

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

CRIMINAL APPEAL NO. 243 OF 2013

Ashish s/o. Arun Burange @ Ashish Kishor Pande,
Age 22 years, Occ. Student,
R/o. Housing Board colony, Near Aai Khanawal, Baitul,
Madhya Pradesh
(PRESENTLY IN CENTRAL JAIL YERWADA AT PUNE)

...APPELLANT
(Ori. accused)

versus

The State of Maharashtra
(At the instance of Rahata Police Station,
Taluka Rahata, Dist. Ahmednagar.

...RESPONDENT
(Ori. Complainant)

.....

Mr.Zia-ul-Mustafa h/f. Mr. Shaikh Mujtaba Gulam Mustafa Advocate for
Appellant.
Mr. S.J. Salgare, APP for respondent sole.

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

**RESERVED ON : 25th APRIL, 2017.
PRONOUNCED ON : 6th OCTOBER, 2017.**

JUDGMENT : (Per : K.K. Sonawane, J.)

1] Being aggrieved with the impugned judgment and order of conviction, under section 302, 201 of Indian Penal Code (For short, "IPC") and resultant sentence to suffer Imprisonment for life and to pay fine of Rs. 30,000/-, in default, to suffer simple imprisonment for one year, as well as R.I. for 7 years and to pay fine of Rs. 10,000/-, in default, S.I. for 4 months;

on both counts, imposed by the learned Additional Sessions Judge, Kopargaon, District Ahmednagar, in Sessions Case No. 26 of 2008, the appellant-original accused preferred the present appeal by invoking the remedy under Section 374 of Cr.P.C. to redress his grievances.

2] Facts, which led to the prosecution of the appellant/accused are as under :-

[I] That, the ill-fated victim Pushpa, daughter of Divakar Pande, 59 years old was the spinster, residing alone in the own constructed bungalow in Indira Nagar locality, within the precincts of village Sakori, Taluka Rahata, Dist. Ahmednagar. She was employed as a staff nurse in the Primary Health Center at Savli Vihir, Taluka Rahata. Prior to six months of the incident, she retired from the service and started residing in her own bungalow in Indira Nagar, Sakori. According to prosecution, the boy namely Manish was staying with the deceased Pushpa since his childhood. He was the son of Usha, sister of deceased Pushpa. The expenses for education of nephew Manish was also incurred by the deceased Pushpa. After completion of Diploma Course the nephew Manish shifted his residence at Pune for employment purpose. It has been alleged that in the month of May 2008, the female members i.e. Usha mother of Manish and his aunt Chhaya accompanied with accused Ashish, all residents of Baitul, Madhya Pradesh came to the house of deceased Pushpa as her guests. The boy Manish had personally gone to Manmad Railway station to receive the mother as well as aunt and accused Ashish and took them to the house of the deceased

Pushpa, at Indira Nagar Sakori. The guest stayed at the house of deceased Pushpa for about 5-6 days and later on, they returned to their home at Baitul, Madhya Pradesh. However, the accused Ashish was intending to join computer courses. Therefore, he did not return to his residence at Baitul, but remained with deceased Pushpa for attending the computer courses. The deceased Pushpa allowed the accused Ashish to stay with her in bungalow, unaware of her tragic end within 10/15 days by the hands of accused Ashish.

[ii] It has been alleged that on 20.6.2008, at about 8.00 p.m. denizens of Indira Nagar locality, namely Nandkumar Shirale, Subhash Nalawade, Sanjay Deokar, visited to the police station Rahata and passed on the information that some sort of foul smell was emanating from the locked house of deceased Pushpa Pande, resident of their locality. The police personnel - PSI Shri Bhalerao took the entry of information in the station diary and rushed to the spot of incident to take stock of situation. The doors of the bungalow of deceased Pushpa were found locked from the outside. The police personnel, in presence of denizens of the locality broke open the lock and barged into the bungalow. During the search, they were aghast on seeing the highly decomposed dead body in the card-board box in the adjoining room. There were marks of violence on the neck and face of the dead body. The PSI Shri Bhalerao drawn panchanama of breaking open the lock of the house of nurse Pande, in presence of residents of the locality. During search, the police personnel came across with one cell-

phone number of Manish Diwakarrao Pande, found written on the chit being personal data. The police immediately contacted with Manish on his cell phone and it was revealed that he was nephew of deceased Pushpa Pande and she was residing with accused Ashish in the said bungalow. Thereafter PSI Shri Bhalerao lodged the report, on behalf of State, in the police station, Rahata for the alleged incident of murder of victim Pushpa by the unknown assailants.

[iii] Pursuant to the FIR of PSI Bhalearao, police of Rahata Police station registered the Crime No. 49 of 2008 under Section 302 of IPC and set the penal law in motion. The investigation was entrusted to PSI Sandbhor. He immediately visited to the spot of incident and drawn the detail panchanama of scene of occurrence. He seized the iron bar, bed sheet, pillow and quilt etc. smeared with blood from the spot of incident. I.O. also recovered six half burnt cigarette butts, bottle of King Fisher beer, from the spot under panchanama. Meanwhile, inquest panchanama was drawn on the corpse of the deceased. The services of medical experts were requisitioned for conducting post mortem on the highly decomposed dead body at the spot. The Medical Experts rushed at the spot and carried out the autopsy on the mortal remains of victim Pushpa. According to medical experts, the victim Pushpa succumbed to neurogenic shock following head injury by hard and blunt object. The nephew Manish also arrived at the spot of incident from Pune. I.O. recorded the statements of witnesses acquainted with the facts of the case. The dog squad was pressed into service but did not evoke

result. The gold jewellery of the deceased Pushpa were impounded under the House Search Panchanama. The clothes of the deceased were also seized after the autopsy. The I.O. apprehended accused for the sake of investigation. During custodial interrogation, accused Ashish confessed about the crime and shown willingness to produce the weapon of the crime as well as his blood stained cloth etc. concealed in the house of deceased Pushpa. Accordingly I.O. prepared the memorandum panchanama. Accused led police and panchas to the house of victim Pushpa and produced the weapon Grinding stone, his blood stained clothes etc. in presence of panchas. I.O. recovered the incriminating articles under Section 27 of the Evidence Act at the behest of accused. The seized Muddemal property including blood samples of accused Ashish were referred to the Forensic Laboratory for analysis. I.O. collected the relevant documents of Post Mortem report, C.A. Report etc. After completion of investigation, I.O. preferred the charge sheet against accused Ashish for the offence of murder of victim Pushpa punishable under sections 302 and 201 of IPC.

[iv] After receipt of charge sheet and investigation papers, learned Magistrate Rahata verified the charges pitted against the accused and it was found that the offence levelled against the accused was triable exclusively by the Court of Sessions, the learned Magistrate wisely transmitted the entire case papers to the Court of Sessions for trial of accused within the ambit of law, vide committal order dated 4.9.2008. As per direction, the accused secured his presence before the learned Sessions Judge for facing

the trial. After compliance of procedural formalities, charge under Section 302,201 of IPC came to be framed against the accused. He denied the charges and pleaded not guilty.

[v] In order to bring home guilt of the accused, prosecution examined in all 16 witnesses in this case and also kept reliance on the circumstantial evidence of admitted documents of Post Mortem report, Inquest Panchanama, spot panchanama etc. The statement of accused under Section 313 of Cr.P.C. came to be recorded by the learned Sessions Judge, to afford him an opportunity to explain the incriminating circumstances on record. Accused turned down the allegations and claimed his innocence.

[vi] After hearing both sides and on appreciation of evidence on record, the learned Additional Sessions Judge, arrived at the conclusion that accused Ashish is the sole author of crime resulting into gruesome murder of his aunt - victim Pushpa. Therefore, the learned Sessions Judge recorded the finding of conviction of the accused Ashish and passed the impugned judgment and order of resultant sentence, the legality, validity and propriety of which is agitated in this appeal.

3] In the instant case, it is not put into controversy on behalf of accused that the death of victim Pushpa Pande was homicidal in nature. The vital documents of Spot Panchanama (Exh. 14), Inquest Panchanama (Exh.18), Post Mortem Report (Exh.19) etc. were tendered by the

prosecution under Section 294 of Cr.P.C. and the accused was called upon to admit or deny the genuineness of these documents. In response, the accused without any demur, accepted the documents being genuine one and allowed these documents to be read in evidence in this case. Therefore, there is no impediment to appreciate these documents for determination of the cause of death of victim Pushpa Pande and its nature.

4] The documents of Panchana (Exh.13) of braking open the locks of the doors of bungalow demonstrate that the premises, wherein the dead body of deceased Pushpa was discovered in a highly decomposed condition, concealed in a card board box, was locked from outside. The police in presence of denizens of the locality broke open the lock and barged into the premises. Thereafter, I.O. drawn the Panchanama of scene of occurrence (Exh.14) in detail. The panchanama of Spot indicates that the dead body of staff nurse Pushpa Pande was found concealed in a card board box in folded condition in the adjoining room. There were marks of violence on the face and neck of the victim Pushpa The clothes, saree, bed sheet, quilt etc. were found smeared with blood. The dead body was in highly decomposed condition and foul smell was emanating from it.

5] After registration of crime, police drawn inquest panchanama on the corpse of deceased Pushpa. The panchas also came across with injury marks on the face, neck etc of the mortal remains of deceased, caused by lethal weapon. The concerned Doctor of Rural Health Center, Rahata carried

out the autopsy on the dead body of victim Pushpa at the spot of incident itself. According to Medical Experts, there were wounds over left zigomatic region, left side parital region and two wounds at chin. The Medical Experts also observed fracture injuries of Mandible at left angle, fractures to the center of lower jaw as well as fracture injuries to temporal bone and ziaomatic bone etc. The Medical Experts opined that, all the aforesaid injuries were ante-mortem in nature, by hard and blunt object caused prior to more than 72 hours of post mortem on the dead body. The Medical Experts also observed internal wounds at left temporal and left parital region as well as fracture to the left temporal bone. The Doctors also noticed 100 cc Semi-digested food material in the contents of the stomach. In view of the post mortem findings the Medical Experts expressed the opinion that the deceased Pushpan Pande died due to neurogenic shock following head injury by hard and blunt object. The Medical Experts issued Post Mortem report at (Exh.19).

6] As referred supra, the circumstances referred above, are not put into controversy on behalf of accused. The attending circumstances mentioned above, even otherwise, categorically demonstrate that the victim Pushpa Pande met with an homicidal death. Therefore, there is no impediment to conclude that the death of victim Pushpa was homicidal in nature.

7] Now, the crucial point to be ponder over in this case is in regard

to find out the author of injuries inflicted to victim Pushpa Pande resulting into her homicidal death. According to prosecution, accused Ashish is the sole perpetrator of the crime and responsible for the homicidal death of his aunt - victim Pushpa. It would be reiterated that in order to bring home guilt of the accused, prosecution examined in all 16 witnesses, out of which 12 witnesses were examined to prove the complicity of accused in this case and rest of the 4 witnesses i.e. PW-13 - Ramesh Thakur, PW-4 Dr. Vaishali Bhujbal, PW-15 Dr. Vijay Sardesai, PW-16 Dr. Rameshwar Kate, were examined on the issue of juvenility of the accused. There were endeavour on behalf of prosecution to show that the accused was not a juvenile in conflict with law but at the time of commission of crime he had attained the age of majority.

8] The learned counsel Shri Zia-Ul-Mustafa scathingly assailed that the learned trial court failed to appreciate the oral and circumstantial evidence adduced on record in its proper perspective and committed error in arriving at the conclusion that the accused is guilty of the offence of murder of his aunt Pushpa Pande. The entire findings of the learned trial court is based on the erroneous assumptions, conjectures and surmises. The learned trial court committed error while appreciating the evidence of hostile witnesses PW-3 Mohit Yadav and PW-4 Pawan Yadav for extra-judicial confession of the accused about the commission of crime. The prosecution did not succeed to establish motive of the crime to commit such ghastly act of murder of his aunt Pushpa Pande. According to learned counsel for

accused, the prosecution examined PW-15 Sunil Joshi - Rickshaw Driver, PW-6 Rajesh Lute, Owner of Computer Institute and PW-7 Mukund Dangad - teacher attached to the computer institute. But, there are material discrepancies in the evidence of these witnesses in regard to visit of accused on 16.6.2008 to the computer center. The learned counsel explained the circumstances and submits that in view of contradictory evidence of these witnesses, it can not be said that accused Ashish had an occasion to visit to the computer center of PW-6 Rajesh Lute on 16.6.2008 for admission purpose. The learned counsel alleged that the entire evidence appears to be doubtful, suspicious and liable to be discarded being not trustworthy and credible one. Learned counsel for the accused also harped on the circumstances that the prosecution examined PW-8 Pandurang Dhamdhare neighbour of deceased Pushpa. His evidence appears cryptic in nature. He had seen the accused Ashish while spreading the Murrum in the courtyard of the bungalow of victim Pushpa. But, he had not stated the particular day or date and time when he had seen the accused at the bungalow of victim Pushpa. Therefore, his evidence did not render assistance to the prosecution to prove the charge of murder of victim Pushpa as alleged against accused. The learned counsel also criticized the mode and manner in which the investigation was carried out by the I.O., PW-1 Shri Anil Sandbhor. He submits that prior to the alleged panchanama of recovery of incriminating articles under Section 27 of the Evidence Act, police personnel including the I.O. had an occasion to visit the bungalow of victim Pushpa. The I.O. drawn detailed panchanama of scene of occurrence as well as house search

panchanama (Exh. 79) for impounding the jewellery of the deceased Pushpa in presence of Panchas. But, the Police Personnel as well as panchas did not seize the grinding stone, clothes of the accused smeared with blood kept open on the kitchen platform as well as loft of the room. Therefore, the recovery of these articles under Section 27 of the Evidence Act appears suspicious and doubtful. The recovery under Section 27 of Evidence Act would not be appreciated as incriminating circumstances to prove the charges against the accused. He further submits that allegation of absconding of accused cannot be a ground to base conviction in this case. According to learned counsel, the entire circumstantial evidence adduced on record is dubious and incredulous one. In such circumstances, it would be unjust and improper to draw adverse inference against the accused for commission of murder of victim Pushpa. Learned counsel Mr. Zia-Ul-Mustafa also gave much more emphasis on the evidence adduced on record in regard to juvenality of the accused. He submits that at the time of commission of crime, the accused was minor and below the age of 18 years. He was juvenile in conflict with law. Therefore, the trial conducted against the accused was not sustainable within the purview of law and liable to be vitiated. The learned counsel for the accused explained the circumstances on record in detail and urged that the prosecution miserably failed to prove the charges against the accused beyond all reasonable doubt. There was no motive for the accused to commit the crime. There were no complaints of conduct and demeanour of accused during his stay with victim Pushpa. The PW-2 Manish stated about the same in his evidence before the learned trial

court. The investigation carried out by the I.O. is tainted, doubtful and perfunctory in nature. Therefore, he prayed to exonerate the accused from the charges pitted against him. In support of his contention, he relied on the judicial pronouncement in the cases of *Parag Bhate vs State of U.P.*, 2016 (12) SCC 744; *Ashwai Kumar Saxena vs. State of M.P.* 2012(9) SCC 750; *Anil Suresh Adakmol vs. State of Maharashtra* 2013 All M.R. (Cri) 1250; *Mohd. Amjad vs. State of U.P.* 2008(9) ADJ 472; *Nafees Ahmed Vs. State of U.P.* 2010(4) Crimes 200 (All.); *Prem Kumar Vs. State* 2012(1) Crimes 636 (Del.); *Ranjeet Goswami Vs. State of Jharkhand* 2013(4) Crimes (SC) 315; *Sahadevan vs. State of Tamil Nadu* 2012(3) SCC (Cri) 146; *Nankannu @ Nanku vs. State of U.P.* 2011 Supreme (All.) 3178; *Hanuman Govind Nargudkar vs. State of M.P.* 1952 AIR (SC) 343 (1).

9] The learned APP raised objection to the contentions put forth on behalf of learned counsel for the accused and submits that the prosecution has proved the case against appellant/accused beyond all reasonable doubt. The learned trial court has appreciated the entire evidence on record in its proper perspective. Therefore, no interference is warranted in the findings of learned trial Judge. He prayed to dismiss the appeal.

10] We have given anxious consideration to the arguments canvassed on behalf of both sides. We have also delved into the oral and circumstantial evidence adduced on record. The intense scrutiny of entire

evidence of the prosecution reflects that there is no direct evidence available on record to nail the accused for the charges of murder of victim Pushpa pitted against him. The entire edifice of the prosecution hinges on the circumstantial evidence. Before embarking upon the merits of the matter, we would highlight the principle of law for appreciation of circumstantial evidence on record to evaluate guilt of the accused.

11] It has been consistently laid down by the catena of judgments of Honourable Apex Court that when a case rests on the circumstantial evidence, the inference of guilt can be drawn only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused. The cumulative effect of all the circumstances should form a chain so complete that there is no escape from the conclusion that within all human probabilities the crime was committed by the accused and none else. It is also a settled rule of law that the circumstantial evidence, in order to maintain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused. The circumstantial evidence must be of such a nature that it should not only consistent with the guilt of the accused, but also inconsistent with his innocence. In ***State of U.P. Vs. Satish (2005)3 SCC 114***, it has been held by the Hon'ble Apex court that conviction can be based solely on the circumstantial evidence, but it should be tested on the touch-stone of law relating to circumstantial evidence laid down by the Honourable Apex court in the case of "***Hanumant Govind Nargudkar and another vs. State of M.P***

reported in AIR 1952 SC 343. The Honourable Apex Court in case of ***State of U.P. Vs. Satish (supra)***, has observed in paragraph No. 15 and 16 as under :-

“15. In ***Hanumant Govind Nargudkar and another vs. State of M.P.***, it was observed thus :

“It is well to remember that in case where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

16. A reference may be made to a later decision in ***Sharad Birdhichand Sarda Vs. State of Maharashtra***, AIR (1994) SC 1622. Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in the prosecution cannot be cured by a false defence or plea. The conditions precedent in the words of this court, before conviction could be based on circumstantial evidence must be fully established. They are:

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(2) The facts so established should be consistent only with the hypothesis of guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) The circumstances should be of a conclusive nature and tendency;

(4) They should exclude every possible hypothesis except the one to be proved; and (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

12] In such backdrop, we proceed to explore the evidence of prosecution witnesses for assessment of guilt of the accused. As referred supra, there is no direct evidence available on record but the entire prosecution case rests on the circumstantial evidence. The mode and tenor of evidence on record adumbrates that prosecution primarily kept reliance on the following circumstances to nail the accused in this case :-

- [I] The time of death of victim Pushpa Pande;
- [ii] The presence of accused Ashish in Sakori town on 16.6.2008 at the relevant time of incident ;
- [iii] Recovery of weapon of crime and blood stained clothes under Section 27 of the Evidence Act at the behest of accused.
- [iv] Subsequent conduct of absconding of the accused after the alleged incident of murder of victim Pushpa.
- [v] The extra-judicial confession of the accused to PW-3 Mohit Yadav and PW-4 Pawan Yadav relating to commission of crime.

13] According to prosecution, the alleged incident of gruesome murder of victim Pushpa was occurred in the intervening night of 16.6.2008 and 17.6.2008 and at the relevant time the accused Ashish was alone residing with victim Pushpa in the bungalow of spot of incident and on 16.6.2008 he was available in the town. Thereafter, accused absconded and vanished since day of incident. The police apprehended accused from his native place at Baitul, Madhya Pradesh. During custodial interrogation, accused confessed about the crime and produced the weapon grinding stone and his blood stained clothes in presence of panchas from the house of

victim Pushpa. It has also been alleged that the accused made extra-judicial confession to his friends PW-3 Mohit and PW-4 Pawan that he committed the murder of his aunt Pushpa and requested them to assist him to cause disappearance of dead body and other evidence of crime. Pursuant to aforesaid circumstances, it has been alleged on behalf of prosecution that the accused was the sole perpetrator of crime and responsible for homicidal death of victim Pushpa. In order to ascertain the substance of prosecution case, we dealt with each of the circumstances in detail as below :-

[i] The Time of death of victim Pushpa Pande :-

14] Admittedly, as discussed supra, the Medical Experts carried out the post mortem on the mortal remains of victim Pushpa on 21.6.2008 in between 11.30 a.m. to 1.00 p.m. The corpse of the deceased Pushpa was in highly decomposed condition. In view of the physical plight of dead body, the Medical Experts opined that death of victim Pushpa must have occurred prior to more than 72 hours of the post mortem. It has also been observed that the injuries received to victim Pushpa was by hard and blunt object. Therefore, the Medical Experts arrived at the conclusion that deceased died due to homicidal death prior to more than 72 hours of the post mortem. After mathematical calculations, it can be inferred that victim Pushpa met with an homicidal death much prior to morning hours of 18.6.2008. Therefore, all these relevant circumstances of time of death of victim Pushpa occurred prior to more than 72 hours of the post mortem strengthen the allegations nurtured on behalf of prosecution that the alleged incident of

assault on victim Pushpa would have occurred in the wee hours of intervening night of 16.6.2008 and 17.6.2008.

[ii] *The presence of accused in Sakori Town on 16.6.2008 at the relevant time of incident :-*

15] According to prosecution, accused Ashish was staying with the lone victim Pushpa for his computer course and on the alleged day of incident, i.e. 16.6.2008, he was seen visiting to the computer institute located in Sakori town for admission purpose. The presence of accused on 16.6.2008 at the computer institute and thereafter return to home demonstrates that the accused was available with deceased Pushpa in the bungalow at the relevant time of alleged incident. Therefore, adverse inference can be drawn that the accused was the only culprit for the homicidal death of victim Pushpa.

The prosecution examined PW-5 Sunil Joshi, an auto-rickshaw driver residing in Indira Nagar locality, Sakori. He had an acquaintance with deceased Pushpa being resident of his locality. PW-5 Sunil deposed that prior to alleged incident of death of victim Pushpa, accused Ashish Kishor Pande was residing with her in the bungalow. The deceased Pushpa had given instructions to PW-5 Sunil to take the accused Ashish to computer center for admission purpose because he did not know anything about the location of computer center in Sakori town. Therefore, on 16.6.2008 at about 11.10 a.m. he took the accused Ashish in his auto-rickshaw to the computer center of one Rajesh Lute located in front of Pipada Petrol Pump. The persons from

computer center made enquiry with the accused Ashish about his credentials and asked him to bring two photographs and fees for admission purpose. According to PW-5 Sunil Joshi, there was no admission of accused Ashish taken in the institute but they only made inquiry about the computer courses and returned to home. PW-5 Sunil Joshi left the accused Ashish at the bungalow of deceased Pushpa Pande on that day and went away. Thereafter, he had no occasion to see accused Ashish till his arrest by the police in this crime.

The prosecution also examined PW-6 Rajesh Lute, Director of Computer institution. He deposed that on 2.6.2008, accused Ashish visited to his computer center for enquiry about the computer courses. He was accompanied with one Joshi auto-rickshaw driver. PW-6 Rajesh Lute gave information of various courses to him. Thereafter, accused and auto-rickshaw driver left the computer center by saying that they would return on the following day. But, they did not visit to his computer center on the next day. According to PW-6 Rajesh Lute, on 16.6.2008, accused again came at his institution. At that time, he was not available, but, his teacher Mukund Dangad was present in the institution. Accused disclosed to teacher Mukund Dangad that he wanted to take admission for computer courses. Accordingly, he deposited Rs. 1,000/- with teacher Mukund Dangad and also disclosed that he would pay the remaining amount of Rs. 500/- at the time of submitting the form. He was also asked to bring two photographs for admission purpose. Thereafter, accused went away and did not turn up to the institution with his admission form, photographs, etc. After about 15

days, the police came to his institution for enquiry purpose. The police impounded relevant documents of receipt of payment of Rs. 1,000/- made by the accused Ashish.

In addition to the evidence of PW-6 Rajesh Lute, prosecution adduced the evidence of PW-7 Mukund Dangad, teacher of the computer institution to strengthen the version of PW-6 Rajesh Lute, owner of the computer institution. PW-7 Mukesh Dangad testified that on 16.6.2008, accused Ashish visited to the computer institution and disclosed that he has already made enquiry about the computer courses from PW-6 Rajesh Lute and he wanted to take admission. He gave Rs. 1,000/- to him. Accordingly, PW-7 Mukund Dangad issued receipt of payment of Rs. 1,000/- in the name of accused Ashish Kishor Pande. PW-7 Mukund Dangad made it clear that no one else was accompanied with the accused Ashish at that time. According to PW-7 Mukund Dangad, the accused Ashish further assured that he would bring balance amount of Rs. 500/- and the photographs for admission purpose on the next date and he would join the class. But, thereafter, he did not visit to the computer institute. PW-7 Mukund Dangad stated that on 24.6.2008, police came to his institution and made enquiry about the accused Ashish. The police seized receipt book and other relevant documents of his admission from the institution. Police recorded his statement for the sake of investigation.

16] The learned counsel Shri Zia Ul Mustafa assailed that there are material discrepancies in the evidence of these star witnesses, i.e.

PW-5 Sunil Joshi, PW-6 Rajesh Lute and PW-7 Mukund Dangad of the prosecution. PW-5 Sunil Joshi stated about his visit to the computer center on 16-06-2008 accompanied with the accused Ashish for making enquiry about the computer courses. But, PW-6 Rajesh Lute and PW-7 Mukund Dangad deposed that accused Ashish had visited to the computer center alone on that particular day i.e. on 16.6.2008. PW-6 Rajesh Lute was not present in the computer institute on 16.6.2008 but PW-7 Mukund Dangad was alone available in the computer center. PW-5 Sunil Joshi did not state about the visit of accused Ashish to the computer center on 2.6.2008. These discrepancies caused serious dent in the credibility of evidence of these material witnesses of the prosecution. According to learned counsel, the appellant accused Ashish was not present in Sakori town on 16.6.2008 but, he was at his native place Baitul in Madhya Pradesh State.

17] The minute scrutiny of the evidence of these key witnesses of the prosecution reflects that the arguments advanced on behalf of learned counsel Shri Zia Ul Mustafa appears to be more appreciable and considerable one. According to PW-5 Sunil, deceased Pushpa had given instructions to him to take accused Ashish to the computer center for admission purpose as he had no knowledge about the location of computer center in the Sakori town. Therefore, he took the accused Ashish with him on 16.6.2008 to the computer center for enquiry of computer courses. But, PW-6 Rajesh Lute stated that accused accompanied with auto-rickshaw driver visited to his institution on 2.6.2008, much prior to 16.6.2008 for enquiry about the

computer courses. PW-6 Rajesh Lute supplied the requisite information and asked accused Ashish to furnish two photographs and other relevant documents. Thereafter, both went away from the computer center. It is to be noted that PW-5 Sunil Joshi did not disclose about his visit with the accused to the computer center on 2.6.2008. However, PW-7 Mukund Dangad stated that the accused on 16.6.2008 visited to the computer center alone and no one else was accompanied with him. He deposited Rs. 1,000/- and disclosed that he would pay the balance amount of Rs. 500/- as well as two photographs etc. on the next date while taking admission. PW-5 Sunil Joshi maintained silence about the payment of Rs. 1,000/- to the computer institution and taking admission. It also remains conundrum that when PW-6 Sanjay Lute disclosed about the photographs and other documents to the accused Ashish when he had been to the computer center for enquiry on 2.6.2008, for what reason he did not produce his two photographs for admission purpose in the computer center on 16.6.2008 at the time of part payment of Rs. 1,000/- towards fees. These circumstances created doubt about the veracity of the version of prosecution witnesses about the visit of accused Ashish at the relevant time on 16.6.2008 to the computer center. No doubt, PW-6 Rajesh Lute and PW-7 Mukund Dangad produced the receipt of payment of Rs. 1,000/- for admission purpose by the accused, but the attending circumstances created doubt about the genuineness of these documents. Therefore, the sole receipt would not itself found sufficient to establish the factum of visit of the accused Ashish to the computer center on 16.6.2008. There are material discrepancies in the evidence of these

prosecution witnesses. Therefore, it is hazardous to arrive at the conclusion that the accused Ashish had been in the Sakori town on 16.6.2008 as divulged by PW-5 Sunil Joshi, PW-6 Rajesh Lute and PW-7 Mukund Dangad in their evidence in this case.

[iii] **Recovery of weapon of crime & blood stain clothes under Section 27 of the Evidence Act at the behest of the accused :-**

18] The prosecution also relied upon the incriminating circumstances of recovery of weapon of crime and blood stained clothes of the accused under Section 27 of the Evidence Act. The prosecution examined PW-12 Firoz Shaikh to prove the memorandum and seizure of weapon as well as blood stained clothes under Section 27 of the Evidence Act. PW-12 Firoz deposed that on 5.7.2008, the police of Rahata Police Station called him in the police station for panchanama. Another panch - Suresh Baburao Shelke was present in the police station. The accused Ashish made a confessional statement in Hindi dialect that on 17.6.2008 in the night hours at about 1.00 A.M., he had consumed liquor and thereafter he committed murder of his aunt with stone and iron bar. He concealed the stone and his blood stained clothes and liquor bottle in the bungalow of victim Pushpa. He shown willingness to produce the same. According to PW-12 Firoz, the police recorded memorandum panchanama (Exh.77) and obtained his signature on it. Thereafter, accused led the panchas and police to Indira Nagar locality at the house of aunt - victim Pushpa. The accused made vehicle jeep of police to stop in front of one locked house. The police opened the lock of the door. The panchas, police and accused entered in the house. Accused

produced one grinding stone kept in the kitchen room of the house. Accused also produced the liquor bottle and blood stained clothes from the loft of the room. Accused also produced one iron bar from the bed room. The police drawn panchana (Exh.78). PW-12 Firoz was cross-examined on behalf of the accused. In cross-examination PW-12 Firoz conceded that he had acted as panch on behalf of police in two cases. He also admitted the fact that his auto-rickshaw was seized by the police and, therefore, he had an occasion to visit to the police station twice. He denied that he was habitual panch of the police for the panchanama in police cases. The learned counsel for the accused harped on the circumstance that the police had visited to the said bungalow on several occasions for the detail panchanama of spot of incident (Exh.14) after the incident. Thereafter, the police pressed into service the dog squad and that time also police frisked the entire house in search of the clue of the assailant. The police impounded gold jewelery of the deceased Pushpa under the Seizure panchanama (Exh.79). In such circumstances, the recovery of grinding stone, blood stained clothes and liquor bottle from the visible place in the house, loses its significance. Moreover, there is no other evidence available on record to support the evidence of recovery of these articles being incriminating circumstances. Hence, learned counsel prayed to discard the evidence of recovery of articles under Section 27 of the Evidence Act.

19] We find substance in the contentions put forth on behalf of the appellant/accused. The police received an opportunity on multiple occasions

to visit the bungalow of deceased Pushpa i.e. spot of incident. The grinding stone smeared with blood stains was seen kept at the visible place in the kitchen. The liquor bottle and blood stained clothes of the accused were also at the loft of the room. In such circumstances, we are at a loss to understand that when the police had an opportunity to frisk the house minutely on several occasions, even after calling the sniffer dog on the spot of incident, then for what reason police did not come across with all these articles incriminating in nature prior to its seizure under Section 27 of the Evidence Act. These circumstances fortify the allegations made on behalf of accused that the alleged document of panchanama under Section 27 of the Evidence Act, is suspicious, doubtful and prepared with purported motivation to embroil the accused falsely in this case. It is the settled rule of law that Section 27 of the Evidence Act is an exception to Sections 25 and 26 of the Evidence Act, which prohibits the proof of a confession made to police or a confession made while a persons is in police custody unless it is made in immediate presence of the Magistrate. Section 27 is by way of proviso to these Sections 25 and 26 and a statement even otherwise a confession which distinctly relates to the fact discovered is admissible as against accused under Section 27 of the Evidence Act. It is incumbent on the part of the prosecution, to establish that information supplied by the accused led to the discovery of weapon and blood stained clothes as disclosed by him. It is also essential to take into consideration the discovery must be of such articles which the police had not previously learnt from the other sources and knowledge of the fact was first derived from the information given by

the accused.

20] In the instant case, it would be reiterated that police had an occasion to visit to the spot of incident prior to recovery under Section 27 of the Evidence Act. Therefore, it would preposterous to appreciate that the police had no knowledge about the weapon grinding stone smeared with blood as well as blood stained clothes and liquor bottle abandoned in the house of the spot of incident. It is worth to mention that the police under spot panchanama (Exh.14) recovered one bottle of King Fisher Beer, seen lying in the room of the spot of incident. In such circumstances, it is strange to appreciate that the police had no knowledge about these articles and therefore, police did not seize the liquor bottle and clothes kept on the loft which were recovered later on at the behest of accused under Section 27 of the Evidence Act. The police also recovered one iron bar stained with blood under the panchana of scene of occurrence (Exh.14). The PW-12 Firoz Khan also stated about the recovery of weapon iron bar at the behest of the accused under the recovery panchanama (Exh.78). But, in fact there was no recovery of iron bar under Section 27 of the Evidence Act. This dichotomy devastated the gravity of allegation of seizure of incriminating articles under Section 27 of the Evidence Act at the instance of accused. The circumstance of recovery of weapon as well as blood stained clothes, liquor bottle etc. under Section 27 of the Evidence Act could not be appreciated for adverse inference against the accused. The evidence of recovery under Section 27 would not advance the prosecution case to bring home guilt of the accused.

Moreover, it is to be borne in mind that the sole evidence of recovery under Section 27 of the Evidence Act would not be a substantive piece of evidence but it would be corroborative in nature. Therefore, the sole evidence of recovery under Section 27 would not itself base the conviction of the accused in this crime.

[iv] **Subsequent conduct of absconding of accused after the alleged incident of murder of victim Pushpa :-**

21] It has been alleged that since the commission of crime in the intervening night of 16.6.2008 and 17.6.2008, accused disappeared from the house and his subsequent conduct of absconding would be the suspicious circumstance to draw adverse inference against him. In the instant case, the police apprehended the accused on 4.7.2008 under arrest panchanama (Exh.25). According to the prosecution, he was apprehended from his native place Baitul town, Madhya Pradesh State. Since commission of crime, he was absconding from Sakori town, District Ahmednagar. Undisputedly, the subsequent conduct of absconding is no doubt relevant piece of evidence to be considered alongwith other evidence, but its value would always depend upon the circumstances of each case. The circumstance of absconding can not be considered as a determining factor in order to complete the chain of circumstantial evidence which would consistent only with the hypothesis of guilt of the accused. In the result, the absconding conduct of the accused by itself would not lead to form a conclusion of guilt/guilty mind of the accused. The Honourable Apex Court in the case of **Matru @ Girish Chandra Vs. State of UP, reported in AIR 1978 SC 1050**, observed in para.

15 as follows :-

“15. The appellant's conduct in absconding was also relied upon. Now mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime; such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the Courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused. In the present case the appellant was with Ram Chandra till the F.I.R. was lodged. If thereafter he felt that he was being wrongly suspected and he tried to keep out of the way we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence.”

Therefore, the subsequent conduct of absconding of the accused, is not itself sufficient to fasten the guilt on the accused in this case.

22] Moreover, there was no motive for the accused to commit such gruesome act of murder of aunt Pushpa. PW-2 Manish in his evidence categorically stated that there were no complaints about the conduct and demeanour of accused Ashish while he was staying with deceased Pushpa in the bungalow of alleged spot of incident. According to prosecution, the accused was in the company of deceased only for about 12-15 days. In such circumstances, it is hard to believe that the accused would commit the murder without any reasonable cause and strong motive. The absence of

motive also cause serious flaw in the prosecution case.

[v] The Extra judicial confession of the accused to PW-3 Mohit Yadav & Pawan Yadav relating to commission of crime :-

23] The prosecution made abortive attempt to keep reliance on the another circumstance of extra-judicial confession of the accused made to PW-3 Mohit and PW-4 Pawan Yadav in regard to commission of crime. It has been alleged that accused confessed about the crime to his friends PW-3 Mohit and PW-4 Pawan and asked them to assist to cause for disappearance of dead body of victim Pushpa. But, PW-3 Mohit and PW-4 Pawan refused to budge for disposal of dead body of the victim Pushpa and they returned to home at Baitul from midway that is from Burhanpur. The prosecution examined PW-3 and PW-4 on this material aspect. But, they made volte-face and refused to nod in favour of prosecution for the alleged confessional statement of the accused to them. They denied about any such confessional statement made by; accused to them. The prosecution witnesses i.e. PW-3 Mohit and PW-4 attempted to retract from their statements made before the police as well as Magistrate under Section 164 of Cr.P.C. Under such circumstances, the evidence of PW-3 Mohit and PW-4 Pawan Yadav would not render beneficial to the prosecution to prove the charges against the accused. Learned APP much more gave emphasis on the circumstance that statement of PW-3 and PW-4 were recorded under Section 164 of Cr.P.C. and, therefore, their evidence may be considered favourable to the prosecution. We are not in agreement with the submission put forth on behalf of learned

APP for the reason that when the substantive evidence of these witnesses is not supporting to the prosecution case and they denied any statement before the Magistrate, in such peculiar circumstances, it would be unjust and improper to draw adverse inference against the accused on such retracted statements of the prosecution witnesses. Therefore, these circumstances about extra-judicial confession would not render much more support to the prosecution case.

24] In recapitulation, it is worth to mention that the prosecution succeeded to prove that victim Pushpa met with an homicidal death and her death was occurred prior to more than 72 hours of the post mortem carried out on 21.6.2008 at about 10.30 a.m. Therefore, inference can be drawn that her death was caused in the intervening night of 16.6.2008 and 17.6.2008, as alleged by the prosecution. But, thereafter silence pervades in the prosecution case. There were no strong incriminating circumstances brought on record to nail the accused in this case being perpetrator of crime. There were attempts to establish that accused Ashish was available in Sakori Town on the day of incident i.e. 16.6.2008 when he had been to the computer center for admission purpose. But, the vital discrepancies in the evidence of PW-5 Sunil Joshi, PW-6 Rajesh Lute and PW-7 Mukund Dangad - personnel from the computer center created doubt about the visit of the accused to the computer center on that particular day i.e. 16.6.2008. Moreover, mere presence of the accused in the town on 16.6.2008 would not itself sub-serve the purpose to establish the nexus and proximity of the

accused with the alleged commission of crime. There were no endeavour on the part of prosecution to adduce the evidence of neighbours of victim Pushpa to bring on record the fact that the victim Pushpa was lastly seen in the company of accused Ashish. The prosecution adduced the evidence of PW-8 Pandurang Dhamdhare neighbour of victim Pushpa. In his evidence, it has brought on record that he had seen the accused while spreading Murrum in the courtyard of the bungalow of victim Pushpa. But, PW-8 Pandurang did not disclose the day, date and time when he had seen accused Ashish spreading Murrum in the courtyard. The evidence of PW-8 Pandurang appears to be slender, and cryptic in nature and do not prop up the weak edifice of the prosecution case. In absence of any evidence of the neighbours that accused was seen lastly in the company of the victim, it is hazardous to believe that the accused was in the company of the deceased Pushpa during the relevant time of incident and that he was the sole author of the crime. Moreover, the prosecution did not adduce the evidence of any independent witness from the locality. Therefore, it is unsafe to draw adverse inference against the accused in absence of any cogent and concrete evidence that accused was only the assailant of victim Pushpa and none else.

It is also significant to note that the prosecution examined PW-2 Manish Saraf who was residing with victim Pushpa since childhood. At the time of alleged incident, he was at Pune for employment purpose. He deposed that he had an conversation on telephone with deceased Pushpa lastly on 16.6.2008. Thereafter, he made attempt to contact with her on telephone but he did not receive any response. On 20.6.2008, he once again

made endeavour to contact with deceased Pushpa on telephone, but, all his efforts found unavailing. Therefore, he asked his friend Pradip Sonawane r/o. Shirdi to go to the house of aunt victim Pushpa to take stock of the situation. Thereafter, at about 6.00 p.m. on 20.6.2008, he received call from his friend Pradip Sonawane. He informed that doors of the bungalow were found locked and he made enquiry with the neighbour - Smt. Shirole. It was informed to him that no one else was seen since last 3-4 days in the house of victim Pushpa. Moreover, Smt. Shirole further disclosed to him that some foul smell was emanating from the side of bathroom of the bungalow of victim Pushpa. In such circumstance, it remains a conundrum that for what reason prosecution did not examine neighbour Smt. Shirole or Pradeep Sonawane, the friend of PW-2 Manish Saraf, who had visited the spot of incident prior to lodging FIR in this crime. These circumstances also found detrimental to the veracity of the allegations nurtured on behalf of prosecution against the accused.

As referred supra, prosecution failed to bring on record the motive of crime. There were no complaints about the conduct and demeanour of the accused. In such circumstances, in absence of any substantive evidence, the bare recovery of articles under Section 27 or mere allegation of absconding of the accused since the commission of crime would not be decisive factor to base the conviction of the accused in this crime. We would reiterate that the prosecution miserably failed to prove each and every circumstance incriminating in nature to complete the chain of circumstances for inescapable inference of guilt of the accused. There is no

cogent and dependable evidence on record to draw adverse inference against the accused in this case. The prosecution miserably failed to prove that the accused was staying with victim Pushpa in the bungalow of spot of incident at the relevant time. No other evidence is available on record to corroborate the circumstance that accused was residing with victim Pushpa in the house and he was the only culprit of the crime and none else. In such circumstances, we are not in agreement with the findings expressed by the learned trial court in regard to guilt of the accused. In contrast, we are of the opinion that the conclusions drawn by the learned trial court are apparently based on surmises and conjectures and not in the proper perspective of the facts and circumstances on record. The entire findings of the learned trial court about the guilt of the accused are perverse and erroneous in nature and deserve to be set aside. In such circumstances, we do not find any propriety to discuss about the evidence of juvenility of the accused further-more as argued on behalf of learned counsel for the accused. When the prosecution failed to bring home the guilt of the accused for commission of murder of the victim Pushpa within ambit of law, the further discussion on the issue of juvenility would be futile efforts and we do not find it justifiable to express any opinion on it.

25] In the above premises, we are of the considered opinion that the circumstances relied upon by the prosecution are not established by convincing evidence to form a complete chain of incriminating circumstances pointing to the guilt of the accused. The law postulates that suspicious

circumstances however strong cannot take the place of proof. Therefore, the conviction recorded by the learned trial court appears not supported by credible evidence. It is doubtful that during the relevant period, accused Ashish was in the company of deceased and sole perpetrator of the crime. The prosecution miserably failed to prove the guilt of the accused beyond reasonable doubt. Eventually, the appellant/accused is entitled for benefit of doubt accrued in the prosecution case. In the result, we have no alternative but to absolve the accused from the charges pitted against him by extending the benefit of doubt in the prosecution case.

26] In sequel, the appeal stands allowed. The impugned judgment and order of the learned trial court is hereby quashed and set aside. The appellant/accused is hereby acquitted for the offence punishable under Section 302 & 201 of IPC. It is informed to this Court that the appellant is in jail being convict of the crime. He be set at liberty forthwith, if not required in any other crime. Muddemal property, if any, preserved in this case be destroyed after stipulated period of appeal. The appellant shall furnish the bail bond of Rs. 15,000/- and surety of like amount, as contemplated under Section 437-A of Cr.P.C. before the concerned trial court at Kopargaon, Dist. Ahmednagar.

[K.K.SONAWANE]
JUDGE

[S.S. SHINDE]
JUDGE

grt/-