

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.282 OF 2013

Ananda S/o Parasram Panewar
Age-41 years, Occu-Agri.
R/o-Hajjapur, Tq. Mudkhed,
Dist. Nanded.

...APPELLANT

VERSUS

The State of Maharashtra

...RESPONDENT

...

Mr. A.M. Gaikwad Advocate for Appellant.
Mr. M.M. Nerlikar, A.P.P. for Respondent.

...

**CORAM: S.S. SHINDE AND
S.M. GAVHANE, JJ.**

DATE OF RESERVING JUDGMENT : 12TH JULY, 2017.

DATE OF PRONOUNCING JUDGMENT: 28TH JULY, 2017.

JUDGMENT [PER S.S. SHINDE, J.] :

1. This Appeal is directed against the
Judgment and order dated 15th July, 2013, passed

by the Sessions Judge, Nanded in Sessions Case No.41 of 2012 thereby convicting accused/Appellant - Ananda s/o Parasram Panewar for the offence punishable under Section 302 of the Indian Penal Code (for short "I.P. Code") and sentencing him to suffer rigorous imprisonment for life and to pay fine of Rs.5000/-, and in default, to suffer further simple imprisonment for six months.

2. The prosecution case, in brief, is as under:-

A) Deceased Shivaji and accused are resident of village Hajjapur Tq. Mudkhed, District Nanded. It was alleged by informant Kondiba Piraji (father of deceased) that about 10 years ago there was some dispute on the pretext of right of way between accused and he himself and since then they were not on talking terms. There was Pola festival on 28th August, 2011. The deceased Shivaji took part in the said festival till 5.00 p.m. and

thereafter he along with Sudam Jadhav and Pandit Kapse went to Chikala Tanda for consuming liquor at the house of Santosh Chavan. They all went to his house. The accused Ananda was already there. All four of them consumed some liquor. Accused picked-up quarrel with Sudam Jadhav on account of some monetary transaction which the said Sudam had to pay to the accused. The accused caught hold of Sudam by collar. Therefore, deceased Shivaji intervened. Thereupon quarrel took place between accused Ananda and deceased Shivaji. At that time, accused Ananda threatened the deceased Shivaji to come out of the house and he will kill the deceased. Santosh Chavan, the owner of the house, where they were consuming liquor, asked them to go out of the house. All the four came out of the house and started proceeding towards their village Hajjapur. There is Mahadev Temple on the way at a distance of about 200 meters from house of Santosh Chavan. Pandit Kapse slept on the Otta of temple. The accused and Shivaji also took halt there but

Sudam went ahead to his house at about 9.00 p.m.

B) Informant Kondiba, the father of the deceased alleged that deceased did not return to the house through out the night. Therefore, in the morning he started searching for deceased. He went towards Chikala Tanda which is about 2 K.M.s away from Hajjapur. He asked residents of Chikala Tanda. However, some persons were gathered in the field of Madhukar Chavan. Therefore, he also went there and found dead body of his son Shivaji lying in the said field in Soyabean crop. There was no shirt on the body and head was smashed. The body was lying facing down with injury on the head. His brother Pandit Kapse, who was accompanying deceased on earlier evening also came there, and on enquiry he told that some quarrel had taken place in the house of Santosh Jadhav. However, he along-with deceased Shivaji, accused Ananda and Sudam returned from the house of Santosh at about 8.00 to 8.30 p.m. The accused Ananda had

threatened deceased Shivaji and had brought the deceased dragging him out of the house. Sudam had left for his house. Sudam slept on the Otta of Temple, and as such the deceased was in the company of accused later on.

C) Thus, on the First Information Report (for short "FIR") lodged by the informant Kondiba, father of deceased, an offence was registered at Crime No. 83 of 2011.

D) The police had already arrived in the field of Madhukar Chavan and the FIR was lodged later on, after identification of the body. The inquest panchnama and spot panchnama were prepared vide Exhibit-16 and Exhibit-17 in presence of panch witnesses. The dead body was sent for postmortem. PW-9 Dr. Ujwala Dongare, conducted autopsy and furnished postmortem report Exhibit-32. She gave concrete opinion that there were corresponding external and internal injuries

on the head of the deceased and death was caused due to "fracture of skull". The Investigation Officer also asked her opinion vide letter Exhibit-33 as to whether the death was possible due to injuries found on the head of dead body, and whether injuries were possible by stones seized, and what was approximate time of the death. The Medical Officer by her opinion Exhibit-34 opined that the death might have been caused within 24 hours, the injuries found on head were sufficient in ordinary course to cause death and stones presented before her for inspection, could cause the injuries resulting into death.

E) After arrest of accused, he had shown the house of Santosh Chavan where they had consumed liquor, the spot of incident i.e. field of Madhukar Chavan, the Pond where shirt (Article 7) of deceased was thrown and also produced his own Kopri, Dhoti and Shirt (Article Nos. 8, 9 and 10). The shirt of deceased was also recovered from the

Pond allegedly shown by the accused (Article 7). The Autopsy Surgeon has preserved viscera of the deceased which was sent to the C.A., besides some water was also collected from the field where dead body was found as the blood of the deceased was trickled in the said water. It also appears that the blood of the accused was also collected for grouping, as the clothes produced by him were alleged to be having blood stains.

F) The Investigating Officer sent all the muddemal i.e. blood samples of deceased, accused and earth collected from field of Madhukar Chavan, the shirt and other clothes of the deceased and that of the accused recovered during the course of investigation, to C.A. through police Naik Ananda Khandare. The Medical Officer Dr. Ujwala Dongare received C.A. report Exhibits-35, 45, 46 and 47 and accordingly produced the same before the Court. The accused was arrested on 30th August, 2011 at 19.25 hours. After completion of the

investigation, charge sheet came to be filed before Court of J.M.F.C. Mudkhed, who committed the case to the Court of Session.

G) A charge for an offence punishable under Section 302 of the I.P. Code was framed against the accused and the same was explained to him. Accused pleaded not guilty and claimed to be tried.

3. After recording the evidence and conducting full fledged trial, the trial Court convicted accused Ananda s/o Parasram Panewar for the offence punishable under Section 302 of the I.P. Code and sentenced him to suffer rigorous imprisonment for life and to pay fine, as afore-stated. Hence this Appeal is preferred by the accused Ananda s/o Parasram Panewar challenging the conviction and sentence.

4. Heard learned counsel appearing for the

Appellant and learned A.P.P. appearing for the State, at length. With their able assistance, we have carefully perused the entire notes of evidence so as to find out whether the findings recorded by the trial Court are in consonance with the evidence brought on record or otherwise.

5. The prosecution has examined PW-9 Dr. Ujwala Munjaji Dongare. She deposed that she is M.B.B.S. In 2011 she was Medical Officer at Cottage Hospital, Mudkhed. On 29th August, 2011 Mudkhed police sent dead body of Shivaji Kondiba Kapse for post-mortem along-with requisition letter. She conducted post-mortem over dead body from 2.15 p.m. to 3.15 p.m. On external examination, she found following injuries as mentioned in Column No.17:

- "1. Abrasions left cheek 3 X 1/2 X 1/2 cm.
2. Contusion on right cheek 3 X 2 cm.
3. Lacerated wound on left occipital region
3 X 2 X 2 cm.

4. Lacerated wound on left temporal region
2 X 2 X 2 cm.

5. Lacerated wound right parietal region 2
X 1 X 2 cm.

6. Contusion on back right and left side 2
X 2 and 3 X 1 cm. respectively."

. PW-9 Dr. Ujwala further deposed that on internal examination she found following injuries as mentioned in Column No.19:

"1 Lacerated wound under left temporal region with heamatoma 3 X 2 cm.

2) Lacerated wound under right occipital region with heamatoma about 1 X 1 cm.

3) 3 fractures i.e. i) fracture of left occipital bone, ii) fracture of left temporal bone and iii) fracture of right parietal bone."

. PW-9 Dr. Ujwala further deposed that after conducting post-mortem, she opined that death has caused due to shock due to injury to vital organs due to fracture of skull. Accordingly, she prepared post-mortem report Exhibit-32.

. PW-9 Dr. Ujwala further deposed that on 1st September, 2011 Mudkhed police made query by requisition letter for her opinion about the time of death and as to whether the injuries can be caused by the stones. That time police brought three stones for her opinion. She gave reply on 18th September, 2011 and opined that death must have been caused within 24 hours of post-mortem and further opined that the injuries found on the body are possible by the stones shown to her. The injuries mentioned in Column No.17 and 19 are possible by the stones before the Court and the injuries are sufficient to cause the death in ordinary course. At the time of post-mortem, viscera was preserved. C.A. Report Exhibit-35 was received. As per C.A. Report ethyl alcohol was found in the viscera. The injuries found over the dead body were ante-mortem.

. During the course of her cross-

examination, PW-9 Dr. Ujwala admitted that in provisional death certificate issued by her, she stated that cause of death was reserved as the viscera was preserved for chemical analysis. She admitted that abrasion is possible by fall on stone. She stated that no poisoning was detected in Chemical Analysis of viscera. She stated that the fractures are possible if person fell down from 4th floor of the building. She further stated that she did not weigh the stones when those were shown to her by police for the opinion.

6. The prosecution examined PW-1 Sudam Maroti Jadhav. He deposed that he knows deceased Shivaji Kondiba Kapse and his father. Incident took place before about one year and 3-4 months prior to the date of recording his evidence. It was Sunday and *Pola*. That day he was present in the village up-to 5.30 p.m. Thereafter he himself, deceased Shivaji and Pandit Kapse went to Chikala Tanda to consume liquor. They reached there at

about 6.00 p.m. They went to the house of Santosh Gangadhar Chavan for consuming liquor. The accused Ananda was already present there. There, he himself, deceased Shivaji, Pandit and accused consumed liquor. That time accused Ananda picked up quarrel with him on account of money. He was to pay some amount to accused. Accused caught hold his collar. Deceased Shivaji intervened. Thereupon quarrel took place between accused and deceased Shivaji. At that time accused threatened to kill Shivaji. Santosh Gangadhar Chavan, at whose house they were consuming liquor, asked them to go out. Then accused took the deceased by laying hand on his neck with him and the witness PW-1 and Pandit were also following them. They came up to Mahadev temple. Pandit slept there on otta of temple. Accused and Shivaji also halted there. However, he went ahead to his home. He left them at about 9.00 p.m. and went to his house.

. PW-1 Sudam further deposed that next day

in the morning, wife of deceased Shivaji came to him and stated that on earlier day Shivaji had not returned back to home. He told her that on earlier day he himself, deceased Shivaji, accused and Pandit consumed liquor at Chikala Tanda and there was quarrel in between accused and deceased Shivaji. He also told her that at about 9.00 p.m. he left them in Tanda and came back to home. Thereafter at about 9.00 a.m. he came to know that Shivaji has been murdered. Then he went to the field of Madhukar Chavan and there found dead body of deceased Shivaji. It was field of Soyabean crop. There was head injury to the body and three stones were lying on the spot. There were blood stains on the stones. There was no shirt on the body.

. During the course of cross-examination, PW-1 Sudam admitted that informant Kondiba and Datta are real brothers. He admitted that daughter of Datta is married to his cousin brother. He is

residing at village Hajjapur since his birth. Accused is also resident of Hajjapur since birth. Chikala Tanda is near about two and half K.M. from Hajjapur. One requires hardly thirty minutes to reach there on foot. He did not know whether Santosh had any liquor permit. He had not seen liquor shop board at the house of Santosh. He does not have permit to consume the liquor. He further stated that when they reached at the house of Santosh at Chikala Tanda, except Ananda nobody was present there. He further stated about the monetary transaction between him and accused. He admitted that he has not stated to police that in the quarrel between him and accused, deceased Shivaji intervened. He stated that on the day of his evidence, for the first time he was saying before the Court. He stated that at the time of quarrel in the house of Santosh, no other villager came there. He admitted that Pandit Kapse is uncle of deceased Shivaji. He denied the suggestion that deceased Shivaji was over drunken and in

drunkenness fell down on the head and died. He stated that he returned back to his home at Hajjapur at about 9.30 p.m. He stated that on that day on his return to village Hajjapur he did not tell to anybody that in his presence there was quarrel in between him and accused at the house of Santosh. He admits that accused belongs to group of Digambar Mungal and Kondiba Kapse belongs to group of Bhagwan Panewar and that these two groups are contesting election against each other for last ten years.

7. The prosecution examined PW-2 Pandit Devasing Chavan. He deposed that he was police patil of Chikala Tanda since 1994. The incident took place on 28th August, 2011. That day there was *Pola* festival. That day he was present in village Chikala Tanda. In evening at about 5.30 p.m. the procession of bullock was taken out. Accused was also present in *Pola*. That day at about 5.30 p.m. to 5.45 p.m. Pandit Kapse,

deceased Shivaji and Sudam Jadhav came to Chikala Tanda and met him and they told him that they were going to consume liquor to the house of Santosh Chavan. Next day in the morning Madhukar Chavan came to him and stated that one person was lying dead in his field in the crop of Soyabean. Therefore, he along-with other villagers went there and saw dead body of Shivaji lying in the field. Three stones were lying there. There were blood stains on the stones. There was no shirt on the dead body. Blood was lying on the ground. Then Sitaram Chavan gave information to police.

. During the course of his cross-examination, PW-2 Pandit stated that he knows accused since 30 years. He admitted that Bhagwan Panewar is ex-sarpanch of Hajjapur and his relations with Bhagwan are good. He admitted that there was some dispute in between father of accused and Bhagwan Panewar.

8. The prosecution examined PW-3 Kondiba Piraji Kapse, who is informant. He deposed that deceased Shivaji was his son. The incident took place prior to about 14 to 15 months from the date of his evidence. It was Sunday and *Pola* day. That day he was present in the village for *Pola* festival and worshiped the bullocks in the evening. In the evening deceased Shivaji took bullocks for procession in *Pola*. In the evening after Pooja, deceased at about 5.00 p.m. told him that Shivaji was going to Chakala Tanda. Accordingly, deceased Shivaji, along-with Pandit Kapse and Sudam Jadhav went to Chikala Tanda to consume liquor. Thereafter Shivaji did not return back in the night. In the morning he went to village Chikala Tanda to search Shivaji. He found people assembled near the field of Madhukar Chavn at Chikala Tanda. When he went there, he found dead body of his son Shivaji lying in the field. There was no shirt on the body. There were three stones stained with the blood lying at the spot.

It was field of Soyabean crop. Blood was also lying on the spot. There he met Pandit Kapse and enquired how the incident happened. Pandit stated that in earlier evening he along-with deceased Shivaji and Sudam Jadhav went to the house of Santosh Chavan to consume liquor and quarrel took place in between deceased and accused at the house of Santosh Chavan. Pandit further stated to this witness that in the said quarrel accused threatened deceased Shivaji to kill him, and that thereafter accused Ananda went along-with Shivaji by laying hand over his neck towards the field. PW-3 Kondiba further deposed that before about 10 to 15 years there was dispute between them and accused over right of way. Their right of way was from the field of accused but accused obstructed their way and therefore they were not on talking terms from the said incident. He further deposed that he lodged report of the incident in police station. Police recorded his statement as per his narration and then he put his signature on it.

. During the course of his cross-examination, PW-3 Kondiba stated that since birth he is residing at village Hajjapur. He has two sons, deceased Shivaji and Subhash. He further stated that while leaving village Hajjapur, deceased Shivaji, Pandit and Sudam did not tell him that they were going together to Chikala Tanda. However that time itself from other villagers he came to know that deceased Shivaji, Pandit and Sudam went to Chikala Tanda to consume liquor. On next day he went to Chikala Tanda at about 8.30 a.m. The field of Madhukar Chavan is on the way from Hajjapur to Chikala Tanda on right side. The said field is near about 150 feet away from the road. Hajjapur to Chikala Tanda road is tar road and often used by the villagers. He admits that the said road goes up to village Martala and joins to Nanded-Hyderabad road. He lodged report of the incident at about 2.00 p.m. in the noon in Mudkhed police station. He further

stated that at the time of dispute between them and accused for right of way, they did not lodge report with police. That time they did not file any proceeding before Tahsildar or in Civil Court against accused. He denied the various suggestions put to him by the defence about political rivalry.

9. The prosecution examined PW-4 Balaji Narayan Jadhav. He deposed that he knows accused and deceased Shivaji. They are resident of his village. The incident took place on the day of *Pola* festival. That day he was present in the village. That day at about 8.00 p.m. he along-with Prakash Gaikwad went to village Mudkhed on the motorcycle with milk Can. On the way they met Pandit Kapse and Sudam Jadhav near Samaj Mandir at Chikala Tanda. The village Chikala Tanda is on the way from Hajjapur to Mudkhed. Sudam Jadhav and Pandit Kapse were under the influence of alcohol. That time deceased Shivaji and accused also came there from one lane. They were also under the

influence of alcohol. They were going towards Hajjapur together. He did not talk to them. Then he and Prakash Gaikwad went to Mudkhed and returned back to Hajjapur at about 10.00 p.m. On the next day morning he came to know from people about the murder of Shivaji. Therefore he went to Chikala Tanda in the field of Madhukar Chavan. There he saw dead body of deceased Shivaji lying in the field. There was head injury on the body and three stones were lying on the spot. There he met Pandit Kapse who told him that on earlier evening there was quarrel in between accused and deceased Shivaji at the time of consuming liquor and in that quarrel accused threatened Shivaji to kill him. Police recorded his statement after 4-5 days of the incident. Thereafter on 29th August, 2011 police called him in Mudkhed police station to act as panch. Second panch Ananda Gaikwad was also with him. In police station, police prepared seizure panchnama of the clothes of deceased i.e. trouser and underwear. There were blood stains on

the clothes. They both panchas put their signatures on seizure panchnama Exhibit-14.

. During the course of cross-examination, PW-4 Balaji stated that distance between Hajjapur to Mudkhed is 14 K.M.s. He did not talk to Sudam Jadhav and Pandit Kapse. They were drunk. He firstly saw Sudam Jadhav and Pandit Kapse and accused and Shivaji Kapse were seen within two minutes. He admits that he is son-in-law of Datta. Informant is brother of Datta. The seizure panchnama of the clothes was prepared at about 5.00 p.m.

10. The prosecution examined PW-5 Ananda Namdev Jadhav. He deposed that on 29th August, 2011 police called him in the field of Madhukar Chavan of Chikala Tanda. There was crop of Soyabean in the field. The dead body of Shivaji was found lying in the field. There was no shirt on the dead body. There was injury to head. Three

stones stained with blood were lying near the body. The corp of Soyabean was found ruffled. Police accordingly prepared spot panchnama. Police seized the stones and took sample of blood from the spot. Then they both panchas put their signatures on the spot panchnama Exhibit-16. Police also prepared inquest panchnama of the dead body. He also put his signature on inquest panchnama Exhibit-17.

. During the course of his cross-examination, he stated that police did not send him written requisition for attending the spot panchnama. There is *Gairan* (barron land) on one side of the field of Madhukar. He admits that PW-4 Balaji is his cousin brother. He admits that informant Kondiba is in his relation.

11. The prosecution examined PW-6 Santosh Gangadhar Chavan. It is the case of the prosecution that at the house of this PW-6

Santosh, accused and deceased consumed liquor and quarrel took place between them. But this witness PW-6 turned hostile and did not support the prosecution case.

12. The prosecution examined PW-7 Pandit Pirji Kapse. He deposed that deceased Shivaji was his nephew. Incident took place on the day of *Pola* festival. That day in the evening he worshiped bullocks. In the evening at about 6.00 p.m. he along-with deceased Shivaji and Sudam Jadhav went to Chikala Tanda to the house of Santosh Chavan to consume liquor. When they went there, accused Ananda was already present there. Accused is resident of his village Hajjapur. There at the house of Santosh they four persons consumed liquor. That time verbal quarrel took place in between accused and Sudam Jadhav. Accused was demanding his money from Sudam Jadhav. That time accused caught hold neck of Sudam and gave slaps to him. That time Shivaji intervened and asked the

accused as to why he was beating Sudam. Thereupon accused threatened Shivaji to come out of the house and he will kill Shivaji. Santosh Chavan asked them not to quarrel in his house and driven all of them out of the house. Therefore, they came out of the house of Santosh. That time accused caught hold deceased Shivaji and took Shivaji with him. He further deposed that he then went to Mahadev Temple and slept on the otta of temple at about 8.30 p.m. He got up from the sleep in the night at about 3.00 a.m. and went to his house. In the morning his wife told him that Shivaji who in the earlier evening accompanying him to Chikala Tanda had not returned back to home. Therefore, he went towards Chikala Tanda. While going to Chikala Tanda, he saw people assembled in the field of Madhukar Chavan. Therefore he went there. There he saw dead body of Shivaji lying in the field. There was no shirt on the body. There was injury to his head. There were 2-3 stones stained with blood lying near the body.

That time Kondiba was also present there. He told Kondiba that in the earlier evening he along-with deceased Shivaji, Sudam and accused consumed the liquor at the house of Santosh Chavan and there was quarrel in between deceased and accused. He further deposed that his statement Exhibit-22, was also recorded by Magistrate at Bhokar, as per his narration and then he put his signature on it.

. During the course of his cross-examination, PW-7 Pandit admitted that informant Kondiba is his real brother. He stated that Chikala Tanda is 2 K.M.s away from his village. They went there on foot. Nobody met them on the way. He again says that Police Patil only met them on the way on the Par of Chikala Tanda. They reached at the house of Santosh at about 6.00 p.m. There they consumed liquor of Rs.100/- to Rs.200/-. He was conscious and in senses. That time he consumed 2-3 glass liquor. They sat at the house of Santosh Chavan for about one and half

hour. He further stated that verbal quarrel between accused and Sudam at the house of Santosh Chavan was continued for 10 to 15 minutes. That time he did not intervene. He further stated that after leaving the house of Santosh, they were going together towards Mahadev Temple. Sudam accompanied them up-to Mahadev Temple. He slept near the Otta of Temple. He woke up from sleep at about 3.00 a.m. He reached to the home within 30 minutes. In the night he had not gone to the house of Kondiba to tell him about the quarrel. In the night he did not tell to his wife about the said quarrel. He denied the suggestion that he himself, Sudam and Shivaji were over-drunk and were out of control. He denied the suggestion that Shivaji sustained injuries due to fall under intoxication.

13. PW-8 Masaji Abaji Mahatre is another panch to the spot panchnama Exhibit-16 and inquest panchnama Exhibit-17, along with panch PW-5 Ananda Namdev Jadhav. He is also panch to the seizure

panchnama Exhibit-25, about the seizure of shirt of deceased. He is also panch to the spot panchnama Exhibit-26. He is also panch to the seizure panchnama Exhibit-28, in respect of clothes of the accused.

14. PW-10 Ananda Yeshwant Kandhare, Police Naik, is a carrier of seized muddemal to C.A. He deposed that on 19th September, 2011 he was deputed for carrying muddemal property of Crime No.43 of 2011 to C.A. Aurangabad. He took muddemal in his custody in the morning of 19th September, 2011. The muddemal was containing sealed envelope and viscera bottle and sealed bundle of clothes. The seals were intact. He went to C.A., Aurangabad on 20th September, 2011 and deposited muddemal property with C.A. and obtained the acknowledgement on copy of requisition letter.

15. PW-11 Pundlik Namdev Khedkar, Police Inspector, Mudkhed police station, was the

Investigating Officer in the crime. He deposed about the manner in which he carried out the investigation of the crime.

16. We have discussed in detail, the entire evidence brought on record by the prosecution. It is the case of the prosecution that alleged incident occurred in the night of 28th August, 2011. Dead body of deceased was discovered in the morning hours of 29th August, 2011 at about 8.30 a.m. Post-mortem on the dead body of Shivaji was carried out on 29th August, 2011 between 2.15 p.m. to 3.15 p.m. PW-9 Dr. Ujwala Dongre who conducted post-mortem on the dead body of Shivaji, has opined that death must have been caused within 24 hours of the post-mortem. Thus the prosecution has not brought on record the exact time of death of Shivaji. During the course of post-mortem, PW-9 Dr. Ujwala noticed digested food material semi-liquid about 100 ml. It shows that the death of Shivaji was not immediately after prosecution

witnesses saw the deceased in the company of accused Ananda at about 9.00 p.m. As already observed, PW-9 Dr. Ujwala Dongare has not stated exact time of the death and only mentioned that death must have been caused within 24 hours of the post-mortem. In the present case, the prosecution has not brought on record the exact time when the death of Shivaji took place. The Division Bench of this Court in the case of Suresh Vithal Parkar vs. State of Maharashtra¹, observed in Paragraph Nos.12 to 14 as under:

"12. The prosecution, therefore, relies upon the following circumstances:-

(a) The homicidal death of deceased Asha in the house which was occupied by the appellant and deceased Asha.

(b) Failure of the appellant to explain under Section 106 of the Indian Evidence Act about the manner in which deceased Asha had died, and

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(c) Deceased Asha being last seen alive in the company of the appellant.

"13. As far as the first circumstance is concerned, it cannot be taken as an incriminating circumstance. In respect of the second circumstance i.e. failure of the appellant to offer any explanation, a reference at this juncture may usefully be made to the judgment of the Supreme Court in Shambu Nath Mehra vs. State of Ajmer². The Supreme Court in the aforesaid judgment has held that Section 106 of the Indian Evidence Act is not a substitute for the burden of proof which rests on the prosecution. In the present case, the prosecution has not been able to establish the exact time of death nor has the prosecution been able to establish the presence of the appellant in the house at about the time when the offence was committed. In the absence of such evidence, the failure of the appellant to offer any explanation under Section 106 of the Indian Evidence Act cannot be used as a circumstance against the appellant nor can a presumption of guilt be drawn on the failure of the appellant.

² A.I.R. 1956 S.C. 404

14. The only circumstance, therefore, against the appellant is the third circumstance that PW 2 - Umesh, when he had gone for attending his duty, had seen the appellant and deceased Asha in the house. Admittedly, the appellant was residing in the house and, therefore, his presence in the house by itself is not suspicious. As pointed out by us above, the prosecution has not been able to establish the exact time of death of deceased Asha and, therefore, the circumstance that the appellant and deceased Asha were seen together by PW 2 - Umesh cannot be said to be an incriminating circumstance which would prove the offence against the appellant beyond reasonable doubt."

17. It appears that the trial Court mainly relied upon only one circumstance that there is evidence of prosecution witnesses to suggest that deceased Shivaji was last seen in the company of the accused Ananada at about 9.00 p.m. and further dead body of deceased Shivaji found within 12 hours and therefore the Appellant was responsible for the death of Shivaji. In fact, PW-1 Sudam

though stated that when the accused Ananda picked up quarrel with him on account of monetary transactions, deceased Shivaji intervened. Thereupon quarrels took place between accused and deceased Shivaji. However, it appears that in his statement which was recorded by the Investigating Officer, he did not state that in the quarrel between he himself and accused, deceased Shivaji intervened. He stated that on the day of recording of his evidence, for the first time he stated before the Court that when there was quarrel between he himself and accused, deceased Shivaji intervened. It appears that the trial Court accepted the evidence of PW-1 Sudam, PW-4 Balaji and PW-7 Pandit Kapse to conclude that deceased Shivaji was last seen in the company of the accused and thereafter he was not seen. In fact PW-4 Balaji was chance witness. It has come on record that the accused and also these witnesses i.e. PW-1 Sudam, PW-7 Pandit Kapse and deceased had consumed liquor. Though deceased, as per the

prosecution case, accompanied the accused while departing at 9.00 p.m., the evidence of medical officer PW-9 Dr. Ujwala, that she noticed digested food material, semi-liquid about 100 ml. while performing the post-mortem, is suggestive of the fact that Shivaji died after couple of hours after witnesses saw him in the company of the Appellant. The prosecution has not brought on record further evidence showing what happened in the interregnum when witnesses last seen deceased in the company of the accused and death of Shivaji took place. Admittedly, it was night time and dead body of Shivaji was found in the agricultural field of Madhukar Chavan, in the morning at about 8.30 a.m. on 29th August, 2011. It further appears that three blood stained stones were lying on the spot of incident. If the Appellant was alone to assault the deceased, in that event blood stains found on three stones creates suspicion, whether the Appellant is real culprit or some other persons have killed Shivaji.

18. The evidence of PW-6 Santosh ought to have been the vital link in the prosecution case. However, he did not support the prosecution case and turned hostile. Though the feeble attempt is made by PW-3 Kondiba to state that there was dispute between his family and accused over the right of way, however, it appears that the said dispute was prior to 10 to 15 years of the incident. Though there was alleged recovery from the Appellant, the same has been disbelieved by the trial Court.

19. It is true that "last seen together" is one of the important circumstance in the chain of circumstances. However, that circumstance alone cannot form the basis for conviction of the accused in absence of any other evidence connecting the accused with the commission of offence. It cannot be safely concluded on the basis of evidence brought on record by the

prosecution that the Appellant and Appellant only has committed the murder of Shivaji and possibility of killing Shivaji by another person/persons is completely ruled out by the prosecution. The Supreme Court in the case of Shyamal Ghosh vs. State of W.B.³, on the basis of the evidence in that case, in Para 74 of the Judgment, observed that reasonableness of the time gap is of some significance. If the time gap is very large, then it is not only difficult but may not even be proper for the Court to infer that the deceased had been last seen alive with the accused and the accused, thus, was responsible for commission of the offence.

20. The Supreme Court in the case Rambraksh alias Jalim vs. State of Chhatisgarh⁴ held that, it is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other

³ (2012) 7 S.C.C. 646

⁴ A.I.R. 2016 S.C. 2381

words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where the time gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.

21. The Supreme Court in the case of Inderjit Singh and another vs. State of Punjab⁵, in Para-2 of the Judgment held that:-

"2. After giving our careful consideration, we are unable to agree with the Courts below. These circumstances are not

5 A.I.R. 1991 S.C. 1674

sufficient to establish guilt of the accused. It is well settled that in a case pending on circumstantial evidence, the prosecution must establish all the circumstances by independent evidence and the circumstances so established must form a complete chain in proof of guilt of the accused beyond all reasonable doubts. The circumstances so proved must also be consistent only with the guilt of the accused. Among the circumstances relied upon by the prosecution, in the light of these principles we find that except the circumstance No.1, the other circumstances are not incriminating. In number of cases it has been held that the only circumstance namely that the deceased was last seen in the company of the accused by itself is not sufficient to establish the guilt of the accused. It is no doubt true that deceased's death was homicidal but since there is no direct witness connecting any of the appellants with the crime we should fall back on the circumstantial evidence and we are of the view that circumstances relied upon by the prosecution are hardly sufficient to establish the guilt of the accused. The circumstance, i.e. the accused also had no enmity between the accused and the deceased and the witness would also

show that the accused also had no enmity against the deceased. Therefore, this circumstance is neutral. However, now coming to the recovery of the gun, the High Court has acquitted him of that charge. The only relevant circumstance as pointed above is that the appellants and the deceased left the house together in a friendly manner for bird-shooting. It is needless to say that no conviction can be passed on this sole circumstance. In the result, the convictions and sentences awarded by the Courts below are set aside. The appeal is allowed. The appellants be set at liberty."

22. Admittedly, in the present case there is no eye witness to the prosecutions case and the prosecution case is entirely based upon the circumstantial evidence. So far as the appreciation of the circumstantial evidence is concerned, the law is well settled. The Supreme Court in the case of Hanuman Govind Nargundkar and another Vs. State of M.P.⁶, held thus:

"It is well to remember that in cases

6 AIR 1952 SC 343

where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the 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.

23. The Supreme Court in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra⁷ has held that, the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or

⁷ (1984) 4 SCC 166

supplied by a false defence or a plea which is not accepted by a Court. It is also to be borne in mind that the case in hand is a case of circumstantial evidence and if two views are possible on the evidence on record, one pointing to the guilt of the accused and other his innocence, the accused is entitled to have the benefit of one which is favourable to him.

24. The Supreme Court in the case of Shankarala Gyarasilal Dixit Vs. State of Maharashtra⁸ in para 13 held thus :

"13. Since this is a case of circumstantial evidence, it is necessary to find whether the circumstances on which the prosecution relies are established by satisfactory evidence, often described as 'clear and cogent' and secondly, whether the circumstances are of such a nature as to exclude every other hypothesis save the one

8 AIR 1981 SC 765

that the appellant is guilty of the offences of which he is charged. In other words, the circumstances have to be of such a nature as to be consistent with the sole hypothesis that the accused is guilty of the crime imputed to him."

. After discussing the circumstances brought on record and the evidence available therein, in the case of Shankarala Gyarasilal Dixit (supra), the Supreme Court observed that though 12 circumstances have been relied upon by the prosecution, the important circumstance is that the appellant therein was present in the house, was not proved by the prosecution. Therefore, in the facts of that case, Supreme Court held in Para-26 of the Judgment that the crucial link in the chain of circumstances is the presence of the appellant in his house at the time when the dead body of Sunita was discovered. Once that link snaps, the entire case would have to

rest on slender tit-bits here and there. This discussion disposes of the second part of the 4th circumstance, part of 5th circumstance and circumstances (6) and (7). The Supreme Court acquitted the appellant therein. In the present case also the prosecution case is that Appellant, PW-1 Sudam, PW-7 Pandit Kapse and deceased Shivaji consumed alcohol in the house of PW-6 Santosh, and further that in the house of PW-6 Santosh initially quarrel took place between accused and PW-1 Sudam, wherein Shivaji intervened so as to pacify the quarrel and thereafter quarrel took place between accused and deceased Shivaji and then Appellant and deceased left the house of PW-6 Santosh, and thus Shivaji was last seen in the company of the accused. However, PW-6 Santosh did not support the prosecution case and turned hostile. Thus crucial link in the chain of circumstances that when deceased last seen in the company of the Appellant, prior to that both of them were present in the house of PW-6 Santosh

with prosecution witnesses PW-1 Sudam and PW-7 Pandit Kapse, is not proved as it is evident from the evidence of Santosh (PW-6), who turned hostile. Therefore, benefit of doubt in favour of the Appellant deserves to be extended.

25. In the light of discussion in foregoing paragraphs, we are of the considered view that the entire prosecution case rests upon the circumstantial evidence and the evidence brought on record by the prosecution is not cogent, sufficient and convincing so as to prove the offence against the Appellant beyond reasonable doubt. Therefore, an inevitable conclusion is that the Appellant is entitled for the benefit of doubt. Hence we pass the following order:

O R D E R

(I) The Criminal Appeal is allowed.

(II) The impugned Judgment and order

dated 15th July, 2013, passed by the Sessions Judge, Nanded in Sessions Case No.41 of 2012 convicting and sentencing Appellant - Ananda s/o Parasram Panewar for the offence punishable under Section 302 of the Indian Penal Code, is quashed and set aside.

(III) The Appellant - Ananda s/o Parasram Panewar is acquitted of the offence punishable under Section 302 of the Indian Penal Code. Fine amount, if deposited as per the impugned Judgment and order, be refunded to the Appellant.

(IV) The Appellant - Ananda s/o Parasram Panewar is in jail, he be set at liberty forthwith, if not required in any other case.

(V) The Appellant - Ananda s/o Parasram Panewar shall furnish the bail bonds of Rs.15,000/- and surety of like amount under Section 437-A of the Code of Criminal Procedure, before the concerned trial Court at Nanded.

[S.M. GAVHANE, J.]

asb/JUL17

[S.S. SHINDE, J.]