

Dond

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 915 OF 2007

1. Kiran Gorakh Shelke
Age: 22 yrs. Occ: Agriculture,
Residing at : Kedgaon,
Taluka: Daund, Dist. Pune

2. Rajendra Dadasaheb Kutwal
Age: 24 yrs. Occ: Agriculture,
Residing at : Kutwalwadi,
Taluka: Baramati, Dist. Pune
(presently lodged in Yerwada Central Jail)

..Appellants.

(Orig. Accused Nos.1 & 2)

Versus

The State of Maharashtra
(at the instance of Vairag Police Station,
Siolapur vide C.R. No.54 of 2008)

..Respondent.

Mr. Daulat G. Khamkar for Appellant No.2.
Smt. V.R. Bhonsale, APP for Resepondent-State.

**CORAM: P. V. HARDAS &
A.S. GADKARI, JJ.**

Date: 25th June 2015.

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

1 The appellant no.2-original accused no.2 has questioned the

correctness of the judgment and order dated 22nd August 2007 passed by the learned Adhoc Sessions Judge-3, Baramati in Sessions Case No.13 of 2007 thereby convicting him for the offence punishable under Section 302, 201 read with Section 34 of Indian Penal Code and sentenced him to suffer imprisonment for life and to pay a fine of Rs.1000/-, in default of the payment of fine to suffer further rigorous imprisonment of three months. The appellant is also convicted for the offence punishable under Section 201 read with Section 34 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for 10 years and to pay fine of Rs.500/-, in default of payment of fine to suffer rigorous imprisonment for two months. The learned Trial Court directed that all the sentences shall run concurrently.

By the said judgment and order dated 22nd August 2007, the appellant no.1-original accused no.1-Kiran Gorakh Shelke is also convicted under various sections of Indian Penal Code by the learned Trial Court. The record discloses that during the pendency of the present appeal, the appellant no.1 i.e. original accused no.1 has been reported to be absconding and is not traceable. This Court by its order dated 6.5.2015 passed in Criminal Application No.502 of 2015 separated the appeal of the appellant no.1/original accused no.1 Kiran Gorakh Shelke from the present appeal.

The present appeal was thereafter listed for final hearing before this Court and is heard by us finally.

2 The facts which are necessary to decide the present appeal can briefly be summarized as under:

(i) Smt. Kavita Ramchandra Shelke (PW-1) is the mother of the deceased Mahadeo Ramchandra Shelke. Smt. Kavita had two sons namely Sadanand and deceased Mahadeo. Sadanand was taking education at the relevant time and Mahadeo was helping Smt. Kavita in the agricultural activities in their field. Smt. Kavita was having two cows and she was doing the business of selling milk to dairy. The appellant no.1/accused no.1-Kiran Gorakh Shelke was her immediate neighbour. The appellant no.1/accused no.1 was on visiting terms to her son and used to visit her house. On 12.7.2006, Smt. Kavita was at her home and Mahadeo was cutting grass. Mahadeo thereafter had been to the house situated in their field and instructed to Smt. Kavita that he is going to collect milk bill from the concerned person. At that time Mahadeo was having mobile phone on which the accused no.1-Kiran had a dialogue with somebody. Then Mahadeo left the said place from the motorcycle of accused no.1-Kiran. Mahadeo informed Smt. Kavita that he will return back at 9.30 p.m. As

Mahadeo did not come in that night, Smt. Kavita went to sleep. Till about 6 a.m. in the morning Mahadeo did not return home and therefore Smt. Kavita enquired with the mother of accused no.1-Kiran about her son and the mother of accused no.1-Kiran also informed that Kiran did not return in the night. Smt. Kavita thereafter noticed accused no.1-Kiran arriving on his motorcycle at his house. She then enquired with Kiran about her son Mahadeo and Kiran informed her that he and Mahadeo were in company till 8 p.m. at Chauphula in Jay Tulja Bhavani hotel and thereafter he did not know what happen to Mahadeo. Smt. Kavita took search of Mahadeo on 13th and 14th July 2006. As Mahadeo could not be located, she lodged a missing report of her son Mahadeo with Kedgaon Police Out Post.

(ii) Shri Shivdas Phunde (PW-10) was attached to Yavat Police station and was deputed to Kedgaon Out Post. On 15.7.2006, Smt. Kavita (PW-1) lodged a missing report of her son Mahadeo. The police tried to search missing boy namely Mahadeo. Till 17.7.2006, the said missing boy could not be located. On 17.7.2006, Sadanand (PW-2) brother of deceased Mahadeo had been to the police out post and lodged a report against accused no.1-Kiran abducting his brother for murder. The said information was reduced in writing and a crime no.144 of 2006 under Section 364 of Indian Penal Code was came to be registered by Shri Phunde.

(iii) The investigation was thereafter handed over to Shri Rajendra Mohite, API (PW-14). As suspicion was raised against the accused no.1-Kiran, Shri Mohite arrested him on the same day at about 11.20 a.m. by preparing panchanama. The present appellant was also arrested on the same day. The absconding accused no.1-Kiran and the appellant thereafter expressed their willingness to point out the place where the dead body of deceased Mahadeo was buried after his murder. After the accused no.1-Kiran and the appellant pointed out the spot where the dead body of Mahadeo was buried, the same was exhumed in the presence of Tahasildar Daund and Baramati and the Medical Officer of Supa Rural Hospital. After digging the earth upto level of 3 ft., the dead body was found. The body was taken out from the said pit after removing the layers of earth and stones. Inquest panchanama came to be prepared on the spot which is at Exhibit 50. Spot panchanama was also effected which is at Exhibit 52. The dead body was thereafter sent for postmortem to Sassoon hospital, Pune. PW-14 Shri Mohite thereafter recorded statements of the relevant witnesses.

(iv) In due course of time, Section 302 came to be applied to the original crime with due permission from the Judicial Magistrate First Class,

Daund. The present appellant when was in custody on 19.7.2006 expressed his willingness for effecting a discovery of an iron bar, mattock, spade and hod used in the commission of the offence of murder which was concealed in hut. Accordingly, the memorandum statement which is at Exhibit 62 was reduced in writing. In pursuance of memorandum statement (Exhibit 62), the appellant led the police and panch witnesses to a hut situated near Mohite Mala. From the said hut, the aforesaid articles came to be seized except the iron rod.

(v) The further investigation was thereafter transferred to Shri Dhanraj Gavhane, PSI (PW-13) who discovered an iron rod at the instance of the appellant from a well which was situated in the field of one Ramchandra Bhodve of Bhondvewadi.

(vi) After completion of the investigation, the police submitted chargesheet in the Court of Judicial Magistrate First Class at Daund on 13.10.2006. The Judicial Magistrate First Class at Daund committed the said case to the Court of Sessions at Baramati as the offence under Section 302 was exclusively triable by the Court of Sessions. After committal of the said case, the learned Trial Court framed charge below Exhibit-28. The said charge was read over and explained to the accused persons in vernacular language to which they pleaded not guilty and claimed to be

tried. The defence of the accused was of total denial. The prosecution in support of its case, examined in all 14 witnesses. The learned Trial Court after recording the evidence and after hearing the parties to the said Sessions case was pleased to convict the appellant as stated hereinabove.

3 Heard Mr. D.G. Khamkar, the learned Counsel appearing for the appellant no.2/Original Accused No.2- Rajendra Dadasaheb Kutwal and Smt. V.R. Bhonsale, the learned APP for the Respondent-State at length. We have also perused the entire record made available before us.

4 The learned Counsel for the appellant no.2 submitted that the discovery at the instance of the appellant where the dead body of deceased Mahadeo was buried is no discovery at all in the eyes of law. He submitted that the original accused no.1-Kiran had already made statement to the police about burial of the dead body at a particular spot and after the original accused no.1-Kiran made memorandum of statement (Exhibit 46), the memorandum statement of the present appellant which is at Exhibit 47 came to be recorded by the police. He submitted that the said discovery at the instance of the present appellant stands vitiated in the eyes of law. He further submitted that an iron road which was discovered at the instance of

the appellant under Section 27 of the Indian Evidence Act was discovered from the mud which was at the bottom of the said well and the said iron rod was submerged in the water for more than five days and there was no probability of having blood stains on it. He further submitted that the report of the Chemical Analyser which is at Exhibit 81 which mentions about blood stains on the said iron rod along with specific blood group cannot be relied upon as in his opinion the same was planted by the police only with a view to frame the present appellant. He lastly urged before us that after taking into consideration the fact that there is no legal evidence at all available against the present appellant, the appeal qua the appellant no.2 be allowed and the conviction and sentence of the appellant no.2/original accused no.2 be quashed and set aside.

The learned APP for the State, per contra, supported the impugned judgment and order passed by the learned Trial Court and submitted that there is sufficient and substantial evidence available on record to sustain the conviction of the appellant no.2 i.e. original accused no.2. She therefore prays that the present appeal may be dismissed and conviction and sentence of the appellant no.2-original accused no.2 be sustained.

5 With a view to appreciate the submissions advanced before us by the learned Counsel appearing for the respective parties, it is necessary to advert to the evidence on record in brief.

6 PW-1 Smt. Kavita is the mother of deceased Mahadeo. PW-1 in her testimony has stated that her husband met with fatal accident in the year 1990. She had two sons namely Sadanand and deceased Mahadeo. They are holding seven acres of agricultural land. That the said land is situated adjacent to Pune Solapur Highway. She herself and deceased Mahadeo were cultivating their land and her elder son Sadanand was taking education. At the time of incident, Sadandnd was taking education in college at Varvand and timing of his college was between 11 a.m. to 3 p.m. At the time of incident, she was taking crops of onion, bajra, lunar grass and Gulchhadi in the field. She was also having two milky cows. She knew original accused no.1-Kiran being her immediate neighbour. The accused no.1-Kiran was often visiting her house to meet her son Mahadeo. The incident took place on 12.7.2006. Till 6 p.m. on that day she was in the field. Thereafter she came to her house and Mahadeo was cutting grass in the field. Mahadeo thereafter had been to their house situated in their field

and informed Smt. Kavita (PW-1) that he was going to collect milk bill from the concerned person. At that time Mahadeo was having mobile phone on which accused no.1 had a dialogue with somebody. Then on the motorcycle of the accused no.1-Kiran, her son Mahadeo went away by informing her that he will return by 9.30 p.m. She waited for Mahadeo till 10.00 p.m., but her son Mahadeo did not return. She thereafter went to sleep. Then on the next day morning when she woke up, she found that her son Mahadeo did not return and hence she had been to the house of the accused no.1-Kiran at about 6 a.m. Then she enquired with the mother of the said accused about Mahadeo, whereupon the mother of accused no.1-Kiran informed Kavita that accused no.1-Kiran did not turn up in the night and thereafter she noticed accused no.1-Kiran arriving by a motorcycle at his house. Then PW-1 Smt. Kavita enquired with accused no.1-Kiran about her son Mahadeo to which he informed that he (Kiran) and Mahadeo were in company till 8 p.m. at Chauphula in Jay Tulja Bhavani hotel and thereafter he does not know what happened to Mahadeo. On 13th and 14th July 2006, Smt. Kavita along with other relatives took search of her son Mahadeo. Thereafter she lodged a missing report of Mahadeo with Kedgaon police Out post. While giving missing report, she gave details of Mahadeo including clothes on the person of Mahadeo on the day of

missing along with his mobile phone number. The missing report which is at Exhibit 41 has been proved by this witness. She has further stated as her son Mahadeo could not be traced out, her elder son Sadanand lodged a report thereof against the accused no1-Kiran.

This witness was cross-examined at length by the appellants. In her cross-examination she admitted that only her sons were having cordial relations with accused persons, but elderly persons of the family were not having such relations. She, however, denied the suggestion that as the elderly persons from her family were having strained relations with elderly persons from the family of accused persons, she raised false suspicion. Apart from this admission no other omission or contradiction has been brought on record by the appellant.

7 PW-2 Sadanand Ramchandra Shelke is the elder brother of deceased Mahadeo. PW-2 Sadanand in his testimony has stated that on 12.7.2006 he attended college at Varvand between 11 a.m. to 2.30 p.m. and came back home at 3 p.m. Thereafter he himself, his mother (PW-1) and Mahadeo worked in the field upto 6.30 p.m. and Mahadeo left field for their house. At that time, the accused no.1-Kiran and Mahadeo had a dialogue and then Mahadeo informed PW-1 i.e. his mother that he

(Mahadeo) is going to collect the milk bill. Mahadeo thereafter by riding motorcycle of accused no.1-Kiran left his house. When PW-2 Sadanand reached at home, his aunt Sangita informed him that his brother Mahadeo by riding the motorcycle of accused no.1-Kiran proceeded towards Chauphula. Thereafter till about 9 p.m. PW-2 Sadanand along with other family members waited for Mahadeo. However, as Mahadeo did not return, they had dinner and went to sleep. That on next day morning when he (PW-2) woke up, he gave phone call to Mahadeo on his mobile phone, but there was no response. Then at about 9 a.m. PW-2 Sadanand enquired with accused no.1-Kiran as to what has happened, whereupon Kiran disclosed that till 8 p.m. on 12.7.2006 they were at Chauphula in Jay Tulja Bhavani hotel and thereafter he alone left hotel for his sister's home situated at village Hingane Gada. Thereafter, for two days search of Mahadeo was taken, but was in vain. That thereafter on 15.7.2006 PW-1 Smt. Kavita lodged a missing report with the police station. PW-2 Sadanand has further stated that he was having suspicion against the accused no.1-Kiran as Kiran was having love affair with a girl namely Vaishali Giri and his brother Mhadeo was aware of the same and thereafter about two months ago from the date of incident, the parents of Vaishali had performed her marriage with other bridegroom. He has stated that likewise Mahadeo had disclosed

about love affair of the accused no.1-Kiran with Vaishali to her parents and therefore accused no.1 Kiran was having grudge/fury against his brother Mahadeo. That due to said reason, on 12.7.2006 in the evening, the said accused no.1-Kiran by dishonestly inducing Mahadeo, had carried him on his motorcycle. PW-2 Sadanand thereafter lodged police report on 17.7.2006 at about 9.45 a.m. This witness has proved the report lodged by him which is at Exhibit 43.

It is to be noted here that PW-2 Sadanand has been examined by the prosecution on two points, namely on last seen together and motive in the present crime. As per testimony of PW-2 Sadanand the accused no.1-Kiran was having strong motive to eliminate Mahadeo as Mahadeo had disclosed love affair of Kiran with Vaishali to her parents and therefore the parents of Vaishali married her with other bridegroom.

PW-2 Sadanand was cross-examined at length by the accused persons. However, no material which would discredit the testimony of PW-2 Sadanand has been brought on record by the defence and the testimony of PW-2 Sadanand remained unshaken.

8 PW-3 is Smt. Sangita Shelke the neighbour of PW-1 Smt. Kavita. PW-3 Smt. Sangita in her testimony has stated that her six acres of

agricultural land is adjacent to the land of PW-1 Smt. Kavita. PW-3 Smt. Sangita herself and PW-1 Smt. Kavita reside in their separate houses situated in their fields. Deceased Mahadeo was her nephew. She knew accused no.1-Kiran being their neighbour. That on 12.7.2006 in the evening she was at home. At that time she noticed accused no.1-Kiran was having a dialogue with somebody on mobile phone. Thereafter Mahadeo came at his house and subsequently accused no.1-Kiran joined Mahadeo and they by riding the motorcycle of accused no.1-Kiran departed towards Chauphula by Solapur Highway. Thereafter PW-1 Smt. Kavita came to the house. She enquired with PW-1 Smt. Kavita as to where Mahadeo had gone and PW-1 informed her that Mahadeo had been to collect the milk bill. In that night Mahadeo did not return. Then on next day in the morning PW-1 Smt. Kavita had been to the house of accused no.1-Kiran. PW-1 Smt. Kavita informed that the accused no.1-Kiran has returned back, but Mahadeo has not returned. They took search of Mahadeo for about two days, but in vain. On 15.7.2006, a missing report was lodged.

In the cross-examination, this witness admitted that the accused no.1-Kiran and Mahadeo being friends oftenly used to move together. Apart from this admission, no other material has been brought on record by the appellants which would come to their aid.

9 PW-4 -Subhash Pandurang Gaikwad is the panch-witness to the recovery under Section 27 of Indian Evidence Act at the instance of accused nos.1 and 2 whereby both appellants pointed out the spot where the dead body of deceased Mahadeo was buried. PW-4 Gaikwad in his testimony has stated that on 17.7.2006 he along with Tukaram Shelke were standing in front of Yavat police station at about 11.30 a.m. At that time one police came to call them as per message of API Shri Mohite and hence they had been in the police station. Both the accused persons were present and API Mohite informed them to listen the statements made by accused no.1 Kiran. At that time accused no.1 Kiran stated that he wanted to discover the place where the dead body of Mahadeo had been buried after committing his murder. Accordingly, memorandum statement was reduced into writing and signed by both panch witnesses and accused no.1-Kiran. The said memorandum statement is at Exhibit 46. PW-4 Gaikwad has further stated that thereafter accused no.2 also made statement that he wanted to discover the place where the dead body of Mahadeo was buried. Accordingly memorandum statement of the appellant was reduced into writing which is at Exhibit 47. Thereafter accused persons led the police and panch witnesses from Yavat to Chauphula via Supa to the village

Kutwalwadi. Thereafter the accused led the police party to village Bhodnvwadi and thereafter led them to the spot where the body was buried. At that time Tahasildar Daund and Baramati were there with Medical Officer. There were thorny branches of bush on the spot shown by the accused. Then with the help of some persons, earth was removed from the spot and there was a layer of stones. The same was also removed. Below the said stones, the dead body of Mahadeo was found. It was in decomposed condition. Accordingly, the panchanama (Exhibit 48) of the body and spot was prepared.

This witness was extensively subjected to cross-examination. However, the testimony given in the examination-in-chief has not been disturbed which would raise a suspicion about its credibility in the mind of this Court.

10 PW-5 is Dr. Dattatraya Babasaheb Vankhande, the Medical Officer who conducted autopsy on the dead body of Mahadeo. PW-5 in his testimony has stated that from 23.6.2006 he was attached to Supa Rural Hospital as a Medical Officer. He has further stated that as the dead body was exhumed, hence for postmortem he had been to the spot. Tahasildar Shri Pardeshi and Shri Shingate of Daund and Baramati respectively with

API Mohite and Medical Officer Rajge of Rural Hospital, Yavat had also been to the spot. Inquest panchanama of the dead body was signed by him as it was prepared in his presence. The dead body was identified by Balaji Thorat, Satyajeet Shelke and Abhijeet Shelke. There were injuries over back, pinna of ear was torn and there was injury over left eyebrow. That the left portion of the face was pressed and the right portion of chest was appearing reddish. That the body was decomposed. That after completion of inquest panchanama, the dead body was shifted to Forensic And Medicinal Department of Sassoon hospital, Pune. Thereafter, postmortem was conducted on 18.7.2006 in between 9 a.m to 11 a.m. under the supervision of Dr. Wabale, Head of the Department of Forensic Science, Sassoon hospital, Pune. On external examination of the body, he found following injuries:

- (i) Lacerated wound over left side of forehead 3 cm from lateral angle of left eye, measuring 4 x 2 cm.
- (ii) Pinna of left ear 3 cm long involving hole breath.
- (iii) Left parietal region 6 cm above left ear measuring 7 x 1 cm.
- (iv) 2 cm above and behind left ear 3 x 1 cm
- (v) 2 cm above injury no.(iii) measuring 2.5 x 0.5 cm

- (vi) Left upper eyelid measuring 1 x 0.3 cm
- (vii) Chin 2 x 2 cm with mandible fracture at the middle point.
- (viii) Contusions over the areas-
 - (a) right temporal region 3 cm in diameter
 - (b) above right ear 5 x 3 cm
 - (c) Left side of the chest, above left nipple 10 x 3.
 - (d) left shoulder 10 x 16 cm
 - (e) right midarm lateral aspect 5 x 2 cm
 - (f) lateral aspect of left thigh 12 x 10 cm.

PW-5 Dr. Wankhande has stated that all the said injuries were ante mortem and he cannot tell the age of the said injuries as the body was decomposed. He has further stated that due to wet material kept on the body, though body was appearing rigid joints were somewhat movable and hence the term false rigidity is mentioned in column no.11 of rigor mortis. He therefore opined that the dead body was found buried about 4 to 7 days prior to the date of postmortem.

PW-5 on internal examination found following symptoms:

“So far as head, there was haematoma under the scalp, blackish clotted.

- (a) Under left temporal area 6 x 4 cm
- (b) left occipital measuring 4 x 3 cm approximately
- (c) by parietal region 4 x 3 cm
- (d) skull depressed fracture of left temporal bone 6 x 3 cm. Extended under left parietal bone for 4 cm
- (e) fracture at base of the skull at the left parietal part.
- (f) fracture of roof of the left orbit.

PW-5 thereafter opined that all the said injuries are corresponding to the external injuries mentioned in column no.17 of post mortem. That all the above injuries can be caused by hard and blunt object like iron bars and by sticks and stones. The above said injuries can be caused by means of iron bar the article no.15. He has further opined that in ordinary course, the above injuries were and are sufficient in causing death. He has further stated that all the aforesaid injuries are homicidal. He has stated that the brain was pale and liquified. That viscera was collected and the sample thereof was sent to the Chemical Analyser, Pune and in the report of Chemical Analyser no poisonous substance is found in it. PW-5 lastly opined that the cause of death was 'due to multiple injuries to head'. Accordingly he prepared postmortem notes which are at Exhibit 51.

This witness has been cross-examined at length and but it did not yield into any fruitful result which would come to the help of the accused persons.

11 PW-6 is Sudam Pardeshi, Tahsildar-Daund. PW-6 in his testimony has stated that he was Tahsildar of Daund from April 2006. That on 17.7.2006 he received a phone call from API Mohite (PW-14) of Yavat

police station to remain present in order to exhume the dead body from the concerned spot. He then went to Yavat police station. The accused persons were present in the police station. At that time the accused no.1 made a statement about discovery of the spot where the dead body of Mahadeo had been buried. Thereafter, the accused persons, police party and other concerned proceeded to the spot. Tahasildar of Baramati was also present at the spot. The accused persons led them to the spot of discovery. The accused showed the spot, where the thorny branches and stones were kept. Then with the help of villagers and persons who were with them removed the thorny branches and stones. That after removal of earth upto 3 to 4 feet, the dead body was found. The dead body was taken out from the pit and panchanama was prepared. He has stated that there was injuries over the head of the body.

In the cross-examination of this witness, no material has been elicited which would help the accused.

12 PW-7 is Sunil Dorge, panch witness to the recovery of Bajaj Pulsar motorcycle which was allegedly used by the accused no.1 on the day of commission of offence to take deceased Mahadeo to the alleged spot of incident and to the recovery of two chits namely Articles A and B, written

by Miss. Vaishali to the accused no.1 Kiran. It appears to us that this witness is formal witness and therefore the cross-examination of this witness proceeds by putting stock questions to him.

13 PW-8 is Shahaji Pandurang Shinde, a panch-witness to the alleged discovery of the instruments which were used in the commission of offence at the instance of the present appellant. PW-8 in his testimony has stated that on 19.7.2006, he along with Balasaheb Kamble were called to Yavat police station. The appellant was present there and he made a statement that he wanted to discover hod, mattock, spade and iron bar used in the commission of offence from certain places. Statement of the appellant was reduced into writing and was signed by the panch witness. The said statement is at Exhibit 62. The accused led the panch witness and police to the hut. There was no door to the said hut. The appellant entered into that hut and took out spade, hod and mattock. The said articles were seized on the spot. PW-8 has stated that the said articles were stained with mud, dung and blood like substance which was appearing in red colour. There was a well at the distance of about 200 to 300 ft. which was pointed out by the appellant. There was water in the said well. The appellant disclosed that the iron bar used in the commission of crime has been

thrown in that well. As the well was having water, iron bar could not be recovered at that time. Accordingly, panchanama was prepared and it was signed by panchas and the police which is at Exhibit 63.

In the cross-examination of this witness, no omission or contradiction has been brought on record at the instance of the appellant.

14 PW-9 is Ayub Noor Mohammed Tamboli, a panch witness to the recovery under Section 27 of Indian Evidence Act of the iron rod at the instance of the accused no.2 i.e. appellant herein. PW-9 in his testimony has stated that on 20.7.2006 when he was in his Pan (Beatle leaf) stall , along with other panch witnesses Vijay Bagade, Police from Yavat police station called them. The appellant was present there. The appellant made a statement for discovery of an iron bar from the well by pointing out that well. A statement of the appellant was reduced into writing. The said memorandum statement is at Exhibit 65. The appellant thereafter led PW-9 and police towards village Kutwalwadi and from there Bhondvewadi. The appellant pointed the well and stated that an iron bar was thrown by him in that well. That well was having water. Then by electric motor, water was drained out from the well. That when the water remained upto the level of 1 or 2 ft., by means of rope the appellant entered into the well. Then from

that well an iron bar was taken out. That iron bar was having a bent at one side. PW-9 has further stated that the said iron bar was stained with blood. That the said iron bar was seized under the panchanama. This witness has identified the said panchanama of discovery of an iron bar which is at Exhibit 66. In the cryptic cross-examination of this witness, nothing beneficial to the appellant has been brought on record.

15 PW-10 is Shivdas Phunde, Police Head Constable. PW-10 in his testimony has stated that he was attached to Yavat police station and was posted to Kedgaon police out post. On 15.7.2006, PW-1 Smt. Kavita had been to the said out post and informed the police about missing of her son Mahadeo from 12.7.2006 since 6.30 p.m. Accordingly, a missing report was recorded by him. He made an enquiry with the relatives of PW-1 and sent wireless list for search of missing boy. That till 17.7.2006, Mahadeo was not traced out. On 17.7.2006, PW-2 Sadanand, the brother of missing boy had been to the police out post and lodged a report against accused no.1 stating that the accused no.1 abducted his brother for murder. The said report is at Exhibit 43. He thereafter prepared the occurrence report and carried it to the Yavat police station where a crime no.144 of 2006 came to be registered at his instance. As the evidence of this witness is of formal

nature, the cross-examination of this witness is very cryptic which is not useful to either side.

16 PW-11 is Ramesh Gundewar. This witness is a carrier of the articles of Forensic Laboratory under the directions of API Shri Mohite (PW-14).

17 PW-12 is Smt. Ganga Rajendra Giri, the mother of Miss Vaishali Giri. PW-12 in her testimony has stated that she had three daughters and her husband was serving as agricultural labour in the field of Vishnupant Kshirsagar resident of Bhadgaon, Taluka Daund. She knew the accused no.1 present before Court. That a tractor of the said accused no.1 was hired by the employer of her husband for agricultural operation. Hence, occasionally for drinking water, he used to visit her house. That the accused no.1 and her daughter Vaishali had exchanged chits and therefore she was apprehending that they have love affair. Thereafter she instructed accused no.1, not to visit her house and with a view to overcome the said situation, she settled the marriage of her daughter Vaishali. She was knowing deceased Mahadeo. When Mahadeo was alive accused no.1 was having love affair with her daughter Vaishali. PW-12 had therefore beaten

Vaishali and her marriage was performed about an year ago with one Dada Puri. Vaishali studied upto 5th standard and PW-12 studied upto 1st standard and therefore she was able to identify the hand writing of Vaishali. PW-12 identified the articles A and B, chits and stated that the said are hand writing of her daughter Vaishali.

It appears to us that as this witness has not deposed anything in her examination-in-chief against the present appellant i.e. accused no.2- Rajendra, the accused no.2 declined to take cross-examination of this witness.

18 PW-13 is Dhanraj Gavhane, PSI then attached to Yavat police station. PW-13 in his testimony has stated that investigation of the present crime was partly conducted by API Shri Mohite. However, on 20.7.2006, the investigation was handed over to him. He has stated that at that time, the appellant was already arrested and was in police custody. That on that day, the appellant showed willingness in discovering an iron rod used in the commission of offence. Thereafter PW-9 Tamboli and one Vijay Bagade were called to act panchas. The memorandum statement of the appellant was recorded which is at Exhibit 65. Then by private jeep, police, panchas and the appellant went at Chauphula. The accused thereafter led the police

and panchas to village Bhondvewadi. After crossing a distance of about 200 ft. they went near the well situated thereto. The accused informed that he had thrown the iron bar used in the commission of offence in the said well. That well was having water upto level of 7 ft. The water was lifted by electric pump. That appellant thereafter entered into the said well by tying rope to his body. That from the sediments of the said well, the accused traced out one iron rod and took it out the said iron rod was having wrinkles and red and black stains on it. PW-13 seized the said iron bar in the presence of panch witnesses by effecting panchnama which is at Exhibit 66.

It appears to us that in examination-in-chief itself as the material admissions have been given by this witness, the appellant herein did not cross-examine this witness at length and the cross-examination proceeds by putting stock questions.

19 PW-14 is Rajendra Mohite, API, then attached to Yavat police station. PW-14 in his testimony has stated that on 17.7.2006, the investigation of the present crime was taken over by him. He thereafter perused the report which is at Exhibit 43 submitted by PW-2 Sadanand wherein suspicion was raised against the accused no.1. PW-14 therefore

arrested accused no.1 on the same day at about 11.20 a.m. by preparing the panchanama. Then the accused no.1 Kiran showed his willingness in pointing out the spot where the dead body of Mahadeo was buried after committing his murder. PW-4 and Tukaram were called to act as panch witnesses. Then statement of accused no.1 Kiran was reduced in writing. The said statement is at Exhibit 46. That thereafter statement of the present appellant was recorded wherein the appellant has stated that he will point out the spot where the dead body of Mahadeo was buried after his murder. Said memorandum statement is at Exhibit 47. Thereafter both accused persons led the police and panch witnesses to the spot where the dead body of Mahadeo was buried. That both accused persons showed the spot where the dead body of Mahadeo was buried. At the said spot thorny branches of babul were kept. That two-three labours were called to exhume body by removing said thorny branches and other material. At the said spot earth and stones were removed from that spot upto the level of about 3 ft. and then stincking odour started coming out. After removing of big stones, the dead body was found. The said body was taken out from the pit. Inquest panchanama was carried out of the dead body which is at Exhibit 50. Panchanama of scene of offence was also effected which is at Exhibit 52. At the said spot, blood mixed earth, blood stained stone were found and

therefore said articles along with sample plain earth was seized under the said pahchanama. Thereafter all the concerned persons came to the police station. That on the same day the clothes which were on a person of the accused persons on the day of incident were seized by effecting panchanama which is at Exhibit 53. On 18.7.2006, the clothes of the accused which were on his person were seized under panchanama which is at Exhibit 54. That Section 302 of Indian Penal Code was applied to the said crime after completing the necessary legal formalities. That on 19.7.2006, when the appellant was in police custody, expressed his willingness to discover the iron bar, mattock, spade and hod used in commission of offence of murder which were concealed in the hut. Accordingly memorandum statement was recorded which is at Exhibit 62. The appellant thereafter led the police and the panch witnesses to the spot where the hut was situated. After reaching the spot, the appellant entered into the hut and removed an empty sack under which mattock, spade and hod were concealed. The said articles were seized at the spot. There was a well at some distance from the hut. The appellant pointed the said well and disclosed that the iron bar used in the commission of offence has been thrown in the well. PW-14 has stated that as the well was having water and there was no facility to lift it, hence panchnama was prepared and

completed on the spot without the recovery of the said iron rod. The said panchanama is at Exhibit 63. It is to be noted here that that on 19.7.2006, PW-14 did not discover an iron bar at the instance of the appellant as the same was submerged deep well water. PW-14 has further stated that it was transpired to him during the course of investigation that the accused no.1 Kiran was having love affair with a daughter of PW-12 namely Miss. Vaishali and the said fact was known to Mahadeo Shelke. Deceased Mahadeo Shelke disclosed the said fact to the parents of Vaishali Giri and therefore they perform her marriage with other person. Hence, the accused no.1 Kiran got annoyed with the deceased Mahadeo and in furtherance with his common intention with the appellant herein, abducted Mahadeo and committed his murder. That with a view to cause disappearance of the evidence, they buried the dead body of Mahadeo in the field.

20 The learned Counsel appearing for the appellant by placing his reliance on a judgments of the Supreme Court in the case of ***Lachhman Singh and Ors Vs. The State [AIR 1952 SC 167]*** and ***Pohalya Motya Valvi Vs. State of Maharashtra [1979 Cri. L.J. 1310]***, submitted that as the police were already aware of the spot where the dead body of Mahadeo was buried, the memorandum statement of the appellant which is at Exhibit

47 has no relevance at all as the memorandum of statement of the appellant which is at Exhibit 47 was reduced in writing after the police came to know about the place where the dead body was buried, initially itself from the accused no.1- Kiran. The accused no.1- Kiran first gave memorandum statement and expressed his willingness to disclose the said place where the dead body of the deceased Mahadeo was buried. The said statement is at Exhibit 46.

21 At this point, it will be useful to also place reliance on another judgment of the Supreme Court in the case of ***Krishan Mohar Singh Dugal Vs. State of Goa [AIR 1999 SC 3842]***, wherein the Supreme Court had held that as the police was already informed about the place where charas was concealed before accused led the police to that place, it could not be said that charas was recovered only on the basis of disclosure statement of the accused. In another decision of the Supreme Court in the case of ***Vijender Vs. State of Delhi [(1997) 6 SCC 171]***, it is held that when the fact has already been discovered, the evidence could not be led in respect thereof. The Division Bench of this Court to which one of us (Shri P.V. Hardas, J.) is a member, in the case of ***Arun Dharma Chavhan Vs. State of Maharashtra [2001(4) Mh. L.J.]***, after relying on the said two

judgments in the case of Krishan Mohar Singh Dugal (supra) and Vijdender (supra) has held in para-16 as under:

“16. For a part of the confession of the accused to be admissible under section 27 of the Indian Evidence Act, it is necessary that such part of the confession should lead to the discovery of a fact referred to by the accused in his confession. Therefore, the prosecution has to prove that the information given by the accused has led to the discovery of some fact stated by him. The discovery of the fact would be relevant in case the police had not previously learnt about it from other sources and the knowledge of the police can solely be attributed to the information received from the accused. Of course, it is essential that the information tendered by the accused must lead to the discovery of a fact and such discovery is the direct outcome of such information. In order to encompass such a statement as admissible under section 27, it is essential that the said information is distinctly connected with the discovery of a fact and the discovery of a fact must relate to the commission of an offence.”

22 Thus, a close scrutiny of the evidence available on record would reveal that the memorandum statement of the appellant which is at Exhibit 47 was reduced into writing in presence of PW-4 after the memorandum statement at the instance of the accused no.1-Kiran was reduced in writing (Exhibit 46). PW-6 Sudam Pardeshi Tahasildar-Daund in his examination-

in-chief has in unequivocal terms admitted that on 17.7.2006 by a phone call he was called by API Mohite (PW-14) of Yavat police station in order to exhume a dead body from the concerned spot. This discloses that PW-14 on 17.7.2006 was already aware of the spot which was to be shown by the appellant herein. PW-6 has further deposed that the accused no.1 informed the police that he will show the spot where the dead body of Mahadeo was buried and thereafter both the accused i.e. accused no.1 and the present appellant led the police to the said spot. This shows that the police were already informed about the spot of burial of the dead body of Mahadeo by the accused no.1 and therefore the disclosure at the instance of the appellant subsequent thereto does not assume any importance. In view of the ratio laid down by the Supreme Court and this Court, it is clear that the fact which was already in knowledge of the police or the fact which was already discovered at the instance of one accused, cannot be said to have been discovered again at the instance of co-accused subsequently. In that view of the matter, pointing out the spot at the instance of the appellant herein and the discovery of the dead body on the said spot lacs significance and cannot be relied upon as an incriminating circumstance as against the appellant. The said circumstance has to be left out from consideration while basing the conviction of the appellant.

23 This takes us to the second circumstance put forth by the prosecution against the appellant that is the discovery of the iron bar which was used in the commission of the crime. It is to be noted here that PW-14 in his testimony has stated that on 19.7.2006 after reducing the memorandum statement which is at Exhibit 62, the appellant herein led the police to the said well. After reaching to the said well, the police and panch-witnesses noticed that the said well was filled with water and there was no facility to drift out the water and therefore on 19.7.2006 the recovery of an iron bar from the well could not be completed. PW-13 PSI Shri Gavhane in his testimony has stated that after the memorandum statement of the appellant was again reduced in writing on 20.7.2006 which is at Exhibit 65, the accused led the police and panch witnesses to the said well. That the said well was having water level upto 7 ft. That the water was lifted from the said well by operating electric water pump and thereafter tying with rope the appellant entered into well and from the sediments/mud which was at the bottom of the said well, he took out one iron bar. The said iron bar was having wrinkles and was also having red and black stains. PW-9 Tamboli who is a panch-witness to the said memorandum statement which is at Exhibit 65 and discovery of iron rod

which is at Exhibit 66 has also stated similar to PW-13. In addition to that he has further stated that said iron rod was stained with blood. It is to be noted here that the date and time of incident is approximately in the night of 12.7.2006. The appellant was arrested on 17.7.2006 and the iron bar was submerged in 7ft. deep water and which was recovered from the bottom of the well after a period of more than 7 days was alleged to have blood stains on it. It is surprising to note that the Chemical Analyser's report which is at Exhibit 81 further mentions about the fact that the article-15 therein i.e. iron rod was stained with blood, and further mentions that the analysis of the blood stains disclosed that the blood is of human origin of "B-group" on it. At the cost of repetition we observe that it is surprising to note that an iron rod which was submerged in the water for more than 7 days and which was recovered from the sediments/mud at the bottom of the said well, was found to have blood stains of human origin on it. In our humble opinion the said fact is improbable and a clear benefit of doubt has to be given to the appellant as it appears to us that the said article i.e. iron bar which was submerged in mud and water for about more than 7 days and therefore it was not only humanly impossible, but in all circumstances improbable to have blood stains on it.

24 Thus, after taking into consideration the entire evidence on record, we find that there is no legal evidence as against the present appellant i.e. appellant no.2/original accused no.2 and he deserves to be acquitted from all charges levelled against him.

25 The Criminal Appeal is allowed and the conviction and sentence of the appellant no.2/Original Accused No.2- Rajendra Dadasaheb Kutwal is hereby quashed and set aside and the appellant no.2/Original Accused No.2- Rajendra Dadasaheb Kutwal is acquitted of the offence with which he was charged and convicted. Fine, if paid by the appellant no.2/Original Accused No.2- Rajendra Dadasaheb Kutwal, be refunded to him. Since the appellant no.2/Original Accused No.2- Rajendra Dadasaheb Kutwal is in jail, he be released forthwith, if not required in any other case.

26 Registry to retain the paper book as the appeal of appellant no.1/Original Accused No.1- Kiran Gorakh Shelke is pending in this Court as the said accused is said to be absconding.

(A.S. GADKARI,J.)

(P. V. HARDAS,J.)

