

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

CRIMINAL APPEAL NO. 489 OF 2002

Popat s/o. Laxman Tikhole,
Age 36 years, Occu. Agril.,
R/o. Gavanwadi, Tq. Shrigonda,
Dist. Ahmednagar.

....Appellant.

Versus

The State of Maharashtra
(Through P.S. Shrigonda
Dist. Ahmednagar)

....Respondent.

Mr. K.B. Khatke h/f. Mr. S.B. Talekar, Advocate for appellant.
Mr. S.J. Salgare, APP for respondent/State.

WITH
CRIMINAL APPEAL NO. 591 OF 2002

The State of Maharashtra
Through P.S. Shrigonda
Dist. Ahmednagar.

....Appellant.

Versus

Mangal w/o. Bapu Mote,
Age 25 years, Occu. Motewadi,
Tal. Shrigonda, Dist. Ahmednagar.

....Respondent.

Mr. S.J. Salgare, APP for appellant/State.
Mr. V.S. Bedre, Advocate for respondent.

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

RESERVED ON : 28/11/2017

PRONOUNCED ON : 14/12/2017

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

1) Both the appeals are filed against judgment and order of Sessions Case No. 165/2001, which was pending in the Court of learned 3rd Ad-hoc Additional Sessions Judge, Ahemadnagar. Accused No. 1 is convicted and sentenced for the offences punishable under sections 302 and 201 of Indian Penal Code (hereinafter referred to as 'IPC' for short) and he is sentenced to suffer imprisonment for life and so, he has filed Criminal Appeal No. 489/2002. The respondent from the Criminal Appeal No. 591/2002 was accused No. 2, but she is acquitted of the aforesaid offences and so, the decision of acquittal is challenged by the State. Both the sides are heard.

2) Deceased Bapu Mote was son of uncle of first informant Bandu Mote. Accused No. 2 Mangal is the widow of deceased Bapu. Accused No. 2 is daughter of maternal uncle of accused No. 1 Popat and the deceased and the deceased was related to accused No. 1 as a cousin from maternal side. Mother of the deceased and mother of accused No. 1 were real sisters.

3) For about two years prior to the incident, accused No. 1 Popat had illicit relations with accused No. 2 Mangal. Popat used to visit residential place of Bapu situated in village Motewadi frequently and due to that there used to be quarrels between the deceased on

one side and accused on other. The deceased had disclosed to the first informant (Bandu) and also to other brother (Bansi) that there were quarrels on aforesaid count. He had also disclosed that Popat had given threat to him when he had asked Popat to remain away from his residential place. The deceased was having two issues at the relevant time, but they were kids. Accused No. 1 Popat is resident of village Gavhanwadi, Tahsil Shrigonda, District Ahmednagar.

4) On 8.8.2001 Bapu visited residential place of first informant situated at the distance of 50 ft. from the house of Bapu and there, he took dinner. He left for his house at about 9.00 p.m. At about 11.30 p.m. on the night between 8th and 9th of August 2001 when first informant was sleeping in the courtyard of his house, he heard shouts of Bapu coming from his house. The first informant thought that probably thieves had entered the house of Bapu and so, after informing his wife, he went towards the house of Bapu. When he gave calls to Bapu from outside, initially nobody responded. Another neighbour also came there by name Dina and both gave calls to Bapu and then without opening door, accused No. 2 informed that nothing had happened between her and the deceased and there was no problem. Due to this, the first informant and Dina returned to their respective houses. The first informant went to his other brother Bansi to inform him about the incident, but Bansi also expressed that

quarrel between the deceased and accused No. 2 was not a new thing and he should ignore it.

5) On 9.8.2001 at about 5.30 a.m. to 6.00 a.m. the first informant again went to the house of Bapu. This time, he noticed that the door of the house was open. When he inquired about Bapu, accused No. 2 informed that Bapu had just left home after putting clothes and nothing had happened between them on previous night.

6) The first informant then went to the field for work and in the noon time, when he again visited the house of Bapu, he noticed that Bapu was not at home. He learnt that accused No. 2 had gone to village Andhalgaon to attend a function. As Bapu was not seen by him for quite some time, he went to village Dhok Sangavi, to the house of sister Kantabai to see as to whether Bapu had gone there, but Bapu was not in Dhok Sangavi also.

7) On 10.8.2001 Kantabai, her husband and two brothers of Bapu viz. Bandu and Bansi started searching for Bapu. They brought accused No. 2 to Motewadi from Andhalgaon. They informed to Police Patil of village Hingli that Bapu was missing. Police Patil advised to give missing report to police and so, the two brothers of Bapu took accused No. 2 to police for giving missing report and due to

insistence of the two brothers of Bapu, accused No. 2 gave report to police. However, she informed that Bapu had probably gone to Mumbai.

8) On 12.8.2001 during inquiry of missing report, police called accused No. 1 to police station. The two brothers of Bapu also went there. In the presence of panch witnesss and brothers of Bapu, accused No. 1 admitted that on the night between 8th and 9th of August 2001 at about 11.30 p.m., he and accused No. 2 had murdered Bapu in the house of Bapu. He disclosed that he had carried the dead body of Bapu after keeping it in a plastic bag and gunny bag on his bicycle first to a field and from there he had shifted the dead body on motorcycle of Gulab Pavade to the place situated near village Nira and he had kept the dead body in a dilapidated house.

9) Police, panchas and two brothers of deceased went with accused No. 1 to the place where the dead body was kept by him. He showed the Wada and then the dead body which was found to be kept in plastic bag and then in a gunny bag. The first informant identified the dead body. The dead body was in decomposed condition. On 12.8.2001 itself Bandu gave report against accused Nos. 1 and 2 and the crime at C.R. No. 164/01 came to be registered

in Shrigonda Police Station for the offences punishable under sections 302, 201 r/w. 34 of IPC.

10) During the course of investigation, police recorded statements of witnesses, who include Bansi, brother of the deceased, the person from whom motorcycle was collected by accused No. 1 and other persons. The panchanama of the spot where dead body was found was prepared and panchanama of the house of Bapu was also prepared. Blood was found in the house of Bapu on wall just adjacent to the floor. One axe with handle which was having blood stains was recovered and one Chaddar having blood stains was recovered from the house of Bapu. These articles came to be sent to C.A. office and blood was found on the articles taken over from the house of Bandu. The death had taken place due to strangulation. After completion of investigation, chargesheet came to be filed for aforesaid offences against both the accused and the charge was framed. The accused pleaded not guilty. They took the defence of total denial. Prosecution examined in all nine witnesses. No defence witness is examined. The Trial Court has believed the evidence given as against accused No. 1, but the benefit of doubt is given to accused No. 2.

Homicidal death :-

11) The record shows that the defence has not seriously

disputed that it is a case of homicide. The inquest panchanama on the dead body was prepared in dilapidated Wada from where dead body was recovered. Dr. Shantinath (PW 4), who conducted the P.M. examination on the dead body is examined by prosecution to prove the homicidal death. He found following injuries on the dead body.

- (i) C.L.W. on left side of the head at the junction of temporal parital and occipital region of size 4x3/4cm. x scalp deep.
- (ii) Groove mark on neck between chin and thyroid cartilage around the neck 1cm. breadth, circular.

According to Dr. Shantinath (PW 4), on internal examination, he found following injuries.

- (i) CLW on left side of the head at the Junction of temporal parietal and occipital region of size 4x3/4 cm. x scalp deep obilige. Brain liquified. Meningases patechical haemorrhage present.
- (ii) Larynx - congested.
- (iii) Trachia rings broken and bronchi - congested odematious, fluid of blood and congested foot (illegible word). Right side heart full and left side empty.

Dr. Shantinath (PW 4) has given evidence that in addition to aforesaid

injuries, he found petachical haemorrhage in pleura. He found right side of heart full of blood and left side empty and the bucal cavity nad tongue prosteded. On the basis of aforesaid things noticed by him, the doctor has given opinion that it is a case of homicide and the death took place due to strangulation. The P.M. report prepared by him is proved in his evidence as Exh. 41.

12) Dr. Shantinath (PW 4) has given evidence that the injuries found on the head can be caused by stick. He has given evidence that the injury found on the neck can be caused by rope and injury is of such nature that two ends of rope must have been pulled by two persons after circling of rope on the neck of the deceased. He has deposed that in ordinary course of nature, the injury which was found on the neck is sufficient to cause the death. Exh. 41 is consistent with the oral evidence. Dr. Shantinath (PW 4) has, however, given evidence that the death took place after six hours of the last meal. Doctor has not given specific evidence as to how much hours or how much days prior to P.M. examination the death had taken place. It is already observed that the defence has not disputed that it is a case of homicide and in the statement given under section 313 of Criminal Procedure Code (hereinafter referred to as 'Cr.P.C.' for short) both the accused have given answers like "I do not know" when the aforesaid evidence was confronted to them. In view of these circumstances,

this Court holds that the prosecution has proved that Bapu died homicidal death.

Other evidence :-

13) Bapu (PW 1) has given evidence on the relations between the deceased, accused No. 1 and accused No. 2. The relation that the mother of the deceased was real sister of mother of accused No. 1 is not disputed. It is also not disputed that accused No. 2 is daughter of maternal uncle of accused No. 1 and the deceased. The marriage between the deceased and accused No. 2 had taken place 10 years prior to the date of incident, but their issues were kids.

14) Bandu (PW 1) has given evidence that his house is situated at the distance of 50 ft. from the house of deceased. He has given evidence that there was illicit relation between accused Nos. 1 and accused No. 2 and due to that, there used to be quarrels between the deceased and accused No. 2. He has given evidence that deceased had warned accused No. 1, not to visit the residential place. Bansi (PW 3), other brother of deceased has also given similar evidence. It appears that his house is situated at longer distance, at the distance of 100 ft. Thus, the evidence is given by these witnesses, real brothers of deceased on motive.

15) The evidence of Bandu (PW 1) and Bansi (PW 3) and the

circumstances mentioned in the spot panchanama and also the cross examination show that Bandu could have heard shouts of deceased, if he was awake on the night between 8th and 9th of August 2001. Further, it was possible atleast for Bandu (PW 1), first informant to notice the incidents of quarrel which were taking place in the house of Bapu as he was immediate neighbour of deceased. Further, the defence itself has brought on the record that accused No. 1 used to work in the field of deceased in the past, though he was working in the fields of other farmers also from Motewadi.

16) Bandu (PW 1) has given evidence that on the day of incident (Wednesday) at about 11.30 p.m. when he was at home, he heard shouts and so, he woke up. He has deposed that he thought that thieves had entered the house of Bapu and after informing his wife that he was proceeding towards the house of Bapu, he went to the house of Bapu. He has deposed that when he gave call to Bapu from outside of house, initially no reply was given either by Bapu or by accused No. 2. He has deposed that afterwards accused No. 2 informed to him that nothing had happened between them and she asked him to return to his house. He has given evidence that another neighbour Dina Mote had also come there and he had also given calls to Bapu. His evidence shows that Bapu had not given response to these calls. He has given evidence that he then went to the house of

Bansi situated at the distance of 100 ft. from his house and he informed about the incident, but Bansi said that there used to be quarrels between the deceased and his wife and so, he should not pay attention to it.

17) Bandu (PW 1) has deposed that at 5.30 a.m. on the next morning i.e. on 9th August 2001 he again went to the house of Bapu. His evidence shows that on that occasion, the door of the house of Bapu was in open condition and accused No. 2 faced him and informed that Bapu had left the house after wearing shirt. He has deposed that he then left the residential place for work. He has deposed that at about 6.00 p.m. when he returned from the place of work, he made inquiry about Bapu with his wife and the wife told that she had not seen both Bapu and Mangal. He has given evidence that he learnt from his wife that accused No. 2 had gone to Andhalgaon for performing Pooja. His evidence shows that he could not see Bapu from the night between 8th and 9th August 2001 and also on the entire day of 9th.

18) Bandu (PW 1) has given evidence that on the next day, on 10th, Bansi and others brought accused No. 2 from Andhalgaon to Motewadi and there, they made inquiry with her about Bapu. He has deposed that accused No. 2 simply informed that he had left the

house after wearing shirt and so Police Patil was called and after inquiry, Police Patil advised them to give missing report to police. He has given evidence that due to this, accused No. 2 gave missing report in police station. He has given evidence that Kantabai and her husband Manik had also come there to make inquiry.

19) Bandu (PW 1) has given evidence that during inquiry accused No. 2 informed them that her husband had gone to Mumbai to one Rangnath Pandhare for collecting money. The evidence of Bandu (PW 1) shows that on 10th, they had left accused No. 2 in the police station. Bandu has given evidence that on Sunday when he went to police station, accused Nos. 1 and 2 gave confession about the crime. He has given evidence that they informed that they had kept the dead body in gunny bag and they had left the dead body at village Gulung. Though such evidence is given, he has given specific evidence that it is accused No. 1 Popat only, who had taken the police and brothers of Bapu to show the dead body.

20) Bandu (PW 1) has given evidence that accused No. 1 took police and them to the place which was dilapidated Wada and there, the dead body was found. He has given evidence that he then gave report against the accused persons. The report is proved in his evidence as Exh. 29. He has given evidence that he identified the

dead body.

21) In the cross examination, Bandu (PW 1) has admitted that the deceased and accused No. 2 were happy in married life. It is suggested to Bandu (PW 1) in the cross examination that accused No. 1 was helping this family by working in the field. Suggestions are given to Bandu (PW 1) in the cross examination that the relations between Bapu and his brothers were strained over sharing of water of common well, but those suggestions are denied. Some suggestions are given to create a probability that there were houses of other villagers, nearer to the house of the deceased, than to the house of Bandu (PW 1). But, those suggestions are not admitted directly. Further, the documents like spot panchanama need to be considered in that regard. The evidence of Bandu (PW 1) shows that he is illiterate and does not understand the distance in feet and even in respect of time, he has given evidence that he had collected information that the time of incident of 11.30 p.m., after making inquiry with others. It is brought on the record in his cross examination that he gave statement to police that on 9th at 5.30 a.m. he had entered the house of Bapu to make inquiry about Bapu with accused No. 2. This circumstance is not that relevant as in ordinary course, he was not expected to see carefully the things inside even if he had entered the house. He has fairly admitted that

on the next morning the door of the house of Bapu was open and accused No. 2 faced her to give him information. In the cross examination, he has admitted that the relatives of Bapu had asked the deceased and then the deceased had given missing report. The evidence as a whole of Bapu (PW 1) needs to be considered. Though he has admitted that Bapu was happy in married life, there is specific evidence about the illicit relations between accused Nos. 1 and 2 and due to the isolated admission, this evidence given on motive cannot be discarded.

22) In the cross examination of Bandu (PW 1), he has given evidence that after giving of missing report, they had left accused No. 2 in the police station. It is brought on the record that on the next day they had gone to police station with accused No. 1 and at that time, they had noticed that accused No. 2 was in custody of police. It is brought on the record that police made inquiry with accused No. 1 in his presence and he was in company of police for entire day when accused No. 1 was showing the places to police. However, the witness has admitted that accused No. 2 was not in their company when dilapidated Wada was shown by accused No. 1.

23) Exh. 29, the F.I.R. given by Bandu (PW 1) is consistent on material points with the substantive evidence given by Bandu (PW 1).

The substantive evidence and contents of Exh. 29 show that accused No. 1 had given statement to police and then he had taken police and others to the said house, dilapidated Wada where the dead body of Bapu was found. The Wada was not in use.

24) The evidence of Bandu (PW 1) given as against accused No. 2 is of the nature of last seen or the custodial death, if it is considered along with the information supplied by accused No. 2 to Bandu as per the version of Bandu (PW 1). In that regard, the missing report given by accused No. 2 to police also need to be considered.

25) In the missing report at Exh. 30 dated 10.8.2001 which is admitted by the defence following things were informed by accused No. 2.

(i) On 9.8.2001 at about 6.00 a.m. accused No. 2 had left Motewadi for Andhalgaon, Tahsil Shirur, for function and at that time, the deceased was at home in Motewadi.

(ii) The deceased had informed to accused No. 2 that he wanted to go to Mumbai on that day i.e. 9th to collect money from Rangnath Pandhare.

(iii) On 10.8.2001 persons from Motewadi had come to accused No. 2 and they had insisted her to give missing

report to police.

(iv) Accused No. 2 had told to the persons including brothers of the deceased that the deceased had gone to Mumbai, but the persons from Motewadi were not convinced and they had insisted her to give missing report to police, and

(v) When the deceased left, he was having clothes like black full open shirt, black pant and he had left Motewadi on 9.8.2001 at about 7 to 8 a.m. for Mumbai. However, she contended that she had left for Andalgaon at about 6.00 a.m.

26) The contents of Exh. 30 show that the information supplied by accused No. 2 is little bit different from the version given by Bandu (PW 1). However, one thing needs to be kept in mind that accused No. 2 admitted in the missing report given by her on 10th that on the night between 8th and 9th the deceased was at home. This report is relevant under section 8 of the Evidence Act.

27) The evidence of Bansi (PW 3), other brother of deceased is similar to the evidence of Bandu (PW 1). Bansi has given evidence that he was present in the police station when accused No. 2 gave missing report. He has given evidence that he was present in the

police station when accused No. 1 gave statement to police (the statement which can be used under section 27 of the Evidence Act). The evidence of Bansi (PW 3) shows that accused No. 1 had informed to police that he had kept the dead body of Bapu in Wada from village Gulunj. He has deposed that it is accused No. 1 who had taken police and others to aforesaid Wada and from there dead body of Bapu was recovered which was found to be kept in gunny bag. He could give description of said Wada. Thus, his evidence is on motive and also the circumstances which are relevant under sections 8 and 27 of the Evidence Act. He has given specific evidence that Bapu had informed him about the illicit relations between accused Nos. 1 and 2 and this evidence is admissible under section 32 of the Evidence Act. His evidence remained unshattered in the extensive cross examination.

28) Bapu Sonalkar (PW 7) is the panch witness, who is examined to prove the statement made by accused No. 1 to police (under section 27 of the Evidence Act). He has deposed that on 12.8.2001 accused No. 1 gave statement to police in his presence that he had kept the dead body of Bapu in a big house from Gulung. After giving evidence on the statement, Bapu Sonalkar (PW 7) has given evidence that accused No. 1 took police and panchas to village Gulung. He has given evidence that the said house was not in use of anybody and police and panchas followed the accused when he went

and the spot was discovered. He has given evidence that inside of the dilapidated house, there was a tree and near the tree, there was gunny bag containing dead body. He has given evidence on the position of the dead body which was in tied condition. The panchanama is proved as Exh.47 and in this document, there is not only the statement of accused No.1, but there is also the incident of seizure of the articles which were found with the dead body.

29) Exh. 47 contains the statement of accused No. 1 and it is of following nature.

(i) The accused first narrated his illicit relations with accused No.2.

(ii) The accused then narrated the incident of murder committed in the house of deceased.

(iii) The accused then narrated the incident of shifting the dead body on bicycle in a sack to the field and then to the aforesaid Wada and

(iv) The accused specifically stated about the place as follows :-

"The dead body was kept in Wada constructed in stones and Wada is situated before village Nira and it is situated on barren land, Malran and he was ready to show that spot."

In view of the object behind the provision of section 27 of the evidence Act and limitations mentioned in it, the last mentioned para viz. para (iv) from Exh. 47 can be used as a statement under section 27 of the Evidence Act. The challenges raised to this evidence are being considered at later stage.

30) Gopinath (PW 8), PSI, to whom statement under section 27 of the Evidence Act was given has deposed that on 12.8.2001 accused No. 1 gave statement in the presence of panch witnesses and he informed that he had kept the dead body at village Gulung situated on Supa-Nira road. Gopinath (PW 8) has deposed that accused No. 1 then took them towards Gulung and then to hilly area where there was dilapidated house. He has deposed that in that house accused pointed out a gunny bag containing the dead body. Gopinath (PW 8) has given evidence that Bandu (PW 1) and Bansi (PW 3) were present with him when accused showed the spot and these brothers identified the dead body of Bapu.

31) In the present matter, there is the evidence of aforesaid nature of Police Officer to whom the statement was made and also of the panch witness in whose presence the statement was made. Further, there is the evidence of two brothers of the deceased on the statement given by accused No. 1 under section 27 of the Evidence

Act. In Exh. 47, the names of these two brothers are mentioned. The record of the case shows that no probability is created by the defence that the aforesaid place was known to police or any other person had given this information prior to the information given by accused No. 1.

32) Panch witness Bapu Sonalkar (PW 7) has given evidence that on 13.8.2001 he was again called by police, but this time to the house of deceased Bapu from Motewadi. He has given evidence that search of this house was taken on 13.8.2001 and it was noticed that the house was cleaned recently by using cow dung. He has given evidence that they noticed some blood stains on wall of the house in inside portion and this portion was just touching the floor of the house. He has given evidence that one axe with handle on which there were blood stains was recovered and one bed-sheet was also recovered from this house. These articles were taken over and earth sample mixed with blood and also ordinary sample of earth from the house was collected and they were closed and sealed in separate packets. He has identified the articles like axe, Article No. 12 and bed-sheet as Article No. 13 in the Court and in his evidence, panchanama is proved as Exh. 48. The document is consistent with oral evidence of Sonalkar (PW 7). There is also evidence of Gopinath (PW 8), Investigating Officer on Exh. 48.

33) From the record, it can be said that accused No. 2 had given incorrect information about the clothes of deceased. The aforesaid record shows that on the dead body, there was white baniyan and white Payajama.

34) Gopinath (PW 8), Investigating Officer has given evidence that he arrested the accused on 12.8.2001 after the discovery of the dead body. The F.I.R. was given by Bandu (PW 1) after discovery of the dead body. The articles taken over by Investigating Officer were sent to C.A. office on 5.9.2001 with covering letter at Exh. 59. The C.A. reports at Exhs. 60 and 61 show that human blood was detected in earth sample collected from the house of deceased, on axe and also on Chaddar taken over from the house of deceased. It was human blood, but the group of blood could not be determined.

35) Gulab Pavade (PW 6) is resident of village Gavhanwadi, village of accused No. 1. He owns motorcycle bearing No. MH-17/E-3483. He has given evidence that on Wednesday the accused had requested him to allow to take his motorcycle as he wanted to bring shoes for his son from Shirur and he had allowed him to take the motorcycle at 5.00 to 5.30 p.m. and on Wednesday and at 6.00 p.m. the motorcycle was returned by the accused. He has deposed that on

next day, his wife informed that accused No. 1 had again taken the motorcycle and that was done at about 6.00 to 6.15 a.m. (on 9.8.2001). He has deposed that at about 1.00 p.m. his motorcycle was found parked at his house. Thus, he has tried to say that between 6.00 a.m. and 1.00 p.m. of 9.8.2001 the motorcycle was with accused No. 1. His wife is not examined and as there was no personal knowledge to Gulab (PW 6), his evidence that accused had taken the motorcycle with him on 9th in the morning cannot be used against accused No. 1. In the cross examination, it is suggested to this witness that accused used to take his motorcycle frequently. There is the evidence on seizure of motorcycle, but nothing incriminating was found on the motorcycle.

36) Suryakant (PW 5), Revenue Circle Officer is examined by the prosecution to prove the map of the house of accused showing the location of the houses of witnesses. Exh. 44, the map shows that from the house of deceased the house of Bandu (PW 1) is situated at the distance of 40 ft. The houses of deceased and Bandu (PW 1) were having country tiles and roof of wooden structure, having slope on two sides. Though there was one more house of Sopan Mote in the vicinity of the house of deceased, the house of Sopan was in R.C.C. construction and so, there was little possibility of hearing of noise by Sopan. Exh. 44 shows that there was road in front of houses of

deceased and Bandu (PW 1) and there was no other house in the vicinity. Thus, Exh. 44 shows that if there was noise of shouting coming from the house of deceased, Bandu (PW 1) could have heard those shouts.

37) The evidence of spot panchanama prepared about the house of deceased shows that human blood was found in this house in the earth sample. Human blood was found on Chaddar and on the handle of the axe. In ordinary course, these circumstances can be used against accused No. 2, widow of deceased as admittedly she was cohabiting with the deceased in that house. However, in view of the other circumstances, it was necessary for prosecution to prove that the murder had taken place in that house and at the time when accused No. 2 was present in that house. Thus, fixing of time of incident was necessary for prosecution and on that there is oral evidence of Bandu (PW 1) of aforesaid nature.

38) Dr. Shantinath Kamate (PW 4), who conducted the P.M. examination has given evidence in cross examination that the death took place after 6 hours of the last meal. There is such mention in the P.M. report at Exh. 41 also. Bandu (PW 1) has not given evidence on the time when the deceased had taken last meal, though he was expected to do so. In view of evidence of Bandu (PW 1) that on that

day at about 11.30 p.m. he was resting probably after taking dinner, it can be said that his brother must have taken dinner between 8.00 and 10.00 p.m. on 8.8.2001. If the deceased had taken the last meal between 8 and 10 p.m. of 8th, it does not look probable that he died at about 11.30 p.m. in view of the opinion given by the doctor. Thus, the time given by Dr. Shantinath (PW 4) does not match with the oral evidence given by Bandu (PW 1) which can be used against accused No. 2. Due to the evidence given by Dr. Shantinath (PW 4), the case as against accused No. 2 has become weak.

39) Admittedly, on 9.8.2001 accused No. 2 left for Andhalgaon and that was done in the early morning. The prosecution witnesses have admitted that accused No. 1 used to visit the house of deceased and that too frequently. Accused No. 1 is the close relative of deceased. The description of dead body given in inquest panchanama and P.M. report shows that it was decomposed. P.M. was conducted on 12.8.2001 at about 16.45 hours. It can be said that apparently, the death had taken place more than 3 days prior to the time of P.M. examination. The missing report was given on 10th and it was informed by accused No. 2 to police that at 6.00 a.m. when she left Motewadi, the deceased was alive. In view of these circumstances and the opinion of the doctor, it has become difficult to fix the time of death of Bapu. As accused No. 1 used to visit the

house of deceased, the circumstance of presence of human blood in the house of Bapu cannot be called as convincing piece of evidence as against accused No. 2. There is no other circumstantial check in respect of the case as against accused No. 2 and even blood stained clothes of accused No. 2 are not recovered.

40) The aforesaid evidence shows that there is the evidence as against accused No. 1 of following nature.

(i) Motive and

(ii) Evidence of his statement which can be considered under section 27 of the Evidence Act and also under section 8 of the Evidence Act.

41) For the State, reliance was placed on some reported cases to show that the aforesaid evidence given as against accused No. 1 can be used to base conviction. The cases are as under :-

(i) (2006) 10 SCC 151 [Deepak Chandrakant Patil Vs. State of Maharashtra],

(ii) (2009) 14 SCC 582 [Ningappa Yallappa Hosamani and Ors. Vs. State of Karnataka and Ors.].

In the second case cited supra, the Apex Court upheld the conviction for the offences punishable under sections 302 and 201 of IPC when the dead body was recovered on the basis of statement given under

section 27 of the Evidence Act. In the first case cited supra, there was evidence on 'last seen' and the conviction given for the offence punishable under section 32 of IPC was upheld. There was also evidence under section 27 of the Evidence Act due to which there was the discovery of dead body.

42) The learned counsel for the accused placed reliance on some reported cases. In the case reported as **2014 CJ (SC) 976 [Sangili @ Sanganathan Vs. State of Tamil Nadu]**, there is discussion and interpretation of section 27 of the Evidence Act. The Apex Court has made observations with regard to the portion of statement given by accused No. 1 which can be used under section 27 of the Evidence Act. In the case reported as **1998 CJ (SC) 537 [Manoranjan Singh Vs. State of Delhi]**, the Apex Court held that the accused was not in custody, no offence was registered and so, section 27 of the Evidence Act was not applicable. In the case reported as **2011 CJ (SC) 1429 [Wakkar and Anr. Vs. The State of U.P.]**, the Apex Court held that in the case which rests mainly on circumstantial evidence, motive is relevant. There is no dispute over these propositions. But, due to absence of motive, the other evidence which is sufficient to bring home the guilt of the accused cannot be discarded. In the case reported as **(2014) 11 SCC 129 [Lalit Kumar Yadav alias Kuri Vs. State of Uttar Pradesh]**, the scope

and ambit of provision of section 27 of the Evidence Act is discussed by referring the previous cases. The observations are at para Nos. 29 and 31 :-

"29. In *Anter Singh v. State of Rajasthan*, this Court noticed the scope and ambit of Section 27 of the Evidence Act and observed: (SCC p. 665, para 16)

"16. The various requirements of the section can be summed up as follows:

(1) The fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in consequence of some information received from the accused and not by the accused's own act.

(4) The person giving the information must be accused of any offence.

(5) He must be in the custody of a police officer.

(6) The discovery of a fact in consequence of information received from an accused in custody must be deposited to.

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible."

30.

31. In *Bodhraj v. State of J & K*, it was held that a statement even by way of confession made in police custody which distinctly relates to the facts discovered is admissible in evidence against the accused. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus what is admissible being the information, same has to be proved and not the opinion formed on it by the police officer. The exact information given by the accused while in custody which led to the recovery of the article has to be proved; the exact information must be adduced through evidence."

There is no dispute over the proposition made by the Apex Court in the case cited supra.

43) The facts and circumstances of each and every case are always different. It is the duty of the Court to first see the provisions of the Act, the limitations given by the legislation and also the object behind the provisions. Some limitations are given to use the statement recorded under section 162 of Cr.P.C. and those limitations are mentioned in section 162 of Cr.P.C. itself. However, in the same

provision, the statement made under section 27 of the Evidence Act is excluded. The provision of section 162 (1) of Cr.P.C. is 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."

The other provision excluding the provision of section 27 of the evidence Act (sub-section (2) of section 162 of Cr.P.C.) from aforesaid limitations runs as under :-

"(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."

44) The wording of provision of section 162 (1) of Cr.P.C. shows that a separate record of statement is possible, but statement can be found in 'any record'. There is no prohibition to mention the statement in the panchanama. The panchanama is also prepared when police want to create memorandum of statement. If in the

same document, the incident of seizure of articles is also mentioned, that circumstance cannot come in the way of prosecution if the prosecution wants to prove that the statement was recorded in the panchanama. Thus, particular portion of seizure panchanama in which there is statement of accused can be proved.

45) Ordinarily, Police Officer to whom statement is made is expected to prepare memorandum of statement in some form like mentioned above and if the memorandum is prepared in the presence of panch witnesses, by examining panch witnesses the statement can be proved by the prosecution. The statement can be proved by examining Police Officer also to whom statement was made. What is required in law is to prepare the record as mentioned in section 162 (1) of Cr.P.C. and that is done to see that no prejudice is caused to the accused. Thus, the evidence of prosecution on the statement of accused cannot be discarded only because the statement is mentioned in the seizure panchanama.

46) The aforesaid provisions and the provision of section 27 of the Evidence Act show that the signature of the accused is not required to be obtained on the statement. But, if signature of accused is obtained on the memorandum of the statement or on the panchanama, the statement cannot be discarded. It can be said that

as provided in section 100 of Cr.P.C. signature of a person is obtained on seizure panchanama/list if some articles are being taken over by the police which probably belong to the said person and the signature is obtained in token of having received such copy or list. Only because there is no restriction to obtain signature on the statements given under section 27 of the Evidence Act and to have some effect, police obtain signature of accused on the memorandum of the statement. But in that case also the absence of signature is not a circumstance due to which the evidence given on the statement of the accused can be discarded.

47) 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."

To ascertain as to whether the statement is admissible under section 27 of the Evidence Act, the Court is expected to ascertain the following things.

(i) A person who made statement is accused of any

offence, and

(ii) He was in custody of Police Officer.

48) In the case reported as **AIR 1960 SC 1125 [State of Uttar Pradesh Vs. Deoman Upadhyaya]**, the term 'person accused of any offence' is considered by the Apex Court and it is held that the term is only descriptive of the person against whom the statement is provable. It is laid down 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.

49) The relevant portion of provision of section 46 (1) of Cr.P.C. 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."

The aforesaid provision shows that there can be submission to the custody of police by a person by word or action. In the case of **Deoman** cited supra, it is laid down that when the person not in custody of police approaches the police and gives statement, he may be deemed to have surrendered himself to the custody of police and may be deemed to be in custody of police. In the present matter, the

oral evidence already discussed shows that accused No. 1 was taken to police station on 10.8.2001. It can be said that as soon as he gave information regarding commission of the offence by him, he had surrendered himself before police. Thus, in the present case, though the crime was not registered against accused No. 1, when he gave aforesaid statement to police, the provision of section 27 of the Evidence Act became applicable against him.

50) The aforesaid discussion shows that only due to the statement given by accused No. 1, the dead body of Bapu came to be recovered and that circumstance was within the knowledge of accused No. 1 only. In view of provision of section 27 of the Evidence Act and also section 8 of the Evidence Act, this circumstance needs to be considered against the accused. Further, there was motive for the crime. Thus, there is legally admissible evidence as against accused No. 1 and inference is easy on the basis of that evidence that it is the accused No. 1, who committed murder of Bapu and it is accused No. 1, who had shifted the dead body from the place of murder to the aforesaid dilapidated Wada. Due to the circumstances already discussed, this Court holds that the benefit of doubt needs to be given to accused No. 2, though she had also motive for the crime. It can be said that the circumstances have created suspicion against her, but due to aforesaid lacuna in the case of prosecution, she

cannot be convicted. This Court holds that it is not possible to interfere in the decision of the Trial Court by which accused No. 1 is convicted and by which accused No. 2 is acquitted. In the result, both the appeals stand dismissed. The accused No. 1 - Popat s/o. Laxman Tikhole is to surrender to his bail bonds for undergoing sentence.

[ARUN M. DHAVALÉ, J.]

[T.V. NALAWADE, J.]

ssc/