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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.790 OF 2007

Bhushan Narayan Tandel

Age: 25 years, Residing at Mahim Rewale,
Tal. Palghar.

(At present in custody of Thane Central
Prison)

...Appellants.
(Orig. Accused No. 1)

Versus

The State of Maharashtra

Palghar Police Station.

..Respondent.

Mr. A.P. Mundargi, i/b Mr. S.V. Marwadi for Appellant.
Mr. H.J. Dedhia, APP for Respondent-State.

**CORAM: Smt. V.K. Tahiramani, Acting C.J. &
A.S. Gadkari, J.**

Reserved On: 15th September 2015

Pronounced On: 6th October 2015.

JUDGMENT (Per A.S. Gadkari, J.):

1 The appellant, original accused no.1, has questioned the
correctness of the judgment and order dated 9th August 2007 passed by the

1st Adhoc Additional Sessions Judge, Palghar in Sessions Case No.179 of 2005, thereby convicting the appellant under Section 302 read with Section 34 of the Indian Penal Code and under Section 201 read with Section 34 of Indian Penal Code and sentenced him to undergo imprisonment for life and to pay fine of Rs.500/-, in default of payment of fine further to undergo R.I. for five months for the offence punishable under Section 302 read with Section 34 of Indian Penal Code. As the appellant is convicted and sentenced for offence punishable under Section 302 read with Section 34 of Indian Penal Code, no separate sentence was passed for offence punishable under Section 201 read with Section 34 of Indian Penal Code by the Trial Court.

The original accused no.2-Ganapati Vijaukumar Kondar was also convicted alongwith accused no.1-Bhushan Narayan Tandel under Section 302 read with Section 34 of the Indian Penal Code. The original accused no.2-Ganapati V. Kondar had filed a criminal application no.473 of 2011 in the present appeal thereby claiming that, he was juvenile in conflict with law in terms of Juvenile Justice (Care and Protection of Children) Act, 2000 and having undergone sentence of imprisonment for more than six years was entitled to be released forthwith. The Division Bench of this Court by its order dated 23rd August 2012 directed the Juvenile Justice

Board to hold enquiry and submit report in that behalf. Pursuant to the said order, enquiry was held by the Juvenile Justice Board and report was submitted in this Court. This Court by judgment and order dated 28th February 2012 held that, the Juvenile Justice Board has recorded a finding that at the time of commission of the offence i.e. 3rd September 2005, the appellant no.2-original accused no.2 was a juvenile. The Division Bench was pleased to hold that the appellant no.2-original accused no.2 was entitled for the benefit of Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2000. The Division Bench in the said judgment and order dated 28.2.2012, by maintaining the conviction of the original accused no.2-i.e. the applicant therein directed the release of the said applicant forthwith, if not required in any other case. Thus, in the present appeal only the original accused no.1 Bhushan Narayan Tandel is the appellant who has impugned the judgment and order dated 9th August 2007 passed by the learned Trial Court.

2 The facts which can be enumerated from the record and are necessary to decide the present appeal can briefly be stated thus:

(i) The date of incident in the present case is 3.9.2005. The name of deceased is Utpal Vartak. The appellant and deceased Utpal were close friends. The families of both the said persons were having cordial relations.

The original accused no.2 Ganapati Kondar was the friend of the appellant. Seven to eight years prior to the date of incident, Utpal had advanced a hand loan of Rs.10,000/- to the appellant. Utpal was demanding the said amount from the appellant. However, the appellant was not returning the same.

(ii) On the day of incident i.e. 3.9.2005 the appellant phoned Utpal at about 7.30 p.m. which was attended by the mother of Utpal i.e.Smt. Damini Vartak (PW-8). The appellant requested her to ask Utpal to come to his house. The said message was delivered by Smt. Damini to Utpal. Utpal accordingly left the house on his motorcycle and went to house of the appellant. The appellant at about 7.30 p.m. purchased two quarters of Hayward whisky bottles and groundnut from the liquor shop of Harihar Raut (PW-1) and went towards Rewale side. The appellant then collected a drinking water pitcher (kalash) from Bhaskar Tandel (PW-4) and glasses from Narendra Pagdhare (PW-6) and thereafter both accused persons and deceased Utpal gathered near the cremation ground of Mahim Rewale for drinking liquor.

(iii) It is the further case of the prosecution that during the said party/drinking of liquor, there arisen a dispute between Utpal and appellant on account of money transaction and at that time quarrel took place

between them. Hearing shouts of quarrel, the villagers from nearby vicinity gathered towards cremation ground, holding torches in their hands. In the said quarrel it is alleged that both accused person stabbed Utpal and committed his murder. When the villagers from the nearby vicinity reached the spot, they saw the two accused persons dragging the dead body by holding the legs and throwing the same in the bushes. The villagers also noticed bleeding injuries over the left hand of the appellant, and appellant was washing his blood stained clothes in the creek water. The appellant, after seeing the said villagers, threatened them not to stay at place and asked them to go back to their houses.

(iv) The villagers thereafter informed the said fact to Kesarinath Tandel, the uncle of the appellant, who came near the place of incident with father of the appellant namely Narayan Tandel. Kesarinath and Narayan enquired about the incident with the appellant upon which the appellant told them that he along with original accused no.2 Ganapati have committed murder of Utpal. Kesarinath took the accused persons in jeep alongwith one Sadanand Kini (PW-2) to the police station. Kesarinath disclosed the incident to the police officer, upon which an entry in the station diary was made. PSI Shri Naik (PW-18) took the injured appellant to the Medical Officer for examination.

(v) Police Inspector Shri Babasaheb Chalak (PW-20) was informed about the incident. The police reached to the house of the deceased Utpal. Bhavesh Vartak (PW-17), brother of deceased Utpal then identified the dead body of Utpal and thereafter lodged the complaint against accused persons. On the basis of the said complaint, C.R. No.I-122/2005 was registered against the accused persons for the offence punishable under Section 302, 201 read with Section 34 of Indian Penal Code. PSI Shri Naik then arrested both the accused persons in the said crime by preparing the arrest panchanama in presence of panch-witnesses. Further investigation was carried out by Police Inspector Shri Chalak. During the course of investigation, P.I. Shri Chalak prepared inquest panchanama and sent the dead body of Utpal for postmortem. P.I. Shri Chalak has also prepared spot panchanama and seized two empty bottles of whisky, one cover of knife and soil mixed with blood from the spot. PI Shri Chalak recorded statement of the witnesses.

(vi) On 6.9.2005 when the appellant was in police custody, he expressed his willingness to show the place where he had concealed the weapon used in the crime namely knife. The original accused no.2- Ganapati made confessional statement under Section 164 of Cr. P.C. before the Judicial Magistrate First Class, Palghar. The test identification of

accused no.2- Ganapati was conducted by the Executive Magistrate, Palghar and he was identified by the witnesses. After completion of investigation, a chargesheet came to be filed in the Court of Judicial Magistrate First Class, Palghar against both the accused persons for the offence punishable under Sections 302, 201 read with Section 34 of the Indian Penal Code.

(vii) As the offence under Section 302 of IPC was exclusively triable by the Court of Sessions, the learned Judicial Magistrate First Class, Palghar committed the said case to the Court of Sessions for trial as per the provision of Section 209 of Cr. P.C. After committal of the said case, the Trial Court framed charge against the appellants below Exhibit-3. The said charge was read over and explained to the appellant. The appellant denied the charge and claimed to be tried. The defence of the appellant is that, at the time of incident he along with Utpal and co-accused Ganapati was enjoying the party. At that time four to five persons came there and picked up quarrel with deceased Utpal and started assaulting him, with weapon and committed his murder. When the appellant intervened, he also sustained injuries on his palm. In the meanwhile the villagers came at the spot and as per the directions of the villagers the appellant went to Palghar Police Station to inform the incident, however, the police falsely implicated

him in the case.

(viii) The learned Trial Court after recording the evidence of the witnesses and after hearing the parties to the said case was pleased to convict the appellant by the impugned judgment and order dated 9th August 2007 as stated hereinabove.

3 Heard Mr. A.P. Mundargi, Senior Counsel alongwith Mr. S.V. Marwadi for the appellant and Mr. H.J. Dedhia, the learned APP for the State and with their assistance we have perused the entire record pertaining to the present case.

4 The learned Senior Counsel for the appellant submitted that the evidence adduced by the prosecution in the present case is not reliable to connect the appellant to the present crime. That the prosecution has failed to establish that the appellant is the author of the injuries on the deceased Utpal. He submitted that the evidence on record even if accepted as true and correct, it only proves that the appellant and the original accused no.2 were present at the spot with deceased Utpal in the night. He submitted that there is no link between the presence of the appellant at the scene of offence and finding of dead body of Utpal on the next day. He further submitted that the conduct of the witnesses in the present case who allegedly saw the appellant dragging the dead body of Utpal and throwing

it in the bushes is very doubtful. That in view of their evidence it is apparent that their presence at the spot and their subsequent conduct after seeing the appellant throwing the dead body in the bushes raises doubt in the mind about their presence itself at the spot. He further submitted that in the present case the witnesses have stated about hearing of quarrel at the scene of offence and it is the quarrel which is the root cause of the entire incident and therefore number of injuries which are found on the dead body of deceased Utpal is not a relevant factor while deciding the present case. In support of his contention, he placed his reliance on the decision of the Supreme Court in the case of ***Surinder Kumar Vs. Union Territory, Chandigarh reported in AIR 1989 2 SCC 217***. Mr. Mundargi further contended that the present case therefore would fall within the purview of Section 304-II of IPC and not Section 302 of IPC. He therefore urged before us that the appeal may be allowed and the appellant may be acquitted or in the alternate the conviction and sentence of the appellant may be converted from Section 302 of IPC to Section 304-II of IPC.

Per contra, Mr. H.J. Dedhia, the learned APP for the State submitted that the evidence of the witnesses on record discloses that only appellant, original accused no.2 Ganapati and deceased Utpal were present at the scene of offence in the said night. He further submitted that all

circumstances if taken together would definitely point the finger of guilt against the appellant. He submitted that in the statement recorded at the instance of appellant under Section 313 of Cr. P.C., the appellant did not explain the cause of injuries on his palm with knife. That there is extra judicial confession given by the appellant to PW-2 Sadanand Kini. He further submitted that the decision relied upon by the learned Senior Counsel is of no help to the appellant as in that case there were only four injuries found on the dead body of deceased, however in the present case there are more than 20 injuries inflicted by the appellant and co-accused to the deceased Utpal. He therefore prayed that the conviction and sentence awarded by the Trial Court may be maintained by dismissing the present appeal.

5 In order to effectively deal with the submissions advanced by the learned Senior Counsel for the appellant and the learned APP for the State, it would be useful to advert to, in brief, the evidence of the prosecution witnesses. The prosecution in support of its case examined in all 21 witnesses.

6 PW-1 is Harihar Nagesh Raut. This witness in his testimony has deposed that he run beer bar and permit room at Mahim bazar styled as “Hotel Smarth”. That on 3.9.2005, at about 7.30 p.m. the appellant

Bhushan came to his hotel and purchased two quarter bottles of Haywards Whisky and groundnuts of Rs.10/- and went away. This witness identified empty bottles of whisky which were article-3.

In the cross-examination, this witness has admitted that he had shown record pertaining to purchase of said two bottles of whisky to the police.

7 PW-2 is Shri Sadanand Pandurang Kini. This witness has deposed that he knew the appellant and deceased Utpal as they were residents of his village. The appellant was working in National Co.Op. Bank and was residing at Cuff Parade in the house of his uncle. That on 3.9.2005, at about 10.15 p.m. Shri Kesarinath Tandel came to his house and informed that the appellant and Ganapati were to be produced in the police station and asked Sadanand (PW-2) to accompany him. Then PW-2 accompanied Shri Kesarinath in jeep to the house of the appellant and from there they proceeded towards the police station. He saw that the appellant had a bleeding injuries on his left hand palm and some cotton was warped on it. That on the way the appellant disclosed to him that he had quarrel with deceased Utpal on account of some money transaction and therefore Utpal slapped him. That the appellant therefore stabbed Utpal. PW-2 has further stated that thereafter they produced the appellant in the police

station. The police took the appellant to the Government Dispensary. The appellant thereafter pointed out the place where the murder was committed which was near the cremation ground at Rewale Kharpada. The other co-accused Ganapati was also present at that time. That the appellant thereafter pointed out the dead body of Utpal which was lying in the bushes. This witness noticed the injuries over the neck, chest and stomach of the deceased. Thereafter PW-2 accompanied police to the house of Utpal and informed the incident to them.

In the cross-examination, this witness has admitted that the appellant and deceased Utpal were close friends. So also their families were having cordial relations. That the appellant used to visit village Rewale on holiday. That he did not pay attention as to whether gait of the appellant was unsteady during travel from jeep to the police station. He has further admitted that even he was not attentive whether the appellant had consumed liquor. This witness has admitted that the appellant was not able to talk clearly. That police did not make any enquiry with Kesarinath, uncle of the appellant at that time. That Bhavesh (PW-17) was not at the house at that time and must be in the village itself when they were going back to the police station. That there was no talk between him and Bhavesh on that night.

8 PW-3 is Chandrakant Maruti Tandel. This witness has deposed that he knew the appellant as he was residing in his village. That on 3.9.2005, at about 8.00 p.m. while he was standing outside his house, he saw the appellant, deceased Utpal and 4 to 5 persons walking towards cremation ground at Kharpada. At about 9.00 p.m. he was watching T.V. Programme. He heard shouts coming from cremation ground and therefore he rushed towards that side.

As this witness did not support the prosecution case, he was declared hostile and the learned APP was permitted to cross-examine this witness. In his cross-examination at the instance of APP, no other material apart from stated above, has been brought on record. In his further cross-examination by the learned Advocate for the appellant, this witness has admitted that the appellant was heavily drunk on that particular night.

9 PW-4 is Shri Bhaskar Maruti Tandel. This witness has also deposed in the same manner as that of PW-3 Chandrakant Tandel and this witness also did not support the prosecution case.

10 PW-5 is Sahdev Maruti Tandel. This witness has deposed that he knew the appellant and deceased Utpal as they were resident of his village. That on 3.9.2005 at about 9.00 p.m. he was sleeping in his house. At that

time his wife woke him up and told him that shouts were coming from the side of cremation ground. Hence, he proceeded towards cremation ground. There he saw three boats near the spot. He saw the appellant, accused Ganapati and four to five other persons standing there. He saw the appellant had a bleeding injury over his left hand. He saw the dead body of Utpal lying on the side of the road. The appellant told him to leave the place. Then he went to the house of the appellant's father Narayan (PW-15) and narrated the incident to him. That he along with Narayan thereafter came at the place of incident. The appellant told this witness and his father (PW-15) not to stop at the spot and go away. Therefore PW-5 and Narayan (PW-15) left that place.

In the cross-examination, this witness has admitted that he had not identified those four to five persons who were present along with appellant and co-accused Ganapati as it was dark. He has further admitted that there was some quarrel/exchange of words going on between the appellant and co-accused Ganapati on one side and other four to five persons on other side. That when he reached at that spot, the appellant got annoyed and told him that he will take care of their quarrel and asked him to go away. He has further admitted that on the next day morning at 10.00 a.m. when he again went to the place of incident, he saw the dead body of

Utpal was not by the side of road, but it was lying away from the road in the bushes.

11 PW-6 is Narendra Yashwant Pagdhare. This witness has deposed that on 3.9.2005 at about 7.30 p.m. Utpal came to his house on the motorcycle along with one person. Thereafter the appellant also came and demanded glasses as he wanted to enjoy party. PW-6 gave the appellant four to five glasses. The appellant took those glasses and went to the cremation ground side. At about 9.15 p.m., he heard shouts and therefore he proceeded towards cremation ground. He reached near the spot where three boats were kept and saw the appellant, co-accused Ganapati and four to five other person standing there. He saw the appellant had bleeding injuries on the left hand. He also saw the appellant was heavily drunk at that time and when he enquired with him, the appellant told him to go away.

As this witness did not support the prosecution case, he was declared hostile and learned APP after taking permission from the learned Judge of the Trial Court, cross-examined this witness. In the cross-examination, apart from what is stated hereinabove, no other material which is beneficial to the prosecution has been brought on record.

12 PW-7 is Rupesh Devraj Shanwari. This witness has deposed that he knew the appellant as he was resident of his village and was also his class-mate. He knew the deceased Utpal. That on 3.9.2005 during night hours he was inside his house. He heard some shouts and therefore he came out of his house with a torch/battery in his hand. That Vijay Laxman Shanwari (PW-16) and Smt. Manda Ambat (PW-9) alongwith other villagers also came out of their house. They all proceeded towards the cremation ground. He saw two persons were dragging one man by holding his legs. Those two persons thereafter threw that man in the bushes. He saw the incident in the light of battery and street light that the appellant and his friend were dragging that man. The appellant was trying to clean blood stains which were on his shirt in the creek water. This witness also noticed the bleeding injuries on the left hand palm of the appellant. The appellant was terrified. When he saw this witness and others, he asked them to go away. After about one month his statement was recorded under Section 164 of Cr. P.C. by the Judicial Magistrate First Class, Palghar.

In the cross-examination, this witness has admitted and in fact reiterated the facts that at the relevant time he saw two persons dragging one man by holding his legs. Those two persons dragged that man for about 50 ft. He saw from distance of about 40 ft. the fact that the said

persons threw the man in the bushes. That in all five persons were present at the spot. That he was not knowing during night hours who was the man (deceased) dragged by the appellant. He has further admitted that as he was terrified at that time, he did not feel to inform the said incident to the police.

13 PW-8 is Smt. Damini Jaywant Vartak, the mother of deceased Utpal. In her testimony, she has stated that Utpal was her son. She knew the appellant Bhushan as he was the friend of Utpal since his childhood. Their family have cordial relations with family of the appellant. Seven to eight years prior to the incident, Utpal had given Rs.10,000/- to the appellant and deceased Utpal was demanding the said money back, but the appellant was avoiding to pay the same. That on 2.9.2005 the appellant had given a phone call to their house which was attended by her. The appellant had asked her to send Utpal. As Utpal had gone to Mumbai, she informed the appellant accordingly. That on 3.9.2005 the appellant again called on the phone at about 7.30 p.m. which was attended by her. The appellant asked her to send Utpal to his house. She informed Utpal (deceased) accordingly. After about five minutes, Utpal left the house on his Hero Honda motorcycle to reach the house of the appellant Bhushan. At about 11.30 p.m., the police came to her house and she was learnt that the appellant and his friend had

committed murder of Utpal. In her cross-examination, no material has been elicited which would be of any assistance to the appellant.

14 PW-9 is Smt. Manda K. Ambat. This witness has deposed that on 3.9.2005 at about 9.00 p.m. she was sleeping in her house. She heard shouts and therefore she woke up and came out of her house. Thereafter she herself, Rupesh Shanwri (PW-7), and Vijay Shanwri (PW-16) went to the cremation ground. She saw two persons dragging a man by holding his legs. They all reached near the spot. The appellant was one of two persons who was dragging the man. She saw it in the light of torch and street light. That Rupesh (PW-7) and Vijay (PW-16) were holding the battery. She saw the appellant cleaning his clothes in creek water, as the clothes were having blood stains. She also noticed injury over the left hand palm of the appellant. When appellant saw them, the appellant told them to go back to their house and therefore she went back.

In her cross-examination, an omission to the effect that, 'street light was also on when they reached near the spot' has been brought on record. No other material which is useful to the appellant has been elicited in her cross-examination.

15 PW-10 is Anil P. Vaiti, the panch-witness to the recovery of knife at the instance of the appellant which was used in the commission of

the crime. This witness has deposed that the appellant was in police custody when he was called to the police station at Palghar. The appellant made disclosure statement to point out the place near the cremation ground where the weapon i.e. knife can be traced out. Thereafter he alongwith appellant and police proceeded to the spot near the cremation ground at Rewale Kharpada. Thereafter appellant walked for about 30 ft. near one Babhul bush and took out one knife and produced the same before police. This witness has identified the said knife as Article-17 which is on record. This witness has proved the discovery panchanama Exhibit 36(A).

In the cross-examination, this witness has categorically stated that there were no thorny bushes from the road upto the distance of 15 ft. where the first knife was recovered. This witness has further admitted that the knife which was recovered at the instance of appellant was kept at the base of the said tree in the Babhul tree.

16 PW-11 is Dr. Rajendra Sitaram Kelkar. This witness has deposed that on 3.9.2005 at about 11.00 p.m. he examined the appellant who was brought by Palghar Police. On examination, the said Doctor noticed one incised wound admeasuring 2" x ½ muscle deep with bleeding over left hand dorsal middle finger base. The age of the injury was within 6 hours and possible by hard and sharp edged weapon. He accordingly issued a

medical certificate. PW-11 has opined that such injury can be possible during the scuffle between more than two persons, if any person holding a sharp edge weapon like knife.

On the same day PW-11 also examined Ganapati Kondur brought by Palghar Police. PW-11 did not notice any injury on the person of said Ganapati. He accordingly issued a medical certificate.

On 4.9.2005 PW-11 he carried out postmortem examination on the dead body of Utpal Jaywant Vartak of Rewale Mahim village. On examination, he noticed 4 incised injuries over the scalp as described in Column No.17 of the P.M. Notes.. He also drew the sketch showing the location of the injuries. All four injuries were incised wounds. He also noticed multiple stab wounds over neck, chest and abdomen, total 20 in number. He has described the said injuries in Column No.17. He also prepared the sketch showing the location of those injuries. All those injuries were ante-mortem. On internal examination of thorax, he noticed upper lobe of right lung perforated, heart was perforated and it was empty. He also noticed 2,3 and 4th ribs fractured at costo chondral joint through and through. On further examination of abdomen, he noticed right lobe of liver lateral surface having stab wound 2.5 “ x 2” deep. He noticed 3 stab wounds over abdomen right side. He noticed omentum was protruding out

from stab wound. PW-11 opined that probable death of deceased as, due to haemorrhagic shock due to multiple stab injuries to vital organs i.e. heart, lung, liver with haemothorax and hamoterritorial. He also prepared postmortem notes which are at Exhibit 40(4) on record. He has further deposed that injuries noticed by him were possible if a person was assaulted by more than one person with a weapon like knife. He also stated that the said injuries were also possible by knife which are Articles 16 and 17 shown to him. He has further deposed that injuries were sufficient in ordinary course of nature to cause the death of the person.

In the cross-examination, this witness has admitted that the appellant was brought alongwith police yadi for his examination and in Exhibit 38 history of assault was not written. Injuries described in Exhibit 38 were possible if that person while defending himself put hand over his chest and sustained blow with knife over that hand. That on enquiry with the appellant about injuries, the appellant had stated about assault by friend.

17 PW-12 is Shri Harihar Laxman Vartak, the panch-witness to the arrest panchanama and seizure of clothes of the accused persons. The arrest and seizure panchanamas are Exhibit 43 and Exhibit 44 respectively. PW-13 is Shri Jayant Parshuram Vaiti, the panch-witness to the production of

glasses and one pitcher by Shri Narendra Pagdhare (PW-6) and Shri Bhaskar Tandel (PW-4) before the police. PW-14 is Shri Sandeep Gajanan Save, the panch-witness to the inquest panchanama and scene of offence panchanama. The said two panchanamas are on record at Exhibits 50(2) and 51(2) respectively. PW-13 and PW-14 are formal witnesses and no material has been brought on record by the appellant to disbelieve their testimony.

18 PW-15 is Shri Narayan Bhaskar Tandel, the father of the appellant. This witness did not support the prosecution case and therefore was declared hostile. The learned APP after taking necessary permission cross-examined this witness at length. No material which is useful to the prosecution has been brought at the instance of this witness. It is to be noted here that this witness has tried to put up the defence as has been taken by the appellant in support of his contention and has tried to depose in that line.

19 PW-16 is Shri Vijay Laxman Shinwari @ Patil. This witness has deposed that he knew the appellant and deceased Utpal as they were resident of his village. On 3.9.2005 at about 9.00 p.m. he was sleeping. At that time he heard the noise of falling of some utensils and hence he woke up. He came out of his house with a torch. His wife Vandana, neighbours,

Jayanti, Manda (PW-9) and Rupesh (PW-7) also came out of their house along with torch. They proceeded towards cremation ground. They saw two persons were dragging one person by holding his legs and threw that man in the bushes. Those two person were appellant and one more person. The appellant had bleeding injuries over his left hand. The appellant was washing his blood stained clothes. The appellant threatened them that they had no business there and they should go back to the house. Hence, they went back to the house and slept. He saw the said incident in the light of electric pole and in the light of torch. Next day morning he woke up and saw the crowd at cremation ground. He therefore went there and saw the dead body of Utpal lying in the bushes.

In the cross-examination, this witness has admitted that he saw two persons dragging one person from a distance of about 80 to 90 feet. That he did not shout or questioned as to who was those persons. He was terrified after seeing that incident and therefore he stood at the place itself. That even though they saw the incident, they did not shout or call the villagers. That he did not feel to inform the incident to the house of the appellant as he was not knowing the actual incident. That after about two days he was called by the police for recording his statement.

20 PW-17 is Bhavesh Jaywant Vartak, the brother of deceased Utpal. This witness has deposed that the deceased Utpal was his brother. He knew the appellant. That on 3.9.2005, he had gone to Vasai for his work and came back to Palghar at about 11.25 p.m. His mother informed him that at about 7.30 p.m. there was phone call from the appellant and therefore Utpal had gone to him. That after some time police came to his house and informed him that the dead body of Utpal was lying near the cremation ground near Kharpada. He went to the spot and identified the dead body of Utpal. That appellant had taken some amount from Utpal as a hand loan.

In the cross-examination, this witness has admitted that the deceased Utpal and appellant were close friends. Whenever deceased Utpal went to Mumbai he used to meet the appellant. In the police station, the police officer told him that the appellant and his associates had killed Utpal. After lodging the complaint, the police pointed out to him both accused persons in the police station. This witness has proved Exhibit 60 which is First Information Report.

21 PW-18 is Shri Ravindra Subhash Naik, P.S.I. then attached to Palghar Police Station. This witness has deposed about Shri Sadanand

Kini (PW-2) bringing the two accused persons to police station, taking accused persons for medical examination, recording of complaint Exhibit 60 given by PW-17 Bhavesh and other facts pertaining to the investigation of the present crime.

22 PW-19 is Shri Digambar Vishnu Patil, A.S.I. then attached to Palghar Police Station. This witness has deposed that on 3.9.2005 at about 11.00 p.m. he, Shri Sadanand Kini (PW-2) and Kesarinath had brought two persons namely the appellant and Ganapati Kondar and narrated that those persons had killed Utpal. This witness has made entry in station diary which is at serial no.41 in his own hand-writing. The said station diary entry is at Exhibit 64 (2) on record. In the cross-examination of PW-18 and PW-19 no material which is beneficial to the appellant has been elicited.

23 PW-20 is Shri Babasaheb Marotirao Chalak, the Additional Superintendent of Police, then attached to Palghar Police Station as Police Inspector. This witness is the Investigating Officer of the present crime no.I-122/2005. This witness has stated that further investigation of C.R. No.I-122/2005 was carried out by him. This witness has deposed about various steps taken by him during the course of investigation of the said crime till filing of the chargesheet in the Court of competent jurisdiction.

In the cross-examination, this witness has admitted that at the

time of preparing spot panchanama (Exhibit 51), he thoroughly searched the place and surrounding in order to find out whether any incriminating article can be found. That he specifically searched the area to find out the weapon of offence. He has further admitted that after he recorded the statements of few witnesses, it transpired that in the night of incident the deceased Utpal and appellant had consumed liquor together. However, he did not requested the medical officer to take blood samples to find out whether any alcohol was in blood.

24 PW-21 is Shri Rajendra Vithoba Tamhanekar. He was working as Civil Judge Junior Division and Judicial Magistrate First Class, at Palghar from 9.6.2003 till May 2006. This witness has deposed that on 20.9.2005 the accused Ganpati Kondar was produced before him by the Jailer for recording his confessional statement under Section 164 of Cr. P.C. He has further deposed that after following the rules and guidelines prescribed in that behalf he recorded statement of accused Ganapati Kondar on 21.9.2005. The said statement is at Exhibit 81(4). He has also recorded statement of Rupesh Shanwri (PW-7) which is at Exhibit 32. It appears to us that the evidence of this witness is formal in nature.

25 Thus, after taking into consideration the entire evidence on record, it is clear that the present case is based on circumstantial evidence.

It is the settled position of law that in a case of circumstantial evidence the circumstances on which the prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. In case of resting on circumstantial evidence, it is incumbent for the prosecution to prove each and every circumstance on which it proposes to rely. The circumstances so proved should be of conclusive nature i.e. they should have a definite tendency of implicating the accused. The circumstances so established should form a complete chain which should exclude every hypothesis of innocence and unquestionably point towards the guilt of the accused. In other words the circumstances should be conclusive i.e. accused and the accused alone has committed the crime. In view of the aforesaid, the following circumstances emerged from the evidence on record:

- (i) The appellant purchased two quarters of whisky bottles from PW-1 Harihar Raut;
- (ii) The appellant took glasses from PW-6 Narendra Pagdhare and water pitcher (kalshi) from Bhaskar Tandel (PW-4) before going to the place of incident;
- (iii) The villagers heard the shouts of quarrel near the cremation ground i.e. at the place of incident. The said villagers are PW Nos.3,4,5 and 6;

- (iv) PW-7, PW-9 and PW-16 saw the appellant and co-accused Ganapati dragging the body of deceased Utpal towards bushes;
- (v) The extra judicial confession given by the appellant to PW-2 Shri Sadanand Kini;
- (vii) The discovery of knife at the instance of appellant with blood stains on it.

26 In view of the aforesaid settled position of law, let us now scrutinize the evidence available on record in the form of testimony of the prosecution witnesses. The circumstance nos.1 and 2 which have been deposed by PW Nos.1,6 and 4 respectively according to us are innocuous circumstances and needs no consideration.

27 The circumstance no.3 is shouts heard by PW Nos.3,4,5 and 6 which are the villagers residing in the vicinity of the place where the incident took place. PW-3 Chandrakant Tandel, PW-4 Bhaskar Tandel and PW-6 Narendra Pagdhare have been declared hostile by the prosecution. However, they have categorically deposed in their examination-in-chief that they have heard the shouts from the side of cremation ground in the night of 3.9.2005 at about 9.00 to 9.15 p.m. and therefore they proceeded towards the cremation ground. PW-5 Shri Sahadev Tandel has stated that on 3.9.2005 at about 9.00 p.m., he heard the shouts from the side of

cremation ground and hence he proceeded there. He saw the appellant and co-accused Ganapati and other four to five persons standing there. He saw the dead body of Utpal lying by the side of road. The appellant told him to leave that place. Then he went to the house of appellant's father Narayan Tandel and narrated the incident. PW-15 Shri Narayan Tandel came to the spot along with PW-5. The appellant told them not to stop there and go away and therefore the said witness alongwith PW-15 Narayan left that place. He also saw bleeding injuries on the left hand of the appellant. Thus, the circumstance that the appellant was present at the spot with a bleeding injuries on the relevant time and the dead body of Utpal was lying nearby has been established by the evidence of PW-5. We are of the opinion that the evidence of PW-5 is trustworthy and reliable.

28 The next circumstance i.e. PW-7 Rupesh Shanwari, PW-9 Smt. Manda Ambat and PW-16 Vijay Shanwari @ Patil saw the appellant and co-accused dragging the body of deceased Utpal towards bushes. These three witnesses have categorically stated that on 3.9.2005 after hearing the shouts they came out of their house and proceeded towards the cremation ground. All the three witnesses interse stated about the presence of others. They saw two persons dragging one man by holding his legs and throwing that man in the bushes. They saw the incident in battery/torch light and

street light. These witnesses have categorically deposed that the appellant and his friend were dragging the man and there were blood stains on the shirt of the appellant and he was attempting to clean it with creek water. The appellant threatened them. They came back to their houses. These three witnesses have specifically proved the circumstance that the appellant and the co-accused Ganapati were dragging the deceased Utpal towards bushes on 3.9.2005 in the night after 9.00 p.m. We find that the testimony of these three witnesses i.e. PW Nos.7, 9 and 16 are trustworthy and reliable and they have proved the circumstance that the appellant was dragging the dead body of deceased Utpal towards bushes on 3.9.2005.

29 The next circumstance which has been relied upon by the prosecution is the extra judicial confession given by the appellant to PW-2 Shri Sadanand Kini. PW-2 has specifically deposed that on 3.9.2005 at about 10.15 p.m. Shri Kesarinath Tandel came to his house and informed that the appellant and other accused persons were to be produced in the police station and asked him to accompany him. He then accompanied Kesarinath in his jeep to the house of the appellant and from there they carried the appellant to the police station in the jeep of Kesarinath Tandel. On the way to the police station, the appellant disclosed that he had quarrel with deceased Utpal on account of some money transaction and therefore

Utpal slapped him and the appellant thereupon stabbed Utpal. Thereafter he produced the appellant in the police station. As far as the said part of the testimony i.e. extra judicial confession is concerned, the same has gone unchallenged in the cross-examination. We are of the considered opinion that the said extra judicial confession given by the appellant to PW-2 is wholly reliable and trustworthy and is corroborated by the other circumstances which are on record.

30 The last circumstance i.e. the discovery of knife at the instance of appellant with blood stains of human origin, PW-10 Shri Anil Vaiti is the panch-witness to the discovery panchanama which is at Exhibit 36(A). This witness is also panch to the discovery of the knife at the instance of original accused no.2 Ganapati. Mr. Mundargi, the learned Senior Counsel for the appellant submitted that the alleged discovery of the knife at the instance of appellant is from the same place from where the police had on earlier date discovered the knife at the instance of original accused no.2 Ganapati and therefore police were already having the knowledge of the place that the appellant had concealed the knife and therefore the discovery of the knife at the instance of appellant should not be believed at all. We have carefully perused the evidence of PW-10. We have also perused and compared the Exhibit No.36(2) i.e. discovery panchanama at the instance

of Accused No.2 Ganapati and Exhibit 36(A) (2) i.e. discovery panchanama at the instance of appellant. A close scrutiny of the evidence of PW-10 Anil Vaiti alongwith contemporaneous document i.e. Exhibit 36(2) and Exhibit 36(A) i.e. the discovery panchanama of both accused persons would reveal that the area of discovery of the knife from the accused persons were actually different. It is to be noted here that the knife was recovered from co-accused Ganapati from the vicinity of cremation ground and not from the same place from where the knife at the instance of appellant was discovered by the police. The place from where the knife was discovered at the instance of original accused no.2 Ganapati Kondar was behind the thorny cactus tree which was at the distance of 15 feet from the road, whereas the knife which was discovered at the instance of appellant is place which is in front of the boat, which was 30 feet away on the eastern side of electric pole and from beneath the thorny Babhul tree. It is further to be noted here that at the time of recovery of knife from the appellant, it was found to be stained with blood. The Chemical Analyzer's report reveals that the said knife was stained with human blood of "O" group.

Mr. Mundargi contended that as the appellant has also suffered injuries and as the appellant is also having blood of "O" group, the finding

of blood on the alleged discovered weapon is of no consequence. It is true that the appellant also suffered injuries while committing the crime, the appellant is also having “O” blood group. The deceased Utpal, appellant and co-accused Ganapati all were having “O” blood group. Thus, what is important is that a knife which was used by the appellant in the crime was discovered at his instance from the place which was within his exclusive knowledge. Though the said place was accessible to the public at large, the appellant alone was aware about the concealment of weapon at a particular place and according to us it is an incriminating circumstance against the appellant.

31 As stated herein above, the deceased Utpal received more than 24 wounds out of which four wounds were on scalp and about 20 wounds were on a abdomen. It appears to us that the murder of Utpal was brutal murder. The circumstances narrated above unequivocally points the finger of guilt towards the appellant and according to us the appellant was the author of the said crime. In view of 24 injuries received by deceased Utpal, we find that the contention of learned Senior Counsel for the appellant that the appellant during quarrel, all of a sudden due to provocation stabbed Utpal and therefore the said act would fall within the purview of Section 304-II of Indian Penal Code cannot be accepted.

32 Taking into consideration the entire evidence on record, we are of the considered opinion that the appellant and the appellant alone is the author of the present crime. The present appeal being sans of any merit, deserves to be dismissed and is accordingly dismissed.

(A.S. GADKARI,J.)

(ACTING CHIEF JUSTICE)

CERTIFICATE

**Certified to be true and correct copy of the original
signed Judgment.**