choudhary had gone to the Taluka town, Wada. He waited there for him and when after a long time the Doctor returned, he informed the Doctor that the woman had fainted and had fallen at a particular place. The Doctor asked him what was wrong. Thereupon respondent told him that he had given her an injection. On hearing that, the Doctor started and asked him as to who told him that he had given her an injection. He replied that Kamlabai had herself told him. Thereupon Dr. Choudhary according to respondent, took out a ten-rupee note from his pocket, gave the same to him and asked him not to speak about his giving any injection to her. The Doctor also asked him that he should meet him at Ambadi Naka at 1.00 p.m. on the next day and give a statement to the

police as instructed by him. Then he went to his house at Malanpada and there he learnt that witness Balu Bhau Patil was shouting that the women had died. The respondent, however, did not go to the hill to see her. Next morning as required by the Doctor he went away and waited for the Doctor at the Ambadi Naka till 1.00 p.m. but instead of the Doctor coming to meet him a constable came there and caught him.

9. The learned Sessions Judge accepted the prosecution evidence as substantially true. He also held that the confession made by the respondent was voluntary and true. He rejected the story put forward by the respondent in his statement under Section 342, Criminal Procedure Code. Finding that there was no extenuating circumstance in the case he sentenced the respondent to death under Section 302, I.P.C.

10. In appeal the High Court felt a doubt as to whether the cause of death was throttling. It was of the opinion that Asphyxia due to poisoning had not been eliminated and, in its opinion, the Medical evidence was not sufficiently strong and conclusive to be relied upon without hesitation. On merits it held that the confession could not be made the basis of conviction and observed as follows :

"The only facts which are firmly established on the record are that on January 26, 1968, at about 4 or 4.15 p.m. the accused was in the company of the lady, and within a relatively short time thereafter the dead body of the lady was found in the vicinity of the place where the accused and the deceased were seen together and the death of the lady was homicidal and very probably as a result of throttling. These facts may no doubt throw a certain amount of suspicion on the accused and point out to the possibility that the accused may have something to do with the death of the lady, but in the absence of other evidence either direct or circumstantial which will in a positive and unmistakable manner connect him with the offence it will not be possible to convict him."

Accordingly, holding that the offence had not been proved beyond reasonable doubt, the High Court acquitted the respondent.

11. It is contended before us on behalf of the State that the High Court improperly raised a doubt with regard to the cause of death when there was conclusive evidence that death was due to throttling. It is submitted that this doubt with regard to death being due to poisoning had no basis whatsoever in the evidence. Having entertained a doubt with regard to the cause of death, the High Court, it was submitted, manoeuvred itself into a situation in which its approach to the evidence on merits could not be other than negative, with the result that the High Court misapprehended the prosecution case and evidence resulting in grave miscarriage of justice.

12. We are satisfied on a perusal of the evidence that the High Court was entirely unjustified in raising a doubt with regard to the cause of death. There was nothing in the evidence even remotely to suggest that this was a case of poisoning. The deceased Kamlabai was a field worker in the Family Planning Department and she was busy on that day contacting couples with a view to persuading them to attend the Vasectomy camp on January 30, 1968. She took the respondent as a guide in the afternoon to go to the hut of one Pandu. She had walked a long distance from the village and at about 4.15 or 4.30 p.m. she had met Balu Bhau, P.W. 1 and Dagdu Aba Choudhary, P.W. 6 near the cattle-shed in Malanpada and it is they who told her that Pandu and his wife were not at home. Thereafter Kamlabai and the respondent turned back and went in the western direction by a footpath which passed through "Aricha Dongar", i.e. the hill of Ari which is full of jungle trees

and bushes. They did not notice that there was anything wrong with the woman at the time. And this is important because if any poison was working in the woman's system since morning, as suggested, so as to cause death within half an hour thereafter, they could not have failed to see something abnormal about her. Dr. Khatri, P.W. 11 who performed the post-mortem examination next morning found that there were not less than 11 injuries on her body.

13. According to the Doctor all those injuries were ante-mortem and the first three which are already described were possible by the pressure of the fingers on the neck. The fourth was a skin abrasion on the left side of the nose extending on the left side of the face and was about 3" in length. The fifth injury comprised two abrasions 1" away from the mouth. The sixth injury consisted of five abrasions on the right elbow. The seventh was an abrasion near the eye. The eighth was an abrasion on the right leg 6" above the ankle joint. The ninth was an abrasion on the left ankle joint. The tenth was an abrasion on both joints and was 2" in length and the eleventh injury was a hemorrhage under the skin of the neck. On opening the body, he found that the brain, plura, the right lung, left lung, pericardium and half of the heart were congested. There was white forth in the larynx, trachea and bronchi. The lungs were blackish. The bucal cavity, the pharynx, liver, the pancreas the spleen and kidneys were congested. Having regard to these indications the Medical Officer found no difficulty in coming to the conclusion that cause of death was due to Asphyxia due to throttling. In his cross-examination, he stated that there was sub-cutaneous haemorrhage to the wind pipe though there was no injury to the hyoid bone. In his opinion that bone is not fractured by the pressure of fingers. He further stated that there was a haemorrhage under the muscles of the neck and there was no mark of any injection on the body of the lady. It was not suggested to the Medical Officer that Asphyxia in this case could have been the result of some poison. No opportunity was given to him to explain if there would or would not be other visible indications if it was a case of poisoning. In the Trial Court it was not disputed at the time of the arguments that death was due to throttling. But the point seems to have been taken up for the first time in the High Court, the contention being based upon the story put forward by the respondent. In that statement, as already seen, the respondent put forward the story that the deceased had told him that Dr. Choudhary of Kudus Dispensary had given her some injection and that was probably the reason why she was feeling giddy. He further suggested that when he met Dr. Choudhary in the evening he told him what he had learnt from the deceased and this made the Doctor start. It was also alleged that Dr. Choudhary gave him a currency note of Rs. 10/ as hush money and to keep quiet about it. The suggestion was that Dr. Choudhary must have administered some poisonous injection in the morning and that must have been the cause of death. There was no basis in the evidence for this tall story told by the respondent. Dr. Khatri was asked on behalf of the respondent as to whether there was any mark of injection on the body of the lady and he replied that there was no such mark. Dr. Choudhary, P.W. 9 was examined in this case and he denied that he had given any injection on the morning of January 26, 1968, to her. As a matter of fact he had not met her on the morning of January 26, 1968. There was absolutely no basis, therefore, for arguing that death might be due to poisoning. If as suggested by the respondent death was due to some poison working in her system that afternoon, it is impossible to account for the various injuries which unmistakably show physical violence and signs of throttling. The respondent stated that he had called Balu Bhau, P.W. 1 to the scene when the deceased was feeling giddy and had gone away to inform Dr. Choudhary after keeping Balu Bhau near the ailing woman. But no suggestion to that effect was made to either witness in their cross-examination. The whole story of the respondent is a tissue of lies and it is rather surprising that the High Court should have unnecessarily drawn on its own medical knowledge that Asphyxia is also possible in case of poisoning and that possibility had not been completely eliminated by the medical evidence.

14. The High Court appears to have though from the contents of the post-mortem examination

report that Dr. Khatri did feel that the contents of the viscera were necessary to be examined with a view to detect if there was any poison. There is no basis for this in the evidence. Dr. Khatri has nowhere stated that he had kept the viscera with a view to examine its contents for poison. The High Court seems to have come to this conclusion from the forwarding report made to the Police Sub-Inspector by the Medical Officer which reads as follows :

"Viscera has been preserved. It may please be stated immediately whether examination by the Chemical Analyser is necessary or it is to be destroyed."

From this, it appears, the High Court concluded that the Medical Officer had his own doubts and that was the reason why the viscera had been preserved. With respect the High Court has completely misread the report. There is a regular printed form prescribed by the Government for recording the result of post-mortem examinations. That form is divided into three parts. The first part deals with the general particulars. The second part deals with the external examination of the dead body and the third part deals with the internal examination. On one side of the form there are 22 printed paragraphs to help the Medical Officer in properly examining the body and nothing down his observations in the blank portion opposite these paragraphs. At the end of the 22nd paragraph the Medical Officer has to give his opinion as to the probable cause of death and against this printed matter the Medical Officer performing the post-mortem examination has to give his opinion. The opinion recorded in this case is Asphyxia due to throttling. In the previous column or para 21 the following item is in print :

"State which viscera (if any) have been retained for chemical examination and also quote the numbers on the bottles containing the same."

Now, if a Medical Officer, during the course of his examination, has reason to believe that it is a case of poisoning he must indicate here against this printed column which viscera is retained and in what bottles. In the present case we find that the Medical Officer has merely stated Nil against this column which means that he had not felt it necessary that any viscera was to be retained for chemical analysis. In the case of suspected poisoning the Medical Officer never gives his opinion below column 22 until the viscera is sent to the Chemical Analyser and his report is obtained. In the present case, not only does the report clearly show that Dr. Khatri did not suspect any poisoning but he has given a positive opinion after the post-mortem examination that death was due to Asphyxia because of throttling. Now the writing on which the High Court relied for thinking that the Doctor had his own suspicions, comes not in the post-mortem examination report but in that portion below the report which contains his communication to the Investigating Officer. It is to be found in the forwarding part of the report. That portion is also printed and no body attaches any importance to the same when the Medical Officer has given a definite opinion about the death below column No. 22. That printed matter about the viscera being preserved is retained in the forwarding part of the report out of abundant caution because even if the Medical Officer has already formed his opinion about the cause of death the Investigating Officer may have his own views as regards the cause of death, having regard to the investigation made by him. Though the Medical Officer might be of the view that the viscera need not be preserved for the detection of any poison and death was due to some cause unconnected with poison, the Investigating Officer, in the course of investigation, may feel that the cause of death by poisoning has to be eliminated. The printed matter with regard to the preservation of the viscera is indirectly a notice to the Medical Officer that he has to preserve the viscera till the Investigating Officer feels that it was no longer necessary to preserve it. Therefore, out of abundant caution every post-mortem report form, as used in Maharashtra, contains this paragraph about the preservation of the viscera, the idea simply being that in spite of the Medical Officer not

suspecting any poison he was not at liberty to destroy the viscera until he finally hears from the Investigating Officer that the viscera might be destroyed. In our opinion, the High Court completely misunderstood the printed matter with regard to the preservation of viscera and without any warrant, thought that the Medical Officer Dr. Khatri had himself suspected some poisoning and had, therefore, preserved the viscera. In our opinion death in the present case was caused by throttling and the marks on the face and the neck leave no doubt whatsoever that the deceased Kamlabai was throttled to death. In this connection, it may be remembered, that Kamlabai though about twenty-six years old, was thin of build. That is how she has been described in the post-mortem notes and also by Dr. Choudhary, P.W. 9 in his evidence.

15. It is true that there is no direct evidence as to throttling. No body says that he had seen the respondent actually throttling Kamlabai. But the circumstantial evidence, in our opinion, is so ample and satisfactory that we are constrained to observe that the High Court must have persuaded itself to give the benefit of doubt to the respondent because of the unwarranted doubt if entertained regarding the cause of death. We have here a body of evidence which is absolutely disinterested. The witnesses who have given evidence with regard to the various circumstances are mostly from Malanpada. They come from a locality where the respondent and his relations lived. The deceased Kamlabai was a stranger to the village. She was living alone in a house four furlongs away from Kudus. She was attached to the Zila Parishad Dispensary at Kudus, as a family planning field worker. She had no known relatives or friends. As a family planning worker she must have done some good work in that village and the surrounding villages and that accounts for her popularity as evident from the fact that a large number attended her cremation. But there was no one who was deeply interested in her to the extent of taking a personal interest in the investigation. Much less would there be any anxiety on the part of any body to falsely implicate the respondent. The principle witness Balu Bhau speaks to no more than the earlier part of the assault, and this witness, it must be noted, would be more inclined towards the respondent than otherwise. The father of the respondent was in Balu Bhau's employment as a watchman guarding his threshing floor. The other two witnesses Shantabai, P.W. 3 and Shivram, P.W. 4 are strangers to the place and have absolutely no interest either way. The former was on a temporary visit to Malanpada for the treatment of her son and was living there with her husband's sister. The other is a 'Phase Pardhi' or a bird catcher from Ambernath who happened to be near the jungle at the material time in the course of his bird hunting. It appears that the latter was camping in the village for the night and was available to the P.S.I. who promptly recorded his statement that very night. If he had gone away, it would have been difficult to trace him as he was not known in the village. The point is that all these three principal witnesses had no axe to grind and would be the last persons to implicate the respondent falsely. None of them has tried to embellish their evidence or exaggerate what they had seen. If anything, they are more guilty of understatement than of over-statement.

16. There is no dispute that the respondent had accompanied Kamlabai that afternoon with a view to go to the house of Pandu. There is also no dispute that when Dagdu, P.W. 6 and Balu Bhau, P.W. 1 told them on the way that Pandu and his wife were not at home, they promptly turned back to go away and their way lay through the jungle area of Aricha Dongar. It is the evidence of Balu Bhau that he has a land to the north of Aricha Dongar and he was going that way to fetch his bullocks. This happened about 10 minutes after the respondent and Kamlabai had left. On the way he heard the voice of a woman crying "Manglya leave me, why are you catching me". On hearing these words, he ran in the direction from which the cries had come. From about 40 or 50 paces, he saw that the respondent was struggling with Kamlabai who was lying on the ground and the respondent was lifting her legs. The witness shouted to the respondent that he should leave the lady. The respondent left the lady but picked up a stone to throw it at the witness and so the witness ran down

the hill to the huts, his principal object being to inform the respondent's father what was happening. This was all that he had seen relative to the respondent and Kamlabai. He has also said that when the respondent left her, the woman who was lying on the ground had sat up. This is an important item of evidence with which we will deal later.

17. While going away from near the scene of offence, witness Balu Bhau met two persons. One was Shantabai, P.W. 3 and the other was Shivram, P.W. 4. They were not going together and he saw them at two different places. He asked them to shout so that the respondent realizing that there were people round about may desist from doing further harm to the lady. He did not spend more time with them because he was in a hurry to go and call the respondent's father. But he noticed that both of them had gone in the direction from where the cries had come. In the cross-examination of the witness it does not appear to have been disputed that the witness was at the place at the relevant time. In fact a suggestion was made to him which he denied that the respondent called him to render help since the lady had become unconscious. That is also the story told by the respondent in his statement under Section 342, Criminal Procedure Code. Some flimsy suggestion was made that he was not on good terms with the respondent, but discard the evidence of this witness so far as it goes.

18. The evidence of Shantabai, P.W. 3, fully supports Balu Bhau's evidence. She was on a temporary visit to Malanpada for the treatment of her son who was ill. At the time she was living with her husband's sister who was a resident of Malanpada. She is a poor Adivasi woman and had gone that afternoon to collect cow-dung. When she was near Aricha Dongar at 4.00 or 5.00 p.m. Balu Bhau Patil told her in one other who was near by that the Dispensary woman and the respondent were struggling. So independently she and the other person, Shivram, P.W. 4. went towards the place. She had seen the woman, i.e., Kamlabai in the Dispensary before and she had also known the respondent because he was from Malanpada. What she saw was this. The woman, i.e., Kamlabai was lying on the ground and the respondent was sitting on her chest. Kamlabai was moving her legs and hands. She told Manglya (the respondent) to leave the woman but the respondent asked her to go home. So she went home. It was suggested to this witness that the respondent was not sitting on the chest of Kamlabai but was sitting by the side of that woman. The witness denied the suggestion. As already stated this witness who had no interest whatsoever either in Kamlabai or against the respondent, has told us as little as possible namely that she had seen the respondent sitting on the chest of Kamlabai and at that time the woman was moving her legs and hands.

19. As we shall show later, the place where the respondent was sitting on the chest of the deceased was a different place, some yards removed from the place where Balu Bhau had seen the respondent molesting the deceased. It is obvious that, after the woman had sat up when Balu Bhau saw her, she must have tried to run away from the place but she was overpowered, and again thrown on the ground and this time the respondent was not trying to satisfy his lust but was sitting on her chest and doing something to her which made her move her hands and legs. What Shantabai, P.W. 3, saw was also seen by Shivram, P.W. 4. Both Shantabai and Shivram appear to have reached the vicinity of the incident at about the same time. Shivram who is a stranger to the place did not know any of the persons concerned. He did not know Balu Bhau. He did not know Kamlabai or the respondent nor did he know Shantabai. Shivram says that Balu Bhau told him to look towards the teak tree because a man was molesting a woman. So from about 100 paces he looked at the place and saw that the woman was lying on the ground and the male was sitting on the chest of the woman. He did not see if that woman was struggling. The witness says that he did not worry much because he was in a hurry to earn his bread for the evening and it struck him that perhaps they might be husband and wife and there was no question of rescuing anybody. It is obvious that Shivram, P.W. 4, saw what Shantabai, P.W. 3, had seen. But he did not attach much importance to what he had seen.

Though Shivram does not say who was the woman who was lying down and who was the man who was sitting on her chest, it is very clear that saw what Shantabai, P.W. 3, had been seen and according to Shantabai, P.W. 3, the man who was sitting on the chest of the woman was the respondent and the woman lying on the ground was the Dispensary woman, i.e., Kamlabai.

20. What the respondent was doing by sitting on the chest of the woman is not deposed to by either witness. But it is very clear to us from the other evidence, which is both circumstantial and conclusive, that at that time the respondent was actually throttling her to death. We know that Balu Bhau had run down to the huts to tell the respondent's father or brother to intervene and save the woman from greater insult and molestation. At the huts, he met the respondent's brother Janu Kongil and asked him to go and save the woman. Janu Kongil left. Ziparya Marad, P.W. 7 who was living close by asked Balu Bhau what had happened. Balu Bhau told him that the respondent was doing mischief with the woman from the Dispensary. So he too followed Janu Kongil to the slope of Aricha Dongar. What he saw was the dead body of the woman. Neither he nor Janu Kongil returned from the place immediately and so Balu Bhau along with his nephew Ganpat, P.W. 5, who was at the threshing floor near the huts and Ziparya's younger brother, Janu Marad, went to the place where Balu Bhau had originally seen the molestation. They did not see anybody there. So they returned to the huts. Later it appears, Ziparya, P.W. 7, returned to the hut. He called Balu Bhau inside and told him that the woman was dead. Then they all went to the place where the dead body was lying and according to Balu Bhau the dead body was lying near the bushes some distance away from the place where he had originally seen the molestation. And here a perusal of the scene of offence panchnama would be useful. That panchnama, Ext. 6, shows that there were two distance places where Kamlabai's presence could be fixed. Her dead body was seen lying below a teak tree near a shrub. An exercise book of 100 pages belonging to the deceased was lying at a distance of about 40 to 42 feet away from the dead body. A small piece of green bangle was lying at a distance of about 53 to 54 feet from the teak tree. It is obvious from this that the preliminary struggle when the respondent was trying to criminally assault the woman was some distance away from the place where the dead body was actually found. Near the dead body were found some other articles. A pair of chappals was found 23 inches away from the dead body. A ladies umbrella was 6 inches away from the dead body. Some yellow papers in a file of papers were found 6 inches away from the dead body. Close to the file 4 inches away there was a plastic while measuring scale. Then again close to the body about a foot away a green and white bag containing vegetables and other articles was lying. These articles near the dead body clearly go to show that the woman was thrown on the ground and throttled at the place when she was carrying these personal articles like umbrella, file, bag, etc. The scene of offence panchnama, therefore, conclusively shows two places of assault. One is the place where the exercise book was seen. That was obviously the place where the respondent had held her and tried to criminally assault her. The second place of assault was near the teak tree where she was actually throttled. Balu Bhau's evidence, therefore, stands amply corroborated. According to him when to the place later on where he had seen her, he did not see anybody. But when he went again with Ziparya, he saw the body was lying at some distance away. It is obvious that when the respondent left the woman after being surprised in the act of molestation by the presence of Balu Bhau, the deceased, who, according to Balu Bhau had sat up, must have left that place with her things in order to escape from the place. But only a few yards from there, she was again pursued by the respondent, thrown on the ground and throttled. That was the place near the teak tree. The very nearness of the umbrella, the chappals and the bag to the dead body proclaim that she must have been throttled at that place only. For the purpose of throttling, the respondent sat on her chest and since his back was towards Shantabai, P.W. 3 and Shivram, P.W. 4, they could not see what he was doing with his hands which were in front of him. Shivram says that he could not see what was

actually done because he only saw the man's back. Similar is the evidence of Shantabai P.W. 3, who say that the back of the respondent was towards her and therefore, she did not see what he was doing by sitting on the lady's chest. It is conclusively proved from this evidence that at the time Shantabai, P.W. 3 and Shivram, P.W. 4, had seen the respondent sitting on the chest of the deceased he must have been actually throttling her and that accounts for the fact that the deceased was moving her legs and hands which was noticed by Shantabai, P.W. 3, who saw the incident from a closer position than Shivram, P.W. 4.

21. Apart from the circumstantial corroboration of the principal evidence of Balu Bhau as referred to above, there is further corroboration in his conduct. He ran to the hut of the respondent's father. The father was not there. He met his brother Janu Kongil and told him what he had seen. So Janu Kongil went that way. The Statement of Janu Kongil was recorded by the P.S.I. that same night. But obviously he could not be trusted to give evidence in court. But Janu Kongil had been followed by Ziparya, P.W. 7. And though this witness did not give the court a full account of what he had seen and for that reason was sought to be cross-examined on the basis of the police statement, it is very clear from his evidence that Balu Bhau did tell him that Manglya the respondent was doing some mischief with the woman from the Dispensary and therefore he had gone towards the place indicated. When he went there, he saw the dead body of Kamlabai and on returning home he met Balu Bhau and told him that the woman were dead and lying there. He then took the party to the place and showed Balu Bhau and others the dead body. The other evidence is of Ganpat, P.W. 5. Witness Balu Bhau Patil is his uncle and it appears that he was looking after the threshing floor belonging to himself and his uncle. That threshing floor was close to the huts. When he saw Janu Kongil and Ziparya running towards Aricha Dongar he came to Balu Bhau and asked him what the matter was. Balu Bhau told him that Manglya (the respondent) had caught hold of the canvassor lady (deceased) near Aricha Dongar and struggle was going on there. He suggested to his uncle that they should go there. So they went to the place where the incident had been seen by Balu Bhau. However, no body was seen there. So they all returned hoping to learn more from Ziparya and Janu Kongil after they returned. But it appears that neither Janu Kongil nor Ziparya returned by that time. So Ganpat went to the village to inform Dr. Choudhary and after informing him he again returned to the threshing floor. By this time, it appears, Ziparya Marad returned and was telling that the woman was dead. So in the company of others, Ganpat also went to the place and there they saw the dead body lying behind a bush. That Ganpat did see Dr. Choudhary, P.W. 9 and conveyed to him what he had learnt from Balu Bhau is admitted by Dr. Choudhary. According to the Doctor at about 5.30 p.m. Ganpat came and told him that there was some struggle between Kamlabai, the nurse and the respondent. The respondent was a man whom Dr. Choudhary had known for the last five or six years. He was also in grave doubts whether Kamlabai would ever go to the jungle area of Aricha Dongar. So he was rather doubtful about the information given to him by Ganpat. Therefore, he asked him where Kamlabai was. Ganpat replied that he had not seen her nor he had seen the struggle himself. Thereafter he went to the room of Kamlabai to see if she was there. He did not find her there. He went to Kudus Naka but he did not get any information. So he consulted the Sarpanch of the place and the Block Development Officer and on their advice he went to the Wada Police Station, 9 to 10 miles away, and gave a report to P.S.I. Pagare. This was at about 6.30 p.m. The report actually given by him is Ext. 17 and all he says is that Kamlabai was missing and, therefore, the matter should be investigated. An argument was based upon this 'missing' report to condemn the evidence of Doctor Choudhary and Ganpat, P.W. 5. It was argued that if the Doctor had heard about the struggle between the respondent and Kamlabai he would not have merely said that Kamlabai was missing. It appears to us that there is no substance in the argument. A responsible man like Dr. Choudhary would think twice before making an allegation which was unauthenticated.

The person who told him about the struggle was not the person who had actually seen it. He had learnt about it second hand from Ganpat. To make a written allegation which may involve the honour of the woman or the character of the man whom he had known for five or six years previously would have been an irresponsible act until the facts were verified. But the information given to him through second hands was disturbing. He had to do something and the very fact that he took the trouble to go at once to Wada, 9 to 10 miles away, to inform the police himself goes to show that he had received some information which was disturbing. That he prevailed upon the P.S.I. to come immediately would also go to show how disturbing the news must have been to him. Missing reports are not usually investigated with such alacrity. The P.S.I. came to the village soon after Dr. Choudhary had returned. All this goes to show that though Dr. Choudhary did not think it wise to make any un-confirmed allegation in writing involving the lady and the respondent, we have little doubt that Ganpat must have conveyed the information which he says he did and is confirmed by Dr. Choudhary.

22. The evidence discussed so far clearly establishes that the respondent was the lady's companion when she was going through the jungle of Aricha Dongar which is the scene of offence where the body of the deceased was found about half an hour later. He attempted to criminally assault her at one place where he was surprised by the presence of Balu Bhau who shouted to him to leave the lady. He left her, and the deceased who was lying on her back sat up. He had thrown the deceased on the ground evidently to commit rape and this is elicited from Balu Bhau's cross-examination where he says as follows :

"He (respondent) had felled her down and was trying to untie the knot of her underwear. She was wearing a red sari and a parkar (petticoat). The sari was on her body. He had lifted the sari and parkar over the body."

That there was struggle between them cannot at all be doubted. Being a thin woman her resistance was easily overcome. Some of the injuries on the legs and the elbows noted by the Doctor clearly show her struggle. The broken bangles and the scattering of the exercise book lend further assurance that violence was used. The inquest Panchnama, Ext. 5 further shows that there were four marks of abrasions 2" X 1" on the back. Dr. Khatri does not seem to have noted these injuries. But we have no reason at all to reject this evidence of the inquest panchnama. Clearly, therefore, Balu Bhau's evidence with regard to what he had seen is amply corroborated. After being surprised by the presence of Balu Bhau the respondent left the deceased, who it appears, tried to escape. Having seen that Balu Bhau had run away, the respondent who was frustrated in his attempt to rape must have been now gripped with fear because the lady, the criminal assault on whom was seen by a known villager, was bound to speak about it when she reached the village. So almost in a frenzy the respondent ran after her and throttled her to death at the very place - some yards away. It was at this point that Shantabai, P.W. 3 and Shivram, P.W. 4, saw the incident. All they saw was that he sitting on her chest with his back towards them and was doing something to her. What that something is, clear from the abrasions and injury marks on her face and neck. By the time Balu Bhau was able to send Janu Kongil and Ziparya Marad to the place, the respondent had disappeared and all that Ziparya was able to see was the dead body of Kamlabai. In our opinion, nothing can be more conclusive than this evidence to establish that the respondent was the murderer.

23. The High Court sought to discount the evidence of Balu Bhau P.W. 1, Shantabai, P.W. 3 and Shivram, P.W. 4, by referring to their reaction and subsequent conduct which, in its opinion, was unnatural and unsatisfactory. When courts purport to disbelieve an eye-witness by reference to his subsequent conduct they have to be careful not to substitute their own norms of behaviour in a given

situation for the norms of behaviour of that witness. Secondly, people react to situation not always in a uniform way. A city dweller, a villager or an Adivasi will react differently according to the degree of their sophistication. Moreover, even in the case of individuals of the same class the reaction would vary with the physical courage, mental equipment and social awareness of the individual. What is to be seen is whether the subsequent conduct of the witness is so incongruous with the evidence that it is impossible to believe that what he says is true. Therefore, subsequent conduct cannot be the sole test of the reliability of a witness. The High Court has passed many questions based upon conduct for doubting the evidence of these three witnesses. Why did not Balu Bhau run to his cattle-shed where he had his two servants and Dagdu, P.W. 6, instead of running to the huts ? Why did he not try to resist the respondent ? Why did he not return with Janu Kongil and Ziparya to the scene of offence ? Why did not Shantabai go to the help of the woman or so much as disclose to anybody what she had seen ? Why has Balu Bhau not referred to the presence of Shivram in his first information ? In our opinion, answers are provided to all these questions in the evidence and they cannot be dismissed as unsatisfactory. Balu Bhau has explained that after the respondent picked up a stone to throw it at him he ran down to the huts, the sole purpose of going to the huts being to send the respondent's father or brother to rescue the woman from further molestation. Indeed, Balu Bhau could not have imagined at that time that something more serious than an indecent assault would be contemplated by the respondent. The distance between the scene of offence and the huts is given by Balu Bhau as about 1 1/2 furlongs. Ganpat, P.W. 5 has described it as being half to one furlong. The cattle-shed of Balu Bhau where Dagdu and two others were with him before was about 500 paces away. One really does not know why Balu Bhau should not have run to the huts but only to his cattle-shed. The huts were at the foot of the hill and Balu Bhau could run to the huts more quickly than to his cattle-shed. Perhaps, his direction might have been determined by his anxiety to avoid the stone thrown by the respondent. A furlong is 660 feet and two paces make not less than 4 feet. If distance only is to determine the course of his action, he would reach the huts earlier than his cattle-shed. Moreover he was more confident that the respondent's father or brother would have more influence over the respondent than Dagdu and others who were at the cattle-shed. In these circumstances, his running to the cattle-shed cannot at all be a circumstance incongruous with his eyewitness account. It is true that he had met Shantabai and Shivram at two different places when he was running to the huts. But could he be confident of enlisting their help ? Apparently he was afraid because the respondent who was furious had picked up a stone to throw at him. Moreover Shivram was a stranger whose inclination to help could not be taken for granted. Even after seeing the man on the chest of the woman Shivram thought that they may be husband and wife. Balu Bhau asked both of them to shout just to show that there were people around and the respondent should desist from further indecent behaviour. We do not, therefore, think that Balu Bhau committed a serious error of judgment or acted unnaturally when instead of wasting his time over procuring the help of these two witnesses, he went to the hut of the respondent's father which was close by. There was no point also in Balu Bhau returning with Janu Kongil and Ziparya to the spot because his accompanying them would not be helpful in the circumstances. Janu Kongil the brother of the respondent was quite capable of doing what Balu Bhau wanted him to do. Then again Balu Bhau has explained that he was tired after running to the huts and he stayed back. We do not, therefore, think that his conduct could be at all described as unusual or unnatural. Shantabai was a stranger in the village. She had come there for a temporary stay. She knew the respondent because he was living in Malanpada where Shantabai was also staying. She asked the respondent to leave the woman but the respondent asked her to go home and this he must have done angrily. Shantabai is not, therefore, likely to shout about what she had seen. It may be that Kamlabai was popular in the village but Shantabai, P.W. 3 was not expected to know about it. In our opinion, therefore, the objections raised to the evidence of these two witnesses

namely Balu Bhau, P.W. 1 and Shantabai, P.W. 3 are not such as to create any real doubt about their integrity and truthfulness. We are also of the opinion that the High Court was definitely wrong in thinking that Shivram's evidence is thoroughly useless and could not be believed at all. As a matter of fact his evidence is of the utmost importance. As already stated he was a perfect stranger to the village and his statement was recorded that very night. He did not know either the two witnesses Balu Bhau or Shantabai, nor did he know the respondent or Kamlabai. But he affirms that he had seen a male sitting on a female's chest just at the time and place where Shantabai, P.W. 3 had identified them as the respondent and Kamlabai, both of whom she had known. His presence, it is true, was not mentioned in the first information report of Balu Bhau obviously because Balu Bhau did not know him and could not have helped the police in tracing Shivram who was not expected by him to camp for the night in that village. It was quite a coincidence that he camped for that night in that village and that is how the police were able to trace him and record his statement that very night. The evidence of such a witness whose presence at the spot is referred to both by Balu Bhau and Shantabai gives considerable support to their evidence and cannot be justly discarded as "thoroughly useless". In short the conduct of these three witnesses cannot be regarded as so incongruous as to dub them as untruthful witnesses.

24. There is one more important piece of evidence and that is the confession of the respondent. The respondent was arrested on the 27th at Ambadi Naka some 6 miles away from Kudus and when brought before the P.S.I., it was noticed that he had a fresh skin abrasion on the left knee joint. It is quite possible that such an injury could be caused in a variety of ways. It is equally probable that during the struggle with the woman or when he was sitting on the chest of the woman while throttling, the knee might have rubbed against the earth. The injury, however, is of no great importance. But the same, in our opinion cannot be said about the confession. After his arrest he was produced before the judicial Magistrate at Wada, next day i.e., on January 28 and he was not remanded to police custody but to judicial custody. On the 29th the Investigating Officer Pagare wrote to the Taluka Magistrate Mr. Ahirrao that the respondent, who was in judicial custody, was willing to make a confession and he should, therefore, record his confession. The practice in Maharashtra is for Executive Magistrates to record confessions. Recording of confessions is not normally done by Judicial Magistrates. Mr. Ahirrao, P.W. 10 after receiving the memo from the P.S.I. wrote to the Judicial Magistrate and procured the respondent's presence before him at 10.00 a.m. on January 30, 1968. He observed all the necessary preliminaries in order to ascertain whether the respondent was going to make a voluntary statement and, on being satisfied, he sent him back to the sub-Jail giving him opportunity for further reflection. On the next day i.e. on January 31, he was again produced before Mr. Ahirrao at about noon and since he was willing to make voluntary statement. Mr. Ahirrao recorded the statement which was duly signed by the respondent after being read over to him. Mr. Ahirrao in his evidence says that he was convinced that the respondent had made the confession voluntarily. In this confession which is at Ext. 20 the respondent stated that on the afternoon of January 26, 1968, he was accompanying Vaidyabai i.e., to say Kamlabai for showing the houses which she wanted to visit and they were moving from one hamlet to another. On the way they had to go through the trees. When they were in the trees, he tried to commit forcible rape on the woman and when she began to cry he throttled her. If the statement is accepted as both voluntary and true the court would be entitled to base its conviction thereon. Though the Sessions Judge accepted this confession as voluntary and true the High Court does not appear to have been fully satisfied. It described the confession as very short and concise and observed that its very brevity raises a certain amount of suspicion. It is true that the confession is a brief confession. But the incident was also a brief incident. The respondent and the young woman were going through the jungle and they were alone together at the time. On a certain sexual impulse he decided to

criminally assault her and the whole incident must have been over-throttling and all in less time than was required to record his statement. He has referred to the fact that he was her companion at the time. He has also referred to the fact that he was moving with her from one hamlet to another because she wanted to visit the houses. He has also mentioned the fact that both of them were going through the trees by which he clearly indicated that they were going through the jungle of Aricha Dongar. He tried to commit rape and as she began to cry, he says, he throttled her. What the respondent has stated is amply corroborated by the evidence already discussed. Therefore, there can not be any doubt with regard to the truthfulness of the statement. As to whether it was a voluntary statement or not, we do not feel the slightest doubt that it was voluntary. Except for the day of his arrest, he was not in police custody. He was remanded to judicial custody on the 28th and was produced for his confession before Mr. Ahirrao on the 30th on which day in answer to questions put by Mr. Ahirrao he informed him that he was going to make a voluntary statement. A day's time for reflection was given and on the 31st this statement has been recorded. He was specifically asked about this confession in the Committing court. He merely replied that he will state whatever he has to say in the Sessions Court. He was asked about his signature on the confession. He admitted that he had signed it. The point to be noted is that he did not retract his confession in the Committing court nor did he remotely suggest that there was any pressure on him from any quarter to make the confession. In the Sessions Court also he does not allege that he was under any pressure. In his replies to questions put to him under Section 342 Criminal Procedure Code, he took the stand that he had not made such a statement and that he was merely made to sign a writing by Mr. Ahirrao, who did not read over the writing to him. There is no suggestion also here that there was any pressure from any source for making that statement. We are, therefore, satisfied that the confession was also voluntary and we agree with the learned Sessions Judge in this respect. The High Court suspected the confession not merely because it was brief but also because the High Court expected the respondent to satisfy his sexual impulse. The High Court observes "Now, it may be that while they were passing through Aricha Dongar, a sudden impulse to commit the offence might have come over the accused. But if he was working under the influence of the said impulse, we do not see why he did not satisfy it. The confessional statement gives no indication whatsoever as to why he should have given up the attempt to ravish her and strangle her. The only reason that the confessional statement gives is that as she cried, he throttled her. Now, if a person who is overcome by lust and wants to satisfy the lust by ravishing a woman whom he has found helpless in a lonely place, it is difficult to see why he will stop at satisfying his lust simply because the woman starts crying. It may be that after satisfying the lust, in order that the woman should not involve him in crime by giving information about the offence committed by him he may strangle her and silence her for good. The mere crying of the woman does not appear to be a probable reason for the accused to give up his attempt to rape and proceed to strangle her instead".

25. In our opinion such an approach is entirely unjustified. There can be very little doubt that he wanted to ravish her. His attempt was frustrated by the timely arrival of Balu Bhau and the lady running away from the place crying. He did not throttle her because he felt pity on seeing her crying. He throttled her because the crying indicated that there was future trouble for him. Indeed he would have ravished her but for the arrival of Balu Bhau. He was frustrated in his attempt. On top of it the woman was crying which foreboded bad days for him and that was why he throttled her.

26. In our opinion, there is considerable force in the submission made on behalf of the State that the High Court adopted a negative approach to the evidence in this case after improperly entertaining a doubt about the cause of death. There has been grave miscarriage of justice, and, therefore, the judgment of the High Court is liable to be reversed. The respondent's conviction by the learned Additional Sessions Judge under Sections 302 and 376, read with Section 511, I.P.C., was correct

and is confirmed.

27. This was pre-eminently a fit case for the imposition of the sentence of death. The only question is whether this court should do it now. The trial of the respondent was over in April, 1968 and he was sentenced to death by the Additional Sessions Judge on April 27, 1968. We are now in 1972. In the interval the High Court had acquitted him and set him free. We, therefore, think that he should be sentenced to imprisonment for life for the offence under Section 302, I.P.C. The sentence imposed by the Additional Session Judge for the offence under Section 376, read with Section 511, I.P.C., is confirmed. The sentences shall run concurrently.

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