

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**BENCH AT AURANGABAD**

**CRIMINAL APPEAL NO. 230 OF 2013**

Hiraman Bhimrao Pawar,  
Age : 40 years,  
R/o.: Takli Pra Cha,  
Presently residing at Bangaon,  
Tq. Chalisgaon, Dist. Jalgaon  
(At present is in Jail)

**..APPELLANT**  
**(Ori. Accused)**

**VERSUS**

The State of Maharashtra

**..RESPONDENT**  
**(Prosecution)**

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Mr. S.B. Jadhav, Advocate (appointed) for the appellant  
Mr. M.M. Nerlikar, A.P.P. for the respondent/State  
Mr. V.Y. Patil, Advocate for assisting to A.P.P.

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**CORAM : S.S. SHINDE AND**  
**SANGITRAO S. PATIL, JJ.**

**Reserved On : 22<sup>th</sup> SEPTEMBER, 2016**  
**Pronounced On : 27<sup>th</sup> OCTOBER, 2016**

**JUDGMENT : (PER : SANGITRAO S. PATIL, J.):**

The appellant, who has been convicted for the offence punishable under Section 302 of the Indian Penal Code (for short, "IPC") and sentenced to suffer imprisonment for life and to pay a fine of Rs.2,000/- in default to suffer rigorous imprisonment for two months,

vide judgment and order dated 26.04.2013 passed in Sessions Trial No.11 of 2012 by the learned 2<sup>nd</sup> Additional Sessions Judge, Jalgaon, has challenged the vires of the said judgment and order by this appeal.

2. The case of the respondent (hereinafter referred to as "the prosecution"), in short, is as under:-

The deceased Sunil Ramchandra Khairnar, resident of Bangaon, Tal. Chalisgaon, was the real brother of the informant namely Chhotu Ramchandra Khairnar. The native place of the appellant is village Takali (Budruk), Taluka Chalisgaon. The co-accused Sundarabai is his wife. The matrimonial village of Sundarabai is Bangaon, Taluka Chalisgaon. The appellant and Sundarabai were residing in the colony of homeless persons at village Bangaon. However, prior to two years of the incident, their relations became strained due to some domestic reasons. Therefore, the appellant had gone to reside at his own house at village Takali (Budruk). However, on the day of Rakshabandan, prior to the incident, the appellant had again started cohabiting with Sundarabai at village Bangaon.

3. It is alleged that the deceased Sunil had illicit relations with the co-accused Sundarabai. The deceased Sunil went to the house of another co-accused viz:- Babulal Pardeshi on 16.08.2003 prior to 8:30 p.m. The deceased Sunil asked the said Babulal to call Sundarabai to his house. Accordingly, Babulal went to the house of Sundarabai and brought her to his house at about 8:30 p.m. The deceased Sunil and Sundarabai were having talks. At that time, the appellant went there and questioned Sundarabai as to why she came there and was having talks with the deceased Sunil. He further questioned Babulal as to why he got called Sundarabai to his house. The appellant slapped twice or thrice on the person of Sundarabai. He caught hold of the deceased Sunil, dragged him inside the house of Babulal and assaulted him with a pestle and knife on his head and chest respectively. The deceased Sunil sustained serious bleeding injuries.

4. After hearing commotion of the incident, the villagers gathered in front of the house of Babulal. The informant had gone to village Ranjangaon at 7:30 p.m. When came back at 9:30 p.m., he saw the crowd of

villagers near the house of Babulal. The brother and uncle of the informant were found running towards the house of Babulal. They informed the informant that the deceased Sunil was lying inside the house of Babulal in an injured condition. The informant went there and found that the deceased Sunil had sustained severe bleeding injuries on his head and chest. He was not in a position to speak. He came to know from Babulal and Sundarabai as to how the deceased Sunil sustained injuries at the hands of the appellant. The deceased Sunil was immediately taken to the hospital of Dr. Deore at Chalisgaon, who examined the deceased Sunil and declared him as dead. The informant lodged a report in Police Station, Chalisgaon on 17.08.2003, as against the appellant for committing murder of the deceased Sunil on the suspicion that the deceased Sunil had illicit relations with Sundarabai.

5. On the report of the informant, Crime No.203 of 2011 came to be registered against the appellant for the offence punishable under Section 302 of the IPC. The investigation followed. Inquest panchanama of the dead body of the deceased Sunil was prepared. The spot

panchanama was prepared. The blood stained pestle and knife, a sleeper, telephone diary, liquor bottle, Tavij and three currency notes came to be seized from the spot of the incident. The samples of plain earth and blood mixed earth also came to be seized from the spot of the incident. The postmortem of the body of the deceased Sunil was conducted by the Medical Officer Dr. Chavan of Municipal Dispensary at Chalisgaon. Considering the external as well as internal injuries found on the body of the deceased Sunil, the Medical Officer opined that the deceased Sunil had died of head injury and other injuries causing puncture of right lung. The clothes of the deceased Sunil came to be seized. The seized articles were sent to the Chemical Analyst for analysis and report.

6. The informant gave the supplementary statement on 05.06.2004 and alleged that Sundarabai and Babulal Pardeshi also assaulted the deceased Sunil and that the appellant, Sundarabai and Babulal Pardeshi, in furtherance of their common intention, committed murder of Sunil. Therefore, Sundarabai and Babulal also came to be shown as the accused persons for committing murder of

the deceased Sunil with the aid of Section 34 of the IPC.

7. After completion of the investigation, the charge sheet came to be filed against Sundarabai but since the present appellant and Babulal Pardeshi were not traceable, they were shown as absconding accused in the charge sheet. On the basis of that charge sheet Regular Criminal Case (R.C.C.) No. 319 of 2004 came to be registered against Sundarabai in the Court of Judicial Magistrate First Class at Chalisgaon for the offence punishable under Section 302 read with Section 34 of the IPC, against Sundarabai. The learned Judicial Magistrate First Class committed the said case to the Sessions Court at Jalgaon, whereon Sessions Case No.171 of 2004 came to be registered. After recording the evidence of the witnesses, the learned 3<sup>rd</sup> Adhoc Additional Sessions Judge acquitted Sundarabai of the above mentioned offence as per the judgment and order dated 04.12.2004.

8. After Babulal was arrested a separate charge sheet came to be filed against him, on the basis of which Regular Criminal Case No.136 of 2005 came to be

instituted against him in the court of Judicial Magistrate First Class at Chalisgaon, for the above mentioned offences, who, in turn committed that case to the Sessions Court at Jalgaon. Sessions Case No.91 of 2005 came to be instituted against Babulal Pardeshi for the offences punishable under Sections 302 and 174 read with Section 34 of the IPC. In that case also, after recording the evidence of the prosecution, the learned 2<sup>nd</sup> Adhoc Additional Sessions Judge, Jalgaon, acquitted him of the above mentioned offences vide judgment and order dated 09.10.2006.

9. The appellant came to be arrested on 28.10.2011. After his arrest the charge sheet came to be filed against him for the above mentioned offences in the Court of Judicial Magistrate First Class at Chalisgaon, on the basis of which Regular Criminal Case No.444 of 2011 came to be registered against him. The learned Judicial Magistrate First Class committed the case to the Sessions Court at Jalgaon, whereon Sessions Case No.11 of 2012 came to be instituted against him for the above mentioned offences.

10. The learned Trial Judge framed charges against

the appellant vide Exh-6 for the offences punishable under Section 302 and 174 of the IPC and explained the contents thereof to him in vernacular. The appellant pleaded not guilty and claimed to be tried. His defence is that of total denial.

11. The prosecution examined in all ten witnesses to establish the guilt of the appellant for the above mentioned offences. After evaluating the evidence produced by the prosecution, the learned trial Judge found that the prosecution established beyond reasonable doubt that the appellant committed murder of the deceased Sunil. He, therefore, convicted the appellant for the offence punishable under Section 302 of the IPC and sentenced him, as stated above.

12. However, the learned Trial Judge, on appreciation of the evidence on record found that the prosecution has failed to prove that in spite of proclamation issued under Section 82 of the Code of Criminal Procedure (for short, "the Code"), the appellant intentionally omitted to attend the Court and thereby committed an offence punishable under Section 174 of the IPC. He has specifically recorded his

negative finding as against point no.3 for determination in respect of the said offence. However, he has not passed specific order acquitting the appellant of the said offence. Considering the negative finding of the learned trial Judge in respect of point no.3, the appellant would be deemed to have been acquitted of the said offence. Since the negative finding in respect of point no.3 pertaining to the offence punishable under Section 302 of the IPC, has not been challenged by the respondent, that part of the judgment has attained finality. Therefore, we are not going to consider the facts as well as the evidence pertaining to the said point in order to see whether the said finding is correct or otherwise. We are, therefore, confining this judgment to the facts and evidence pertaining to the offence punishable under Section 302 of the IPC only.

13. There is no dispute that the incident took place inside the house of Babulal at village Bangaon on 16.08.2003 at about 8:30 p.m. The spot panchanama is at Exh-16. The blood stained pestle and knife came to be seized from that spot under the said panchanama. The inquest panchanama (Exh-23) in respect of the deceased

Sunil was prepared wherein bleeding injuries were noted over his head and chest. The postmortem of the body of the deceased Sunil was actually conducted by Dr. Chavan, who is no more. Therefore, Dr. Tribhuvan (PW7) (Exh-32) was examined by the prosecution, who was working as the Medical Officer in Municipal Dispensary at Chalisgaon. On the basis of the contents of the memorandum (Exh-33) of the postmortem, Dr. Tribhuvan (PW7) states that the deceased Sunil had sustained head injury i.e. compound fracture, over right side of frontal region having size 5 c.m. X 2 c.m. into brain deep, compound fracture over both parietal regions having size 5 c.m. X 2 c.m. brain deep on each side, stab wound over 4 th inter-costal space of chest having size 2 c.m. X plural deep (touching the lung) cavity deep. The said injuries were ante-mortem. He further states that on internal examination, it was noticed that there was compound fracture over the scalp of front parietal region and laceration over brain. There was puncture of middle lob of right lung. He states that Dr. Chavan opined that the death of the deceased Sunil was due to head injury and other injuries causing puncture of right lung. He opined that the said injuries were caused by forceful assault

by hard and blunt object. He further deposes that injuries Nos.1 and 2, mentioned in column no.17 of the memorandum (Exh-33) of postmortem, were possible by pestle Art. "A", while injury no.3, mentioned in column no.17, was possible by penetrating and sharp object like knife Art. "B". From the evidence of Dr.Tribhuvan (PW7), it is clear that the deceased Sunil succumbed to the injuries that were caused on his head and chest. There is nothing on record to show that the said injures were either accidental or suicidal. It is not even suggested to Dr. Tribhuvan (PW7) that the death of the Sunil was not homicidal. In the circumstances, considering the nature of the injuries and the evidence of Dr.Tribhuvan (PW7), we hold that the death of Sunil was homicidal.

14. To connect the appellant with the death of Sunil, the prosecution is mainly relying on the evidence of Jijabai (PW4) (Exh-19), who was residing in front of the house of Babulal and the co-accused Sundarabai (PW8) (Exh-41). The prosecution is further relying on the circumstance that the appellant was absconding since after the incident. Therefore, it will have to be seen as to how far the evidence of these two witnesses and

the alleged abscondence of the appellant would be helpful to the prosecution in establishing the guilt of the appellant for the offence of committing murder of Sunil.

15. Jijabai (PW4) states that her house is in front of the house of Babulal. She states that she had seen Sundarabai (PW8) and the deceased Sunil talking with each other in the house of Babulal on the day of the incident at about 8:00 p.m. According to her, she was preparing food at that time in the kitchen, which was inside of her house. She states that the appellant came there and gave two slaps on the person of Sundarabai (PW8). Thereafter, scuffle took place between the appellant and the deceased Sunil. The appellant dragged the deceased Sunil inside the house of Babulal. She got frightened and closed the door of her house from inside. She opened the door of her house after an hour when she found crowd in front of the house of Babulal Pardeshi. She further saw that the deceased Sunil had sustained injuries over the head and chest. Thereafter, the brother and uncle of the deceased Sunil came there and took him to the hospital at Chalisgaon.

16. The learned counsel for the appellant submits that, in the cross-examination of Jijabai (PW4), she states that the house of Babulal Pardeshi was not visible from her kitchen and that at the relevant time, she was preparing food in the kitchen that was at the backside of her house. He, therefore, submits that the evidence of Jijabai (PW4) that she saw the appellant giving two slaps on the person of Sundarabai (PW8) and dragging the deceased Sunil inside the house of Babulal, cannot be believed. The learned counsel for the appellant pointed out to the deposition (Exh-63) of Jijabai (PW4), recorded on 29<sup>th</sup> November, 2004 before the Court in Sessions Case No. 171 of 2004, that was instituted against Sundarabai (PW8) as well as the present appellant and Babulal Pardeshi. He submits that the said evidence was brought to the notice of Jijabai (PW4) but she could not state as to why the above mentioned facts which have been stated in the present case against the appellant, were not stated by her before the Court in Sessions Case No. 171 of 2004. He, therefore, submits that Jijabai (PW4), in fact, has not at all witnessed the appellant slapping Sundarabai (PW8)

and dragging the deceased Sunil inside the house of Babulal and that she is not a reliable witness.

17. Jijabai (PW4) in her deposition (Exh-63) before the Court in Sessions Case No. 171 of 2004 states that on 16.08.2003 at about 8:00 a.m. to 8:30 p.m., when she was cooking in her house, she heard commotion from the house of Babulal Pardeshi and therefore went out of her house. She saw that Babulal Pardeshi, the appellant and Sundarabai (PW8) came out of the house of Babulal and went to some other place. Thereafter, the villagers gathered there. Then somebody told her that the deceased Sunil was lying inside the house of Babulal. She specifically states that she did not see as to what had happened prior to the shouts from house of Babulal. She was cross-examined by the learned A.P.P. but she denied all the above mentioned facts which were stated by her in this case, implicating the appellant in the incident in question. In her cross-examination in Sessions Case No.171 of 2004, she admitted that she did not hear shouts but heard the sound of falling utensils. She further admitted that she had not seen Sundarabai (PW8) coming out of the house of Babulal. The deposition of

Jijabai (PW4) recorded in Sessions Case No.171 of 2004 does not contain that the appellant had slapped twice or thrice to Sundarabai (PW8) on the ground that she was having talks with the deceased Sunil and thereafter, the appellant dragged the deceased Sunil inside the house of Babulal Pardeshi. She could not explain as to why these material facts were not stated by him in her deposition (Exh-63), to which her attention was specifically drawn. Thus, whatever was not stated by her before the Court in Sessions Case No.171 of 2004 has been tried to be stated by her before the Court in the present case to implicate the appellant. Even otherwise, her evidence that she had seen the appellant slapping Sundarabai (PW8) and dragging Sunil inside the house of Babulal cannot be believed, since she herself admitted that at the time of the said incident, she was preparing the food in the kitchen at the back side of her house and the house of Babulal is not visible therefrom. It has come in her cross-examination that she had not stated before the police that she had seen the deceased Sunil talking in the house or at the door of the house of Babulal. She further admitted that she had not stated before the police that there had been scuffle between the appellant

and the deceased Sunil. There are material omissions in the evidence of Jijabai (PW4). Considering the variance between her version before this Court and that has been recorded in Sessions Case No.171 of 2004 as well as the above referred material omissions, it would be difficult to rely on the testimony of Jijabai (PW4). Her evidence would not be helpful to the prosecution to prove that the appellant caused injuries on the person of the deceased Sunil.

18. Sundarabai (PW8) states that she used to sell liquor prior to the incident and that she was prosecuted for the same. She states that the deceased Sunil was helping her in the cases prosecuted against her. According to her, on the day of the incident at about 8:00 p.m. to 8:30 p.m., Babulal came to her house and told her that the deceased Sunil wanted to tell her something about the dates of Court cases. Therefore, she went to the house of Babulal, where the deceased Sunil was present. She was talking to the deceased Sunil in respect of the dates of court cases. At that time, the appellant came there and gave her two – three slaps asking her as to why she was talking with the deceased

Sunil. She further states that the appellant dragged the deceased Sunil and the scuffle took place between them. She tried to intervene. The appellant took up iron pestle and assaulted over the head and chest of the deceased Sunil. The deceased Sunil sustained bleeding injury on his head and fell down on the ground. Thereafter, accused took up a knife, which was lying nearby and inflicted blow thereof on the chest of the deceased Sunil. She got frightened and went to the house of her mother. Thus, Sundarabai (PW8) has tried to implicate the appellant with the offence of murder of the deceased Sunil.

19. The learned A.P.P. submits that the Sundarabai (PW8), wife of the appellant was present at the time of the incident. Her evidence is quite natural, probable and believable. He, therefore, submits that the evidence of Sundarabai (PW8) itself is sufficient to prove the guilt of the appellant for committing murder of the deceased Sunil.

20. As against this, the learned counsel for the appellant submits that Sundarabai (PW8) admittedly is a co-accused. She faced the trial in Sessions Case No.171

of 2004 for committing murder of the deceased Sunil, in furtherance of her common intention with the appellant and Babulal. Therefore, she being an accomplice her evidence cannot be believed unless there is strong corroboration on all material points. He submits that Sundarabai (PW8) is a got up witness. Her presence at the time of incident itself is doubtful. When she claims to have intervened at the time of the incident and that the deceased Sunil had sustained bleeding injuries, her clothes must have been stained with blood of Sunil. Her clothes have not been seized by the police. The statement of Sundarabai (PW8) is coming for the first time before the Court in the present trial. She was not even examined as a witness in Sessions Case No. 91 of 2005, instituted against Babulal, the another co-accused. It is not explained by the prosecution as to why her statement before the police was suppressed for such a long time. He submits that the evidence of Sundarabai (PW8) is full of infirmities. It is not corroborated by any independent evidence. She is not at all believable witness.

21. Admittedly, Sundarabai (PW8) was prosecuted and

tried in Sessions Case No. 171 of 2004 for committing the offence punishable under Section 302 read with Section 34 of the IPC, in respect of death of Sunil only. She has been acquitted of the said charges on 04.12.2004. However, her acquittal would not change her character as a co-accused. Therefore, in view of the judgment **Banwari Lal Vs. State of H.P., 2004 CRI.L.J.1067** cited by the learned counsel for the appellant, as stated in illustration (b) of Section 114 of the Indian Evidence Act, the Court has to presume that she is unworthy of credit unless her version is corroborated in material particulars.

22. As stated above, the evidence of Jijabai (PW4) is of no help to connect the appellant with the incident in question. Nothing incriminating has been recovered or discovered to connect the appellant with the incident in question. The evidence of Sundarabai (PW8), thus, has remained totally uncorroborated by any independent evidence. Even otherwise, if the version of Sundarabai (PW8), as has been brought in her cross-examination, is considered carefully, it would be clear that she was a tutored witness. In paragraph no.6 of her deposition,

she admits that the police had read over her statement before her for two—three times prior to entering the witness box. She further states that the police had asked her to depose according to that statement.

23. As stated above, the statement of Sundarabai (PW8) has surfaced only when the appellant came to be prosecuted. The prosecution has not at all explained as to why her statement was suppressed for about 8 years of the incident. In paragraph no.7 of her deposition, Sundarabai (PW8) specifically states that she had not stated about the incident immediately to the police. She further states that she did not narrate the incident to her mother or anybody else. This evidence creates a strong doubt about the recording of her statement immediately after the incident. If that be so, it would be hazardous and risky to rely on her statement given before the Court against the appellant for the first time after about 9 years of the incident and particularly in the absence of any independent corroboration to her version.

24. The learned A.P.P. relied on the judgment in the case of **Haricharan Kurmi Versus State of Bihar AIR**

*1964 SC 1184*, wherein it is held that the testimony of the accomplice though a weak piece of evidence can be acted upon for conviction. He further relied on the judgment in the case of *Mrinal Das & Ors. Versus State of Tripura AIR 2011 SC 3753*, wherein the evidence of approver which was fully supported from the narration of occurrence given by the eye witness was held to be acceptable. In the present case, basically Sundarabai (PW8) has not been granted any pardon by any Court and as such, she is not an approver. Moreover, her evidence has not been corroborated by any independent evidence. Her evidence itself is not cogent and consistent. In the circumstances, the above cited rulings would not be helpful to the prosecution to show that the evidence of Sundarabai (PW8) is wroth believing.

25. The learned A.P.P. submits that the accused was absconding from the day of the incident and he could be arrested only on 28.10.2011. He submits that this is a strong circumstance which points out to the guilt of the appellant. As against this, the learned counsel for the appellant submits that there is nothing on record to establish that the accused was absconding after the

incident. He further submits that the Trial Judge has acquitted the appellant of the offence punishable under Section 174 of the IPC. Therefore, it cannot be held that the appellant intentionally did not appear before the police or the Court, in spite of the alleged proclamation under Section 82 of the Code. He submits that there is nothing on record to show that despite necessary search by the police, the appellant could not be traced out by them. Therefore, according to him, the alleged abscondence of the appellant cannot be an incriminating circumstance against him.

26. Here, a reference may be made to the judgment in the case of ***Dinkar Bandhu Deshmukh and another V. State AIR 1970 BOM 438***, wherein it has been held in paragraph no. 21 of the judgment as under :-

“.....In order that the Court can legitimately draw the inference that the subsequent conduct of an accused was that of a guilty person and not of an innocent man, there must be proper material placed before the Court. All that the prosecution has placed before the Court in the present case are two bald statements, both made by Police Sub-Inspector

Borkar: (1) that the second accused was not in the village on the day soon after the incident when the police went there; (2) that Police Sub-Inspector Borkar had sent about four constables in search of accused No.2 to some villages. That evidence is, in my opinion, wholly insufficient to lead to the inference that the second accused was absconding since the date of the incident. In order to lead to that inference, the investigating police officer must lay before the Court further evidence to show that continuous watch was kept at the house of the accused concerned, and that a watch was also kept by him at the places which the accused frequented, including his place of work, but the accused did not turn up at all at any of those places during a certain period of time. In the absence of such evidence, I am afraid, no inference can be drawn that accused No.2 was absconding and his subsequent conduct was that of a guilty person. ...."

27. In the case at hand, P.I. Vilas Jadhav (PW9) (Exh-49), who investigated the above numbered crime, states that during the entire investigation, the appellant could not be traced out and therefore, he submitted the charge sheet against Sundarabai (PW8) by showing the appellant and Babulal as absconding.

Indisputably, the native place of the appellant was Takali (Budruk). There is nothing in the evidence of PSI Nikam (PW10) that he had sent any police personnel at any point of time in search of the appellant at village Bangaon and village Takali (Budruk) or any other place. There is nothing in his evidence to show that continuous watch was kept at the house of the appellant and also at the places where the appellant frequented. There is nothing on record to show that warrant for arrest of the appellant was issued from time to time and attempts were also made by the Process Serving Officer to arrest him. The Magistrate issuing proclamation must record his satisfaction that the accused had absconded or concealed himself. The procedure laid down in Section 82 of the Code is required to be followed. It is only after publishing of the proclamation as contained in sub sections (1) and (2) of Section 82 of the Code, that the person against whom such proclamation is published has to appear at a specified place and time as required. The requirements of Section 82 of the Code are mandatory. The prosecution has totally failed to prove publication of such proclamation against the appellant and pronouncement that the appellant is a proclaimed

offender. Every person who is not immediately available, cannot be characterised as a proclaimed offender. Here, it would be useful to refer to paragraph no. 31 of the judgment in the case of **Sk. Yusuf V. State of West Bengal (2011) 11 SCC 754**, wherein it is observed as under :-

"Both the courts below have considered the circumstance of abscondence of the appellant as a circumstance on the basis of which an adverse inference could be drawn against him. It is a settled legal proposition that in case a person is absconding after commission of offence of which he may not even be the author, such a circumstance alone may not be enough to draw an adverse inference against him as it would go against the doctrine of innocence. It is quite possible that he may be running away merely on being suspected, out of fear of police arrest and harassment. (Vide *Matru v. State of U.P.*, *Paramjeet Singh v. State of Uattarakhand* and *Dara Singh v. Republic of India*.) Thus, in view of the law referred to hereinabove, mere abscondence of the appellant cannot be taken as a circumstance which gives rise to draw an adverse inference against him."

28. Considering the above mentioned legal position

pertaining to abscondence of the accused, the appellant cannot be held to be absconding. Moreover, the fact that the appellant was absconding after the incident with a view to screening himself, has not been put to him in his examination under Section 313 of the Code. If that be so, the alleged abscondence of the appellant cannot be used to incriminate him.

29. As stated above, the prosecution has totally failed to bring sufficient cogent, consistent and believable evidence to establish that the appellant committed murder of the deceased Sunil.

30. The learned Trial Judge did not appreciate the evidence of Jijabai (PW4) and Sundarabai (PW8) properly and correctly. He placed reliance on their evidence despite the fact that it was not cogent, consistent and dependable. The learned Trial Judge wrongly relied on the bald statement of the P.I. Vilas Jadhav (PW9) that the appellant was absconding and held that the abscondence of the appellant is the circumstance which definitely would go against him. As stated above, the alleged abscondence of the appellant was not put to him in his examination under Section 313 of the Code.

Moreover, the abscondence of the appellant has not been duly proved by the prosecution by producing necessary evidence. In the circumstances, the findings recorded by the learned Trial Judge, on the basis of evidence of Jijabai (PW4), Sundarabai (PW8) and the alleged abscondence of the appellant, cannot be said to be correct and sustainable.

31. The learned Trial Judge has directed that the seized currency notes of Rs.40/- be deposited with the Reserve Bank of India. The learned Trial Judge has not assigned any reason as to why this cash amount should be deposited in the Reserve Bank of India. The said direction is not at all warranted. The amount of Rs.40/- will have to be directed to be forfeited to the State. The remaining part of the order for disposal of the property needs no interference.

32. The prosecution has failed to establish the guilt of the appellant for the offence of committing murder of the deceased Sunil. The impugned judgment and order convicting and sentencing the appellant for the offence punishable under Section 302 of the IPC, are not sustainable. They are liable to be quashed and set

aside. The appeal is liable to be allowed. In the result, we pass the following order.

**O R D E R**

- (i) The appeal is allowed.
- (ii) The impugned judgment and order are hereby quashed and set aside.
- (iii) The appellant is acquitted of the offence punishable under Section 302 of the Indian Penal Code.
- (iv) The appellant is in jail. He be set at liberty forthwith, if not required in any other case.
- (v) The order in respect of the disposal of the property is modified to the extent of the direction to send the seized currency notes of Rs.40/- to the Reserve Bank of India and instead, it is ordered that the said amount be forfeited to the State. Rest of the part of the order in respect of disposal of the property is maintained as it is.

- (vi) The appellant shall execute a personal bond of Rs.10,000/- with a surety in the like amount vide Section 437-A of the Code of Criminal Procedure.
- (vii) Since learned counsel Mr. S.B. Jadhav was appointed to represent the appellant, we quantify his fees at Rs.7500/-, which shall be paid by the High Court Legal Services Sub Committee at Aurangabad.

**[SANGITRAO S. PATIL]**  
**JUDGE**

**[S.S. SHINDE]**  
**JUDGE**