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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. 368 of 2010.

Darshan Hiru Shivdasani, **APPELLANT.**
 aged 32 years, Indian Inhabitant,
 Serviceman by profession,
 permanent resident of Flat No.3,
 Mayur Villa, Anandrao Dhewali
 Road, Juhu, Mumbai No. 400
 049. (Presently lodged at Nasik
 Road, Central Prison in the above
 matter)

VERSUS

The State of Maharashtra, **RESPONDENT.**
 (at the instance of Oshiwara
 Police Station through C.R. No.
 186 of 2008)

Ms. Naima Shaikh i/by Mr. Khan Abdul Wahab, Advocate for
 the Appellant.

Mr. J.P. Yagnik, APP for the State.

**CORAM : S.C. DHARMADHIKARI &
SMT. BHARATI H. DANGRE, JJ.**

RESERVED ON: 3rd November, 2017.

PRONOUNCED ON: 23rd November, 2017.

JUDGMENT (PER: SMT. BHARATI, H. DANGRE, J)

1 The present appeal is filed by the appellant being aggrieved by the judgment delivered by the learned Additional Sessions Judge, City Civil and Sessions Court, Greater Mumbai in Sessions Case No. 447 of 2008 on 30th March, 2010 thereby convicting the appellant for commission of offence punishable under Section 302 of the IPC and sentencing him to suffer life imprisonment and to pay fine of Rs.10,000/-.

2 In order to effectively deal with the said appeal, it is necessary to reproduce the case of the prosecution.

 The case of the prosecution is that the complainant Smt. Sonia Hiru Shivdasani lodged a report with Oshiwara Police Station on 5th April, 2008, informing that her brother Darshan Hiru Shivdasani had committed murder of Kumari Payal Kamlesh Ganatra who is his legally wedded and wife whom, he had subsequently divorced, since it was revealed to him that she was having illicit relationship with another man. In the complaint, it was stated that she was residing in Flat No.315, Satpuda Building, Oshiwara Park, Link Road, Jogeshwari (West), Mumbai - 102 and she was also residing with her parents at Mayur Villa, Flat No.3, near Chandan

Cinema, Juhu, Mumbai. She stated that she used to go for sleeping to Flat No.315, Satpuda Building, Jogeshwari, since the said flat belonged to her sister Twinkle and her brother-in-law and they were residing in Dubai since November, 2007. In the complaint, it was stated that she was knowing Payal Ganatra since one and half year and she was married to her brother Darshan Shivdasani. The complainant also stated that she was not informed about the said marriage. However, since last one month the relations of Payal and her brother Darshan were strained on account of fights between them and her brother had come to know that Payal had developed illicit relationship with some other man. It was also stated in the complaint that Payal had sent a notice to her brother in March, 2008 seeking divorce and therefore her brother was annoyed with her and in the same month they were divorced. It was stated in the complaint that on 4th April, 2008 at about 1:30 a.m. she had locked the flat in Satpuda building and left her for residential place and thereafter she had proceeded to Mahabaleshwar. The complainant had further stated that on 5th April, 2008 at around 6:00 p.m. when she returned to the said flat in Satpuda building and opened the door with her key, she noticed blood stains all over the hall and when she entered the

bed room she saw that Payal was lying in a pool of blood and her clothes were drenched in blood and one chunri was tightly tied around her neck and she had suffered stab injury under her right breast and on her stomach, which was bleeding.

3 Based on the said complaint, an FIR was registered at the Oshiwara Police Station vide C.R. No. 186 of 2008 against Darshan Hiru Shivdasani, the present appellant and the investigating machinery was set into motion. Shri Dattatraya Ganpat Sankhe (Police Inspector) attached to Oshiwara Police Station (PW No.17), visited the place of incident on receipt of a phone call at around 6:30 p.m. When PW 17 reached the spot, the complainant lodged the report which was scribed and registered as FIR and immediately the police personnel were sent in search of accused Darshan as he was specifically named by the complainant in the FIR. The Investigating Officer recorded the statements of witnesses and during investigation it was revealed to him from the complainant that she received the SMS from her brother Darshan and a team headed by PSI Kadam (PW No.15) was deputed to apprehend him at Pune. The accused was produced in Oshiwara Police Station on 9th April, 2008 and he was

interrogated and arrested. The accused was produced before the Court and Investigating Officer secured police custody remand (PCR) of the accused and the further investigation was carried out. It is the case of the prosecution that after commission of the crime, the accused had concealed himself in a hotel at Kolhapur in the name of Raju Mathur and reported his address as Mira Road. The case of the prosecution is that the accused stayed in the hotel for two days and thereafter he transited to hotel "Rajashri" in Pimpri, Pune and again concealed his identity and recorded his name as Rahul Sharma in the hotel register. On the next day, while he was staying in the said hotel, a telephone call was received in the hotel from a woman informing hotel Manager that the customer who was booked in room No. 208 is ailing and he should be taken to the hospital and when the Manager (PW 12) Shri Ashok Bhere, entered the room, he saw a customer in semi-conscious condition, and heavily drunk he carried the said customer to Yashwantrao Chavan Hospital, Pimpri and admitted him. In the night, the Investigating team arrived at the said hotel and the Manager led the Investigating team to Yashwantrao Chavan Hospital. Thereafter, the police officers returned to the hotel and carried out a panchnama and recovered certain articles from the Room and they

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also recovered the log book from the said hotel.

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During the course of investigation, the report from the Chemical Analyser was obtained. The treatment papers of the accused persons were also received from the hospital. On completion of the investigation the charge-sheet was filed in the competent Court and the Court of Sessions Judge for Greater Mumbai was entrusted with the trial of the offence punishable under Section 302 of the Indian Penal Code in Sessions Case No. 447 of 2008 against the accused/present appellant.

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The accused pleaded not guilty for commission of the offence with which he was charged and he claimed to be tried.

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On examination of the case of the prosecution, the learned Sessions Judge afforded an opportunity to the prosecution to bring home the guilt of the accused. The prosecution examined 18 witnesses. The statement of the accused under Section 313 of the Criminal Procedure Code (Cr.P.C.) was also recorded. The learned Additional Sessions Judge on examination of the witnesses and the

material produced by the prosecution and on hearing arguments of the prosecution as well as the accused, delivered the judgment on 30th March, 2010 thereby convicting the accused under Section 302 of the IPC and sentenced him to suffer life imprisonment and to pay fine of Rs.10,000/-.

The learned Additional Sessions Judge on the basis of the evidence produced before him arrived at the conclusion that the evidence which was brought by the prosecution against the accused is very specific and clinching in nature and irresistibly leads to the conclusion that the accused alone is guilty of commission of murder of the deceased Payal. The learned Additional Sessions Judge also concluded that each of the circumstance established by the prosecution indicates mens rea as each act of the accused was well planned and executed in a thoughtful manner. According to the learned Sessions Judge, the chain of circumstance was complete and it established the accused to be the person who killed Payal by a sharp edged, deadly weapon. By considering the case in its entirety, the Additional Sessions Judge convicted the appellant by the impugned judgment and being aggrieved by the said judgment the present appeal has been preferred on various grounds.

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It is urged in the appeal that the learned Trial Judge did not appreciate the material on record properly and the very link with respect to identity of the appellant was missing and the learned Judge has erred in appreciating the case which according to the prosecution is based on circumstantial evidence. The appeal is also filed on the ground that no motive has been proved by the prosecution for committing the murder of the deceased at the hands of the appellant and in the absence of test identification parade to identify the accused, whole case of the prosecution must fail. The appellant in the appeal has also alleged that the recovery of weapon of assault has not been sufficiently proved and the learned trial Judge has relied upon uncorroborated version of hostile witnesses and hence the conviction cannot be sustained.

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We have heard the learned Counsel Ms. Naima Shaikh i/by Shri Khan Abdul Wahab, Advocate for the appellant and Mr. Yagnik, learned APP, for the State and perused the record of the court below.

The learned Counsel for the appellant would argue that the prosecution case is based on circumstantial evidence and the prosecution has failed to establish the chain of circumstance which

would inevitably point towards guilt of the accused. According to the learned Counsel for the appellant, the prosecution story has several loopholes and according to her, the theory of last seen has been wrongfully invoked to establish the guilt of the accused as the chain is broken at several places and did not meet the test laid down by the Apex Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra** reported in **AIR 1984 SC 1622**. The learned counsel would also contend that the prosecution has failed to examine the crucial witnesses whose statements were recorded during the course of investigation, namely, the driver of the deceased and sister of the deceased namely Twinkle and one Babu whose presence has been brought on record through the evidence of PW No.7 Smt.Kunda Damre.

The learned APP would contend that the prosecution has proved its case beyond doubt and urged to uphold the impugned judgment. From the above the only point for determination in this Appeal is whether the Trial court's Judgment of conviction and sentencing the Appellant is valid, legal and proper.

9 The case of the prosecution is based on circumstantial evidence. The deceased Payal died an unnatural death and her body was found lying in Flat No.315, Satpuda Building, Oshiwara Park. The deceased Payal was resident of Vileparle locality and she was an Interior Designer and serving in such capacity with Shri Milind Pai, (PW No.5) who was an Architect. From the evidence brought on record by the prosecution Payal was married to the appellant but the marriage did not last and resulted into a decree of divorce. However, in spite of divorce she was in constant touch with the appellant and on the fateful day she had accompanied the appellant to the place of incident, which was a flat owned by the sister of the appellant, namely Twinkle.

 The prosecution relies upon the following circumstances to connect the appellant with the death of the deceased namely;

- a) The appellant was married to the deceased but on account of discord and strained relations divorced the deceased.
- b) That the deceased was in touch with the appellant even after a decree of divorce passed by the competent Court dissolving

the marriage.

- c) On the date of the incident, the appellant visited the flat No.315 Satpuda Building, Oshiwara Park at around 1:00 p.m. and procured key of the said flat and obtained access was seen by Watchman of the building (PW No.18);
- d) The appellant brought the deceased in the said flat after 1:30 p.m. and the deceased was last seen in the company of the appellant by PW No.18;
- e) The body of the deceased was found lying in Flat No.315, Satpuda Building which belong to sister of the appellant at around 6 p.m;
- f) The appellant suffered injury on his right forearm in the scuffle and was examined

by doctor at Juhu who treated and sutured the said injury and put bandage on the same;

- g) That the appellant stayed in hotel Atithi in Kolhapur on 6/4/2008 at around 6:00 a.m. and signed the register maintained by the Hotel as Rajiv Mathur and the appellant is identified as a customer by PW Nos.10 and 11;
- h) The appellant stayed in hotel Rajashri in Pimpri and checked in the said hotel at around 4:00 a.m. in the name of Rahul Sharma;
- i) The appellant was taken to Yashwantrao Chavan Hospital,Pimpri,Pune by the Hotel Manager on receipt of a phone call from a woman who informed that he needed medical assistance;

- j) Recovery of articles and belonging to the deceased from the hotel room where the appellant has concealed himself.
- k) The appellant was accosted by investigating team in the said hospital and brought to Oshiwara Police Station and arrested. The arrest panchnama mentions about an injury on his right hand forearm which was a fresh injury;

10 The prosecution relies upon the evidence of PW No.18 Omprakash to establish the fact that on the day of incident i.e. on 5th April, 2008 deceased Payal had accompanied the appellant to the said flat. Evidence of PW No.18 Omprakash S. Kunwar who was working as watchman supports the case of the prosecution and according to this witness on 5th April, 2008 around 1:00 p.m. the appellant went on the upper floor and returned back and informed the said witness Omprakash that the key of the house is kept with the maid servant and he will come back with the key. PW No.18 states in

his deposition before the Court that thereafter Darshan returned back with the key and went to the flat and came back after sometime and paid Rs.20/- to him. The witness further states that appellant Darshan informed him that he will bring his wife to the flat and he should greet her by saying "Namaste". PW No.18 further states that Darshanji returned along with the lady who was talking on cell phone.

This witness therefore establishes the presence of the appellant in the said flat from 1:00 p.m. and intervening period he was joined by the deceased. Prosecution witness No.18 had further stated that in the evening when younger sister of Darshanji came in the building and she opened the flat and the dead body of the lady who had accompanied Darshanji was found lying in the said flat. This witness has been examined by the prosecution to establish that the deceased was last seen in the company of the appellant in the afternoon on the date of the incident and thereafter she was not seen alive by any person. PW No.18 has been subjected to rigorous cross-examination by the counsel for the accused but from the cross-examination it is reaffirmed that this witness was knowing the appellant, though he was not resident of the building since he was intermittently visiting the building. In the cross-examination he has

admitted that he saw the deceased Payal for the first time in that building and he had saluted to her and therefore he could identify the body of the person lying in the flat of the building as the same lady who had visited along with the appellant. The material testimony of this witness to the effect that the deceased was last seen together in the company of the appellant in the premises of Satpuda building, is not shattered in any way in the cross-examination.

11 To establish the link and the fact that the deceased Payal was in the company of the appellant on the fateful day in the afternoon hours, the prosecution has also examined PW No.2 Pintu who was working associate of the deceased since he was working with the same architect to whom the deceased Payal was rendering services. PW No.2 had thrown light on the personal life of the deceased and had deposed that her marriage was performed with Darshan before two years and she had instituted petition for divorce against Darshan in the family Court at Bandra. He even deposed that he had accompanied the deceased Payal to the court and has also stated the reasons for the divorce as Darshan had performed another marriage with one Nikky @ Tapaswini about six months after the

marriage with the deceased. The said witness had an opportunity of knowing the appellant who was introduced to him by the deceased as her husband. PW No.2 has further deposed that on the date of the incident, she had called the said witness and informed that she was going to meet Darshan and even requested him to accompany her. On that day this witness went to the office of his employer Milind, where the deceased was employed and when he contacted the driver of the deceased he was informed that Payal had gone to hotel Kalinga along with the appellant Darshan. The said witness also deposed that hotel Kalinga is in the same locality and just separated by a road and he attempted to contact Payal on her mobile phone and she asked him to wait and after sometime he was informed by Payal that she is in Oshiwara but at that time the appellant snatched her mobile phone and spoke on the phone with the said witness and said that Payal had more love and affection with him and the phone was immediately switched off. This witness further deposed that he made efforts to contact Payal on her mobile phone unsuccessfully and therefore he sent her a Sms stating that he would go to the police station as she had not given the whereabouts. However, even after second Sms was forwarded there was no response. The witness further deposed that

he received phone call from the mother of deceased Payal that she had not returned home and she enquired her whereabouts and after sometime she asked her this witness to come home along with the car and the driver of Payal where she informed that Payal was murdered.

Prosecution Witness No.2, though cannot be said to be a witness who had seen Payal and deceased together but he is a witness to the fact that the deceased was in the company of the appellant after 3:00 p.m. and he had conversation with the appellant on the phone of Payal after snatching the phone from her and he was the one who switched off the phone, as a result, the said witness was unable to contact Payal thereafter till her body was recovered. The said witness throws light on the crucial aspect that though the deceased was divorced from the appellant, she was meeting the appellant. On the fateful day, she had accompanied the appellant and they were together after 3:00 p.m. This witness has been also put to extensive cross-examination and he gave the date of divorce as 7th March, 2008 which appears to be not far away from the date of incident i.e. 5th April, 2008.

of the deceased Milind Pai who was the Architect with whom the deceased was working as interior designer and co-ordinator for nine months prior to her death. This witness has testified before the Court that on the date of the incident she left the office at 2:30 p.m. as she had finished her work. This witness further deposed that about 6:30 p.m. in the evening he received the phone call from the mother of the deceased enquiring that where Payal had gone as she did not return home and was not receiving the phone call. He further deposed that when he called her mother at around 8:30 p.m. on that day of the incident he was informed that Payal was no more. Though this witness is not aware whether she was married with Darshan or when she had obtained divorce, he deposed to the effect that when the deceased joined the office, she had disclosed that she is a divorcee. As an employer it cannot be expected that this witness was in much knowhow of the personal life of his employee but he is an important witness from the view point of prosecution who had deposed that on the date of the incident, deceased had left the office at around 2:30 p.m. located at Juhu Link road Oshiwara Mumbai and she did not return home on that day.

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13 The prosecution also examined one Smt.Kunda who was working as a maid servant and taking care of flat No. 315, Satpuda building owned by the sister of the appellant, Twinkle. This witness has been declared hostile by the prosecution and has been strenuously subjected to cross-examination. From the cross-examination what is extracted by the prosecution is an admission that she was in the flat in the afternoon from 1:00 p.m. to 2:00 p.m. when she cleaned the flat and thereafter she left the flat. The prosecution has also examined her son Jayesh as PW No.8 who has stated that he was present at home at 2:30 p.m. and Darshan uncle had came to their house and demanded the key of the flat and took away the key. The said witness has identified the appellant Darshan in the dock. However, in the cross-examination he deposed that he did not recollect the date or day when he had handed over the key to the appellant and he had not seen Darshan uncle any time before the date of the incident.

14 The evidence adduced on record by the prosecution in the form of witness No. PW No.2, PW No. 5 and PW No.18 establishes that the deceased Payal had left her office located at Juhu Link road,

Oshiwara at around 2:30 p.m. This fact is reaffirmed by PW No.2 Pintu who visited the office at around 3:00 p.m. and was informed by the driver that the deceased had gone to hotel Kalinga, along with the appellant which is in the same locality. The prosecution has established through the evidence of PW No.2 Pintu that when he contacted deceased on her mobile she informed him that she is in Oshiwara and this witness also establishes the fact that the deceased was in the company of the appellant since he had telephonic conversation with him. The presence of the appellant and the deceased together in Flat No.15 Satpuda Building is further reaffirmed by PW No.18 who establishes the prosecution case that initially the appellant visited the flat alone at about 1:00 p.m., obtained the key of the flat from the maid servant, opened the flat, remained in the flat for 10/15 minutes and after sometime returned to the said flat along with deceased Payal who was identified by this witness as the lady whose body was found in the flat. The prosecution has therefore brought clinching evidence on record that from 3:00 p.m. till her body was found by the complainant lying in the flat No.315, Satpuda building around 6 O' clock, the deceased remained in the flat where she was lastly seen in the company of the appellant.

The burden therefore shifts on the accused / appellant to show as to in what manner and at what point of time he lost custody over the deceased person and when he parted with her company. However, no explanation has come from the appellant to that effect nor he has led any evidence to rebut the fact established by the prosecution that the deceased was last seen in the company of the appellant.

15 The prosecution has also adduced evidence in the form of subsequent conduct of the appellant after the incident and that he sought shelter outside the city of Bombay by concealing his identity, in the fake name. The prosecution has also relied upon a circumstance that the accused had sustained injury during the incident on his forearm and has examined the Medical Practitioner Dr Anand Pai (PW 14) whom the accused visited on the date of the incident at about 6:00 p.m. PW No.14 Dr Anand Pal was examined by the prosecution deposed that he is having his clinic at Juhu market Mumbai and around 5th April, 2008 at about 6:00 p.m. Darshan had been to his clinic for treatment since he had sustained injury on his right hand on account of accidental fall. The appellant was examined

by PW No.14 and he found bleeding injury on his right hand which was treated by cleaning and suturing and by prescribing some antibiotics. The said witness had identified the accused Darshan present in the dock. Though the said witness in the cross-examination states that he was not able to recollect the exact size of the injury and the exact part of the right hand where the injury was found, he admits that on examination of the patient he felt that it was a defence injury.

16 The prosecution has further relied upon PW No.10 Sachin Kumbhar and PW No.11 Balwant to establish that the appellant concealed himself in hotel in Kolhapur and sought shelter in the said hotel by giving a fake identity. PW No.10 Sachin Kumbhar has deposed before the trial Court that he was working as housekeeper in the hotel "Atithi" Kolhapur and on 6th April, 2008 at about 6:30 p.m. he was called at the counter of the hotel and asked to reach the customer to Room No.206. The said witness states before the Court that the customer was having a bandage on his right hand (right wrist) and the name of the said customer was told by the hotel Manager as Raju Mathur. The said witness identified the accused

before the Court present in the dock as the same customer who had visited hotel Athithi and stayed in the name of Raju Mathur. His evidence is further corroborated by PW No.11 Balwant who is the Manager of Hotel Atithi who deposed before the Court that one customer booked Room No.206 by entering his name in the hotel register in his own handwriting and he put his name as “Raju Mathur” who stayed in the hotel for 2 days. He produced the register of the hotel for the year 2008 and he also identified the accused Darshan in the trial Court and stated that he is the same person who stayed in the hotel for two days. These two witnesses have therefore supported the prosecution case that in order to flee away from the crime, the appellant had gone to Kolhapur and stayed in hotel from 6th April, 2008 in the name of Raju Mathur. Register of the said hotel records an entry which according to PW No.11 was made by the accused himself in his own handwriting and he also put his signature as Raju Mathur. PW No.11 has identified the accused Darshan who signed the register. In order to complete the chain, the prosecution has further examined PW No.12 Ashok Bhere, Hotel Manager in whose hotel the accused sought shelter from 8th April, 2008 and identified himself as Rahul Sharma who had come from Kolhapur.

PW No.12 Ashok Bhare has deposed that he was working as Hotel Manager in Rajashri Hotel, Pimpri, Pune and when he was present at the counter at 4:00 a.m. a customer requested a room in the hotel and made entry in the hotel register in his own handwriting and paid an advance amount for stay in the hotel for two days. This witness PW 12 Ashok Bhare further deposed that in the morning he left the hotel and returned in the evening at around 7.00/7:30 p.m. and enquired about the hotel phone number which was supplied to him. PW No.12 further states that after about 15/20 minutes he received phone call from a woman, that the customer in Room No.208 is ailing and she made a request to take him to the hospital. It is further deposed that when he went to Room No.208, the customer was lying in semi-conscious condition and he was drunk and not in a position to talk. It is further deposed that he called for an auto-rickshaw and with the assistance of one employee of the hotel he carried the customer to Yashwantrao Chavan Hospital, Pimpri, Pune and admitted him there. This witness has identified accused Darshan, present in the dock, as a customer, who had visited his hotel and stayed in Room No.208. According to this witness, in the same night policemen arrived at his hotel and made enquiry as to who stayed in Room No.208 and he took

the police officials to Yashwantrao Chavan Hospital, Pimpri Pune and showed them the customer in the hospital. According to this witness, the policemen then returned to the hotel, prepared panchnama in Room No.208 and he also produced the hotel register in which the accused had entered his name as Rahul Sharma.

The aforesaid three witnesses PW No.10, 11 and 12 support the prosecution case about the conduct of the accused after the date of the incident when he concealed his identity and lodged himself in different names, initially at Kolhapur and subsequently at Pimpri, Pune.

17 The chain of events is linked by the prosecution in the form of evidence of PW No.10,11 and 12 to show that it is the accused who stayed in hotel "Atithi" in Kolhapur from 6th April, 2008 and 7th April, 2008, who subsequently came to hotel Rajashri in Pimpri at around 4:00 a.m. on 8th April, 2008 and entered his name as Rahul Sharma who was then taken by PW No.12 to Yashwantrao Chavan Hospital, Pimpri and it is at this place when the policemen accosted the accused from the said hospital. There is no dispute about the identity of the accused person since the chain of evidence in the form

of PW No.10,11 and 12 who referred to their customer as none else than the appellant who was accosted by the police personnel while he was admitted and being treated in Yashwantrao Chavan Hospital, Pimpri. The chain of the events, demonstrate that after commission of the offence with which the appellant was charged, he left Mumbai, arrived at Kolhapur on 6th April, 2008, stayed at Kolhapur till 7th April, 2008 and reached Rajashri hotel in Pimpri on 8th April, 2008, admitted to the hospital in Yashwantrao Chavan Hospital, Pimpri by PW No.12 on 9th April, 2008 where he was traced by the Investigating team where PW No.15 Jitendra Kadam PSI arrived and found that he is the same accused to whom he was supposed to arrest in relation to C.R. No. 186 of 2008 registered at Oshiwara Police Station. It is PW No.15 who carried the accused from Pune to Mumbai at Oshiwara Police Station where he came to be arrested on 9th April, 2008.

18 As per the prosecution, the accused came to be arrested on 9th April, 2008 and the column no. 7 of the arrest panchnama mentions that the arrested accused had a fresh injury on his forearm of the right hand and the said wound was stitched. According to the prosecution, the accused was referred for medical examination to

Cooper Hospital, Mumbai by Oshiwara police station and was examined by Dr. Prashant (PW No.13). The accused was examined by the said PW No.13 and in his deposition before the Court he stated that he had noticed a scar mark on his right forearm having 3 inches in length though he was unable to give its dimension, witness had deposed that the accused had given history of consumption of 30 tablets of Restyl 0.5 mg. The said prosecution witness has produced the medical papers in relation to the accused person and described him to be a chronic smoker and occasional alcoholic.

19 The another incriminating evidence against the accused which is tendered before the Sessions Judge by the prosecution is recovery of the weapon and also certain articles belonging to the deceased which supports the case of the prosecution. PW No.15 Jitendra Kadam who had visited Rajashri Lodge at Pune and by whom the accused was brought to Oshiwara Police Station had carried out a search of the room in the said lodge where the accused had stayed in the name of Rahul Sharma. The said witness has deposed that on search of the room, he found two bags and in one bag there was a knife, driving licence of the deceased and there was also

one Ladies' purse with credit cards belonging to the deceased. The said articles were seized in the presence of panch witness Mohd. Usman who has been examined as PW No.9 by the prosecution. The seizure panchnama Exh.37 is proved by the said witness and it mentions about seizure of one stainless steel Suri with a bronze handle with dry stains of blood, edge of which is 18 cms. The ladies packet contained five credit cards in the name of the deceased and also her driving licence. Recovery of the said incriminating articles belonging to the deceased is a circumstance which points out to the guilt of the accused since the deceased was last seen in the company of the accused and the things which he was supposed to carry along with her i.e. valet containing driving licence and credit cards were recovered from the accused in a lodge at Pune. Further from the spot certain articles were recovered in presence of panch witness Smt. Sushila (PW 6) who is also panch on the inquest panchnama Exh.31 and it refers to presence of a knife which was seized during investigation and the description of the knife is 18 cms in length with 11 cms black handle and 7 cms edge having blood stains. The said knife was marked as Article 7 and sent for chemical analysis since it was stained with blood. PW No.6 Sushila has proved the inquest

panchnama along with the presence of knife at the spot and its recovery from the said place. The said knife and the spear (Khanjir) Article 15 were forwarded to the Chemical Analyser and the report obtained from the Director of Forensic Science Laboratory, Kalina, Mumbai, dated 10th November, 2008 i.e. Exh.57's proved by PW No.17 reports that the said Article No. 7 and Article No. 15 were having blood stains on the blade and the blood group detected on the Article 7 and 15 is Group "A".

The prosecution has therefore placed sufficient evidence on record to prove that the deceased Payal met with homicidal death and to connect the accused to be the only person who caused said death, the prosecution has relied upon the circumstantial evidence in the form of witnesses who have conclusively proved that the deceased was in the company of the accused immediately preceding the time when she was found dead at 6:00 p.m. by the complainant. The evidence of PW No.18 watchman the prosecution witness No.2 Pintu is sufficient to support the prosecution case that the deceased was in the company of the accused on the fateful day. The spot of incident is the flat belonging to the sister of the accused and the deceased had no access to the said flat independently except through

accused Darshan who had frequent ingress into the said flat as per PW No.18. The complainant Sonal in her evidence has also admitted that her brother used to visit the said flat by obtaining the key from caretaker maid servant Smt. Kunda PW 7 who was declared hostile by the prosecution since she did not support the prosecution case. However, the prosecution has sufficiently proved that the accused had access to the said flat and since the deceased was his wife whom he had recently divorced had accompanied the deceased to the said flat and two of them were last seen in the afternoon hours and immediately after which the dead body of the deceased Payal was found by PW No.1. The chain of events unfolded by the prosecution amply demonstrate that it was only the accused who had an opportunity to kill the deceased in the lonely flat where he had asked the deceased to accompany and it has also come in the evidence of PW No.2 that he was annoyed with Payal since she was conversing on telephone with the said witness and had switched off the phone and thereafter no phone call was made by the deceased. The prosecution has also completed the chain by recovery of knife from the spot of incident and Sura Article 15 which was seized from the Rajashri Lodge at Pune where the accused had taken shelter after he

attempted to escape the consequences of his act of killing the deceased. PW No.4, Medical Practitioner who conducted the postmortem on the deceased, had described the age of injuries within 24 hours and had deposed that the said stab injuries are possible by weapon like “Khanjir/Sura”, Article 15. PW No. 4 Dr Shantanu was shown the weapon “Sura” (Khanjir) (Art.15) and he had categorically deposed that the injuries on the body of the deceased described on the postmortem could be possible by weapon “Sura”/Khanjir” (Art.15) shown to him. Further incriminating material which the prosecution has produced against the accused is the recovery of articles belonging to the deceased Payal from Rajashri Lodge, Pune and no explanation has come forth from the accused to rebut the said prosecution case.

20 It is not in dispute that death of Payal is homicidal and the place where her dead body was found in Flat No. 315, Satpuda Building, Oshiwara Park. The prosecution did not have any direct evidence in the form of ocular evidence as to the said act of killing the deceased. However, the prosecution relies on the circumstantial evidence and based its case on the theory of last seen. The deceased was last seen in the company of the accused in the afternoon hours on

the date of incident. PW No.18 Omprakash who is the watchman of the Satpuda building has deposed that the appellant had been to the flat at around 1:00 p.m. and had obtained the key of the said flat from the maid servant. The appellant was known to the said witness and he returned to the said flat with his wife, who was identified by the said witness as deceased Payal. The prosecution has proved that deceased accompanied the appellant to the said building after 1:00 p.m. and she was not seen alive thereafter. The prosecution relies upon the said circumstance of the deceased being last seen in the company of the appellant at a point of time which is very proximate to the point when her dead body was found at around 6:00 p.m. by the complainant. The prosecution has also relied upon the circumstance that the body was lying at a place where she had accompanied the appellant and it is only the appellant who had an access to the said flat along with the complainant's sister who had come to the said flat but she did not return to the said flat till 6:00 p.m. after her departure from the said flat in the night of the earlier date. Thus, the prosecution has clinchingly established that it was the appellant who had an access to the flat and had an opportunity to cause death of the deceased in the said flat.

21 The prosecution has based its case on circumstantial evidence and by cogent evidence brought on record has established the circumstances which are consistent with the hypothesis regarding guilt of the present appellant. The circumstances so established by the prosecution exclude every other hypothesis except the one that the deceased was killed by the appellant. The prosecution has established the chain of circumstance brought on record by the prosecution which do not lead to any other inference than the guilt of the accused. The evidence brought on record by the prosecution in relation to last seen together is completely established to show that the time gap when the deceased was last seen in the company of the accused and when she was found dead was so small but that the only inference that can be drawn is that it was the appellant who was responsible for death of deceased. In the present case, it is to be noted that the circumstances are sufficient to conclusively point out to the commission of murder of the deceased by the appellant and while dealing with the factum of last seen together it is well established by the prosecution that a close proximity exists between the event of the appellant last seen in the

company of the deceased. The Hon'ble Apex Court by applying the principles laid down by the Apex Court in the case of ***Hanumant Vs. State of Madhya Pradesh (AIR 1952 SC 343)*** laid down the principle which should be a guiding one in such case and the said principle is consistently following in the judicial hierarchy and still holds good.

"It is well to remember that in cases 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 & 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."

A close analysis of the decius would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in [Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra](#),

(1973) 2 SCC 793; where the following observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

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

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

22 The Apex Court in the case of **Sharad Birdichand Sarda Vs State of Maharashtra, (1984 4 SCC 116)** has laid down the five golden principles which the number of cases based on circumstantial evidence. It would be appropriate to enumerate the said principles below. It held that the onus is on the prosecution to prove that the chain is complete and Apex Court laid down the

conditions precedent, before conviction based on it to be fully established.

1. *The circumstances from which the conclusion of guilt is to be drawn should be fully established;*
2. *The facts so established should be consistent with the hypothesis of guilt and the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
3. *The circumstances should be of a conclusive nature and tendency;*
4. *They should exclude every possible hypothesis except the one to be proved; and*
5. *There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*

23 Applying the said principle the Apex Court in a recent judgment in the case of Kishor Vs. State of Maharashtra, 2017 (3) SCC p. 716 has observed that last seen together circumstance does not by itself necessarily lead to inference that it was accused who committed crime but there must be something more to connect the accused with the crime and to point out the guilt of the accused and

none else. As aforesaid, in the present case there is clinching evidence to point towards the involvement of the appellant in the commission of the crime.

24 In the present case, the prosecution has led clinching evidence to point out the involvement of the appellant in the commission of the crime and we see no reason to interfere with the findings recorded by learned Sessions Judge.

The prosecution has established the guilt of the appellant by leading cogent and trustworthy evidence. Considering the evidence led by the prosecution in the form of the subsequent conduct of the appellant, where he attempted to evade the arrest, is also a circumstance to complete the chain of events which lead to the guilt of the accused. Though we are aware of the position in law in relation to abscondance of a accused and that it by itself may not be a positive circumstance since an innocent person would also run away from the course of justice fearing the consequences but when such circumstance is coupled with other circumstances it assumes significance. The appellant has not only absconded to evade arrest but also concealed his identity and took shelter in the hotels far away from the place of the incident outside Bombay in fake name to avoid

arrest. The appellant was unmistakably traced as a customer who was admitted to the private hospital Yashwantrao Chavan Hospital, Pimpri. The learned counsel for the appellant has vehemently argued that test identification parade was not carried out to establish the identity of the accused. However, in our view, the court identification itself is good identification in the eyes of law and prosecution witnesses have identified the accused in the dock as the same person who had been to the hotel in Kolhapur and Pimpri and established the circumstance that it was the accused who had stayed in the said hotel by concealing his identity.

25 The identity of the appellant is well established and merely because no test identification parade is conducted is no reason to break the chain against the appellant. In case of circumstantial evidence, the motive assumes great significance and importance and in the absence of such motive the Court would be put on guard and caution to scrutinize each piece of evidence very closely in order to ensure that mere suspicion or conjecture did not take place of proof. In the present case, the prosecution has also brought on record the motive of the appellant in causing the death of the deceased as they shared an estranged relationship and the

accused/appellant was suspecting that the deceased was carrying illicit relationship after the divorce and this motive according to us was sufficient to commit the crime in the scenario of modern urban life, specifically when the ego of the appellant is hurt in discovering that the deceased who was once upon a time his wife, is leading a happy life and carrying illicit relationship with the PW No.2. Thus, the prosecution has also brought on record the motive in causing the death of the deceased.

26 Taking overall view of the matter and appreciating the materials in their entirety and by analysing the evidence led by the prosecution, we are of the view that the learned Sessions Judge has rightly convicted the appellant and the conviction is based on circumstances which are fully established beyond reasonable doubt and are consistent, forming a complete chain, where all links in chain, unerringly point to the guilt of the appellant.

27 In the aforesaid circumstances, we uphold the judgment passed by the learned Sessions Judge and we dismiss the appeal filed by the appellant. The appeal is hereby dismissed.

[SMT.BHARATI H.DANGRE,J.]

[S.C. DHARMADHIKARI, J.]