

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.415 OF 2010

Swapnali @ Sapana Sharad Mahadik,	]	
Aged 37 years, Occ.-Housewife,	]	
Residing at Room No.51, Naigaon (E),	]	
Vasai, District : Thane.	]	
(Presently detained in Byculla Jail).	]	... Appellant/ Orig.Accd.No.6

Versus

The State of Maharashtra	]	
(at the instance of D.C.B. C.I.D.	]	
Unit XII).	]	... Respondent

Mr. N. V. Sawant for Appellant/Original Accused No.6.
Dr. F. R. Shaikh, APP for State.

WITH

CRIMINAL APPEAL NO.417 OF 2010

1. Rakesh Kantilal Bachchawat,	]	
Age - 33 years, Occ.-Business,	]	
Residing at Room No.101,	]	
Ganesh Bhavan, Katak Road,	]	
Bhayander (West), Thane.	]	
 2. Vishal Champalal Jain.	]	
Age - 23 years, Occ.-Service,	]	
Residing at Ratnapriya Building,	]	
'C' Wing, Room No.210,	]	
Bhayander (West), Mumbai.	]	
Both are at present undergoing the	]	
sentence imposed upon them at	]	
Nashik Road Central Prison, Nashik.	]	... Appellants/ Orig. Accd. Nos. 5 & 7

Versus

The State of Maharashtra	]
(at the instance of Senior Inspector of	]
Police, D.C.B., C.I.D., Unit XII, vide	]

C.R.No.18 of 2007) (corresponding]
 C.R.No.55 of 2007 registered with]
 Borivali Police Station).] **... Respondent**

Mr. Hrishikesh Mundargi i/b Mr. Aniket Vagal for
 Appellant/Original Accused No.5.
 Mr. Saurabh Butala & Mr. Harshawardhan Salgaonkar i/b Mr.
 Harshad Bhadbhade for Appellant/Original Accused No.7.
 Dr. F. R. Shaikh, APP for State.

WITH

CRIMINAL APPEAL NO.454 OF 2010

1. Raju @ Dheknya S/o.	]	
Maganbhau Thakre,	]	
Age - 23 years, Plumber,	]	
Residing at Room No.5, Narendra	]	
Sharma Chawl, Shade No.4, Irani	]	
Wadi, Kandivali (W), Mumbai.	]	
2. Shabbir @ Khadda	]	
S/o. Feroz Khan,	]	
Age - 22 years, Painting Work,	]	... Appellants/
Residing at Azad Nagar, Ambedkar	]	Orig. Accd. Nos.
Nagar, Malad (E), Mumbai.	]	3 & 4

Versus

The State of Maharashtra	]	
(D.C.B. C.I.D.) Unit 12, Mumbai.	]	... Respondent

Mr. S. R. Chitnis, Senior Advocate, for Appellants/Original
 Accused Nos.3 and 4.
 Dr. F. R. Shaikh, APP for State.

WITH

CRIMINAL APPEAL NO.608 OF 2010

Vishal @ Suraj S/o. Arjun Singh	]
Chouhan,	]
Aged about 28 years,	]
Occupation - Hotel Business,	]
residing at Sakadi, Tal.-Aamet,	]

Dist.-Rajasman (Rajasthan).	]	
Presently R/o. Naigaon, Vasai,	]	
Dist.- Thane.	]	
(At present undergoing the sentence	]	
imposed upon him at Nashik Road	]	... Appellant/
Central Prison, Nashik).	]	Orig.Accd.No.2

Versus

The State of Maharashtra	]	... Respondent
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Mr. A. V. Bedekar, Advocate (Appointed) for Appellant/Original Accused No.2.
Dr. F. R. Shaikh, APP for State.

WITH

CRIMINAL APPEAL NO.613 OF 2010

James @ Jumbo S/o. John	]	
Fernandis	]	
Age – 35 years, Occ.-Private Service,	]	
Residing at Kaveri Sadan, Room No.5,	]	
Opp. Malvani Church, Malad (R),	]	
Mumbai.	]	
(Central Jail at Nashik).	]	... Appellant/
	]	Orig.Accd.No.1

Versus

The State of Maharashtra	]	
(D.C.B. C.I.D., Unit 12, Mumbai.	]	... Respondent

Mr. S. R. Chitnis, Senior Advocate, for Appellant/Original Accused No.1.
Dr. F. R. Shaikh, APP for State.

CORAM :- SMT. V. K. TAHILRAMANI AND
SMT. I. K. JAIN, JJ.

RESERVED ON :- FEBRUARY 26, 2015
PRONOUNCED ON :- APRIL 22, 2015

JUDGMENT (PER SMT. I. K. JAIN, J.) :-

1. These Appeals arise out of the Judgment and Order dated 20/04/2010 passed by the learned Additional Sessions Judge, Greater Mumbai, in Sessions Case No.642 of 2007. By the said Judgment and Order, the trial Court convicted the Appellants/original accused nos.1 to 7 under Section 396 read with 34 of the Indian Penal Code and sentenced each of them to life imprisonment and fine of Rs.10,000/- (Rupees Ten Thousand Only); in default R.I. for two years.

2. For the sake of convenience, we shall refer the Respondents as accused as they were referred before the trial Court.

3. The prosecution case briefly stated is as under :

(i) That Mahendra Mehta, then aged about 30 years, was residing with his parents, wife Surabhi and a year old son Amit in Flat No.309, Ravi Kiran Building, Carter Road No.3, Borivali (E), Mumbai. He was one of the partners in Riddhi Jewellers situated at 285/305, Krishna Niwas, Office No.22/A,

Zaveri Bazar. PW 3 Rakesh Jain, his brother Manojkumar Jain and Vimal Mehta, brother of Mahendra Mehta, were the other partners of Riddhi Jewellers. PW 1 Mukesh Mehta, brother of Mahendra Mehta, was residing intervening 6-7 buildings from Ravi Kiran building, Borivali (E), Mumbai where Mahendra Mehta was residing with his family and parents.

(ii) On 21/03/2007 morning, Mahendra Mehta was to travel to Gujarat. At about 4.30 a.m., PW 3 Rakesh Jain returned to Bombay from Baroda. He went to the house of Mahendra Mehta in Ravi Kiran building. PW 3 Rakesh delivered two samples of gold to Mahendra. Those samples were to be taken to Gujarat by Mahendra. That time, Rakesh also handed over a mobile phone to Mahendra which was being used by them in Gujarat. At 5.30 a.m., PW 3 Rakesh went to Ganesh temple which was situated in the compound of the same building.

(iii) At around 6.00 a.m., Mahendra left the house and walked down to catch train for Surat which was scheduled at

6.30 a.m. On the way, at some distance from his house in front of Jain Milk Dairy, four persons came on two motorcycles and snatched the bag which was being carried by Mahendra. Mahendra resisted the same, so those persons assaulted Mahendra by means of choppers over the head and wrist. That time, one male and one female were loitering at the gate of Ravi Kiran building. After assault, assailants ran away on the motorcycles. Mahendra was severely injured and lying in a pool of blood. PW 3 Mukesh, elder brother of Mahendra, was informed about the incident. He rushed to the spot. Devichand, father of Mahendra, also came to know and he too came to the spot. They shifted Mahendra to Bhagwati Hospital. Medical Officer at Bhagwati Hospital declared Mahendra dead at around 7.45 a.m. Matter was reported to Kasturba Marg Police Station.

(iv) On 20/03/2007, PSI Chandrakant Mandavkar was on duty from 8.00 p.m. to 8.00 a.m. of 21/03/2007. He received a telephonic message at around 7.05 a.m. on 21/03/2007 that Mahendra was admitted to hospital as MLC

case. He communicated information to PI Dalvi and proceeded to hospital. Mahendra was admitted in ICU. He was not in a condition to give statement. On the death of Mahendra at 7.45 a.m., PSI Mandavkar recorded report of Mukesh. He returned to police station and registered C.R.No.55 of 2007 under Sections 393, 397 and 302 of IPC.

It appears that ADR entry no.22/2007 was also registered on the basis of report lodged by Mukesh. Investigation was set into motion. During investigation, it was revealed that accused no.7 Vishal Jain was serving in Sejal Jewellers. He was knowing Mahendra Mehta. On 19/03/2007, he met Mahendra in Zaveri Bazar and asked him why he had not been to Gujarat on 14/03/2007. On that, Mahendra informed accused no.7 Vishal that he would be going to Gujarat on 21/03/2007. This information was passed on by accused no.7 Vishal to accused no.5 Rakesh who, with the help of accused nos.1 to 4 and 6, executed the plan to rob Mahendra. It was also revealed that on 21/03/2007 when Mahendra was on the way, accused nos.1 to 4 snatched away the bag which was being carried by Mahendra and

when Mahendra resisted, they assaulted him and caused his death. That time, accused nos. 5 and 6 were guarding accused nos.1 to 4. Then accused were arrested. On completion of investigation, charge-sheet came to be filed. In due course, case was committed to the Court of Sessions.

4. Charge came to be framed against the Appellants under Sections 396 and 398 of the IPC vide Exh.23. The Appellants/accused pleaded not guilty to the charge and claimed to be tried. Their defence was of total denial and false implication. On going through the evidence of 26 witnesses examined in the case, the learned Additional Sessions Judge convicted and sentenced the Appellants as stated in para 1 above. Hence these Appeals.

5. We have heard the learned Advocates for the Appellants and the learned APP for State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned Advocates for the parties, the Judgment delivered by the learned Additional

Sessions Judge and the evidence on record, for the reasons stated below, we are of the opinion that on facts prosecution succeeded but for want of proper compliance of Section 313 of the Code of Criminal Procedure, trial vitiates and judgment and order of conviction and sentence needs to be quashed and set aside.

6. The fact of homicidal death is seriously in dispute. As such, exclusive burden lies on the prosecution to not only overrule the possibility of natural, accidental or suicidal death but also to prove homicidal death beyond reasonable doubt by reliable and convincing evidence.

7. To establish the factum of homicidal death, prosecution has relied upon -

- (i) Inquest panchanama,**
- (ii) Medical evidence and**
- (iii) Circumstantial evidence.**

8. **(i) Inquest panchanama -**

Accused have not disputed genuineness of inquest

panchanama (Exh.52). It was drawn on 21/03/2007 between 8.40 to 9.30 hours at Bhagwati Hospital dead house, Borivali (West). It can be seen from the panchanama that several injuries were noticed on the head, forehead, right hand, right wrist and right arm. These injuries clearly indicate that the death in question was unnatural.

9. (ii) **Medical evidence -**

After inquest panchanama was drawn, dead body was sent for post-mortem examination. PW 13 Dr.Rambhau Sanap was the Medical Officer at Borivali PM Centre from 2006 to January 2009.

On 21/03/2007, Dr.Sanap received the dead body of Mahendra Devichand Mehta through Kasturba Marg Police Station for post-mortem. On the same day he conducted post-mortem between 1.30 p.m. and 2.30 p.m. He noticed the following external injuries on the dead body -

- i) Incised wounds over left hand, index finger 1st phalgnx posteriorly, size 4cm X 2 cm X bone

deep, over ring finger, size 2cm X 2cm X 1cm,
over wrist, size 4cm X 3cm X bone deep and over
thumb, size 3cm X 1cm X bone deep.

- ii) Incised wound over left arm size 7cm X 6cm X muscle deep.
- iii) Incised wound over scalp, forehead 3cm X 1cm X 1cm and 5.3cm X 1cm X bone deep and over occipital area 3cm X 1cm X bone deep.
- iv) Incised wound over right shoulder 3cm X 1cm X muscle deep, over right arm 6cm X 2cm X muscle deep, over right wrist 7cm X 3cm X muscle deep and 6cm X 3cm X bone deep, over right dorsum of hand, thumb cut completely of SBC, size 6.3cm X 5cm X bone deep.

On internal examination, Dr.Sanap noticed the following injuries -

- i) Heamatoma under the scalp,
- ii) Fracture of skull frontal area and occipital area,
- iii) Sub-dural and sub-aregnoid haemorrhage present.

According to PW 13 Dr.Sanap, all the injuries were ante-mortem and caused by sharp and hard cutting object like chopper, sword, etc. The probable cause of death opined by PW 13 Dr.Sanap was haemorrhage and shock due to multiple injuries. PW 13 Dr.Sanap opined that it was an unnatural death. Post-mortem report was proved at Exh.59A. The Cause of Death Certificate was proved at Exh.83. Dr.Sanap stated that such injuries could be possible by assault with weapon like chopper and spear (Arts.1 and 2).

In this connection, it was vehemently contended by Mr. Chitnis, learned Senior Advocate for Appellants, that deceased met with an accidental death. Referring to the nature of injuries stated by PW 13 Dr.Sanap, it was submitted that such injuries are possible only in motor vehicular accident. Mr. Chitnis pointed that ADR entry was deliberately suppressed as the death was due to accident. He submitted that had ADR entry been produced, the truth would have come to the light.

In view of the submissions advanced on behalf of the Appellants, relevant ADR entry No.22/2007 was called by

us and verified. The learned APP has produced its true copy on record which shows the history of homicidal death and not an accidental death, as submitted by the learned Senior Advocate for Appellants.

On ADR, evidence of PW 19 PSI Chandrakant Mandavkar is important. On 20/03/2007, PW 19 PSI Mandavkar was attached to Kasturba Marg Police Station as Diary Officer from 8.00 p.m. to 8.00 a.m. of 21/03/2007. On 21/03/2007, he received a telephonic message at around 7.05 a.m. that Mahendra was admitted to the hospital for treatment and it was a MLC case. He communicated the information to PW 22 PI Dalvi and proceeded to the hospital. He found Mahendra in ICU undergoing treatment. He stated that Mahendra was not in a condition to make statement and expired at 7.45 a.m. His brother PW 1 Mukesh was in the hospital. PSI Mandavkar inquired from Mukesh. On inquiry, he recorded the report (Exh.47) as per the say of Mukesh. It appears that this report was registered as ADR entry No.22/2007. In view of the evidence of PW 19 PSI Mandavkar and true copy of ADR entry No.22/2007 which came to be

verified from the original register, we do not find merit in the contention raised by the learned Senior Advocate for the Appellants that the death in question was an accidental death.

Further it is significant to note that before the trial Court, factum of homicidal death was not seriously in dispute. The defence set up in cross-examination of PW-13 Dr.Sanap was that injuries which were found during post-mortem could be caused by fall from any height on hard and blunt object. It indicates that there is no consistency in the defence raised by the accused.

On the other hand, we find overwhelming evidence in the form of inquest panchanama, post-mortem report supported by testimony of PW 13 Dr.Sanap which exclusively tilts in favour of homicidal death overruling the complete possibility of natural, accidental or suicidal death. We, therefore, do not find any reason to take a view different then taken by the trial Court on the mode and cause of death of Mahendra Mehta.

10. (iii) **Circumstantial evidence -**

In addition to uncontroverted inquest panchanama (Exh.52), post-mortem report (Exh.59A) and Cause of Death Certificate (Exh.83), prosecution has placed strong reliance on the following circumstances -

- (A) Ocular evidence.**
- (B) Test identification parade.**
- (C) Oral dying declaration to PW 1 Mukesh.**
- (D) Discovery of the incriminating articles.**
- (E) Recovery of clothes at the instance of accused no.1 from the flat of accused no.6.**
- (F) Recovery of motor-bikes.**

The elaborate discussion on the above circumstances would be necessary at an appropriate stage. Suffice it to state that prosecution could establish the above circumstances through the evidence of PW1 Mukesh Mehta, PW3 Rakesh Jain, PW4 Mahesh Vyas, PW6 Mitesh Shah, PW8, Kishor Nikam, PW11 Manoj Shah, PW-14 Radheshyam Bind, PW15 Sultan Siddhiqui, PW16 Sandeep Jain, PW17 Ismail Khan, PW18 Sanjay Jain, PW20 Ankush Chavan, PW22 PI

Raghunath Dalvi, PW23 PI Sunil Darekar and PW26 PI Ramakant Pimple. These circumstances too indicate that the death in question was a homicidal death.

To prove the authorship of the accused and to attribute the specific role to each of them in commission of act also prosecution relied upon the aforesaid circumstances. It would be essential here to appreciate the same and find out whether these circumstances are legally proved and sufficient to bring home the guilt of the accused beyond reasonable doubt or not.

11. (A) Ocular evidence.

(B) Test identification parade.

(i) PW 3 Rakesh Jain, PW 4 Mahesh Vyas and PW 6 Mitesh Shah are the eye witnesses to the incident. PW 3 Rakesh was one of the partners of Riddhi Jewellers. According to him on 21/03/2007 at around 4.30 a.m., he returned to Bombay from Baroda and straight way went to the house of Mahendra Mehta as Mahendra was to go to Gujarat at around 6.30 a.m. on the same day. Rakesh

handed over two samples of gold to Mahendra and a cell phone which was being used for transaction in Gujarat. After handing over gold samples, Rakesh left the house of Mahendra at around 5.30 a.m. and went to Ganesh temple situated in the compound of Ravi Kiran building. On his way to temple, PW 3 Rakesh saw a lady and a man at the gate of the building. He proceeded ahead. He then saw two motorbikes near Saibaba temple. Two persons were sitting on each motor bike. Thereafter PW 3 Rakesh reached his residence.

At 6.30 a.m., Rakesh received phone call from Vimal Mehta informing him that some persons attempted to snatch away the bag and assaulted Mahendra. He was also informed that Mahendra was being carried to Bhagwati Hospital by PW 1 Mukesh and his father Devichand. On receiving information, PW 3 Rakesh went to Bhagwati Hospital. Medical Officer declared Mahendra as dead. After two days, PW 3 Rakesh had been to Dahisar Police Station and informed police that he saw a lady and a man at the gate of Ravi Kiran building and also two persons each on two

motor bikes. Accordingly, his statement was recorded at the police station on 23/03/2007.

(ii) On 08/05/2007, PW 3 Rakesh was called at Thane prison for identification parade. SEO Ismail Khan conducted the identification parade. During identification parade, PW 3 Rakesh identified accused no.1 James and accused no.5 Rakesh Bachchawat. PW 3 Rakesh misidentified accused no.4 Shabbir who was not in the TIP.

(iii) It is further stated by PW 3 Rakesh that on the same day i.e. on 08/05/2007, he was taken to Byculla prison. During TIP conducted in Byculla prison, he identified accused no.6 Swapnali as the same lady to whom he saw at the gate of Ravi Kiran building. Thereafter on 05/06/2007, TIP was held at Arthur Road jail. In that TIP, PW 3 Rakesh identified accused no.7 Vishal as the person sitting on motorbike.

(iv) On 25/06/2007, TIP was held in Arthur Road prison in respect to accused no.4 Shabbir. PW 3 Rakesh could not

identify accused no.4 Shabbir in TIP and mis-identified accused no.3 Raju @ Dheknya during the parade.

(v) From the entire evidence of PW 3 Rakesh, it is apparent that he had seen accused nos.5 and 6 at the gate of Ravi Kiran building and accused no.1 sitting on the motorbike.

(vi) The next eye witness examined by the prosecution is PW 4 Mahesh Vyas. He used to go to Jain Milk Dairy early in the morning for bringing milk. He stated that on 21/03/2007 at about 6.00 a.m., he was returning home after purchasing milk. Near Maru General Store, he heard shouts. He looked to the direction of shouts and saw four persons snatching away a bag from the hands of one person. He stated that the person holding the bag was resisting. According to PW 4 Mahesh, out of four persons, two assaulted the person with sharp edged weapons and remaining two caught hold the victim. He saw two motorbikes parked to the left side of place of incident. He

stated that after assault, assailants ran away with their motorbikes in the Southern direction. PW 4 Mahesh identified accused no.2 Vishal in the TIP held on 08/05/2007 and accused no.3 Raju @ Dheknya in the TIP conducted on 05/06/2007. However in the Court, he identified accused no.5 Rakesh Bachchawat holding the victim and accused no.2 Vishal assaulting the victim. So far as accused no.3 Raju @ Dheknya is concerned, PW 4 Mahesh identified him in the TIP as well as in Court. However in the TIP conducted on 25/06/2007, PW 4 Mahesh identified accused no.4 Shabbir, he could not name the accused in Court. In respect to accused no.2 Vishal and accused no.3 Raju @ Dheknya, his evidence is consistent.

(vii) Another eye witness is PW6 Mitesh Shah, who was going to National Park for morning walk. When he reached the main road, he heard shouts "*Bachao, Bachao*". PW 6 Mitesh turned back and saw two persons holding the victim and two snatching bag from the victim. He stated that victim did not leave the bag. The assailants assaulted the

victim with sharp edged weapons. After assault, all four went away on two motorbikes parked near the place of incident. Thereafter PW 6 Mitesh went near the victim lying in pool of blood. After two days, he informed Dahisar police about the incident.

(viii) In the TIP held on 08/05/2007, PW 6 Mitesh identified accused no.1 James, on 25/06/2007 he identified accused no.4 Shabbir during TIP.

(ix) The evidence of PW 3 Rakesh, PW 4 Mahesh and PW 6 Mitesh is assailed by the defence on several grounds.

Those are -

- (i) Vimal Mehta who informed PW 3 Rakesh, not examined.
- (ii) PW 4 Mahesh Vyas introduced a new story that injured person went to Jain Milk Dairy and made phone call to his house.
- (iii) Delay in recording statements of these witnesses not explained. In support, reliance is placed on **Lahu Kamlakar Patil and Another V/s. State of Maharashtra**¹
- (iv) Their evidence on identification of the accused is confusing, concocted and forged.

¹ (2013) 6 Supreme Court Cases 417

(v) The testimonies of PW 3 Rakesh, PW 4 Mahesh and PW 6 Mitesh are not consistent and cannot be relied.

(x) On going through the entire evidence of PW 3 Rakesh, PW 4 Mahesh and PW 6 Mitesh, it can be seen that their evidence in respect to manner of occurrence of incident is cogent and consistent. Except a minor contradiction in the evidence of PW 6 Mitesh, nothing substantial could be elicited in the piercing cross-examination of the eye witnesses. Thus, we do not find any reason to disbelieve their evidence on incident.

(xi) So far as TIP is concerned, it is a matter of record that the eye witnesses have mis-identified some of the accused as discussed above. On the close scrutiny of evidence of PW 3 Rakesh, it is clear that he identified accused nos.1, 5 and 6 in the TIP conducted on 08/05/2007. PW 4 Mahesh identified accused no.3 Raju @ Dheknya on 05/06/2007 during the TIP. PW 6 Mitesh identified accused no.4 Shabbir in the TIP held on 25/06/2007.

(xii) The star witness on TIP is PW 17 SEO Ismail Khan.

He stated that PI Darekar called him at Crime Branch office, Dahisar, and requested to hold identification parade in Crime No.11/2007 of Crime Branch. Accordingly letter was issued to him. He conducted TIPs on 08/05/2007, 05/06/2007 and 25/06/2007. It is stated by PW 17 SEO Khan that in the TIP held on 08/05/2007, Sukhdeo Shinde and Nagesh Jangam were the two panch witnesses. ASI Deshmane introduced PW 17 SEO Khan to Jailor. The identifying witnesses i.e. PW 3 Rakesh Jain, PW 4 Mahesh Vyas and PW 6 Mitesh Shah were made to sit in a separate room. This TIP was in respect to accused no.1 John, accused no.2 Vishal and accused no.5 Rakesh Bachchawat. PW 17 SEO Khan selected 18 dummies. Out of 18, he asked 12 dummies to stand in a line. He took care to see that place of identification parade was not visible to outsiders and particularly to the identifying witnesses.

Initially accused no.1 James and accused no.2 Vishal were called. They were given idea of conducting identification parade. Accused were given a choice to select their own place, change the clothes if they desired and take the position in the line as per their wish. Accused declined to

change the clothes. Accused no.1 James stood between dummy nos.3 and 4 and accused no.2 Vishal stood between dummy nos.7 and 8. Thereafter panch witness Sukhdeo was sent to bring identifying witness PW 3 Rakesh Jain. PW 3 Rakesh identified accused James and Vishal by touching them with finger. The proceedings were noted by PW 17 SEO Khan. Then PW 3 Rakesh was sent to different room.

(xiii) Another panch was sent to call PW 6 Mitesh Shah. He was asked to identify the culprits. PW 6 Mitesh identified accused James and Vishal by touching their bodies. The proceedings were accordingly recorded by PW 17 SEO Khan. The same procedure was followed in respect to the third identifying witness PW 4 Mahesh Vyas. He too identified accused James and Vishal. Memorandum of TIP was drawn. It was proved at Exh.88.

(xiv) In the process of identification, PW 17 SEO Khan selected six dummies. Accused no.5 Rakesh Bachchawat was then called. He was identified by PW 3 Rakesh Jain during TIP. Memorandum of identification was drawn by SEO

Khan. Then dummies, accused and panchanama of TIP were handed over to the Investigating Officer.

(xv) On the same day, PW 17 SEO Khan conducted identification parade in Arthur Road prison. In the parade, PW 3 Rakesh Jain identified accused no.6 Swapnali as the lady standing at the gate of Ravi Kiran building. Its separate memorandum was drawn by PW 17 SEO Khan. It was proved at Exh.89.

(xvi) At the time of second parade held on 05/06/2007, accused Raju @ Dheknya Thakre was subjected to identification parade. Shaku Qureshi and Ramsagar were the panch witnesses. PW 17 SEO Khan stated that 3 identifying witnesses Rakesh Jain, Mahesh Vyas and Mitesh Shah were called at Arthur Road prison. He selected six dummies. Accused no.3 Raju stood in between dummy nos.3 and 4 as per his wish. Then identifying witnesses were called one by one. They identified accused no.3 Raju in the identification parade. Memorandum of identification parade (Exh.90) was accordingly drawn.

(xvii) On 25/06/2007, another identification parade was conducted. Tukaram Lokhande and Aba Shirsath were the panch witnesses. PW 17 SEO Khan took all necessary precautions. He selected six dummies. This TIP was in respect of accused no.4 Shabbir @ Khadda. Following the same procedure as followed in the earlier parades, this identification parade was held. Identifying witnesses PW 3 Rakesh Jain, PW 4 Mahesh Vyas and PW 6 Mitesh Shah identified accused no.4 Shabbir @ Khadda in the TIP. Memorandum of TIP was drawn by PW 17 SEO Khan at Exh.91.

(xviii) It is pertinent to note that identifying witnesses have attributed specific role to each of the accused. Memorandum panchanamas are self speaking to that effect. Considering evidence of PW 17 SEO Khan, Memorandum panchanamas Exhs.88 to 91 and the ocular version of PW 3 Rakesh Jain, PW 4 Mahesh Vyas and PW 6 Mitesh Shah, it can be seen that the evidence is natural, convincing and cogent. There is no reason to disbelieve the same. Some minor contradictions and omissions were bound to be there as the

witnesses were examined in the year 2009 whereas incident took place in the year 2007. There was no animosity between identifying witnesses, SEO who conducted TIPs on one hand and the accused on the other. In our view, the evidence of eye witnesses and PW 17 SEO Khan inspires confidence and clearly establishes the manner of incident of assault on Mahendra and the role played by each of the accused in occurrence of incident.

13. (C) Oral dying declaration to PW 1 Mukesh -

To prove oral dying declaration, prosecution examined PW-1 Mukesh Mehta. He is the real brother of deceased Mahendra. It is stated by Mukesh that on 21.3.2007, in the morning at around 6.30 a.m. when he was sleeping in the house, his wife Mamta received a phone call of Veena Mehta, wife of his real brother Vimal Mehta asking her to send Mukesh immediately as Mahendra met with an accident. Therefore, his wife woke him up and informed the message of Veena. Immediately, Mukesh rushed to the house of Mahendra. On the way, he saw Mahendra lying in

injured condition on the road near his house. At the same time, his father arrived there. Mukesh inquired from Mahendra what had happened. On that, Mahendra told him that four persons arrived on two motor bikes. They were snatching his bag and he resisted the same. Those persons then assaulted him. When Mukesh asked him about identity of those four persons Mahendra told that they were unknown to him. Thereafter, Mahendra fell semi-unconscious and he was taken to Bhagwati Hospital in a rickshaw. He was declared as dead by Medical Officer. Mukesh proved Exh. 47 report lodged by him after Mahendra was declared dead.

On going through the evidence of Mukesh, it is apparent that Mahendra did not name accused persons. From the evidence of Mukesh, at the most it can be said that Mahendra met with homicidal death. So far as authorship of the accused to cause death of Mahendra is concerned, evidence of Mukesh is not helpful to the prosecution as deceased had not implicated the appellants/accused in the commission of alleged act.

14. (D) Discovery of incriminating articles -

On discovery under Section 27 of the Evidence Act the learned Senior Counsel for accused Nos. 1,3 and 4 relied upon ***Prabhoo V/s. State of Uttar Pradesh***² in which it has been held that -

“9. The main difficulty in the case is that the evidence regarding the recovery of blood stained axe and blood stained shirt and dhoti is not very satisfactory and the courts below were wrong in admitting certain statements alleged to have been made by the appellant in connection with that recovery. According to the recovery memo the two witnesses who were present when the aforesaid articles were produced by the appellant were Lal Bahadur Singh and Wali Mohammad. Lal Bahadur Singh was examined as Prosecution Witness 4. He did give evidence about the production of blood stained articles from his house by the appellant. The witness said that the appellant produced the articles from a tub on the eastern side of the house. The witness did not, however, say that the appellant made any statements relating to the recovery. Wali Mohammad was not examined at all. One other witness Dodi Baksh Singh was examined as

² (1963) 2 SCR 881 : AIR 1963 SC 1113 : (1963) 2 Cri LJ 182

Prosecution Witness 3. This witness said that a little before the recovery the Sub-Inspector of Police took the appellant into custody and interrogated him; then the appellant gave out that the axe with which the murder had been committed and his blood stained shirt and dhoti were in the house and the appellant was prepared to produce them. These statements to which Dobi Baksh (PW 3) deposed were not admissible in evidence. They were incriminating statements made to a police officer and were hit by Sections 25 and 26 of the Indian Evidence Act. The statement that the axe was one with which the murder had been committed was not a statement which led to any discovery within the meaning of Section 27 of the Evidence Act. Nor was the alleged statement of the appellant that the blood stained shirt and dhoti belonged to him was a statement which led to any discovery within meaning of Section 27. Section 27 provides that when any fact is deposed to and discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovery may be

proved. In Pulukuri Kotayya v. King Emperor the Privy Council considered the true interpretation of Section 27 and said :

"It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to past user or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A.', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant." (p. 77)

10. We are, therefore, of the opinion that the courts below were wrong in admitting in evidence the alleged statement of the appellant that the axe had been used to commit murder or the statement that the blood stained shirt and dhoti were his."

In the present case according to prosecution, chopper used in commission of act was recovered at the

instance of accused No.3 - Raju @ Dheknya and accused No.4 - Shabbir @ Khadda. To establish discovery of chopper at the instance of these accused, prosecution relied upon evidence of PW 8, PW 18 and PW 23.

On going through the evidence of PW-8 Kishor Nikam, it can be seen that he was called by Police Officer Darekar to act as a Panch. Accused No.4 Shabbir was in police custody that time. It is stated by PW-8 Kishor that accused Shabbir made a statement to discover chopper and pant, which was thrown by him near Naigaon. The statement of Shabbir was accordingly recorded.

It is further stated by PW-8 Kishor that after memorandum was drawn, Shabbir led them to Naigaon. He discovered a pant and chopper which were lying between the trees. Chopper was identified by Kishor at article 3 and pant at article 8. He proved memorandum and recovery panchanama accordingly.

Nothing substantial could be elicited in the cross-examination of this witness which is fully supported by PW-23, Investigating Officer - Sunil Darekar. The evidence of PI Darekar shows that accused No.4 Shabbir was arrested on 7.6.2007. On 12.6.2007, he voluntarily gave a memorandum

in the presence of Panch witnesses to discover chopper and pant. He stated that chopper and pant were recovered at the instance of Shabbir near a field at Naigaon.

Memorandum and Panchanama exhibits 69 and 70 are duly proved by the Investigating Officer and Panch Witnesses. There is no reason to disbelieve their testimonies. Trial Court has properly appreciated the evidence on discovery and there is no reason for us to interfere with the same.

So far as accused No.3 Raju @ Dheknya is concerned, evidence of PW-18 will have to be looked into. PW-18 Sanjay Jain was standing at Ravindra Hotel on 23.05.2007. One Police Officer requested him to act as Panch. So he accompanied the Officer to Police Station. Accused Raju gave memorandum in his presence to discover a chopper and a pant. Accordingly, memorandum was drawn vide Exhibit 96. It is stated by PW-18 Sanjay that after memorandum, accused Raju discovered chopper and clothes in their presence. Panchama is proved by him at Exhibit 97. None of the accused persons except accused No.3 cross-examined this witness. Nothing otherwise could be brought by accused No.3 in the cross-examination to discard the

testimony of Panch Witness Sanjay. His evidence is fully corroborated by PW-23 PI Darekar. We are, therefore, not inclined to take a view different than one taken by the trial court in this regard.

15. (E) Recovery of clothes at the instance of accused no.1 from the flat of accused no.6 -

To prove this circumstance reliance is placed by the prosecution on evidence of PW-11 Manoj Shah. On 28.4.2007, he was called at Unit No XII of DCB, CID. Accordingly, he went there. He stated that one person in custody of police gave his name as Jambo. He made a statement to discover his Shirt, Banyan, Pant and a Mobile. As stated by Jambo, memorandum was drawn at Exhibit 77.

According to PW-11 Manoj, after memorandum, Jambo led them in a jeep to a flat in Udisha Apartment, Room No. 501, owned by accused No.6 – Swapnali. A person by name Sharad Mahadik was present there. Jambo made discovery of Jeans Pant, Banyan and a Mobile Phone of Nokia Company. These articles were seized and Seizure Panchanama Exhibit 78 was drawn. Witness identified article 9 – Jeans Pant, article 10 – Banyan and article 11 – Mobile hand set. He could not identify accused Jambo before the

Court. PW-23 – P.I. Darekar identified him in the dock. It is pertinent to note that accused No.1 Jambo was acquainted with accused No.6 Swapnali. No plausible explanation was given by accused No.1 Jambo and accused No.6 Swapnali in respect of recovery of clothes from the house of accused No.6 - Swapnali. This is the most clinching circumstance against accused No.1 Jambo and accused No.6 Swapnali. We find no reason to disbelieve the same.

16. (F) Recovery of motor bikes -

To establish this circumstance, prosecution adduced evidence of PW-14, PW-20 and PW-15, PW-22.

PW-14 – Radheshyam Amrutlal Bind was running a Mechanic Shop of repairing motor bikes. He stated that motor bike bearing No. MH-02/HA-1715 was sold by him to accused No.2 Vishal Chauhan for Rs. 20,000/-. He identified accused No. 2 – Vishal Chauhan in the dock. This motor bike was recovered at the instance of accused No.2 Vishal Chauhan.

In this connection, PW-20 ASI Ankush Chavan stated that on 24.4.2007, the abovesaid motor bike was recovered at the instance of accused Vishal Chauhan. He

proved memorandum Exhibit 101 and Seizure of motor bike on the information given by accused No.2 Vishal Chauhan vide Exhibit 102.

Another motor bike bearing No. MH-01/HA-802 was sold by PW-15 Sultan Siddiqui, who runs a Shop "City Motors". According to PW-15 Sultan Siddiqui, he sold the said motor bike to James @ Jambo for Rs. 12,500/- on 12.1.2007. PW-15 deals in sales and purchases of old motor bikes. He identified accused No.1 Jambo in the dock. This motor bike was recovered at the instance of accused by PW-22 P.I. Raghunath Dalvi. Memorandum Exhibit 108 given by accused No.1 to discover the said motor bike and discovery panchanama of the motor bike Exhibit 109 are proved by PW-22 - P.I. Raghunath Dalvi. Accused No.1 Jambo and accused No.2 Vishal Chauhan could not elicit anything adverse in the cross-examination of these witnesses. Thus, prosecution succeeded in establishing this circumstance against accused Nos. 1 and 2.

According to prosecution, deceased Mahendra Mehta was known to accused No. 7 - Vishal Jain. On 19.3.2007, PW-16 - Sandip Jain alongwith Mahendra Mehta had been to Zaveri Bazar, Mumbai for purchasing gold chain. At around 4.00 p.m. when they were proceeding to Zaveri

Bazar, accused No.7 Vishal Jain met them near the shop where he was working. At that time, accused Vishal Jain asked Mahendra Mehta reason of not going to Gujarat on 14.3.2007. Mahendra told him that he could not go on 14.3.2007 and he would be going on 21.3.2007. It is alleged that accused No.7 – Vishal Jain passed on this information to accused No.5 Rakesh Bacchawat, who then, with the help of other accused planned to rob Mahendra and accordingly, the plan was executed on 21.3.2007 when Mahendra was proceeding towards railway-station to catch the train.

So far as involvement of accused No.7 Vishal Jain is concerned, prosecution has relied upon the evidence of PW 16 Sandip Jain, who fully supports the prosecution and confessional statement of accused No.7 Vishal Jain recorded by PW 21 Metropolitan Magistrate Mr. G.M. Agrawal. Mr. Agrawal was attached to 23rd Esplanade Court at the relevant time. He recorded statement of accused Vishal Champalal Jain under Section 164 of the Code of Criminal Procedure. The trial court has relied upon the confessional statement of Vishal Jain recorded by learned Magistrate Mr. Agrawal. It is at Exhibit 106. It is apparent from confessional statement Exhibit 106 that the same is exculpatory. Accused Vishal Jain does not implicate him in the entire confession made before

PW-21 Mr. Agrawal.

On this piece of evidence, learned counsel for accused No.7 Mr. Salgaonkar, relied upon the decision of the Hon'ble Apex Court in ***Harbans Singh Bhan Singh vs. State of Punjab***³, in which it has been held that corroboration is necessary to the confessional statement before convicting an accused person on such a statement.

In the case on hand, we have already observed that confessional statement Exh. 106 recorded by the learned Metropolitan Magistrate is of no use to the prosecution as it is exculpatory in nature and, so, we do not find it necessary to dilate much on this aspect.

If confessional statement is kept out of consideration, then only circumstance which remains against accused No.7 Vishal Jain is as stated by PW-16 Sandip Jain that on 19.3.2007 accused Vishal Jain inquired from Mahendra Mehta and he told him that he would be going to Gujarat on 21.3.2007. There is no evidence to show that he passed on the information to accused No.5 Rakesh Bacchawat. In the absence of such link, we find that evidence against accused No.7 is not sufficient to convict him.

³ AIR (SC) -1957-0-637

17. In view of the role attributed to Accused No.5 Rakesh Bacchawat, learned counsel Mr. Rishikesh Mundargi, submitted that there is no material to attribute an overt act to accused Rakesh Bacchawat and in the absence of such material, his conviction needs to be set aside. On common intention and common object, learned counsel Mr. Mundargi referred to the following decisions :

(i) ***Rambilas Singh and Others V/s. State of Bihar***⁴ in which it has been held -

“It is true that in order to convict persons vicariously under Section 34 or Section 149 IPC, it is not necessary to prove that each and everyone of them had indulged in overt acts. Even so, there must be material to show that the overt act or acts of one or more of the accused was or were done in furtherance of the common intention of all the accused or in prosecution of the common object of the members of the unlawful assembly. In this case, such evidence is lacking and hence the appellants cannot be held liable for the individual act of A-16.”

⁴ (1989) 3 Supreme Court Cases 605

(ii) **Dayashankar V/s. State of Madhya Pradesh**⁵

In this case it was observed that -

*“In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true contents of the Section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in **Ashok Kumar v. State of Punjab**⁶, the existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.*

9. *The evidence of PWs 2 and 3 did not*

⁵ (2009) 11 Supreme Court Cases 492

⁶ (1977) 1 SCC 746 : 1977 SCC (Cri) 177 : AIR 1977 SC 109

attribute any overt act to the appellant. The mere fact that he was in the company of the accused who were armed would not be sufficient to attract Section 34 IPC. It is undisputed that appellant was not armed and he had no animosity with the deceased. This position is also accepted by the prosecution. Additionally, the stand that he pulled the leg of the deceased has not been established."

(iii) ***Sripathi and Others V/s. State of Karnataka***⁷

in which it was held -

"9. 5. Section 34 has been enacted on the principle of joint liability in the commission of a criminal act. The Section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances

⁷ (2009) 11 Supreme Court Cases 660

appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of moment; but it must necessarily be before the commission of the crime. The true contents of the Section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. As observed in Ashok Kumar v. State of Punjab, the existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision."

On constructive liability, Mr. Salgaonkar, learned counsel for accused No.7 relied upon ***Dharam Pal and Others V/s. State of Haryana***⁸ in which it was held -

“It may be that when some persons start with a pre-arranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an understanding to commit the major offence as well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf. A criminal Court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. There is no law to our knowledge which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. The existence or otherwise of the common intention depends upon the facts and

8 AIR 1978 SUPREME COURT 1492

circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guilty for every offence committed by the principal offender. As already stated, there is no evidence to justify the conclusion that Surta and Samme Singh, appellants shared the common intention with Dharam Pal to commit the murder of Sardara Singh or to make an attempt on the life of Singh Ram and that the said acts were committed by Dharam Pal in furtherance of the common intention of all the appellants. The common intention denotes action in concert and necessarily postulates a pre-arranged plan or prior meeting of minds and an element of participation in action. As pointed out above, the common intention to commit an offence graver than the one originally designed may develop during the execution of the original plan e. g. during the progress of an attack on the person who is intended to be beaten but the

evidence in that behalf should be clear and cogent for suspicion, however strong, cannot take place of the proof which is essential to bring home the offence to the accused.”

18. In respect of the role attributed to accused Nos. 5,6 and 7, we have elaborately discussed the evidence of prosecution witnesses in the foregoing paragraphs. It is crystal clear from the evidence that at the relevant time, accused No.5 - Rakesh Bacchawat and accused No.6 - Swapnali were guarding on the gate of the building. So far as accused No.7 Vishal Jain is concerned, it is not disputed that he was not present at that time. The authorities referred by the learned counsel for accused Nos. 5 and 7 reiterated the settled propositions of law that absence of material companion or companions cannot justifiably be held guilty for every offence committed by the principal offender. The provisions of Sections 34 and 149 are squarely applicable in the circumstances of the case in view of the evidence of the prosecution witnesses and, therefore, the authorities relied upon as above, by the learned counsel for the accused No.5 and 7 would not come to their rescue.

19. In the light of the above, on facts, in fact,

conviction of accused Nos. 1 to 6 was required to be maintained. But the crucial question before us is, whether conviction recorded by the trial court would legally sustain. In this respect the learned Senior Counsel for the accused drew our attention to the statement of accused persons recorded by the learned Additional Sessions Judge under Section 313 of the Code of Criminal Procedure at Exhibits 127 to 133. Referring to various questions and particularly questions 22 and 62 it was submitted that questions though not related were asked which caused grave prejudice to them.

On the applicability and scope of Section 313 of the Code of Criminal Procedure, learned Senior Counsel for accused Nos. 1,3 and 4 vehemently relied upon the following decisions :-

(i) ***Tara Singh V/s. State***⁹ in which it has been held that -

“32. I cannot stress too strongly the importance of observing faithfully and fairly the provisions of section Criminal Procedure Code. It is not a proper compliance to read out a long string of questions and answers made in the

⁹ 1951 SCR 729 : AIR 1951 SC 441 : (1951) 52 Cri LJ 1491

Committal Court and ask whether the statement is correct. A question of that kind is misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true, or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily

appreciate and understand. I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether pre-judice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of Section 342 of Criminal Procedure Code, is so gross in this case that I feel there is grave likelihood of prejudice."

(ii) **Narain Singh V/s. State of Punjab**¹⁰ in which it has been held that -

"5. Under Section 342 of the Code of Criminal Procedure by the first sub-section, insofar as it is material, the Court may at any stage of the enquiry or trial and after the witnesses for the prosecution have been examined and before the accused is called upon for his defence shall put questions to the accused person for the purpose of enabling him to explain any circumstance appearing in the evidence against him. Examination under Section 342 is primarily to be directed to those matters

10 (1963) 3 SCR 678 : (1964) 1 Cri LJ 730

on which evidence has been led for the prosecution, to ascertain from the accused his version or explanation, if any, of the incident which forms the subject-matter of the charge and his defence. By sub-section (3), the answers given by the accused may "be taken into consideration" at the enquiry or the trial. If the accused person in his examination under Section 342 confesses to the commission of the offence charged against him the court may, relying upon that confession, proceed to convict him, but if he does not confess and in explaining circumstance appearing in the evidence against him sets up his own version and seeks to explain his conduct pleading that he has committed no offence, the statement of the accused can only be taken into consideration in its entirety. It is not open to the Court to dissect the statement and to pick out a part of the statement which may be inculcrimative, and then to examine whether the explanation furnished by the accused for his conduct is supported by the evidence on the record. If the accused admits to have done an act which would but for the explanation furnished by him be an offence, the admission cannot be used against him divorced from the

explanation.”

(iii) **Paramjeet Singh alias Pamma V/s. State of Uttarakhand.**¹¹ in which it has been held that -

“A criminal trial is not a fairy tale wherein one is free to give flight to one's imagination and fantasy. Crime is an event in real life and is the product of an interplay between different human emotions. In arriving at a conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case, in the final analysis, would have to depend upon its own facts. The court must bear in mind that "human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions." Though an offence may be gruesome and revolt the human conscience, an accused can be convicted only on legal evidence and not on surmises and conjectures. The law does not permit the court to punish the accused on the basis of a moral conviction or suspicion alone. "The burden of proof in a criminal trial never shifts and it is always the burden of the prosecution to prove its case beyond

11 (2010) 10 Supreme Court Cases 439

reasonable doubt on the basis of acceptable evidence." In fact, it is a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof required, since a higher degree of assurance is required to convict the accused. The fact that the offence was committed in a very cruel and revolting manner may in itself be a reason for scrutinizing the evidence more closely, lest the shocking nature of the crime induce an instinctive reaction against dispassionate judicial scrutiny of the facts and law."

21. *An accused can be questioned under Section 313 Cr.P.C. only for the purpose of enabling him personally to explain any circumstance appearing in the evidence against him. No matter how weak or scanty the prosecution evidence is in regard to certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation on incriminating material which has surfaced against him.*

22. *Section 313 Cr.P.C. is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do*

*so. Therefore, the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which were not put to the accused in his examination under Section 313 Cr.P.C. cannot be used against him and have to be excluded from consideration. (Vide **Sharad Birdhichand**¹² and **State of Maharashtra v. Sukhdev Singh**¹³.*

23. *In **S. Harnam Singh v. State (Delhi Admn.)**¹⁴, this Court held that non-indication of inculpatory material and its relevant facts by the trial court to the accused adds to the vulnerability of the prosecution case. The recording of the statement of the accused under Section 313 Cr.P.C. is not a purposeless exercise.*

24. *If any appellate Court or revisional court comes across the fact that the trial Court had not put any question to an accused, even if it is of a vital nature,*

12 (1984) 4 SCC 116 : 1984 SCC (Cri) 487

13 (1992) 3 SCC 700 : 1992 SCC (Cri) 705

14 (1976) 2 SCC 819 : 1976 SCC (Cri) 324 : AIR 1976 SC 2140

*such an omission alone should not result in the setting aside of the conviction and sentence as an inevitable consequence. An inadequate examination cannot be presumed to have caused prejudice. Every error or omission in compliance of the provisions of Section 313 Cr.P.C., does not necessarily vitiate trial. Such errors fall within category of curable irregularities and the question as to whether the trial is vitiated, in each case depends upon the degree of error and upon whether prejudice has been or is likely to have been caused to accused. Efforts should be made to undo or correct the lapse. (Vide: **Wasim Khan v. State of U.P.**¹⁵, **Bhoor Singh v. State of Punjab**¹⁶, **Labhchand Dhanpat Singh Jain v. State of Maharashtra**¹⁷, **State of Punjab v. Naib Din**¹⁸ and **Parsuram Pandey v. State of Bihar**¹⁹.*

25. In Asraf Ali v. State of Assam²⁰, this Court observed:

“21. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as a necessary

15 AIR 1956 SC 400 : 1956 Cri LJ 790

16 (1974) 4 SCC 754 : 1974 SCC (Cri) 664 : AIR 1974 SC 1256

17 (1975) 3 SCC 385 : 1975 SCC (Cri) 11 : AIR 1975 SC 182

18 (2001) 8 SCC 578 : 2002 SCC (Cri) 33

19 (2004) 13 SCC 189 : 2005 SC (Cri) 113

20 (2008) 16 SCC 328 : (2010) 4 SCC (Cri) 278

corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.” (emphasis supplied).

26. In *Shivaji Sahebrao Bobade v. State of Maharashtra*²¹, this Court observed as under:

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

21 (1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : AIR 1973 SC 2622

even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction.” (Emphasis added).

27. In *Ganesh Gogoi v. State of Assam*²² this Court, relying upon its earlier decision in *Basavaraj R. Patil v. State of Karnataka*²³, held that the provisions of Section 313 Cr.P.C. are not meant to nail the accused to his disadvantage but are meant for his benefit. The provisions are based on the salutary principles of natural justice and the maxim "audi alteram partem" has been enshrined in them. Therefore, an examination under Section 313 Cr.P.C. has to be of utmost fairness.

28. In *Sk. Maqsood v. State of Maharashtra*²⁴ and *Ranvir Yadav v. State of Bihar*²⁵, this Court held that it is the duty of the trial court to indicate incriminating material to the accused. Section 313 Cr.P.C. is not an empty formality. An improper examination/inadequate questioning under Section 313 Cr.P.C. amounts to a serious lapse on the part of the trial Court

22 (2009) 7 SCC 404 : (2009) 3 SCC (Cri) 421

23 (2000) 8 SCC 740 : 2001 SCC (Cri) 87

24 (2009) 6 SCC 583 : (2009) 3 SCC (Cri) 82

25 (2009) 6 SCC 595 : (2009) 3 SCC (Cri) 92

and is a ground for interference with the conviction.

29. *In **Suresh Chandra Bahri v. State of Bihar**²⁶, this Court rejected the submission that as no question had been put to the accused on motive, no motive for the commission of the crime could be attributed to the accused, nor the same could be reckoned as circumstance against him observing that it could not be pointed out as to what in fact was the real prejudice caused to the accused by omission to question the accused on the motive for the crime. No material was placed before the court to show as to what and in what manner the prejudice, if any, was caused to the accused. More so, the accused/appellant was aware of accusation and charge against him.*

30. *Thus, it is evident from the above that the provisions of Section 313 Cr.P.C. make it obligatory for the court to question the accused on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same. But, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead he must show that such non-examination has actually and*

26 1995 Supp (1) SCC 80 : 1995 SCC (Cri) 60

materially prejudiced him and has resulted in the failure of justice. In other words, in the event of an inadvertent omission on the part of the court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the court.”

20. The gist of the above authorities is that every error or omission in compliance with the provisions of Section 313 does not necessarily vitiate the trial. Such errors fall within the category of curable irregularities and question, whether trial is vitiated in each case, depends upon the degree of error and whether prejudice has been or is likely to have been caused to the accused. The ultimate test in determining whether or not the accused has been fairly examined under this Section is to see whether, having regard to the questions put to him, he did not get an opportunity to say what he wanted to say in respect of the prosecution case against him. Where the non compliance with Section 313 holds the trial to be vitiated, ordinarily the proper course is to order a retrial from the stage at which the provisions of this

section were not complied with.

21. We have meticulously examined the statement at Exhibits 127 to 133. We could notice that 66 identical questions were put to each of the accused by the learned Additional Sessions Judge though entirely different incriminating circumstances against each of them were brought on record.

It is pertinent to note that role played by accused Nos. 5,6 and 7 even according to prosecution was limited, as accused Nos. 5 and 6 were guarding at the gate of the building and accused No.7 passed on the information to accused No.5, who, executed the plan. Accused No.7 was not even present on the spot. Therefore, there was no meaning in putting all 66 questions to each of the accused. As questions were not put specifically, distinctly and separately, in our view, it amounts to serious irregularity vitiating the whole trial, as it is shown that serious prejudice has been caused to the accused.

22. It is significant to note that since 2007, accused were facing the trial. Some of the accused remained in jail throughout. The statements under Section 313 of the Code

were recorded just by cut-copy-paste. Most of the questions put to each of the accused were irrelevant and misleading. The accused have demonstrated from the questions put to them that serious prejudice has occasioned to them as statements were recorded in the total disregard of the provisions of Section 313 of the Cr.P.C. In this premise we are not inclined to order retrial from the stage at which provisions of Section 313 of the Cr.P.C. were not complied with.

23. In the result, appeals succeed. Accordingly, we pass the following order :-

[a] The impugned judgment and order of conviction and sentence in Sessions Case No. 642 of 2007, passed by the learned Additional Sessions Judge, Greater Bombay, is hereby quashed and set aside ;

[b] The accused are acquitted of the offence punishable under Section 396 read with Section 34 of the Indian Penal Code.

[c] Accused Nos.1 to 5 and 7 who are in jail shall be released forthwith, if not otherwise required in any

other case.

[d] Bail bonds of accused No.6 shall stand cancelled and she is set at liberty forthwith.

[e] Registry to communicate this order to the accused in jail through the concerned jail authorities.

[f] We quantify fees to be paid by the High Court Legal Services Committee to the appointed Advocate Mr. A.V. Bedekar at Rs. 5000/-.

[SMT. I.K. JAIN, J]

[SMT. V.K.TAHILRAMANI,J]

grt/-