

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 486 OF 2002

Nivrutti s/o kondiba Ghalewad,
Age: 27 years, Occu: Agriculture,
R/o Mardasgaon, Tal, Gangakhed,
Dist. Parbhani.

....Appellant

Versus

1. State of Maharashtra

2. Dhondabai w/o Shankarrao Dhanewad,
Age: 53, Occu: Household,
70 Kandgaon, Tq. Gangakhed,
Dist Parbhani.

....Respondents

Mr. R.N. Chavhan h/f Mr. Vijay Sharam, Advocate for appellant.

Mr. R.V. Dasalkar, APP for respondent/State.

WITH
CRIMINAL APPEAL NO. 487 OF 2002

Dhondiba s/o Sonba Ghalewad,
Age: 29 years, Occu: Agriculture,
R/o Mardasgaon, Tal Gangakhed,
District Parbhani.

....Appellant

Versus

1. State of Maharashtra

2. Dhondabai w/o Shankarrao Dhanewad,
Age: 53, Occu: Housewife,
70 Kandgaon, Tq. Gangakhed,
Dist Parbhani.

....Respondents

Mr. R.N. Chavhan h/f Mr. Vijay Sharam, Advocate for appellant.

Mr. R.V. Dasalkar, APP for respondent/State.

WITH
CRIMINAL APPEAL NO. 508 OF 2002

1. Haribhau s/o Dadarao Dhobale
Age: 29 years, Occu: Nil
2. Radhabai w/o Babarao Dhanewad
Age: 34 years, Occu: Nil

Both R/o. Maradasgaon, Tq. Gangakhed,
Dist. Parbhani.

....Appellants

Versus

1. State of Maharashtra
2. Dhondabai w/o Shankar Dhanewad,
Age: 53, Occu: Household
R/o Kandgaon, Tq. Gangakhed,
Dist Parbhani.

....Respondents

Mr. S.S. Rathi, Advocate for appellants.

Mr. R.V. Dasalkar, APP for respondent/State.

**CORAM : T.V. NALAWADE AND
ARUN M. DHAVAL, JJ.**

RESERVED ON : 04/12/2017

PRONOUNCED ON : 20/12/2017

JUDGMENT : [PER T.V. NALAWADE, J.]

1) All the appeals are filed against judgment and order of Sessions Case No. 95/1998, which was pending in the Court of learned Additional Sessions Judge, Parbhani. The Trial Court has convicted all the appellants for the offences punishable under sections 302, 201 r/w. 34 of Indian Penal Code (hereinafter referred to as 'IPC' for short). Both the sides are heard.

2) Deceased Babarao Dhanewad was brother of first informant Baban and son of Dhondabai. Dhondabai and Baban were living in village Kaulgaon, but the deceased had shifted to village Mardasgaon with his family to earn the livelihood. Accused No. 3 is the widow of deceased Babarao. The deceased has left behind some issues, but they were kids at the relevant time. Mardasgaon is the native place of accused No. 3.

3) The deceased was working as labour in the field of Ram Kale and he was living with his family in the farm house created by Ram Kale. Accused No. 1 Haribhau was also working as labour in the field of Ram Kale and he was supposed to supervise overall agricultural operations. Accused No. 2 Dhondiba was working as labour in the field of one Balasaheb Kale and the said field is situated in same village, Mardasgaon. Accused No. 4 Nivrutti is also resident of Mardasgaon. He had deserted his wife. It is the case of prosecution that accused No. 4 Nivrutti was trying to establish relations with Laxmi, sister of deceased living in Mardasgaon and he used to frequently visit residential place of deceased. Due to the conduct of accused No. 4, the deceased and brother of said Laxmi had warned accused No. 4 not to visit the house of Laxmi. Due to that accused No. 4 had become angry and he had given threats to

the deceased. Accused No. 1 had established illicit relations with accused No. 3. He was visiting the residential place of deceased frequently and he was feeling that the deceased was proving to be obstacle in continuing the relationship with accused No. 3. There was talk among people about this relationship and the relatives of deceased on parents' side knew about it due to the disclosure made by the deceased to them.

4) On 2.8.1997 Dhondabai, mother of the deceased went to Mardasgaon to see Babarao. Babarao was not present in the house, but, accused No. 3 was present there. Accused No.3 informed to the mother of deceased that the deceased had left for Gangakhed for marketing and he had not returned from Gangakhed. This was the second day after the incident in question had taken place.

5) After 2.8.1997 Babarao did not return and so, the relatives on parents' side of deceased started searching for him. As they could not trace Babarao, report was given to Gangakhed police on 10.8.1997 by Baban, brother of deceased. In that report, he informed that accused No. 3 had given information that Babarao had left for Gangakhed.

6) On 13.8.1997 brother of accused No. 3 received letters

which were purportedly written by Babarao. He was not convinced that the letters were written by Babarao. Attempt was made in the letters to show that Babarao was alive and he was in Aurangabad. Then more inquiry was made and then Baban expressed suspicion that due to illicit relations between accused Nos. 1 and 3 and due to aforesaid reason, which accused No. 4 was having, all of them must have finished Babarao.

7) Due to specific allegations made against accused Nos. 1 to 4 by close relatives of deceased, police made inquiry with accused No. 1 on 17.8.1997, after about 15 days of the date since when Babarao was not seen alive. During inquiry, accused No. 1 admitted that by joining hands with accused Nos. 2 to 4, he had murdered Babarao by electrocution and dead body of Babarao was buried near brook known as Bendkicha Odha. After receipt of this information, police took steps like giving requisition letter to Executive Magistrate. The dead body was exhumed. In the presence of panch witnesses accused No. 1 showed the place where the dead body was buried. The relatives of deceased like Baban were present with police. From that place after making some digging, the dead body was recovered. It was in decomposed condition. But, Baban and other close relatives were in a position to identify Babarao. PSI Shelke of Gangakhed Police Station then gave report against all the

four accused and crime was registered at C.R. No. 197/1997 for the offences punishable under sections 302, 201 and 34 of IPC. All the accused came to be arrested on 17.8.1997. During the course of investigation, the statements of other witnesses came to be recorded. Some recoveries were made on the basis of statements made by accused Nos. 2 and 4 under section 27 of the Evidence Act and the articles which were used for commission of the offence and for concealing the dead body were recovered. As accused No. 2 showed willingness to give confession, he was produced before J.M.F.C. The J.M.F.C. recorded the statement of accused No. 2 after following the procedure laid down for the same under section 164 of Criminal Procedure Code (hereinafter referred to as 'Cr.P.C.' for short). The doctor who conducted the P.M. examination could not give definite opinion regarding cause of death. Due to the circumstances which were revealed and the existence of black spot on elbow, it is the case of prosecution that Babarao was murdered by electrocution.

8) For proving the aforesaid offences, the prosecution examined in all 15 witnesses. The Trial Court has believed all the witnesses and has considered the evidence given on statements of accused recorded under section 27 of the Evidence Act and the conviction is given to all the four accused for aforesaid offences.

Accused had taken the defence of total denial.

9) The prosecution case rests entirely on circumstantial evidence and the circumstances are of following nature.

(i) There was motive for accused Nos. 1 and 3 as there was illicit relation between them and the deceased was proving to be obstacle in continuing that relationship.

(ii) Accused No. 4 was feeling that the deceased was obstacle for establishing relation with his sister Laxmi.

(iii) False information was supplied by accused No. 3, widow of deceased that the deceased had gone to Gangakhed for marketing when already Babarao was dead.

(iv) No steps were taken by accused No. 3 like giving of missing report and it is the brother of Babarao, who was required to give missing report.

(v) On the basis of statement given by accused No. 1 under section 27 of the Evidence Act the dead body of Babarao was discovered and it was in buried condition.

(vi) Confessional statement of accused No. 2, recorded under section 164 of Cr.P.C.

(vii) Recovery of some articles, implements used for commission of the offence and for burying the dead body.

10) It can be said that the dead body was recovered after supplying the information by accused persons. It is the case of prosecution that the statement was given by one of the accused, accused No. 1 under section 27 of the Evidence Act to PSI Vishwas Shelke (PW 14) and on that basis, the dead body was recovered. In view of this case of prosecution, the evidence of Shelke (PW 14) needs to be considered first.

11) Shelke (PW 14) has given evidence that he was making inquiry in to the missing report given by Baban, dated 10.8.1997. In the report at Exh. 36 given by Baban, no suspicion was expressed by Baban against anybody, though he had informed that accused No. 3 had supplied him information by saying that he was proceeding to market of Gangakhed, the deceased had left the house. Shelke (PW 14) has given evidence that afterwards Baban gave one written application on 16.8.1997 in which he expressed suspicion against all accused persons. Here only it needs to be mentioned that no such application is produced on the record. However, evidence is given both by Shelke (PW 14) and Baban (PW 2) that orally also Baban had expressed suspicion against all the accused persons.

12) Shelke (PW 14) has given evidence that when the suspicion was expressed by Baban, he called accused No. 1 Haribhau

for inquiry and during inquiry, accused No. 1 admitted the offence and disclosed the incident. He has given specific evidence that Haribhau disclosed on 17.8.1997 that he had buried the dead body at a place and he was ready to show that place. Though the name of the place is not given in the substantive evidence by Shelke (PW 14), Investigating Officer, the place is described in F.I.R. at Exh. 70 given by Shelke (PW 14).

13) The evidence of Shelke (PW 14) shows that after learning about the commission of offence and the place where the dead body was buried, he made correspondence with Executive Magistrate as the dead body was to be exhumed. He has given evidence that accused No. 1 then showed the place where the dead body was buried and it was taken out in the presence of panch witnesses and also Tahsildar and then inquest panchanama was prepared. After that report at Exh. 70 was given by Shelke (PW 14). Further investigation was also made by Shelke and all the accused were arrested on 17.8.1997.

14) Shelke (PW 14) has given evidence on the spot panchanama which was prepared by him and also on panchanama of seizure of articles which were taken over from the spot where the dead body was found to be buried.

15) Shelke (PW 14) has given evidence on statement given by accused No. 2 Dhondiba and memorandum of this statement is proved as Exh. 53. There is also evidence of panch witness on this statement. On the basis of this statement, articles like spade and basket were recovered and they were produced by accused No. 2. Seizure panchanama of these articles is at Exh. 54. This statement was given on 21.8.1997.

16) Shelke (PW 14) has given evidence that Nivrutti gave statement while in police custody about pick-axe and axe and memorandum of this statement was prepared, which is at Exh. 55. He has given evidence that on the basis of this information, pick-axe and axe were recovered, they were produced by accused No. 4 and they were seized under panchanama at Exh. 56. There is evidence of panch witness on Exhs. 55 and 56.

17) The articles like spade, axe, basket are available in every field. The prosecution wanted to prove that these articles were used for creating ditch at the place from where dead body was recovered and also for collecting the branches of tree which were used to cover that place. Only on the basis of such evidence, prosecution cannot prove that those articles were really used for the incident of digging

and for cutting the branches. In view of this, absence of linking evidence, there is no need to discuss that evidence more.

18) Shelke (PW 14) has given evidence that specimen hand writing of Ram Kale and others including accused No. 2 were collected as two letters were produced which were purportedly sent by deceased and they were sent to expert. Though expert opinion was produced on the record, the hand writing expert was not examined. In view of this circumstance, lacuna, that piece of evidence collected as against accused No. 2 cannot be used in the present matter. Further, there is no mention of such incident in the so called judicial confession of accused No. 2. There is also no mention about the incident of recovery of articles on the basis of statement made by accused No. 2 in so called judicial confession. The evidence of Shelke (PW 14) shows that he had sent the viscera to C.A. office. There is no report of anatomy expert on record. So, that evidence also need not be considered in detail. It is not disputed that Shelke had sent accused No. 2 before J.M.F.C. as his statement was to be recovered under section 164 of Cr.P.C. That can be seen in the statement given under section 313 of Cr.P.C.

19) During cross examination of Shelke (PW 14), it is only suggested to him that accused No. 1 was not under arrest when the

dead body was recovered. This point is dealt with separately and in the background of position of law.

20) Baban (PW 2) has given evidence that as Babarao was not traced for many days, on 16.8.1997 he went to police and he expressed suspicion that accused Nos. 1 to 4 must have murdered Babarao. He has given evidence that he had given written application to police and he had informed the suspicion orally also. His evidence shows that when he expressed suspicion, police called Baban and then they went to the field of Ram Kale and then accused No. 1 showed the place to police where the dead body was buried and from there, the dead body was taken out. It is Baban, who identified the dead body of Babarao on the basis of clothes of deceased and the articles are given numbers as 3 to 6. Some omissions are brought on the record like absence of statement before police that on occasions accused No. 1 used to live in the field.

21) Baban (PW 2) had given missing report at Exh. 36 and he had informed that on 2.8.1997 accused No. 3 had supplied information that Babarao had left the residential place by saying that he was proceeding to Gangakhed market and after that he had not returned to the residential place, the field of Ram Kale.

22) Dhondabai (PW 1) has given specific evidence that she had visited the residential place of deceased on Saturday and she was sure that Babarao was murdered on previous day i.e. on Friday. Thus, the evidence of Baban (PW 2) is not only on motive, but it is on the circumstance that accused No. 1 showed the place to police and from that place the dead body of Baburao was recovered.

23) Babu Kamble (PW 3), Executive Magistrate is examined by prosecution. In his presence, the dead body was exhumed. He has deposed that on 17.8.1997 by giving requisition letter, police had requested him to take steps for taking out the dead body. He has given evidence that in his presence, the dead body was taken out and the dead body was identified by the relatives of deceased. He has described the articles which were found with the dead body and according to him, the inquest panchanama at Exh. 38 was prepared in his presence. Exh. 38 shows that police officers and panchas were present when the dead body was exhumed. This document also shows that accused No. 1 had showed the place where the dead body was buried. The description given shows that on this place, branches of tree were found spread to hide the things. There were clothes like baniyan and underwear on the dead body and other clothes Payajama and shirt were found to be kept on dead

body along with a piece of barbed wire and rope. On left elbow one black spot was noticed and it was mentioned in Exh. 38. The field from where the dead body was recovered belongs to Tatyrao Kale. Thus, in the record created in the presence of Executive Magistrate when dead body was exhumed, it was mentioned that the spot was traced only due to information supplied by accused No. 1 and he had shown that place.

24) There is evidence of Ram Kale (PW 5) showing that accused Nos. 1 and 2 had taken police and others to spot situated near Bendkicha Odha and the place where the dead body was buried was shown. The omission in respect of this information supplied by accused Nos. 1 and 2 in previous statement is brought on the record. His evidence is also there on identification of the dead body of Babarao. He has given evidence on the information supplied by widow of Babarao which proved to be false or incorrect subsequently.

25) There is evidence of Prakash Hatgale (PW 13), panch witness on the panchanama of seizure of articles under which dead body was exhumed. As per this record, it is accused No. 1 who had shown the place. In the cross examination, it is brought on the record that he was called by police at 8.30 a.m. and they left for the

place at 9.30 a.m. In the cross examination, he has admitted that he does not know as to who showed the place. Exh. 18 is the panchanama of seizure of articles found on the dead body, with the dead body. This panchanama is signed by this panch witness and PSI Shelke (PW 14) of Gangakhed Police Station. In this document also, there is mention of statement given by accused No. 1 which is to the effect that the dead body of Babarao was buried near Bendkicha Odha (stream known as 'Bendkicha Odha' situated in the field of Tatyarao Kale).

26) Inquest panchanama at Exh. 38 shows that it is signed by Tahsildar and two panchas. It shows that police had brought accused No. 1 to the field and in the presence of the Executive Magistrate, the place was shown by accused No. 1. Thus, it was informed to Executive Magistrate by police that they were taking steps on the basis of information collected from accused No. 1.

27) The aforesaid discussion shows that there is the evidence of Shelke (PW 14) on the statement given by accused No. 1 and there is the evidence of Shelke and other witnesses showing that the place was also shown by accused No. 1 from where the dead body of Babarao was recovered. The learned counsel for appellants, accused submitted that the aforesaid evidence cannot be used under section

27 of the Evidence Act in view of the conditions mentioned in section 27 of the Evidence Act.

28) The provision of section 27 of the Evidence Act runs as under :-

"27. How much of information received from accused may be proved - Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

The provision of section 27 shows that the person who has made statement needs to be accused of any offence and he needs to be in custody of police officer at the relevant time. This provision is interpreted by the Apex Court in the case reported as **AIR 1960 SC 1125 [State of Uttar Pradesh Vs. Deoman Upadhyaya]**. The Apex Court has laid down that the term 'accused of any offence' is descriptive of the person against whom the statement is provable. It is observed that the term does not predicate a formal accusation against the said person at the time of making statement which is sought to be proved. In the same case, the Apex Court has laid down that when a person is not in custody of police, approaches

police and gives statement, he may be deemed to have surrendered himself to the custody of police and he may be deemed to be in the custody of police. In this regard, the provision of section 46 (1) of Cr.P.C. can be referred and it runs as under :-

"46. Arrest how made. -(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action."

Thus, in a case like present one, when person like accused No. 1 is before police and he makes statement about commission of cognizable offence, murder, the Court can presume that he had submitted himself to the custody of police and he was inviting accusation of offence of murder. Whether that information is admissible in the evidence or not is the different point, but due to disclosure made, it can be presumed that he had submitted himself to the custody of police by his word and also by his action.

29) It was submitted for the appellants, accused that for using section 27 of the Evidence Act, 'statement' of the person needs to be proved and in the present matter, there is no such statement, no separate memorandum of statement of accused No. 1 and evidence is given only on the conduct of accused, showing the

place from where the dead body is recovered. In this regard, it can be said that the record created by Shelke (PW 14) shows that the information was supplied by accused No. 1. He prepared the record of that information by mentioning the statement in F.I.R. and by incorporating the statement in other documents like panchanama as already mentioned. Whether that record is sufficient can be ascertained from the provision of section 162 (1) of Cr.P.C. The provision of section 162 (1) of Cr.P.C. runs as under :-

"162. Statements to police not to be signed: use of statements in evidence.- (1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statements or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act."

Thus, the statement as per the aforesaid provision can be found in

any record including the F.I.R. given by police officer. The wording of provision of section 27 of the Evidence Act and also the exception given in section 162 of Cr.P.C. need to be read together. These provisions show that 'statement' of accused can be proved by examining independent witnesses like panch witnesses and even by examining other persons like Baban (PW 2) if the police officer is not available. However, as it is the statement given to police officer, the police officer like Shelke (PW 14) can definitely give evidence on the statement made to him, if he has created the record of it as mentioned in section 162 of Cr.P.C. The evidence discussed above shows that only due to information supplied by accused No. 1, the dead body of Babarao which was in buried condition came to be recovered. So, this Court holds that the conditions laid down in section 27 of the Evidence Act are satisfied in the present matter and aforesaid evidence is sufficient to prove that accused No. 1 had given statement to police and that led to discovery of fact, the dead body of Babarao which was concealed by burying it at the place shown by the accused No. 1. Here only it needs to be observed that nowhere in section 162 of Cr.P.C. or section 27 of the Evidence Act, it is laid down that there needs to be separate record of memorandum and on it signature of the accused, who made statement needs to be obtained.

30) The aforesaid discussion shows that there is not only the

evidence under section 27 of the Evidence Act available against accused No. 1, but there is evidence on motive. On motive, there is more evidence of persons like Dhondabai (PW 1), mother of deceased. Her evidence shows that she had not only learnt about the illicit relations, but she had seen them in that position and such evidence is brought on the record during cross examination. She has given evidence that she had also informed police about her suspicion which she was having against accused Nos. 1 to 4. She has given evidence that during inquiry, accused told to police about the incident. The distance between her village and village of Mardasgaon is hardly 2 k.m. as per the evidence brought on record in her cross examination. She has given evidence that the wife of deceased, accused No. 3 was not giving information about the whereabouts of deceased and she was not satisfied about the information supplied by accused No. 3. She gave statement to police immediately i.e. on 17.8.1997. Further, there is the evidence of Ram Kale (PW 5) showing that accused No. 1 was working with him in the same field where deceased was living with his family. He has given evidence that on inquiry accused No. 1 had supplied him information that the deceased had gone to Gangakhed for marketing. Though some omissions were confronted to Ram Kale in relation to the previous statement, the omissions are not duly proved by putting the omissions to the police officer, who recorded the statement. Thus, accused No. 1, at whose instance dead body is recovered had

supplied false information subsequent to 2.8.1997 that deceased had gone to Gangakhed for marketing. The evidence of Ram Kale can be used also on circumstance like opportunity to him. He has given specific evidence that accused No. 1 used to live in the field, though occasionally. His evidence shows that it is accused No. 1, who was having control over everything in the field including the use and operation of electrical pumps.

31) The prosecution has relied on the judicial confession of accused No. 2 which is proved as Exh. 75 in the evidence of Kailas Bankar (PW 15), the learned Judicial Magistrate, Gangakhed. This Court has carefully gone through Exh. 75. This document shows that it was recorded on 24.9.1997. Accused No. 2 did not admit that he had taken active part either in murdering Babarao or in burying dead body at the aforesaid place. He gave statement that threats were given to him and due to that, he only remained present when Babarao was murdered by accused No. 1 by electrocution and when the dead body of Babarao was buried by accused Nos. 1 and 4. On this point, the learned counsel for the appellants placed reliance on observations made by the Apex Court in the case reported as **AIR 1957 SC 216 [Balbir Singh Vs. State of Punjab]**. In this case, while discussing the provision of section 24 of the Evidence Act, the Apex Court has laid down that if in the statement, it is mentioned that the maker of the statement was unwilling spectator of the crime

committed by other accused, such statement cannot be used against co-accused. This proposition can be used in the present matter in view of the contents of the statement. Further, the record shows that when the statement under section 313 of Cr.P.C. was recorded, the contents of Exh. 75 were not put to the accused persons to give them opportunity to have their say in respect of the contents of Exh. 75. For this reason, Exh. 75, is of no use to the prosecution in the present matter.

32) Prosecution has examined Dhondiba Kadam (PW 7), who is panch witness on Exh. 51. This witness has tried to say that accused No.2 had made the demonstration about the use of current of electricity for electrocution and about taking the supply of electricity illegally from supply wires of Electricity Board. This part of the evidence cannot be used in view of the restrictions put by section 27 of the Evidence Act. Under Exh. 51, two pieces of wires are shown to be recovered from the farm house of Ram Kale. This circumstance also cannot be called as incriminating circumstance. The evidence of Ram Kale (PW 5) shows that it is accused No. 1, who was controlling things in his field. Dhondiba, accused No. 2 was not working in the field of Ram Kale. Further, there is no linking evidence to show that by using these wires and by taking supply of electricity electrocution was done. Thus, the evidence of Dhondiba Kadam (PW 7) cannot be used against accused No. 2 also.

33) Prosecution has examined two employees of Electricity Board like Maheboobkhan (PW 9) and Mohammad Rafiyoddin (PW 10). Maheboobkhan (PW 9) turned hostile. Through his evidence, the prosecution wanted to prove that the supply of electricity was taken illegally in the field of Ram Kale. Mohammad Rafiyoddin (PW 10) has deposed that Maheboobkhan (PW 9) had informed that supply of electricity was taken illegally in the field of Ram Kale. As Maheboobkhan (PW 9) has not given such evidence, the evidence of Rafiyoddin (PW 10) in that regard is of no use. In any case, if the evidence of judicial confession of accused No. 2 is excluded from the consideration, the evidence of PW 9 and PW 10 can be of no use to the prosecution for any purpose. There are many more reasons for the same.

34) The prosecution has examined Dr. Bhagwan (PW 4), who conducted the P.M. examination on the dead body of Babarao. He has given evidence that he conducted P.M. examination between 12.30 p.m. and 2.30 p.m. of 17.8.1997. His evidence shows that the dead body was in decomposed condition and due to that he could not form definite opinion regarding the cause of death. The P.M. report at Exh. 42 and the evidence of doctor show that there was blackish coloured contusion near right elbow and sub-cutaneous tissues were petrified. But he has not given evidence that such injury

can be caused due to electrocution. He had preserved viscera. Though Investigating Officer has given evidence that viscera was sent to expert, there is no opinion of anatomy expert. Thus, the prosecution has no convincing evidence to prove that the cause of death of Babarao is electrocution.

35) The learned counsel for appellants, accused placed reliance on some observations made by the Apex Court in the case reported as **AIR 1975 SUPREME COURT 258 [The State of Punjab Vs. Bhajan Singh and Ors.]**. In that case, the dead body recovered was in decomposed condition and due to that, doctor could not form opinion that it was homicide. Benefit of this circumstance and also omission on the part of investigating agency to obtain report of anatomy expert was given to the accused. The facts and circumstances of each and every case are always different. In that case, features of the person on whose dead body doctor performed P.M. examination were unrecognizable. In the present case, the dead body is identified by close relatives and also by the employer of deceased. There is also evidence on motive and there is evidence on other circumstances like opportunity to accused No. 1. Due to facts and circumstances of the present matter, this Court holds that the observations made by the Apex Court in the case cited supra are of no help atleast to accused No. 1.

36) The aforesaid discussion shows that the evidence as against accused No. 1, though circumstantial is sufficient to point finger to him. It was necessary for him to explain the things. When the dead body in aforesaid condition is recovered and it is only accused No. 1 who knows the place, it becomes necessary for him to explain the things. If he does not give explanation, inference can be drawn against him that he had finished the deceased and then he had buried the dead body. Such inference is possible due to other circumstances also which need to be read together with the circumstance of discovery of dead body on the basis of information supplied by the accused. When the dead body is decomposed, but it is identified by the close relatives, the circumstance that the prosecution has no evidence to prove that it is a case of homicide, cannot give any benefit to the accused. The deceased was Hindu and in ordinary course, his dead body would not have been buried. Thus, he died unnatural death. Further, false information was supplied by accused No. 1 with regard to the whereabouts of deceased when he knew that the dead body was buried at the place mentioned above. Due to these circumstances, this Court holds that the conviction given by the Trial Court to accused No. 1 for the offence punishable under section 302 and 201 of IPC cannot be interfered with.

37) Though the evidence given as against accused No. 1 is sufficient for proving the offences, the evidence as against the

remaining accused is not that sufficient. This Court has already observed that the so called judicial confession of accused No. 2 cannot be used in the present matter against any accused including accused No. 2. Accused No. 4 had virtually no motive for the crime. The main witness Laxmi who could have given evidence on motive against accused No. 4 is not examined. Accused No. 4 had no opportunity also and it is not a case of conspiracy. The articles shown to be recovered like implements of agriculture cannot be linked with the offence.

38) Accused No. 2 was working in other field and not in the field of Ram Kale. He had virtually no motive for finishing Babarao. The statement under section 164 of Cr.P.C., which can be said to be retracted in view of the answer given in statement under section 313 of Cr.P.C. is not sufficient to convict accused No. 2. Further, the circumstance of recovery of articles like agricultural implements is not incriminating circumstance as there is no linking evidence. Due to absence of expert evidence, the case of prosecution that the two letters purportedly written by Babarao were actually written by accused No. 2 is not proved against accused No. 2.

39) So far as accused No. 3 is concerned, it can be said that there is strong suspicion against her. There is evidence on the record to prove that she had illicit relation with accused No. 1 and she had

motive for the crime. However, it is not the case of prosecution that she had played active role in murder of Babarao. It is also not the case of prosecution that she had any role in burying the dead body. The possibility that she had not consented, but accused No. 1 finished Babarao cannot be ruled out.

40) The circumstance that accused No. 3 gave false information to mother of deceased that he had gone to Gangakhed for marketing can also be not used as incriminating circumstance as there is possibility that on that day, she had no information that on the previous night, Babarao was murdered. The place of murder is not fixed in the present matter.

41) In view of the discussion made above, this Court holds that interference is warranted in the decision of the Trial Court given as against accused Nos. 2 to 4. The Trial Court has used the evidence given on recovery of agricultural implements on the basis of statement given by accused Nos. 2 and 4. The Trial Court has also used the evidence given on demonstration given by accused No. 2 of use and taking current of electricity from public supply. The Trial Court had not kept in mind the restrictions or conditions put by section 27 of the Evidence Act while considering the so called evidence given against accused Nos. 2 and 4 under section 27 of the Evidence Act. The Trial Court has not considered the circumstances

mentioned above with regard to the judicial confession and that evidence is also used against all the accused. Due to the reasons given those circumstances cannot be considered as incriminating circumstances and proved circumstances. The Trial Court has committed error in convicting accused Nos. 2 to 4. In the result, following order.

ORDER

(I) Criminal Appeal Nos. 486 and 487 of 2002 are allowed. The conviction given to accused No. 2 Dhondiba s/o. Sonba Ghalewad and accused No. 4 Nivrutti s/o. Kondiba Ghalewad for the offences punishable under sections 302 and 201 r/w. 34 of IPC is hereby set aside. They stand acquitted of the offences for which they were charged. Fine amount, if any, deposited by them is to be returned to them.

(II) Criminal Appeal No. 508/2002 filed by accused No. 3 Radhabai w/o. Babarao Dhanewad is hereby allowed. The conviction given against her for the offences punishable under section 302 and 201 r/w. 34 of IPC is hereby set aside and she stands acquitted of these offences. The fine amount, if any, deposited by her is to be returned to her.

(III) Criminal Appeal No. 508/2002 filed by accused No. 1 - Haribhau s/o. Dadarao Dhobale stands dismissed. He is to surrender to his bail bonds for undergoing the sentence.

[ARUN M. DHAVALÉ, J.]

[T.V. NALAWADE, J.]

SSC/