

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 859 OF 2006

Sohail Abdul Rashid Shaikh.

Age : 23 yrs

14/7, Quins Mansion, Ground floor,

Govaliya Tank for Jeet Street Cross

Lane, Nana Chowk, Mumbai.

Present lodged at Kolhapur Central Jail,

Kolhapur.

... Appellant.

Versus

The State of Maharashtra.

(at the instance of Colaba Police Station.

C.R. No. 113 of 2000.)

... Respondent.

WITH

CRIMINAL APPEAL NO. 1497 OF 2003

Shri Shakir Abdul Latif.

Age: Adult, residing at Almadine Bldg.

3/Am Motali Bai Street, Agripada,

Mumbai.

... Appellant.

Versus

The State of Maharashtra.

(at the instance of Colaba Police Station.

C.R. No. 113 of 2000.)

... Respondent.

Mr. S.R. Phanse, Amicus Curiae, for the Appellant in Appeal No. 859 of 2006.

Mr. Ayaz Khan, for the Appellant in Appeal No. 1497 of 2003.

Mrs. P.P. Shinde, APP for State.

CORAM : R.M. SAVANT &

SMT.SADHANA S. JADHAV,JJ

JUDGMENT RESERVED ON: JUNE 19, 2017

JUDGMENT PRONOUNCED ON : AUGUST 11, 2017

JUDGMENT :(PER SMT. SADHANA S. JADHAV,J)

1 The Appellants herein are convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs. 1000/-each in default R.I. for one month. They are also convicted for offence punishable under section 201 read with 34 of the Indian Penal Code and sentenced to suffer R.I. for 2 years and fine of Rs. 500/- I.d. R.I. for 15 days. The Accused No. 1 i.e.

Appellant in Criminal Appeal No. 859 of 2006 is further convicted for offence punishable under section 392 of the Indian Penal Code and sentenced to suffer R.I. for four years and to pay fine of Rs.1000/- in default to suffer further R.I. for one month, by the Additional Sessions Judge, Greater Bombay vide Judgment and Order dated 27/8/2003 and 28/8/2003.

2 Such of the facts necessary for the decision of this Appeal are as follows :

(i) One Madan Phatak, resident of Dadar used to visit Hotel “Three Flight Up” at Colaba regularly and used to spend time playing pool game at the said hotel. On 14/4/2000 Madan had left the house and had been to hotel “Three Flights Up” for having dinner with his friends. He did not return home. His relatives and friends made enquiries at all possible places and finally approached Colaba Police Station and lodged a missing report with the police. The said missing report was registered bearing No.

13/2000. The description of the clothes worn by Madan Phatak while leaving the house was mentioned in the missing report.

(ii) On 16/4/2000 the investigating agency visited the Hotel “Three Flights Up” and the surrounding area. In the course of enquiry, it was revealed that Madan Phatak had left the hotel with his friends Sohail and 3 associates in green Maruti Zen car. The police recorded statements of staff and the Assistant Manager of the said hotel and also two taxi drivers.

(iii) On 18/4/2000, the police had received a secret information about the whereabouts of Sohail. The police visited the residence of Sohail and called him in the police station for the purpose of enquiry. In the course of enquiry after hearing his evasive answers, the police suspected his complicity and he was arrested.

(iv) The police had then called upon two panchas. In the presence of the panchas, Sohail had disclosed that he would show place where he had thrown dead body of Madan Phatak with the

help of his associates. The memorandum was recorded and then Sohail had led the police Station to Tiger Hill point at Lonavala.

(v) Police had called one Dinesh Rane, who happens to be the good friend of Madan Phatak. Sohail had led the police to a valley from where he had thrown the dead body of Madan Phatak. The police had searched the area and had noticed a dead body lying under the valley, which was 20 to 25 ft. from the hill point.

(vi) Dinesh Rane had identified the dead body of Madan Phatak. The police had verified and found that the clothes on the person of the dead body, matched with the description of the clothes in the missing complaint.

(vii) Sohail had also disclosed the names of his associates as Shakir Latif, Ali Mohmed i.e. Accused No. 3 and Accuse No. 4 Ismail. The Police had then registered Crime No. 113 of 2000 against the accused under section 365, 302, 328, 392, 201 read with section 34, 120B of the Indian Penal Code.

(viii) The investigation was set in motion. Accused Shakir was arrested on 18/4/2000 from Agripada.

(ix) It was revealed that Accused Nos. 3 and 4 were found to be juvenile in conflict with law and therefore, on 20th April, 2002 case of the Accused No.3 was transferred to Juvenile Justice Board and on 21/7/2002 case of Accused No. 4 was transferred to Juvenile Justice Board.

(x) After completion of investigation, on 15/7/2000 the charge-sheet was filed against the four Accused. The case was committed to the Court of Sessions and registered as Sessions Case No. 710 of 2000.

(xi) The prosecution examined as many as 20 witnesses to bring home the guilt of the Accused.

3 This is a case which rests on circumstantial evidence and therefore, it would be necessary to discuss the substantive evidence of every witness in order to ascertain as to whether the

chain of circumstances is so complete as to eliminate doubt of the complicity of one or all Accused.

4 P.W. 1 Baburao Mohite was attached to Colaba Police Station as PSI. He has deposed before the Court that on 15/4/2000 at about 8.30 p.m. one Milind Madhav Joshi had approached police station and lodged a missing complaint in respect of his brother-in-law Madan Phatak. He had given the description of the missing person as well as the clothes worn by him when he left the house. Milind Joshi had further informed the police that Madan Phatak had left for hotel “Three Flights Up” for having dinner with his friends and not returned home. The Police had initiated enquiry in respect of the missing person and in the course of enquiry they had learnt that Madan had left the hotel “Three Flights Up” in the company of his friends Sohail Abdul Rashid, Shakir Abdul Latif, Ali Mohammed Irani and Ismail Abdul Mansoori.

5 P.W. 1 has further deposed before the Court that on the basis of a secret information, they had called upon Sohail, Rashid for enquiry under section 41 of the Code of Criminal Procedure, 1973 and at that stage, Sohail had admitted that on 15/4/2000 he alongwith his associates i.e. co-accused had taken away Madan Phatak from Hotel “Three Flights Up” Colaba to Dadar in green colour Maruti Zen car owned by Ismail Mansoori and that they had administered some spurious substance through cold drink. That Madan had started shouting and therefore, they had throttled him. After they had realised that he had died, they had thrown the dead body from Tiger Hill Point, Lonawala and before disposing of the dead body they had removed the gold chain from his neck as also cell phone and other valuables. After recording memorandum panchanama Sohail had led to the discovery of the dead body of Madan Phatak, which was duly identified by Dinesh Rane and then investigation was carried on in accordance with the procedure.

6 It is elicited in the cross-examination of P.W. 1 that he had personally not done anything in the enquiry regarding missing complaint. According to him, names of the Accused were recorded by the Police Inspector Babar. P.W. 1 has feigned ignorance about the place wherefrom the Accused was picked up and brought to the police station for the purpose of enquiry. However, P.W. 1 has categorically admitted that Sohail was put under arrest after enquiring under section 41(1)(A) of Code of Criminal Procedure, 1973 after he had made the disclosure statement.

7 P.W. 2 Nitin Suvarnapatki is the panch for discovery of dead body. He has identified Accused Sohail in the court as the person who had led the police and panchas to the discovery of the dead body of Madan Phatak. He has proved the contents of the memorandum panchanama, which is at Exh. 17. He has deposed before the Court that the dead body was found at the foot of Tiger hill near Bhushi dam. The discovery-cum-inquest panchanama is

marked at Exh. 17/1. The witness has also identified the clothes on the dead body i.e. off-white shirt, chocolate colour full pant, black colour reddish Banian, under garment and chocolate colour pair of shoes and sox, leather belt.

8 It is elicited in the cross-examination that Dinesh Rane happened to be distant friend/acquaintance of P.W. 2. It is further admitted in the cross-examination that P.W. 2 had been to Colaba Police Station with his friend when he saw Dinesh Rane present in the police station and thereafter he had agreed with the police to act as panch. He was not aware at the time of recording of panchanama that the co-pancha was photographer by profession. He has admitted that the discovered body was totally decomposed. That he was not present at the time of post mortem. The witness has proved the contents of the panchanama at Exh. 17/1.

9 P.W. 3 Appa Ramchandra Patil is another panch for the purpose of recovery of the vehicle at the behest of Accused No. 2 whom he has identified before the Court. According to P.W. 3, after recording of memorandum of Accused No. 2 they had reached Agri pada in front of one building alongwith Accused No. 2. That Accused No. 2 had pointed out one green Maruti car parked in the compound of that building. The police had then inspected the car. Finger prints were taken. The car was brought to the police station. The said panchanama is at Exh. 19.

10 P.W. 3 had admitted in the cross-examination that being a hawker dealing with magic items on the footpath, he was acquainted with the police. That he has signed the panchanamas in the van. He appears to be a stock panch of police. It is also admitted that the number plate on the car was missing at the time of panchanama. The memorandum under Section 27 of the Indian Evidence Act was not recorded in this presence. He has also

admitted that at the time of recovery panchanama the face of the Accused was not covered and there was no veil on his face.

11 P.W.4 Narayan Ravi Shetty is panch for the recovery of the green colour Maruti Zen. According to him, the woolen matting inside the dicky had faint blood stains, similarly, other articles such as blue colour plastic bag, plastic sheet and the Tommy. The seat covers were stained with blood. The articles seized were packed in a carton, sealed and labelled. The panchanama is at Exh. 23. It is admitted that the signatures on the labels of the cardboard box were not found. He was a cold drink vendor running a stall near Gateway of India.

12 P.W. 5 Abdul Azis Qureshi and P.W. 6 Ashok Mishra are the panch for recovery of pair of shoes from the Accused No. 1 and the clothes of Accused No. 1 respectively. The panchanama of

seizure of pair of shoes is at Exh. 27 and panchanama in respect of recovery of clothes of Accused No. 1 Sohail is at Exh. 29.

13 P.W. 7 Abu Hasan Vali Mohd. Ansari is the panch for recovery of a cell phone at the instance of the Accused No. 1. The said cell phone was produced by one Lucky to whom the Accused No. 1 had sold the said cell phone. P.W. 7 had identified Accused No. 1 Sohail in the Court.

14 P.W. 8 Arif Ablatif Sayyed is another panch for the recovery of metal lock of Globe company.

15 P.W.9 Dr. Bhalchandra Gopinath Chikhalkar had performed autopsy on the dead body of Madan Phatak at Grant Medical College at J.J. Hospital. The post mortem notes are at Exh. 37. According to P.W. 9, he had noted external and internal injuries in the post mortem reports and after receipt of Chemical

Analysers report he had opined about the cause of death as compression of neck with head injury. All injuries were ante mortem injury. P.W. 9 has specifically opined that death was caused more than 72 hours prior to conducting post mortem.

16 In the cross-examination Dr. Chikhalikar has admitted that blackish thread was found around the neck of the body at the time of conducting post mortem and the same was noted in column No. 8 of the notes of the post mortem. According to him, it is a case of homicidal death. However, the possibility that the injuries could be a result of falling from height under intoxication and that particular part of the body had come into contact with hard and rough substance cannot be ruled out. He has also admitted that the head injuries mentioned in column No. 19 were individually sufficient to cause death. Column 12 of the post mortem notes indicates that maggots were present all over the body.

17 P.W.10 Bascoraj Antiraj Christopher has acted as panch for the recovery of the stolen articles at the instance of the Accused No. 1 Sohail. The Accused No. 1 had led the police and panchas to Nagpada near Maratha Mandir where the Accused had pointed out one jewellery shop where he had sold the gold chain which was adorned by the deceased. The police had seized the chain.

18 P.W.11 Shashidhar Somappa Salian was working as Pool Master in the hotel “Three Flights Up” at Colaba. He has deposed before the Court that he was acquainted with the members who regularly visited the Hotel for playing pool. He was working in the said hotel from 1999 to 2001. According to him, Madan Phatak used to regularly visit the Hotel for playing pool. That on the relevant day, Madan Phatak had introduced Sohail and Shakir to P.W. 11. According to the P.W. 11, on 14/4/2000 he had seen Madan Phatak in the company of Sohail and Shakir in hotel “Three Flights Up”. That on 14/4/2000 at 8 p.m. Madan

Phatak had visited Hotel “Three Flights Up” and had played 2/3 games with P.W. 11 as other members had not yet come. Thereafter, P.W. 11 had left for having meals and when he returned after sometime, he had seen Madan playing with Sohail.

19 While narrating the chronology of events, P.W. 11 stated that after Madan had played 2 to 3 games with Sohail, Sohail had left the Hotel and returned after some time alongwith his friend. Sohail had then introduced his friend Shakir to P.W. 11 and then all three of them had consumed liquor in the hotel and left the Hotel by 11.15 p.m. P.W. 11 has identified the Accused before the Court.

20 On 19/4/2000 the police had recorded the statement of P.W. 11. On 20/4/2000 P.W. 11 was called in Arthur Road Jail to identify the suspect. He had identified 3 suspects in a row where they were standing alongwith 15 to 20 other persons.

21 In the cross-examination, P.W. 11 has admitted following :

(i) There is no register maintained in the hotel to show that Madan Phatak and both the Accused had visited the Hotel “Three Flights Up” on 14/4/2000. That 20 to 25 members were regularly visiting the Hotel “Three Flights Up” for playing Pool game.

(ii) That there are 3 tables in the hotel and that he was incharge of 3 tables alongwith another employee namely, Mandar.

(iii) That near about 10 to 15 minutes is required for completing one pool game.

(iv) That at the time when P.W.11 was playing with Madan Phatak, other members were playing on other pool table. But he could not recollect their names.

(v) P.W.11 has further admitted in the cross-examination that on 17/4/2000 for the first time, he learnt about missing of

Madan Phatak from the Manager of his Hotel namely, Vivek. His statement was recorded on 19th April, 2000 by P.I. Babar and at the time of recording of his statement 3 employees namely Vivek, Alwin and Inayaz were present in the police station. He has admitted that no police officer had visited the hotel. When confronted with his statement, he has stated that he had not disclosed to the police that Madan Phatak, Sohail and Shakir had consumed liquor in the hotel on that date.

(vi) It is also admitted that 4 persons from Hotel namely Vivek, Alwin, Imtiyaz were called to Arthur Road Jail. That his supplementary statement was not recorded after the test identification parade. The witness was confronted with the supplementary statement by the advocate for the defence and he has admitted that the other employees were not present in the police station when his supplementary statement was recorded.

(vii) It is further admitted in the cross-examination that P.W.11 was not acquainted with Shakir prior to 14/4/2000. The

witness was confronted with his statement and omission was marked to the extent that Sohail had revisited the Hotel at about 10.15 to 10.30 p.m. alongwith his friend. It is admitted that after playing pool game Shakir had not revisited the Hotel. That Mandar was not on duty on 14/4/2000 and P.W. 11 was alone handling all the 3 pool tables.

(viii) It is elicited in the cross-examination that in the test identification parade, appearance of 15 persons put for the parade was not similar.

22 P.W. 12 Allauddin Abdul Razak Sah was working as taxi driver and was plying taxi bearing No. MH-01-121 owned by Sah Ulla Khan. He used to drive the said taxi from 6 p.m. to 9 p.m. at Colaba and after 9 p.m. he used to halt at taxi stand near the hotel Three Flights-up. According to him, he had taken Madan Phatak from Colaba to Hindu Colony on 10 to 12 occasion. That Madan Phatak used to be accompanied by his friend Sohail in the

taxi. That he used to drop Madan Phatak at Hindu Colony, Dadar and thereafter, his friend Sohail at Yari Road, Andheri on every occasion.

23 He has further deposed that on 14/4/2000 at about 11.45 p.m. he was waiting for passenger near the petrol pump at the back side of Regal Theatre. He noticed Madan Phatak alongwith Sohail leaving Hotel Three Flights-up. He was expecting that both would engage his taxi. However, at that time, one Maruti Zen of Green colour having dark glasses came from the side of the Hotel Regal and stopped in front of them. He saw Madan Phatak and Sohail boarding the said Maruti Zen car which proceeded towards Regal Theatre. In the meanwhile, his taxi was engaged by another passenger and therefore, he had left the place.

24 Statement of P.W. 12 was recorded on 16/4/2000. Upon being shown the photo of Madan Phatak he has identified

Madan Phatak as the person whom he used to drop at Hindu Colony, Dadar. He has identified Sohail at the test identification parade as well as in the Court.

25 He has admitted that the police had recorded the statement of taxi driver Shakil and the employees of hotel Three Flights-up on 16/4/2000. He has expressed his inability to disclose the name of other passenger like Madan Phatak. He was cross-examined on the point of the procedure adopted while conducting test identification parade and has admitted that upon being asked by the jail police, he had identified the suspect. P.W. 12 has specifically stated that Maruti Zen car had dark window glass and therefore, occupants of the car at the relevant time were not visible. He has also admitted that he had not noted the registration number of the Maruti Zen car at the time when he had seen Madan Phatak and Sohail boarding the said car.

26 According to him, Madan was a regular customer. On 14/4/2000 Madan Phatak was playing pool at 8.30 p.m. and was consuming beer. That Madan Phatak had introduced him to one person whom he identified in the Court as Accused No. 1 Sohail. That on 14/4/2000 at about 11.15 p.m. Madan Phatak had left the Hote in the company of Sohail. On 15/4/2000 wife of Madan had enquired with him about the whereabouts of her husband. On 20/4/2000 P.W. 13 had identified Sohail at test identification parade. There is an omission to the effect that before arrival of the accused Madan Phatak was playing pool with others.

27 P.W.14 Naval Kishor Sav is a material witness since he had last seen the deceased Madan in the company of Soheb. He has deposed before the Court that on 14/4/2000 at about 11.30 to 12 mid night Madan had been to his pan stall and ordered two pan(beetel leaves). He has taken one as a parcel. The witness has identified Sohail as the person who had accompanied Madan at

the relevant time. P.W. 14 was also taken to the Arthur Road Jail for the purpose of test identification parade. According to him, he had identified three suspects. One of them was Sohail, second was Sakir and third one was Ismail. He identified Sohail and Sakir in the Court. According to the witness, Sohail had accompanied Madan to the pan stall, whereas Sakir was seated in the front seat of the car and while departing, Madan and Sohail had occupied the rear seat of the car.

28 It is reiterated in the cross-examination that the Accused No. 1 was seen in the company of Madan Phatak. He had not mentioned the name of Sohail but had given his description.

29 P.W. 15 Sham Patil is the Special Metropolitan Magistrate who had conducted the test identification parade at Arthur Road Jail. According to him, he had conducted the test identification parade in accordance with law. He had recorded

memorandum panchanama of the test identification parade, which is at Exh. 51, which was recorded simultaneously at the time of conducting the parade.

30 P.W. 15 was knowing the names of both the suspects and therefore, had not verified their names. According to him, Sohail has not changed the place at the time of identifying witness No. 6, 7 and 8. He has also admitted certain errors in recording the panchanama. P.W. 15 knew the provisions stipulated in the High Court Criminal Manual for holding test identification parade.

31 P.W. 16 Dipti Phatak is the widow of deceased Madan Phatak. She has deposed before the Court that on 14/4/2000, she had called upon her husband at about 5 p.m. seeking permission to go to Dombivli since their daughter was residing with her parents. He allowed her to go. Upon further enquiry, her husband had informed her that since she is not at home, he would go to Hotel

Three Flights-up, Colaba and enjoy with his friends. She reached Dombivali and again called upon her husband. In their casual discussion, he had informed her that he would wear cream colour shirt and chocolate colour pant and brown colour shoes for the party.

32 She has further deposed that on 15th April, 2000 she made a phone call to her husband and the same was not answered. The cell phone of her husband was switched of.. Their factory at Thane is closed. She reached Dadar at about 12 noon and enquired about her husband. They tried to trace his whereabouts, but could not trace the same and therefore, they decided to lodge a missing complaint. She asked her brother Milind Joshi to lodge a missing complaint. Before the Court she identified the clothes and the accessories of her husband.

33 In the cross-examination, she had admitted that she had not gone to her residence at Dadar on 14/4/2000 but she had gone on 15/4/2000. The missing complaint was filed on the same day i.e. on 15/4/2000. Her statement was recorded by the police on 20/4/2000. She had admitted that 4 to 5 months prior to the alleged incident, she had visited the Hotel Three Flights-up, Colaba alongwith her husband.

34 P.W. 17 Suresh Jain is licensed money lender and his shop was situated at Forest Road, Betwali Chawl. He has deposed before the Court that on 16/4/2000 at about 7 p.m. the Accused Sohail had been to his shop and demanded Rs. 2000/- by mortgaging gold chain which was weighing 12 to 13 grams. He has passed on a receipt in favour of the Sohail. On 23/4/2000 the police from Colaba Police Station had brought Sohail to his shop. At that time, he had produced gold chain, which was mortgaged by Sohail before the police. He had identified the gold chain. The

copy of the receipt is marked at Exh. 55. The witness had shown the register to the police which was signed by the Accused Sohail and the details of the receipt No. 288. Perused the Receipt No. 288 which is signed by the Accused. The defence had tried to make a capital of the overwriting in case of date. However, on the same receipt the date is recorded as 16/4/2000 and is signed by the Accused. The chain weighed 14.400 gms. The receipt clearly establishes the complicity of the Accused Sohail.

35 P.W.18 Mohd. Rajput was working as Mobile Motor Mechanic at Khandala Ghat. According to him, in April, 2000, the Accused No. 1 had approached him for repairing the car which had failed at Mechanic Point, Bhore Ghat at about 3 to 4 a.m. The witness had not noticed registration number of the vehicle. He had changed clutch plate of the vehicle. According to the witness, there were four occupants in the said car, who were referring to one another by their name Sohail, Ismail, etc. He has admitted in

the course of cross-examination that he has no documentary evidence to show that he was working as mobile motor mechanic.

36 P.W.19 Saif Yusuf Jafrani was doing business as hawker on the footpath of Manish market. On 16/4/2000 he was running a Chinese stall at Bohri Moholla. On 24/4/2000 the police had taken Sohail to the house of P.W.19 and it was revealed that Sohail had sold a cell phone to P.W. 19. He has identified Sohail before the Court, but has refused to identify the cell phone which was given to him by Sohail. The said witness has been declared hostile.

37 P.W.20 Sunil Babar was attached to Colaba Police Station as P.I. Crime. According to this witness on 15/4/2000 one Milind M. Joshi had approached Colaba Police Station and lodged a missing complaint of his brother-in-law Madan Phatak. It was registered as Adult Missing Report Registration No. 13/2000. On

16/4/2000 police visited Hotel Three Flights-up and it was revealed that Madan Phatak was taken by his friend Sohail and 3 associates in green Maruti Car Registration No. MH-019080 on 14/4/2000 at about 11.30 p.m. They had recorded the statement of the Assistant Manager of Hotel Three Flights-up, Security staff and two taxi drivers. On 17/4/2000 the police had reached the house of Sohail and recorded statement of his father. On 18/4/2000 Sohail was brought to the police station as they had suspected him. In the course of interrogation Sohail had volunteered to show the place where the dead body of Madan Phatak was thrown by him with the aid of his associates. They were led by Sohail to Tiger Hill point at Lonawala and have traced the dead body of Madan Phatak. It was in a decomposed state. The police had noticed that the deceased was wearing off-white shirt, chocolate colour full pant, wear chocolate colour shoes, brown colour sox etc. as was mentioned in the missing complaint. The witness has stated that Sohail has also disclosed the name of

the co-accused Shakir, Ismail, Ali Abbas. Hence they were arraigned as Accused in C.R. No. 113 of 2000 .

38 P.W. 20 surprisingly submits that he had then registered ADR No. 39 of 2000 and forwarded the dead body to G.T. Hospital for conducting autopsy under the said ADR. According to P.W. 20, he had carried the investigation in accordance with law. He recorded the statement of the witnesses. He has summoned the Chemical Analyser to the police station who inspected the car which was seized in the course of investigation. He has proved the omissions and contradictions in the statement of the witnesses.

39 He has admitted in the course of cross-examination that while recording the missing complaint, the description of the clothes last worn by the missing person was also mentioned. He had proceeded with the investigation of the said crime on

18/4/2000. He had recorded statement of the wife of the deceased on 20/4/2000. That the Accused No. 1 Sohail was in police custody in the intervening night of 18th and 19th April, 2000 and that the Accused was produced before Additional Chief Metropolitan Magistrate, 37th Court, Esplanade, Mumbai on 19/4/2000 and he was remanded in custody till 3/4/2000. Two Accused were juvenile in conflicts with law. It is also admitted that the body was in a decomposed state. It was infiltrated with maggots. The dead body was identified by his friend Dinesh Phatak. The clothes found on the dead body had tallied with the description of the clothes mentioned in the missing complaint. The dead body was also identified by the cousin of the deceased namely Prabhakar Phatak in the hospital. He had seen the Accused to be identified at the time of test identification parade.

40 Upon the perusal of the substantive evidence recorded by the prosecution, it is established by the prosecution that on

14/4/2000 Madan Phatak had visited the Hotel Three Flights-up at Colaba. He had not returned home. His wife was in contact with him. On 15th April, 2000 the brother-in-law of Madan Phatak had lodged a missing complaint and while lodging the missing complaint he had also given description of the clothes last worn by the missing person. That Madan Phatak had left the Hotel Three Flights-up some time after 11.30 p.m. He was seen in the company of Sohail and other friends and had boarded a green colour Maruti Zen car. That they had been to the Pan stall of P.W. 14 who had seen the deceased in the company of Accused No. 1. That the Accused No. 1 had mortgaged a gold chain with P.W. 17 Suresh Jain. The receipt signed by the Accused dated 16/4/2000 is on record which is marked as Exh. 55. P.W. 11,12 and 13 have proved that Madan Phatak was in the company of Accused No. 1 upto 11.30 p.m. on 14/4/2000 and Madan Phatak was missing thereafter. The prosecution has seized the Car No. MH-01 U 9080 and has made an attempt to prove that it was the same car which

was boarded by Sohail and his friend on 14/4/2000. On 16/4/2000 Sohail was summoned to the Police Station for enquiry and in the course of investigation Sohail Accused No. 1 had led the investigating agency to the discovery of the dead body of Madan Phatak. The body was in decomposed state on which there was maggot formation. On the basis of medical evidence i.e. post mortem notes, it is established that Madan had expired more than 72 hours prior to conducting of autopsy on the dead body and the same is proved by P.W. 9. The contents of the post mortem notes are proved by P.W. 9 and the same is marked as Exh. 36.

41 Upon perusal of the substantive evidence of P.W. 11, 12, 13, 14 it is not proved that the Accused No. 2 i.e. Appellant in Criminal Appeal No. 14 of 1997 Shakir Abdul Latif was the person who was driving the Maruti Zen car. None of the witnesses had given the registration number of the Maruti Zen car. The recovery of the said car at the instance of Accused No. 2 under section 27 of

the Indian Evidence Act is not proved as the car was parked in open space. There was no enquiry or investigation in respect of the ownership of the said car. In any case, it is established that the Accused No. 2 was not the registered owner of the said car nor it was parked in front of his house. The evidence of P.W. 18 Mohd. Rajput who claims to have repaired the car in the intervening night of 14th and 15th April, 2000 is also not proved. That he has deposed before the court that he had not noticed the registration number of the said car. It is case of the prosecution that the clothes of the Accused were seized from the house within 3 days of the alleged incident. The complicity of the Accused No. 2 in the said offence is not proved beyond reasonable doubt.

42 It is a case of circumstantial evidence and the incriminating circumstances as against the Accused No. 1 is that the dead body of deceased Madan Phatak was discovered at the instance of Accused No. 1. Hence, it was incumbent upon the

Accused No. 1 to explain the circumstances as to how he had knowledge about the place where the dead body of deceased Madan Phatak was disposed of.

43 The Accused No. 2 was arrested on the basis of the disclosure statement of the Accused No. 1. The manner in which the test identification parade was conducted as far as Accused No. 2 is concerned, would not inspire the confidence of the Court.

44 The learned Counsel for the Accused No. 2 has placed implicit reliance upon the Judgment of the Hon'ble Apex Court in the case of **Aghnoo Nagesia v/s. State of Bihar reported in AIR 1966 (SC) page 119**, more particularly the finding of the Hon'ble Apex Court to the observation which reads thus :

“The law relating to confessions is to be found generally in [ss. 24](#) to [30](#) of the Evidence Act and [ss. 162](#) and [164](#) of the Code of Criminal Procedure, 1898. [Sections 17](#) to [31](#) of the

Evidence Act are to be found under the heading "Admissions". Confession is a species of admission, and is dealt with in ss. 24 to 30. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provision of law. Section 25 is imperative and confession made to a police officer in no circumstances is admissible in evidence against accused. This section covers confession made when he was free and not in police custody as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. A statement or confession made in the course of investigation may be recorded by Magistrate under section 164 of the Cr.P.C. subject to the safeguards imposed by the Section.

45 According to the learned Counsel, the confessions or admissions and the statement of Accused No. 1 as well as Accused No. 2 are inadmissible in evidence and the only material against the Accused No. 2 is disclosure statement of Accused No. 1 and the

recovery of car which is not proved beyond the reasonable doubt. It is also submitted by the learned Counsel that the prosecution has also failed to prove the guilt of Accused No. 1 beyond reasonable doubt as the dead body was discovered while he was in custody.

46 The last submission of the learned Counsel for the Accused No. 2 deserves no consideration in the facts of the present case. The Accused No. 1 was called by the police for the purpose of enquiry and that he had volunteered to show the place where the dead body of Madan Phatak had been thrown. Therefore, it is clear that the said fact was within the exclusive knowledge of Accused No. 1.

47 Section 106 of the Indian Evidence Act, 1872 stipulates as under :

“When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

48 Hence, onus shifts on the Accused and that it was incumbent upon the Accused No. 1 to prove the particular fact. It is not the case of the Accused No. 1 that Madan Phatak had met homicidal death at the hands of some other person and that he had the knowledge of the place where the dead body was thrown or concealed. Hence, it can be safely inferred that the said fact was within his special knowledge. Moreover, the chain adorned by Madan Phatak was mortgaged by the Accused No. 1 soon after the incident with P.W. 17 is duly proved through P.W. 17. Hence, it can be said that the prosecution has proved that the deceased was last seen in the company of Accused No. 1. The circumstances which are proved by the prosecution are incompatible with the innocence of the Accused No. 1.

49 The learned Counsel appointed to espouse the cause of Accused No. 1 has placed reliance upon the Judgment of the

Hon'ble Apex Court in the case of **Jaharlal Das v/s. State of Orisa** reported in (1991) 3 SCC 27. The Hon'ble Apex Court in the said case observed thus :

“It is well-settled that the circumstantial evidence in order to sustain the conviction must satisfy three conditions;

- i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
- iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.”

50 These are settled principles of law. It is true that the Court has to be cautious that the conjecture and suspicion do not

take place of legal proof. In the present case, Pan stall owner P.W. 14 has identified the person who had accompanied Madan Phatak after 11.30 p.m. coupled with the fact that within 3 days dead body of Madan Phatak was discovered at the instance of Accused No. 1 is sufficient to draw a conclusion that Accused No. 1 is guilty of the offence punishable under section 302 read with Section 201 and 34 of the Indian Penal Code.

51 In **Hanumant Govind Nargundkar v/s. State of M.P.** reported in AIR 1952 SC 343, the Hon'ble Apex Court has observed that -

“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 pendency 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.”

That the dead body of Madan Phatak being discovered at the instance of the Accused No. 1 without putting forth any explanation about his knowledge of existence of dead body at the given point, coupled with the fact that there are witnesses, who have stated on oath that Madan Phatak was lastly seen in the company of Accused No. 1 and was not heard of thereafter, is sufficient to prove the guilt of the Accused.

52 The learned Counsel appointed for Accused No. 1 further submits that the Accused No. 1 can be convicted at the

most for the offence punishable under section 201 of the Indian Penal Code and not for section 302 of the Indian Penal Code.

53 That unless the Accused No. 1 had discharged his liability under Section 106 of the Indian Evidence Act, such conclusion would not be permissible in the eyes of law as the onus would shift upon the Accused to establish that he only had the knowledge of the place where the dead body was disposed of. There is only denial at the stage of statement under section 313 Code of Criminal Procedure, 1973 and no explanation under Section 106 of the Indian Evidence Act.

54 That the Accused No. 1 was convicted by a Judgment and Order dated 20/8/2003. He was transferred to Nagpur Central Prison on 9/4/2007. He was released on parole on 14/4/2010 and has not returned to the jail. Hence, Crime No. 190 of 2013 is registered at J.J. Marg Police Station, Mumbai against

the Accused No. 1 for offence punishable under section 224 of the Indian Penal Code. It was in this circumstance that this Court had appointed Mr. Phanse, Advocate to espouse the cause of the Appellant.

55 The learned Counsel appearing for the Accused No. 1 submits that the prosecution has failed to establish the motive on the part of the Accused No. 1 to cause homicidal death of Madan Phatak. In every case, it is not necessary that there should be a motive to cause homicidal death. The motive is psychological factor which is in the mind of the Accused and may not be apparent on the face of the record unless it culminates into action. There is no material on record to show what must have transpired between the Accused No. 1 and deceased Madan Phatak on 14/4/2000 after 11.30 p.m. It is in this circumstance that the onus would still lie upon the Accused to establish the facts within his special knowledge. The motive of the Accused person may not

be known to any other person and therefore, it would be difficult to put forth the evidence as far as the motive is concerned.

56 In the case of **Nathuni Yadav v/s. State of Bihar reported in 1996 Suppl(10) SCR 905**, the Hon'ble Apex Court has observed as follows :

“Motive is the emotion which impells a man to do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crimes.”

57 In a criminal trial it would not be necessary to prove the motive, but the criminal act of the offender itself is an expression of motive. The prosecution has proved the complicity of the Accused No. 1 by establishing the chain of circumstances which eliminates the innocence of the Accused and therefore, it can be safely inferred that the prosecution has proved the case as against the Accused No. 1 beyond reasonable doubt.

58 Post mortem was conducted on 19th April, 2000 and at that time, it was noticed that there was maggot formation. P.W. 9 has specifically stated that post mortem was conducted on 19/4/2000. Dr. Mody in his Medical Jurisprudence and Toxicology has stated thus :

“Flies such as, common houseflies and blowflies, are attracted to the body, and lay their eggs, especially in the open wounds and natural orifices. The eggs hatch into maggots or larvae within eight to twenty four hours during the hot weather. The maggots crawl into the interior of the body and helps in destroying the soft tissues. Some times, maggots appear even before death, if a person has ulcers on him. The maggots become pupae in four or five days, developing through about four stages called instars. The pupae developed into adult flies in the course of three to five days. They are of some help in estimating the time of death; ability to identify the type and knowledge of their exact life history being essential.”

In the present case, missing complaint was lodged on 15th April, 2000, the deceased had spoken to his wife in the late hours of 14/4/2000. The dead body was discovered at the instance of Accused No. 1 on 18/4/2000 and the post mortem was conducted on 19/4/2000. The maggot formation would clearly establish that Madan Phatak had died 4 to 5 days prior to the conducting of post mortem.

59 After going through the facts of the case and submissions advanced by the learned Counsel as well as the learned APP, this Court is of the opinion that no case is made out to interfere in the findings recorded by the Trial Court as against the Accused No. 1. However, the Appellant in Criminal No. 1497 of 2003 deserves to be acquitted by extending to him benefit of doubt. He was in custody from 18/4/2000 till November, 2005.

He was enlarged on bail by this Court vide order dated 27/10/2005. Sentence of fine deserves to be set aside.

60 Before parting with the Judgment, this Court record appreciation for the efforts taken by Mr. Phanse, Advocate appointed to espouse the cause of the Appellant in Criminal Appeal No. 859 of 2006 herein. He is entitled to the professional remuneration as stipulated by the rules.

70 Hence, the following order is passed :

ORDER

- (i) Criminal Appeal No. 859 of 2006 is dismissed.

- (ii) The Judgment and Order dated 27/3/2003 is hereby confirmed in so far as the Appellant/Accused No. 1 Sohail Abdul Rashid Shaikh in Criminal Appeal No. 859 of 2006 is concerned.

(iii) The Appellant-Sohail Abdul Rashid Shaikh in Criminal Appeal No. 859 of 2006 is convicted for offence punishable under section 302, 201 read with section 34 of the Indian Penal Code and sentenced to R.I. for life. Sentence of fine is maintained.

(iv) There shall be a standing non-bailable warrant against Accused No. 1/Appellant in Criminal Appeal No. 859 of 2006.

(v) Criminal Appeal No. 1497 of 2003 is allowed.

(vi) The Judgment and Order dated 27/3/2003 is hereby set aside in so far as the Appellant/Accused No. 2 Shakir Abdul Latif in Criminal Appeal No. 1497 of 2003 is concerned.

(vii) The Appellant-Shakir Abdul Latif is acquitted of all the charges.

(viii) Sentence of fine is set aside.

(ix) The bail bond of Appellant/Accused No. 2 Shakir Abdul Latif in Cri. Appeal No. 1497 of 2003 stands cancelled.

(SMT. SADHANA S. JADHAV,J)

(R.M. SAVANT, J)