

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

CRIMINAL APPEAL NO. 307 OF 2013

Abdul Rauf s/o. Abdul Razzak,
Age 45 years, Occupation : Agri.,
R/o. Sewdi (Bajirao), Sonkhed,
Taluka: Loha, District: Nanded.

...APPELLANT
(Ori. Complainant)

Versus

1) Abdul Qayyum s/o. Abdul Wahed Sab,
Age: 60 years, Occupation : Agri.,
R/o. Shevadi Bajirao, Tq. Sonkhed,
District: Nanded.

2) Abdul Ansar s/o. Abdul Qayyum,
Age 19 years, Occupation : Agri.,
R/o. Shevadi Bajirao, Tq. Sonkhed,
District: Nanded.

3) Abdul Jabbar s/o. Abdul Qayyum,
Age 22 years, Occupation : Agri.,
R/o. Shevadi, Tq. Sonkhed,
District: Nanded.

4) The State of Maharashtra

...RESPONDENTS
(Respondents No. 1 to 3
are original accused.)

Mr. Y.M. Khan, Advocate for appellant- Absent.
Mr. B.S. Kudale, Advocate for Respondents No. 1 to 3.
Mr. S.G. Karlekar, APP for Respondent No.4 - State.

**CORAM : S.S. SHINDE AND
K.K. SONAWANE, JJ.**

**RESERVED ON : 10th FEBRUARY, 2017.
PRONOUNCED ON : 1st AUGUST, 2017.**

JUDGMENT : (PER: K.K. SONAWANE, J.)

1. Being dissatisfied with the judgment and order of acquittal of respondents No. 1 to 3 - original accused in Sessions Case No. 12 of 2008, passed by the learned *Ad-hoc* Additional Sessions Judge, Kandhar, District Nanded, dated 17-11-2008, the first informant of the

crime, namely, Abdul Rauf Abdul Razzak preferred the present appeal to redress his grievance.

2. It appears from the record that, initially appellant Abdul Rauf filed the Criminal Revision Petition No. 08 of 2008 against the impugned judgment and order of learned trial Court acquitting the respondent-original accused in Sessions Case No. 12 of 2008. But, during the course of hearing of Revision Petition by invoking remedy under section 401 of the Criminal Procedure Code (for short "Cr.P.C."), Revision Petition of the appellants came to be treated as petition of appeal and proceeded to deal with the same accordingly. In such circumstances, appeal is admitted. Heard finally, with consent of learned counsel for the parties appeared in present matter.

3. The facts which led to prosecution of respondent Nos. 1 to 3 (hereinafter called as "accused" for the sake of brevity) are in brief as under :-

That, the victim Abdul Razzak Abdul Khader and victim Abdul Majeed Abdul Razzak, both were the father and elder brother of first informant Abdul Rauf Abdul Razzak, r/o. Shevadi Bajirao, Tahsil Loha, Dist. Nanded. The Abdul Majeed is the another brother of first informant Abdul Rauf and all are eking livelihood by doing agricultural work. There were agricultural lands belonging to father Abdul Razzak and brother Abdul Majeed located within the vicinity of village Shevdi Bajirao tahsil Loha District Nanded. The accused Qayyum is cousin uncle of the first informant Abdul Rauf. Accused Abdul Ansar and Abdul Jabbar are the sons of Abdul Qayyum. The agricultural lands of the

accused were located abutting to the land of Abdul Razzak and Abdul Majeed and since last ten years there was dispute in between the family of accused and first informant on account of boundary line of the agricultural land. The accused always made endeavour to encroach upon the land of victim by causing damage to the boundary line. The dispute pertains to the boundary line was amicably settled time and again with the intervention of villagers, but, there was no change in the behaviour of accused.

4. On the unfortunate day of incident, i.e. 02-11-2007, in the morning hours, first informant Abdul Rauf and his wife were at home. The father Abdul Razzak was sitting with son Abdul Rauf. At about 8.00 a.m. accused Abdul Qayyum and his son Abdul Ansar arrived in front of the house of first informant Abdul Rauf and gave threats that they are going to cause damage to the boundary line of the agricultural land and in case some one else ventured to interfere in it, they would chop him. The first informant did not pay heed to the threats of accused being usual matter. Thereafter, first informant left the home for going to Kandhar to attend function of "Walima" at the house of relative Yasinsaheb. The father victim Abdul Razzak and wife Kamrunissa had to attend the function at Kandhar in the evening. According to prosecution, the victim Abdul Razzak and Abdul Majeed both attended the Friday prayer in the Mosque and returned to home. Abdul Razzak asked daughter-in-law Kamruissa to get ready for going to Kandhar for "Walima" function at the house of relative Yasinsaheb. Meanwhile, victim Abdul Razzak and his son Abdul Majeed both

proceeded towards the field to take stock of situation after receiving threats from the accused to cause damage to the boundary line of the field. But, they did not return to home, even after quite sometime. Therefore, daughter-in-law Kamruissa rushed towards the field to see father-in law Abdul Razzak and brother-in-law Abdul Majeed. She was aghast on seeing the accused assaulting both, father-in-law and brother-in-law in brutal manner. The Accused Abdul Qayyum was armed with Katti whereas Abdul Ansar was having Axe in his hand and accused Abdul Jabbar was standing with stick near them in the field. The frantic Kamruissa raised the shouts for help, but accused exhorted to kill her. The accused Abdul Jabbar attempted to chase her for attack. But, any how she succeeded to escape from the spot and came running to home. She asked the nephew Moin to communicate about the assault to the villagers congregated in the Mosque for prayer. She also passed on information about the incident on telephone to her husband at Kandhar. On receipt of information about the incident, he immediately returned to home in Auto Rickshaw accompanied with other relatives. They all rushed to the spot and saw that his father Abdul Rauf and brother Abdul Majeed were lying in the pool of blood in the field of accused near the plough in injured condition. Both victims were no more. There were fatal injuries on their throats, face, limbs, etc. The denizens of the locality also thronged at the spot. Thereafter, first informant Abdul Rauf visited to Sonkhed Police Station to ventilate grievance against accused. He blamed the accused for the death of his father and brother.

5. Pursuant to FIR of Abdul Rauf, Police of Sonkhed Police Station registered the Crime No. 63 of 2007 under section 302, 506 of the Indian Penal Code (for short "IPC") and set the criminal law in motion. I.O. rushed to scene of occurrence and drawn the *panchnama* of the spot. I.O. collected earth smeared with blood and simple earth from the spot of incident. I.O. also recovered pair of plastic chapple, shirt buttons, etc. from the spot. The dead bodies of both victims were escorted to the Government Hospital, Nanded for autopsy. Police dealt with the mortal remains of both victims and drawn inquest *panchnama*. The concerned Medical Officer conducted the post mortem on the dead bodies of victim Abdul Razzak and Abdul Majeed. According to medical experts, both victims died due to injuries to major vessel with cervical spine injury. I.O. recorded statements of witnesses acquainted with the facts of case. I.O. apprehended the accused for the sake of investigation. During custodial interrogation accused shown willingness to produce weapons of the crime. I.O. recorded memorandum *panchnama* of accused and visited to the respective sites at the instance of accused. I.O. recovered weapons Katti, Axe and Sticks at the behest of respective accused and drawn recovery *panchnamas* under section 27 of the Evidence Act independently. The cloths of accused and deceased were seized in presence of panchas. The seized muddemal were referred to forensic laboratory for C.A. analysis. I.O. collected relevant papers i.e. sketch map of the spot, post mortem report, C.A. report, etc. and after completion of investigation, I.O. preferred charge-sheet against accused before learned Magistrate at Kandhar.

6. The learned Magistrate verified the charges pitted against the accused and wisely transmitted the proceeding to the concerned Sessions Court for trial of the accused within ambit of law. Accordingly, the learned *Ad-hoc* Additional Sessions Judge, Kandhar framed the charges against each of the accused for the offence punishable under sections 302, 506 read with section 34 of IPC. The accused pleaded not guilty and claimed for trial. The prosecution adduced evidence of in all 14 witnesses to bring home guilt of the accused. The learned trial Court after hearing both sides, appreciated the entire oral and circumstantial evidence adduced on record and arrived at the conclusion that, prosecution failed to prove the serious charges of murder against accused beyond reasonable doubt. Therefore, learned trial Court was pleased to acquit all the respondents-accused from the charges levelled against them and passed the impugned judgment and order of acquittal, which is the subject matter of present appeal.

7. Before embarking into merits of the prosecution case to evaluate guilt of the accused, we would like to elucidate the scope of exercise of powers by the appellate Court against judgment of acquittal under sections 378 and 386 of the Cr.P.C. The Hon'ble Supreme Court in the case of *Ghurey Lal Vs. State of Uttar Pradesh*¹ considered the catena of judgment and delineated the legal guidelines in paragraph No. 69 as below:-

"69. The following principles emerge from the cases above:

1(2008) 10 SCC 450: 2009 (1)SCC Cri. 60

1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial Court. The trial Court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial Court's decision. This is especially true when a witness credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong."

8. Keeping in mind aforesaid legal principals, we proceeded to deal with core question in this case as to whether, prosecution story is worth credence and whether prosecution succeeded to prove the case against accused beyond all reasonable doubts?.

9. We have heard learned APP for respondent No. 4 - State and learned counsel appearing for respondents No. 1 to 3 at length. We have also made endeavor to secure the presence of learned counsel for appellant, but found unavailing. However, with the able assistance of learned APP, we have carefully considered the submissions, impugned

judgment and order passed by the learned Sessions Judge and the evidence in this case. After careful consideration of the entire evidence on record and for the reasons mentioned below, we are of the opinion that learned Sessions Judge did not appreciate the evidence on record in its proper perspective and has taken extremely perverse view and acquitted the respondents-original accused in this case.

10. P.W. 2 Dr. Nilkant Bhosikar and his associate Dr. Punpale conducted post-mortem on the dead bodies of victims of Abdul Razzak and Abdul Majeed on 03-11-2007. At the time of autopsy on mortal remains of deceased Abdul Razzak Abdul Khader he noticed following ante-mortem injuries.

- (i) An incised would on anterior surface of neck extending from mid-lines to right sterno-mastoid cutting, skin superficial fascia muscles red vessels with fracture of cervical spine.
- (ii) multiple incised wound on left side of neck.
- (iii) Incised would on left little finger with fracture of phalax.
- (iv) Incised would on left side of face.
- (v) Incised would on left thigh measuring 10 c.m.x 2 cm. and
- (vi) Incised wound on right fore-arm.

P.W.2 Dr. Bhosikar opined that cause of death of victim Abdul Razzak was cardio respiratory arrest due to hemorrhagic shock

following injury to major vessels with cervical spine.

11. P.W.2 Dr.Bhosikar and his associate Dr. Punpale also conducted post mortem on the dead body of another victim Abdul Majeed on the very same day i.e. on 03-11-2007 and came across with following external ante-mortem injuries.

- (i) Injury on the anterior surface of neck measuring 10 cm X 10 cm, cutting skin, subcutaneous tissues, muscle, great vessels of neck with injury to cervical spine.
- (ii) Incised wound on right palm measuring 4 cm. X 2 cm.

There was also fracture to the cervical spine of Abdul Majeed. According to P.W.2-Dr. Bhosikar, the deceased Abdul Majeed succumbed to the injuries of major vessels with fracture to cervical spine. Accordingly, medical expert P.W.2-Dr. Bhosikar issued post mortem reports (Exhibits 25 and 26) which are placed on record in this case. There was no arduous cross-examination to medical expert on behalf of accused. In such circumstances, there is no impediment to arrive at the conclusion that both the victims met with an homicidal death. The learned trial Court did not discuss this issue of homicidal death of both victims elaborately, might be because of uncontroversial issue in this case.

12. In order to bring home guilt of the accused, prosecution primarily relied upon following four sets of incriminating circumstances including

animosity in between family of accused and victims on account of dispute of boundary line of their agricultural land.

- (a) The evidence of sole eye witness, P.W. 12 – Kamrunissa,
- (b) Recovery of weapons of the crime under section 27 of the Evidence Act at the behest of accused,
- (c) C.A. Reports of the blood stain on weapons, cloths of the deceased and accused etc. and
- (d) Subsequent conduct of the accused relevant under section 8 of the Evidence Act.

(A) Evidence of sole eye witness PW-12 Kamrunissa

13. P.W.12 Kamrunissa deposed that accused are her co-lateral relatives. The accused used to pick up quarrels with her family members since last 12 years on account of boundary line of their agricultural land. On the day of incident, accused Abdul Qayyum came to her home and gave threats that he would going to destruct the boundary line and if some one else ventured to intercept, he would be chopped there only. At that time, her husband, father-in-law and brother-in-law were at home. P.W. 2 Kamrunissa further stated that they did not take threats of the accused serious as same was routine matter for them. Thereafter, her husband left home for going to Kandhar to attend function of “Walima” at the house of relative. Her father-in-law and brother-in-law both attended Juma (Friday Prayers) and returned to home. P.W.12 Kamrunissa stated that her father-in-law and brother-in-law disclosed her that they all have to attend function of “Walima” at the house of their relatives at Kandhar. Thereafter, they

both went towards field saying that they would return shortly for going to attend the function of "Walima". But, they did not return to home, even after sufficient time. Therefore, P.W.12 Kamrunissa rushed to the field. There were no one else present at the well in the field. Therefore, she proceeded towards common boundary line (Bandh) of the field. She saw her father-in-law and brother-in-law in the field of accused Abdul Qayyum. They both were mercilessly assaulting by accused Abdul Qayyum, his son Abdul Ansar and Abdul Jabbar. Both victims sprawled on the ground. She further deposed that the weapon katti was in the hand of accused Abdul Qayyum and accused Abdul Ansar was armed with Axe whereas wooden log was in the hand of accused Abdul Jabbar. On seeing assailants she raised shouts. Accused Abdul Jabbar saw her and exhorted to kill her. He attempted to chase her. The frantic P.W.-12 Kamrunissa, any how escaped from the spot and came to her home. P.W.-12 Kamrunissa further stated that her nephew Moin and children were at home. She asked nephew Moin to go to Mosque in the village and if some one found from her relations disclosed them about the incident of assault to victims- Abdul Razzak and Abdul Majeed. Thereafter, she gave information about the incident to her husband on telephone. Accordingly, her husband accompanied with other relatives returned to village in Auto rickshaw. She narrated the incident of assault by the accused on victims to her husband. All rushed towards the field. Eventually, her husband visited to the Police Station and filed the FIR. He blamed the accused for injuries sustained to his father and brother.

14. The learned trial Court disbelieved the version of P.W.12 Kamrunissa mainly on the following reasons,

- (I) Testimony of P.W.12 Kamrunissa suffers from contradictions. While P.W.12- Kamrunissa stated in her evidence that accused Abdul Qayyum alone came to her house in the morning hours and gave threats for destruction of boundary line in the filed, the deposition of her husband P.W.13 -Abdul Rauf was that all three accused came to his house and gave threats. In the FIR Exhibit-62 he stated about visit of only accused Abdul Qayyum and his son Abdul Ansar to the house and gave threats of destruction of boundary line.
- (II) P.W.12 Kamrunissa failed to give accurate account of events occurred at the time of assault. She was unable to state the distance between both the victims and assailants at the time of alleged incident. She could not state in which hand the weapons were holding by the assailants while assaulting and how many blows of weapon assailants dealt with on the victim and at what part of their bodies.
- (III) The conduct and demeanour of P.W.12 Kamrunissa found suspicious and incredulous one. She did not disclose about the incident to anybody else while she escaped from the spot and straight way came to home, nor she stated about the incident to Coin Box owner while informing her husband about the

incident on telephone. Moreover, she did not prefer to take shelter for protection in the adjoining field of one Jaffar.

- (IV) Panch of the spot panchnama P.W. 14- Mohd Mustaq (relative of first informant Abdul Rauf) admitted in his cross-examination that P.W-12 Kamrunissa was at Kandhar during the relevant period for attending function of "Walima", and therefore, her presence at the scene of occurrence found doubtful.

15. After intense scrutiny of the evidence of P.W.12 Kamrunissa, we find painful to discard the evidence of such star witness of the prosecution for the reasons as referred supra, pointed out by the learned trial Court. It is true that the P.W.12 Kamrunissa was the chance witness in this case. She by chance or co-incidence happens to be at the place of occurrence and watched the spectacle. She was also the relative of both victims and inimical to accused. But, it does not mean that her evidence is necessarily incredible and unbelievable one. No doubt, it requires cautions and close scrutiny.

16. There are some discrepancies in the evidence of P.W.12 but these discrepancies are not fatal to the prosecution case. The P.W.12 Kamrunissa stated about visit of accused Abdul Qayyum alone and gave threats for destruction of boundary lines of the field and about dire consequences, while her husband stated that all three accused came to his house in morning hours and gave threats for destruction of boundary lines. In the FIR, he (first informant Abdul Rauf) stated only the names of two accused i.e. Abdul Qayyum and Abdul Ansar for

giving threats in the morning hours. But, these discrepancies appears not vital in nature to cause damage to the prosecution case. These discrepancies are relating to the incident occurred in the morning hours. The substram of prosecution case was that of incident of brutal attack by accused occurred in the field late afternoon. Obviously, these minor discrepancies relating to the incident of morning hours would not touching to core of the matter and, therefore, cannot bring discredit to the story of prosecution.

17. Moreover, in regard to conduct and demeanour of P.W.12 Kamrunissa not disclosing the incident to anybody else till arrival of her husband as well as her failure to give detail particulars of the incident of assault as referred supra, we find that giving undue importance to all these circumstances would amount to adopting hyper-technical approach for appreciation of her evidence. It cannot be ignored that P.W. 12 Kamrunissa was illiterate and rustic woman. The learned trial Court was required to bear in mind the set up and environment in which the crime came to be committed, the level of understanding of the witness and her power of observation. It seems that most of the part of cross-examination of P.W. 12 was very much depend upon her power of observations. The Hon'ble Supreme Court time and again in series of cases made it clear that people react to situation not always uniform ways. The reaction would vary with the physical courage, mental equipment and social awareness etc. The evidence of the witnesses cannot be thrown away only because of few discrepancies or omissions to state certain acts. If story of the prosecution found

probable in the sense that it is coming in natural flow and it finds support from other surrounding circumstances, it cannot be suggested that testimony of witness is doubtful.

18. The learned trial Court criticized the evidence of P.W.12 that she was unable to disclose the detail particulars of the incident, the sequence of event occurred, the distance in between victims and accused at the time of alleged assault. Moreover, she failed to state the hands in which the weapons were holding by the accused at the time of incident and the number of blows inflicted by the accused etc. Therefore, learned trial Court proceeded to disbelieve her version for adverse inference against accused. We are not in agreement with the observation made by the learned trial Court. The failure to give all these details by P.W.12, may be due to normal error of observation or owing to mental disposition following shock and horror at the time of occurrence of gruesome murder of her family member. In such situation, it would unreasonable to expect that evidence of ignorant and rustic witness P.W.12 must be photographically accurate and should stand to the test of word to word and in measurement of an inch to inch. The Court should not adopt suspicious approach to the evidence of witnesses by resorting to surmises and conjectures. In the instant case, P.W. 12 Kamrunissa deposed that when her father-in-law and brother-in-law did not return to home from the field even after quite sometime, she rushed to the field. She was aghast on seeing the brutal attack with deadly weapon by the accused on her family members. She raised shouts but accused Abdul Jabbar attempted to

chase her. Albeit, she succeed to escape from the spot. The sequence of events occurred at the relevant time adumbrates that P.W. 12 Kamrunissa, unsophisticated and rustic woman, must have under mental stress, truma as well as under duress. Moreover, while sending nephew Moin at the Mosque, she had taken care and asked him to disclose about the incident to only relatives and not any other person. Thereafter, she immediately, passed on information to her husband on telephone. The story putforth on behalf of P.W.12- Kamrunissa appears more probable in the sense that it has come in natural flow. Therefore, non-disclosure of incident to other villagers or even Coin Box Owner would not render her evidence nugatory and worthless

19. The another aspect of the impugned judgment required to be considered is in regard to evidence of panch witness P.W.14 Mohd. Mustaq. He was examined by the prosecution to prove panchnama of scene of occurrence and inquest panchnama. However, in his cross-examination he gave admission that on the day of incident P.W.-12 Kamrunissa was at Kandhar for attending function of "Walima." The learned trial Court found much more impressed by this stray statement made by the panch witness during his cross-examination. Learned trial Court venture to appreciate the mode in which panch P.W. 14 Mohd. Mustaq adduced his evidence on record. He has stated about the manner in which police conducted panchnama, and therefore, learned trial Court drawn the inference that P.W.14 Mohd. Mustaq was straight forward and truthful witness. The learned trial Court in paragraph No. 18 of the judgment has observed that:-

"18.

I had especially noticed that he was examined before the court during the month of Ramzan and it had come to the notice of the Court that he was fasting. In these circumstances, it was more than clear, that he did not want to make false statement only to suit the prosecution-complainant Abdul Rauf but he was fully aware of expectations from him to be a truthful Muslim while fasting during the month of Roznama.".....

..... on this background his admission that Kamrunissa wife of Abdul Rauf had attended Valima that was celebrated at Kandhar on the day of the incident is a hard reality.....

... Therefore, I have absolutely no hesitation on holding this witness to be a straight forward, truthful and as such trustworthy witness and holding that his version about Kamrunnisa being present at the place of celebration of Valima at Kandhar being a true version. If that is the case, he has taken earth from beneath the prosecution feet, especially on the point of P.W-12 Kamrunnisa's presence at celebration of Valima at Kandhar on the day of incident."

20. We find the aforesaid observations would be the fallout of impression which prevailed over in the mind of concerned learned Judge. It is to be appreciated that evidence of P.W.12-Kamrunissa and her husband P.W. 13 Abdul Rauf were recorded by the learned trial Court on 08-09-2008 and 09-09-2008 as well as evidence of P.W.14 Panch Mohd Mustaq was also recorded on the very same day i.e. on

09-09-3008, during the fasting period of month of "Ramzan". In such circumstances, the evidence of P.W.12 Kamrunissa as well as her husband P.W. 13 – Abdul Rauf was also required to be appreciated as truthful and unblemished version. Be that as it may, stray statement of P.W.-14 Mohd Mustaq made in his cross-examination that P.W. 12 Kamrunissa was at Kandhar for attending function of Walima at the relevant time, cannot be accepted, on such emotional religious ground without any corroboration. In contrast, circumstances demonstrate that P.W. 13 Abdul Rauf had been to Kandhar in morning hours for attending function of Walima and his wife P.W. 12 Kamrunissa as well as father victim Abdul Razzak were at home. They were intending to attend function in the evening hours. The victim Abdul Razzak and his son Abdul Majeed after prayer in the mosque proceeded towards the field to take stock of situation, unaware of their tragic end on account of dispute of boundary line of the field. The P.W.13 Abdul Rauf immediately returned to home after receipt of information about the incident from his wife P.W.12 Kamrunissa. The F.I.R. (Exh.62) corroborates to the version of P.W.13 Abdul Rauf, In such circumstances, inference drawn by the learned trial Court that P.W.12 Kamrunissa was at Kandhar to attend function of "Walima" appears fallacious and not credible one. We find that judicial approach while dealing with such kind of evidence has to be cautious and careful.

21. In view of aforesaid discussion, we are of the considered opinion that findings of the learned trial court rejecting the evidence of P.W.12-Kamrunissa, star witness of the prosecution appears erroneous illegal

and extremely perverse in nature. In contrast, we are of the opinion that her evidence is trustworthy and inspire confidence. At this juncture, we would like to mention that the duty cast on the Court is to see with the vision of prudence and appreciate the evidence of prosecution witness taking into consideration substratum of prosecution case. Their Lordships in the case of the State of Punjab Vs. Jagir Singh Baljit Singh and Karam Singh² in paragraph No. 23 observed that:-

"23. A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

In such backdrop discussed above, we are unable to persuade ourselves to discard the evidence of P.W.12 Kamrunissa, the key witness of the prosecution. The reasons given by the learned trial

² (1974)3 Supreme Court Cases 277

Court for rejection of her evidence appear to be based on figment of imagination and not sustainable at all.

:: 'DISCOVERY OF WEAPONS U/S. 27 OF THE EVIDENCE ACT' ::

22. Prosecution placed reliance on the incriminating circumstance of recovery of weapons at the behest of accused. Prosecution has examined P.W.1 Balaji Suryawanshi for recovery of weapon Katti (sickle) from accused Abdul Qayyum and P.W.3 – Dattarao Sadashivrao Mukhede for recovery of Axe from the custody of accused No. 1 Abdul Ansar as well as P.W. 8- Abdul Masood Abdul Aziz for recovery of weapon wooden log at the behest of accused – Abdul Jabbar.

23. P.W.1 Balaji Suryawanshi deposed that on 06-11-2007 he was called at Sonkhed Police Station to act as panch. Accused Abdul Qayyum was in the police custody. He divulged that he would produce weapon – Katti (sickle) concealed in his agricultural land located at Shevadi Bajirao. I.O. prepared the memorandum panchnama of confessional statement of accused Abdul Qayyum in presence of panchas (Exhibit-21/A). Thereafter, accused - Abdul Qayyum led the police and panchas with photographer and other police staff to village Shevadi Bajirao in his field. The accused Abdul Qayyum produced one weapon katti (sickle), which was concealed in the heap of stems of Till crop. The police drawn seizure panchnama of the weapon katti (sickle), recovered at the instance of accused-Abdul Qayyum. The weapon was found smeared with blood stains and earth particles. Panchas put their

signatures on recovery panchnama (Exhibit 21/B), P.W.1 Balaji identified the weapon recovered at the instance of accused – Abdul Qayyum at the time of his evidence in the Court.

24. P.W. 3 Dattarao Mukhede deposed that on 08-11-2007 he was called by his Superior Officer, Tahsildar and directed him to go to the Police Station and assist the Police in the investigation of crime. Accordingly, he visited to Sonkhed Police Station. The Talathi Mr. Kawale was also accompanied with him. Police Personnel asked him to act as panch for the panchnama as accused Abdul Ansar would produce the weapon of crime. Thereafter, the memorandum panchnama (Exhibit-31/A) was prepared and he put his signature on it. P.W. 3-Dattarao Mukhede stated that accused Abdul Ansar took the police and panchas in the vehicle jeep to his village Shevadi Bajirao and produced weapon Axe, concealed beneath the Soyabean crop. The police seized the weapon Axe under panchnama (Exhibit-31/B) and obtained his signature on it.

25. P.W. 8-Abdul Masood deposed that he was called by the Police in the Police Station to act as panch. It was informed to him that accused would produce wooden log used as weapon while commission of crime. P.W. 8 -Abdul Masood stated that confessional statement of accused was reduced into witting under memorandum panchnama. Thereafter, both panchas put their signatures on panchnama (Exhibit-49). According to P.W.8- Abdul Masood, accused Abdul Jabbar led police and panchas to his village Shevadi Bajirao in the Police jeep and produced one wooden log from the heap of Soyabean crop. The Police drawn

panchnama (Exhibit-49/B) for seizure of weapon wooden log at the behest of accused Abdul Jabbar.

26. It is worth to mention that all these weapons recovered at the behest of accused were seen and identified by P.W.12-Kamrunissa being weapons used by assailants at the time of assault on both victims. In C.A. Report (Exh.76), the human blood was detected on the blade of the weapon katti (sickle) and Axe having blood group 'B'. Unfortunately, the blood group of both victims and accused were detected as of blood group 'B' only. But, the find of human blood on the blade of weapon katti (sickle) and axe lends corroboration to the testimony of P.W.12-Kamrunissa.

27. The learned trial Court found reluctant to appreciate the evidence of recovery of weapons of the crime at the instance of accused and adopted superficial approach. The learned trial Court did not take into consideration that after seizure panchnama, the weapons were referred to Forensic Laboratory for chemical analysis. The articles were handled by the C.A. for examination. In such circumstances, it would preposterous to appreciate that in absence of labels of signatures of panchas on the pocket as well as weapons were kept in cloth and not cotton bag etc. the evidence of discovery of weapon loses its significance. It would be fallacious to ignore the evidence of discovery of weapons for the reasons that, weapon Axe was wrapped in the white cloth and not put in white cloth bag at the time of its seizure as well as the pasting of labels bearing signatures of the panchas on it, would not be consistent with discovery in furtherance of confessional

statements made by the accused. The learned trial Court also pointed out some discrepancies in the version of panch witnesses about confessional statement of the accused and recovery of weapon. But, it is to be noted that, the witness is not like tape-recorder. While giving evidence in the Court after efflux of sufficient period, his memory may not serve him completely right. There may be an possibility of some sort of variation in their evidence. Therefore, it would not render their evidence suspicious and doubtful. Moreover, it would highly improper to disbelieve the P.W.3 Dattarao Mukhede, for the reason that he was the public servant and working in the Tahsil Office dealing with the files of Police chapter cases. Therefore, he must have an acquaintance with the accused, and even though he is deposing falsely that he had not seen accused prior to panchnama of recovery of weapon Axe (Exhibit-31/A). We find observations of learned trial Court is unreasonable and irrational one and totally based on assumption & presumption. There is no impediment to appreciate evidence of these witnesses to prove the incriminating circumstances of recovery of weapons at the instance of accused in this case.

28. It is also essential to appreciate that, the blood stains detected on incriminating weapons were of blood group "B". The blood group of victims as well as accused were also detected as of Group "B". But, it would not fatal to the prosecution case. The circumstances of bare similar blood group of "B" on the weapon would not negate the evidence of prosecution witness as well as it does not make find of human blood on the weapons of crime of no consequences. In

contrast, the human blood detected on the weapon and on the cloths of the accused render corroboration to the testimony of P.W.12 Kamrunissa. It has brought on record that the P.W.12 Kamrunissa had seen the accused inflicting blows of Katti (sickles) and axe on both the victims, and consequently, there weapons would smear with stains of human blood. There was no explanation from the accused in regard to presence of human blood on these weapons as well as their cloths. We are, therefore, of the opinion that the similar blood group detected would not itself affect adversely to the prosecution case but the human blood detected on the weapon as well as garments of the accused would establish their involvement and nexus with the alleged incident of assault.

(C) C.A. Report of blood stains on the cloths of deceased and Accused.

29. Prosecution examined P.W.5 Maroti Pandalwar to prove the panchnama of seizure of cloths of the accused in this case. P.W-5 Maroti deposed that prior to 7/8 months, he was called in Sonkhed Police Station for seizure panchnama of the cloths of accused Abdul Qayyum. Police seized one Nehru Shirt, Paint and Baniyan of white Colour in his presence and drawn panchnama (Exhibit-35). He has further deposed that the Police also seized cloths of accused No. 2 Abdul Ansar in his presence and drawn panchnama (Exhibit-36). It is an admitted fact that accused Abdul Qayyum and Abdul Ansar both were arrested in this crime on the following date i.e. 03-11-2007 at about 12.30 p.m.. Both these accused were at Sonkhed Police Station on 02-11-2017 after alleged incident occurred at late afternoon. They

lodged information about alleged fight with their kinsmen. The Police of Sonkhed Police Station referred both these accused to the Primary Health Centre, Sonkhed for medical checkup with medical memo (Exhibit-33). Thereafter, on the following day they were arrested in this crime pursuant to FIR (Exhibit-62) filed by P.W. 13 Abdul Rauf. These circumstances indicate that the cloths seized by the Police under panchnama (Exhibits-35 and 36) from the person of accused Abdul Qayyum and Abdul Ansar were the same cloths on their person at the time of incident of assault. P.W. 5-Maroti proved the seizure panchnama of cloths of accused Abdul Qayyum and Abdul Ansar.

30. P.W-6 Shaikh Usman stated about the seizure of cloths of both the victims after autopsy under panchnama (Exhibits-38 and 39). All these cloths of the accused and deceased were referred to the Forensic Laboratory for C.A. analysis. P.W.10 - PHC Kamble carried all these articles to the C.A. Office for analysis with letter (Exhibit-53). The prosecution produced C.A Report (Exhibit-76) on record. It reveals that cloths of victim Abdul Majeed at Exhibits-11 to 14 were smeared with human blood stains of blood group "B". The blood stains were also detected on the cloths of the accused, which are at Exhibits 18 to 22 as per C.A. Report (Exhibit-76). All these blood stains detected on the cloths of both the accused were of human and blood group of "B".

31. These circumstances demonstrate that accused had an nexus and proximity with the alleged incident of assault and suggested their presence at the scene of occurrence. Definitely, detection of human blood stains on the cloths of accused strengthen version of P.W.12

Kamrunissa attributing overtact of both the accused in this crime. Therefore, these circumstances being incriminating in nature, definitely prop-up the edifice of prosecution case.

(D) Subsequent conduct of the accused relevant under section 8 of the Evidence Act.

32. There is no doubt that conduct of the accused would be relevant under section 8 of the Evidence Act. In order that Court can legitimately draw inference that subsequent conduct of the accused was that of guilty person and not of innocent man, there must be some reliable material placed before the Court for appreciation. In the instant case, it has been alleged that after the alleged incident accused No. 1 Abdul Qayyum and accused No. 2 Abdul Ansar, both had been to Sonkhed town for medical treatment of their injuries at the Government Hospital. P.W.9 Miraj Shaikh deposed that on the day of incident i.e. on 02/11/2007, in the evening hours, accused Abdul Qayyum and Abdul Ansar met him near the School and disclosed that there was quarrel in between themselves and their kinsmen and in the fight they sustained injuries and they were intending to go to the hospital at Sonkhed. Hence, P.W.9 Miraj Shaikh carried both the Abdul Qayyum and Abdul Ansar in his auto-rickshaw and dropped them near the Government hospital at Sonkhed for medical treatment. He stated that accused paid Rs. 50/- towards fare of Rickshaw to him.

33. Prosecution also examined P.W.4 - PHC Musale. He deposed that on 02-11-2007 he was on duty as PSO in Sonkhed Police Station. In the evening hours at about 6.30 p.m. the accused Abdul Qayyum and

Abdul Ansar visited to the Police Station and divulged that they were being assaulted by their kinsmen, on account of dispute over the agricultural land and they sustained injuries in the assault. P.W. 4 - PHC Musale verified the injuries of both the accused. Thereafter, he gave medical memo (Exhibit-33) and sent them to the Primary Health Centre, Sonkhed for medical checkup. He took the entry about the same in station diary. P.W.4-PHC Musale further added that he learnt that doctor was not available at Primary Health Centre, and, therefore, both accused had gone to Civil Hospital, Nanded for Medical checkup. He had also given instructions to both the accused to return to Police Station after medical treatment for lodging the complaint about the incident in the Police Station. But, they did not return to Police Station. PW-4 PHC Musale produced extract of medical memo (Exhibit-33) issued in favour of both accused on record. P.W.4 PHC Musale further deposed that in the night at about 11.00 p.m. first informant Abdul Rauf rushed to the Police Station and filed FIR about the incident of murder of his father and brother on the part of accused, namely, Abdul Qayyum, Abdul Ansar and Abdul Jabbar on account of land dispute.

34. The overall scrutiny of the evidence of P.W.9 Miraj Shaikh, Auto rickshaw driver, P.W. 4- PHC Musale coupled with document of medical memo (Exhibit-33) would reveal that on 02-11-2007 after the occurrence of alleged incident at late afternoon, the accused Abdul Qayyum and accused Abdul Ansar had been to Sonkhed Police Station at about dusk to ventilate grievance in regard to the incident of assault by their kinsmen on account of dispute of agricultural land. Medical

memo (Exhibit-33) indicate that they were referred to Government Hospital for medical checkup. Meanwhile, P.W. 13-Abdul Rauf filed FIR against the accused for brutal murder of his father and brother on account of dispute of boundary line of agricultural land. It is discernible from the circumstance that visit of the accused Abdul Qayyum and Abdul Ansar to the Police Station for their grievance about incident of assault against kinsmen was relating to the incident of brutal attack on both the victims Abdul Razzak and Abdul Majeed at late afternoon on 02-11-2007 on account of dispute of boundary line of agricultural land. The accused committed murder of both victims and thereafter they visited Police Station to lodge information to the effect that they were attacked by kinsmen on account of dispute of agricultural land. The accused, thus, gave version favourable to them. The information given to the Police about assault by kinsmen to sustain injuries and thereafter they were referred to the Government Hospital with medical memo (Exhibit-33), all are circumstances relevant under section 8 as the evidence of conduct of guilty person. The subsequent conduct of the accused conjures up the image that they had an involvement and participation in the alleged incident of assault as nurtured by the eye witness P.W. 12 Kamrunissa resulting into death of both the victims Abdul Rauf and Abdul Majeed. Therefore, suspicious conduct and demeanour of both the accused constrained to draw adverse inference against them. These incriminating circumstances fortify allegations nurtured on behalf of prosecutions against the accused in this case. Therefore, there is no impediment to appreciate circumstance of suspicious conduct and demeanour of the accused to evaluate their

guilt.

35. In the above premises, we are of the considered opinion that the evidence of P.W.12- Kamrunissa found credible, trustworthy and inspire confidence. She was the sole eye witness of the incident. We have already observed that she received the opportunity to watch the spectacle by co-incidence and once it is satisfied that evidence of such interested witnesses bearing ring of truth, there is no impediment to keep implicit reliance on her version for adverse inference against accused. Her husband P.W.13-Abdul Rauf also corroborates the testimony of wife P.W. 12-Kamrunissa on the material circumstances of alleged incident of assault, which resulted into death of victim Abdul Razzak and Abdul Majeed. The medical expert P.W. 2 Dr. Bhosikar certified that both the victims met with an homicidal death. The incriminating weapons of the crime stained with human blood were also recovered at the behest of accused Abdul Qayyum and Abdul Ansar in this case. The C.A. reports adumbrate stains of human blood on the weapons Katti (Sickle) and Axe recovered from the custody of accused under section 27 of the Evidence Act. These incriminating circumstances reflect nexus and proximity of the accused with the alleged incident of brutal attack on the victim Abdul Razzak and Abdul Majeed. The cloths of the deceased as well as accused were also found smeared with human blood. There were no explanation from the accused for detection of human blood of group "B" on their cloth as well as weapon recovered from their custody. The subsequent conduct of the accused for lodging information to the Police about the quarrel with

kinsmen for dispute of agricultural land demonstrate guilty conscious of the accused. The overall assessment of all these attending circumstances constrained, our judicious conscious to arrive at the conclusion that the accused are only the perpetrator of the crime and author of injuries sustained to both victims resulting into their death and none else.

36. There is no any other view possible than to complicity of the accused in this case for the alleged caused of death of victim Abdul Razzak and Abdul Majeed. The P.W. 12 -Kamrunissa attributed the overact of all these three accused while brutal attack on her family members. The accused Abdul Jabbar had also attempted to chase her to assault but any how she succeed to escape from his clutches. These circumstances indicate the commission of act of accused Jabbar in furtherance of their common intention. Therefore, all three accused found responsible for homicidal death of victim Abdul Razzak and Abdul Majeed.

37. In this view of the matter, we are of the considered opinion that, the view of the acquittal under sections 302 and 506 read with section 34 of the IPC taken by the learned Sessions Judge is totally perverse and not sustainable within the ambit of law. The prosecution has proved the guilt of all these accused for the homicidal death of both the victims beyond reasonable doubt. The incriminating circumstances on record are not only consistent with the guilt of the respondents-accused but also inconsistent with their innocence.

38. In view of aforesaid discussion, the appeal stands allowed. The impugned judgment and order passed by the learned *Ad-hoc* Additional Sessions Judge, Kandhar, District Nanded deserves to be upset and accordingly set aside and quashed. The respondent-original accused No. (1) Abdul Qayyum S/o Abdul Wahed Sab, (2) Abdul Ansar S/o Abdul Qayyum and (3) Abdul Jabbar S/o Abdul Qayyum are hereby convicted for the offence punishable under section 302 read with section 34 of the IPC and they are sentenced to suffer life imprisonment and to pay a fine of Rs. 10,000/-(Rupees Ten Thousand) each, in default of payment of fine, they shall suffer rigorous imprisonment for further two years. The respondents-accused are on bail. They shall surrender before the learned trial Court at Kandhar on or before 21st August 2017 to serve out the sentence. In case, respondents-accused fail to surrender themselves within stipulated period, the concerned learned trial Court, Kandhar shall issue non-bailable warrant against respondents-accused to secure their presence for further process to serve out sentence imposed as mentioned above. The respondents-original accused are entitled to set off in accordance with law.

39. Accordingly, Criminal Appeal stands disposed of in aforesaid terms.

Sd/-
[**K. K. SONAWANE, J.**]

Sd/-
[**S.S. SHINDE, J.**]