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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.32/2013

Swapnil s/o Shivaji Waghmare,
age 22 yrs., occu.unemployed,
r/o Sumedhnagar, Nanded.
Tq. & Dist.Nanded.

...Appellant..

Versus

The State of Maharashtra.

...Respondent...

.....

Shri Satej S. Jadhav, Advocate for appellant.
Shri G.R. Ingole, APP for respondent.

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**CORAM: P.V. HARDAS &
N.W. SAMBRE, JJ.**

DATE: 15.06.2015

ORAL JUDGMENT (Per P.V. Hardas, J.) :

1] The appellant, who stands convicted for offence punishable u/s 302 of the Indian Penal Code and sentenced to imprisonment for life and to pay fine of Rs.1,000/-, in default of which to undergo further rigorous imprisonment for six months, by the Sessions Judge, Nanded, by judgment dated 21.12.2012 in Sessions Case No.79/2011, by this appeal questions the correctness of

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his conviction and sentence.

2] Facts as are necessary for the decision of this appeal may briefly be stated thus:

PW12 Deputy Superintendent of Police Mr.Laxmikant Patil, who was working as the Sub Divisional Police Officer, Nanded, at the time of the incident, was informed on 24.1.2011 at about 10-05 p.m. by an unknown person that one girl was assaulted in Viveknagar / Shrinagar. PW12 Dy.S.P. Patil, therefore, proceeded towards Viveknagar and at about 1-20 p.m. reached the house of PW3 Vijay Gunjkar. On reaching the scene of the incident, he noticed that a crowd had gathered and also noticed that in the veranda, there was pool of blood. He was informed that inside the room, a girl named Mayuri had been assaulted by a knife / dagger. PW12 Dy.S.P. Patil, therefore, entered in the room and noticed a pool of blood and also noticed blood stains on the bed and on the wall. On the bed towards the northern side, he noticed some articles - one money purse and two mobiles. He also noticed two passport size photographs on the bed and also found a driving licence lying there. The

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injured had already been removed to the hospital and PW12 Dy.S.P. Patil received information that the injured was in critical condition. PW12 Dy.S.P. Patil, therefore, proceeded to the hospital. On reaching the hospital, he was informed that the Medical Officer had declared the injured Mayuri as dead. PW12 Dy.S.P. Patil communicated this information to his superiors and from the hospital returned to the scene of the incident. He had shown the two photographs, which were found on the bed to the persons who had assembled there. It appears that those photographs had already been shown by the other Police, who had arrived at the scene of the incident. The driving licence bore the name of Swapnil Shivaji Waghmare (appellant). On the basis of the driving licence and the address on the driving licence, PW12 Dy.S.P. Patil and the other Police personnel went in search of the accused. The investigation was entrusted to PW12 Dy.S.P. Patil.

PW12 Dy.S.P. Patil visited the scene of the incident on the next day in the morning and drew the scene of the incident — panchanama between 9-00 a.m. to 11-00 a.m. at Exhibit 18. The scene of the incident was shown by PW1 Govind — father of deceased Mayuri. The scene of the

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incident was a room which was admeasuring 10 x 10 ft. and there was a window adjacent to that door. In the northern and eastern corners of the room, there were two beds. Sample of the blood stains was taken and the cover of a dagger, which was found on the bed, was also seized. The money purse was opened and in the money purse, two passport size photographs of the accused as well as his driving licence were also found. A condom packet was also noticed on that bed. In the packet, a receipt of Gokul Hotel dated 13.1.2011 was also found. A couplet was found to have been written on the said receipt. One chit was found in the packet in which some poem had been written. Other articles were also found in the other money purse. All the articles were seized under the spot panchanama at Exhibit 18.

The blood stained clothes of PW3 Vijay, who had carried injured Mayuri to the hospital, were seized in the presence of panchas under seizure panchanama (Exh.25). On 30.2.2011, the seized articles were referred to the Chemical Analyser under requisition at Exhibit 42 through PW9 Police Constable Jambuvant. Statement of PW8 Sandip was recorded and a mobile was

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seized from him under seizure memorandum at Exhibit 61. The appellant – accused had been arrested at Mumbai in another crime and his custody was transferred from Mumbai in the present crime. Accordingly, the appellant – accused was arrested on 4.2.2011 at 5-30 a.m. under arrest panchanama at Exhibit 39. During the custodial interrogation, the appellant expressed his willingness to point out the place where his trouser was concealed. A memorandum was accordingly drawn in the presence of panchas at Exhibit 34. The appellant led the Police and the panchas to a stream and showed a cream colored trouser, which was lying by the side of the stream. Blood stains were noticed on the trouser and on the handkerchief, which were seized and sealed. A panchanama was drawn at Exhibit 35 in the presence of panchas. During further custodial interrogation, the appellant expressed his willingness to point out the place where a shirt and a dagger had been concealed by him. A memorandum was accordingly recorded in the presence of panchas at Exhibit 22. The appellant led the Police and the panchas in Shrinagar area and from near a Shriram Mandir and at a distance of 20 to 25 ft., from behind a

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broken door took out a shirt and a dagger. Both the articles were found stained with blood. These articles were seized under seizure memorandum at Exhibit 25. Statements of witnesses were recorded and on 23.2.2011, the seized property was referred to the Chemical Analyser under requisition at Exhibit 43. Further to the completion of investigation, a charge-sheet against the appellant was submitted.

3] *Post mortem* on the dead body of deceased Mayuri was conducted by PW5 Dr.Maroti Dake. PW5 Dr.Maroti Dake noticed the following external injuries on the dead body of deceased Mayuri :

"1] Incised wound present over left side of forehead at mid part of left eyebrow, obliquely placed, 2 cm x 1 cm x bone deep.

2] Chop wound present over left side of nose, vertically placed, 3 cm x 1 cm into nasal cavity deep, underlying bone cut beveling of left border present.

3] Stab injury present over right side of face, obliquely placed 1 cm above right lip, 3 cm x nasal cavity deep, directed upwards, medially and backwards, margins sharp angles acute.

4] Stab injury present over left side of neck, obliquely placed 0.5 cm below left ear pinna, 3 cm x 1 cm x cavity deep, directed forwards, downwards and medially, blood oozing out, margins

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sharp, angles acute.

5] Incised wound present over front of neck, midline, horizontally placed, 8.5 cm below tip of chin, 5 cm x 1.5 cm x muscle deep, tailing present over left end.

6] Stab wound present over front of neck in midline horizontally placed 1 cm below injury no.5 of size 2.7 cm x 1 cm x bone deep, directed backwards, upwards and towards left, both angles acute and margins sharp.

7] Stab injury present over left side of chest, horizontally placed, 7 cm lateral to midline and 10 cm above left nipple 2.5 cm x 1 cm x cavity deep, directed backwards, downwards and medially, medially, both angles acute margins sharp.

8] Stab injury present as entry wound over left arm lateral aspect, obliquely placed 10 cm below tip of left shoulder, 3 cm x 1 cm x muscle deep, directed backwards and upwards and exiting as exit of size 1 cm x 0.5 cm margins sharps, angles acute, sharps, angles acute.

9] Stab entry wound present over front of left arm lower part, horizontally placed, 1 cm, above elbow, 3 cm x 2 cm x bone deep, directed upwards and medially exiting as exit wound over posterior medial aspect of left arm, 7 cm above left elbow of size 2.5 cm x 1 cm x bone deep.

10] Chop wound present over right forearm lower part antero-medial aspect, obliquely placed, 1 cm above wrist of size 6 cm x 2 cm x muscle deep, underlying muscle tendons cut, bevelling of lower border and undermining of supper border present.

11] Incised wound present over back left side lower part, horizontally placed at level of 1.3 vertebra 10 cm lateral to midline of size 3 cm x 1 cm x subcute tissue deep.

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12] Incised wound present over left flank 7 cm anterior to injury no.11 of size 1 cm x 0.5 cm x subcutaneous tissue deep, horizontally placed."

PW5 Dr.Maroti Dake opined that all the injuries were fresh and on internal examination, he noticed following injuries:

"Rib cut on left side corresponding to injury no.7 in column no.7, pleura cut corresponding to injury no.7 in column no.117, left pleural cavity contains about 1 lit. of blood, larynx and hyoid bone intact, stab injury going through and through present over trachea corresponding to injury no.6 in column no.17, left lung collapsed stab injury present over apical lobe corresponding to injury no.7 in column no.17, right jugular vein cut, at level of C5 vertebra corresponding to injury no.6 in column no.17, surrounding tissue blood present."

PW5 Dr.Maroti Dake opined that the probable cause of death was stab injury to left lung and neck. Viscera was preserved for chemical analysis. The final opinion regarding cause of death was stab injury to left lung and neck. The *post mortem* report is at Exhibit 30.

4] On the case being committed to the Court of Sessions, the trial Court vide Exhibit 5 framed charge against the appellant for offence punishable u/s 302 of

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the Indian Penal Code. The appellant denied his guilt and claimed to be tried. Prosecution in support of its case examined 12 witnesses. The defence of the appellant was of denial. The trial Court, on appreciation of the evidence, convicted and sentenced the appellant as afore-stated.

5] We have heard Shri Satej S. Jadhav, learned counsel for the appellant and Shri G.R. Ingole, the learned APP and in order to effectively deal with the submissions advanced before us by the learned counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

6] Prosecution has examined PW1 Govind, father of deceased Mayuri, who deposes that deceased Mayuri was residing at Nanded in Viveknagar and was appearing in the CET. Mayuri had been residing there since 18.7.2010 and had taken a room on rent and her landlord was PW3 Vijay Gunjkar. According to PW1 Govind, Mayuri had last come and visited him some time in January and thereafter had returned back to Nanded. Govind further deposes that at

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about 9-00 to 9-30 p.m., he learnt from his relative that Mayuri had been assaulted and was admitted in the hospital. Govind alongwith his other family members reached the Government hospital at Nanded and on reaching the hospital learnt that Mayuri had expired. He had noticed several injuries on the dead body of deceased Mayuri. On going to the room of Mayuri, he had noticed blood stains in the room and had also noticed two mobiles and one money purse lying in the room. According to him, in the money purse, there was photograph of a young male person and learnt that the photograph was that of the appellant. PW1 Govind, therefore, proceeded to the Police Station and lodged his report at Exhibit 14. In cross-examination, he has admitted that he had only seen the photograph in the money purse but did not verify the other articles, which were in the money purse. He has admitted that PW3 Vijay had told him that the photograph was of the appellant.

7] Prosecution has examined PW3 Vijay, the owner of the house where deceased Mayuri was residing. PW3 Vijay deposes that he owns a house at Viveknagar, which is of

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12 rooms. He and his family were residing in six rooms while the other six rooms had been given on rent. According to him, deceased Mayuri was residing as a tenant in one of the rooms. She was residing there since 18.7.2010. About 15 days prior to the incident, he had noticed deceased Mayuri talking with one young boy in front of the gate of the house. According to Vijay, the appellant was the same person with whom deceased Mayuri was talking. In respect of the incident, he deposes that on 24.1.2011 at about 12-00 noon, deceased had arrived at the house and thereafter had gone out of the house. Deceased Mayuri returned back at about 6-00 to 7-00 p.m. and at about 9-30 p.m., Vijay heard cry of Mayuri. Room of Vijay is opposite to the room of Mayuri and, therefore, he immediately rushed towards her room. The door of room of Mayuri was latched from inside. PW3 Vijay, therefore, knocked on the door and thereafter opened the sliding window by inserting his hand and noticed the appellant assaulting deceased Mayuri by a knife. PW3 Vijay, therefore, shouted loudly and on hearing the cry of Vijay, the appellant came out of the room. PW3 Vijay attempted to catch him, but the

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appellant gave push and fled away from the scene of the incident. PW3 Vijay also followed him. While the appellant was running away, the appellant dashed against a motorcycle. PW3 Vijay, therefore, requested the motorcyclist to chase the appellant because he had assaulted one girl. Vijay and PW7 Dattatraya then chased the assailant but the assailant gave them a slip and ran away. Vijay has admitted that there was no street-light and, therefore, they could not catch him. Vijay further deposes that when he returned back, he noticed injured lying in the veranda having sustained the injuries. Vijay took the injured in the hospital in a auto-rickshaw and admitted her there. After the doctor declared her dead, he went away. He has admitted that he returned back alongwith the Police and the Police inspected the room and collected the money purse on the cot. The passport size photographs were in the money purse. He also noticed another money purse and the cover of a dagger lying on the bed. According to him, the other persons residing in the locality verified the photograph and informed that the photograph was of the accused. Father of deceased had arrived and PW3 Vijay narrated the

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incident to him. According to him, when the accused fled away from the room, the accused was carrying the dagger with him. He has admitted that his clothes were seized by the Police as they were blood stained.

In cross-examination, he has admitted that he does not know if his father had informed the Police about the incident. He has admitted that about 17 to 18 girls were residing in his house as tenants. He has admitted as true that in the map, there was no window shown to any of the rooms. He has admitted as correct that generally if a sliding window is closed from inside, it cannot be opened from outside. He has admitted as true that previously he was not knowing the name of the assailant. He has also admitted as correct that the persons gathered there were taking the name of the appellant. He has admitted that he could not give the name of the person who informed him that it was the appellant. He has admitted as correct that he had not specifically given the date as to when he had noticed the appellant and the deceased talking. Omission has been elicited that he had not stated in his previous statement that the person who was seen talking with Mayuri few days ago was the same

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person who had assaulted her. He has admitted that he could identify the assailant on the basis of the photograph. He has also admitted that the money purse contained letters addressed to Mayuri.

An omission has been elicited that he has not stated in his previous statement about electric light burning in the room at the time of the incident. Omission is also elicited that he had not stated in his previous statement that he informed the motorcyclist that the person had assaulted one girl residing in his house. Omission is also elicited that he has not stated in his previous statement that the appellant ran from the side of Rohit Bag and that there was no street-light and, therefore, he could not be caught. Omission is also elicited that he had not stated in his previous statement that the residents of the locality on seeing the photograph had identified the photograph to be of the appellant. Omission is elicited that he had not stated in his statement u/s 164 of the Cr.P.C. that about 15 days prior to the incident, he had noticed the appellant and Mayuri talking in front of his house.

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8] Prosecution has examined PW7 Dattatraya who deposes that on 24.11.2011, he was standing at the entrance gate of his employer, which was adjacent to the house of PW3 Vijay Gunjkar. Dattatraya further deposes that he heard the cries and noticed one person running and also noticed PW3 Vijay chasing that person. Dattatraya, therefore, questioned Vijay as to why he was chasing that person and Vijay informed him that he was the assailant who had assaulted a girl with knife and, therefore, was chasing him. Dattatraya, therefore, chased that person upto the flour mill of one Panchal. The assailant was running with a knife in his hand. The assailant dashed against a motorcycle and when the assailant turned around, his face was visible. Dattatraya has identified the assailant to be the same person. He further deposes that thereafter Vijay carried the injured girl to the hospital in a auto-rickshaw. He also claims that PW3 Vijay had shown photograph to him which was found in the packet in the room.

In cross-examination, he has admitted as true that he could not identify the person on the next day. He has admitted that he cannot identify any person whom he had

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met the previous day. Omission is elicited that he had not stated in his previous statement that after the assailant dashed against the motorcycle, the appellant turned around and his face was visible. Omission has been elicited that Dattatraya had not stated in his previous statement that the assailant was carrying a knife in his hand. Omission is also elicited that he had not stated in his previous statement that the assailant had dashed against a motorcycle.

9] Prosecution has also examined PW10 Dasharath, father of PW3 Vijay. PW10 deposes that he was residing on the ground floor of the building alongwith his son PW3 Vijay. He admits that he was knowing deceased Mayuri who was residing as a tenant in the first room on the ground floor since about 5 to 6 months prior to the incident. According to him, on 24.1.2011 between 9-30 to 9-45 p.m., he was present in the house and was taking his dinner in the front room. He heard the cry of a girl and also heard the cry of Vijay as "Catch Catch". Dasharath, therefore, came out of the room and noticed one young person running away and being chased by PW3 Vijay.

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Dasharath, therefore, went to the room of Mayuri and noticed Mayuri lying on the floor in a pool of blood. According to Dasharath, in the mean time, the other tenants and the residents of the locality also gathered at the spot. He attempted to contact the relatives of Mayuri but could not contact them. Dasharath, therefore, requested his elder son Udaykumar to bring an auto-rickshaw and to take Mayuri to the hospital. After about 5 to 10 minutes, Vijay and Udaykumar took the girl in an auto-rickshaw to the hospital. Within five minutes thereafter, the Police reached the scene of the incident and inspected the room. Dasharath claims that the Police showed him one photograph, which was one in one of the packets and had also shown him the driving licence. He has identified the accused as the same person who was seen running away from the scene of the incident. Omission has been elicited in cross-examination that he had not given the description or the complexion of the person who was observed running away from the scene of the incident. Omission is also elicited that he had not stated in his previous statement about the Police showing him the photograph and the driving licence of the

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appellant. Omission is also elicited that he had not stated in his previous statement about PW3 Vijay identifying the photograph and stating that it was the assailant. Since the aforesaid statement is alleged to have been made in the presence of the Police, the same would be inadmissible in evidence.

10] Prosecution has examined PW8 Sandip who claims that since 2003, he was residing at Nanded in the Bhavsar Square. According to him, he started running a mess at Nanded from 2009. He deposes that he was knowing deceased Mayuri as she was visiting his mess. According to him, the appellant was also visiting his mess and some times taking his meals at his mess. He admits that he knew one Sandip Wane. According to him, the appellant was asserting that deceased Mayuri was "his" and if Mayuri could not belong to him, then she would not belong to any one. According to him, the appellant was also stating that he liked deceased Mayuri and loved her. Deceased Mayuri used to come to his mess for taking tiffin and on 18.01.2011, the appellant had asserted that he was in love with Mayuri. According to him, deceased

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Mayuri was sending messages to PW8 Sandip and the appellant learnt this fact. On 18th, therefore, the appellant took the SIM card from the mobile of PW8 Sandip and started using the same. On 22nd, the appellant caught Sandip by his neck and threatened him on that score. On the next day of the incident, at about 7-30 p.m., the appellant came to his mess and requested Sandip to reach him to his house on motorcycle. Thereafter, Sandip and his friend drove the motorcycle to the house of the appellant and returned back. He has admitted that on 24th, the appellant returned back his SIM card.

In cross-examination, PW8 Sandip has admitted as true that when he received a call from deceased, he learnt her mobile number. He has admitted that since three months prior to the incident, Mayuri became his customer and used to take her meals at his mess. He has also admitted as correct that during that period, Mayuri used to contact him on phone. Omission has been elicited that he had not stated in his previous statement that the accused had taken his SIM card on 18th and had returned the same on 24th. In further cross-examination, he has admitted that he does not remember if on 13th

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January, he and deceased Mayuri had gone to Hotel Gokul on his motorcycle. He was confronted with Article No.5, which was a chit found in the packet. He has admitted that the name of Sandipkumar appears on the side of the chit. The said chit is at Exhibit 38. He has admitted that a couplet has been written on the chit (Exh.38). He has claimed that he does not remember if on 13th he had gone to Gokul Hotel alongwith the deceased. Omission has been elicited that he had not stated that the appellant had threatened him on 22nd January.

10] Shri Satej S. Jadhav, learned counsel for the appellant has urged before us that identification of the appellant by PW3 Vijay Gunjkar is extremely doubtful as there is an omission in the previous statement of Vijay about any light being switched-on in the room of Mayuri. The learned counsel for the appellant has further urged before us that admittedly there was darkness outside as PW3 Vijay has admitted that the street-light was not working. The learned counsel points out to us that PW3 Vijay chased the appellant and, therefore, he had only seen the back of the assailant. Even PW7 Dattatraya, who

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had chased the appellant alongwith PW3 Vijay, had only seen the back of the assailant. PW10 Dasharath, father of PW3 Vijay, who had come out of the room on hearing the cries, had only a faint glimpse of the assailant and that too had only seen the assailant who was seen running. The learned counsel for the appellant, therefore, urges that the identification of the appellant as the assailant is extremely doubtful. The learned APP has supported the findings arrived at by the trial Court.

11] The paucity of adequate illumination either at the scene of the incident or on the road has been highlighted in the omissions and in the evidence of PW3 Vijay. If no electric light was burning in the room of Mayuri, it is extremely doubtful if PW3 Vijay to notice the features of the assailant. When he was chasing the assailant, the assailant was running ahead and PW3 Vijay and PW7 Dattatraya had only seen the back of the assailant. The assailant undisputedly was not a person of acquaintance of these two witnesses. Even PW10 Dasharath, who had come out of the room on hearing the cries, had seen the assailant, who was seen fleeing from

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the scene of the incident. None of these witnesses claim that they had noticed the assailant earlier and that he was a person of their acquaintance. Omission has been elicited in the statement of PW3 Vijay u/s 164 of the Cr.P.C. about noticing the appellant and deceased Mayuri talking with each other a few days prior to the incident. Thus, the appellant was a stranger to these three witnesses and consequently in the absence of test identification parade, the identification of the assailant becomes doubtful. More over, none of these witnesses had adequate time nor was the illumination adequate for these witnesses to have noticed the features of the assailant in order to identify him. Identification on the basis of seeing a single photograph would hardly carry any weight. If the identification on the basis of photographs is to be relied upon, several photographs ought to have been mixed together in order to test the ability of a witness to identify an assailant on the basis of photographs. The photograph was freely shown to the witnesses and in such circumstances, the identification of the assailant in the Court, therefore, is grossly affected. In our opinion, therefore, the

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prosecution has utterly failed in establishing that the assailant, who was running from the scene of the incident was the appellant.

12] The evidence of PW8 Sandip discloses that the appellant was in love with deceased Mayuri and in fact the appellant had claimed that eh was in love with deceased Mayuri. The appellant is sought to be named as an assailant on the basis of finding of two passport size photographs and his driving licence in a money purse, which was found on the bed. The finding of a money purse containing the passport size photograph of the appellant as well as his driving licence would certainly indicate that the appellant had visited the room of Mayuri. However, that by itself would not lead to an irresistible inference that the appellant had visited the room of Mayuri on the day of the incident and at the time of the incident and that the appellant is the same person who had assaulted Mayuri and had fled away from the scene of the incident. Such an inference in the absence of any evidence of identification of the appellant cannot be used to establish that the appellant is the assailant.

13] The report of the Chemical Analyser at Exhibit 65 indicates that the full shirt of the appellant was found stained with blood of "A" group while the blood group could not be determined on his trouser and handkerchief. Even the dagger allegedly discovered at the behest of the appellant, the blood group could not be determined. The discovery memorandum would be inadmissible in evidence as the Investigating Officer has stated that memorandum in presence of panchas was drawn and prior to that he was aware about the place. The Investigating Officer has admitted that accused disclosed to him the information and thereafter he had called the panchas and in their presence, the accused disclosed again. The Investigating Officer was thus aware and the second disclosure would be inadmissible in evidence. In our opinion, not much reliance can be placed on the report of the Chemical Analyser as there is no satisfactory evidence of sealing of the articles and the articles being kept in the same sealed condition maintaining the same seal till they were examined by the Chemical Analyser. In any event, in the absence of any

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other corroborative evidence, the report of the Chemical Analyser by itself would not be sufficient for sustaining the conviction of the appellant. The substantive evidence of the witnesses does not establish the identity of the appellant as the assailant and in the absence of such evidence establishing the identity of the appellant as the assailant, the other evidence is completely insufficient for sustaining the conviction. In our opinion, therefore, the appellant is entitled to be given the benefit of doubt.

14] The appeal is allowed. The conviction and sentence of the appellant is quashed and set aside. The appellant is acquitted of the offence with which he was charged and convicted. Fine, if paid by the appellant, be refunded to him. Since the appellant is in jail, he be released forthwith if not required in any other case.

(N.W. SAMBRE, J.)

(P.V. HARDAS, J.)