

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

CRIMINAL APPEAL NO. 213 OF 2016

1. Firoj Akbar Shaikh,
Age: 36 years, Occu: Business,
2. Jyoti Ganpat Shingade,
Age: 22 yrs, Occu. Household,
3. Raju Bhausahab Dive,
Age: 22 yrs, Occu. Labour Work.
4. Babasaheb Sabaji Bare,
Age: 27 yrs, Occu. Agricultural,

All R/o. Varvandi, Tq. Rahuri,
Dist. Ahmednagar.

... APPELLANTS
(Org. Accused)

VERSUS

The State of Maharashtra,
Through the Police Station Officer,
Rahuri Police Station,
Dist. Ahmednagar.

... RESPONDENT

...
Mr. S. R. Wakale, Advocate for Appellant Nos.1, 2 & 4.

Mr. N. V. Gaware, Advocate with Mr. Shaikh Mazhar A. Jahagirdar,
Advocate for Appellant No.3.

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

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CORAM : **T. V. NALAWADE &
SMT. VIBHA KANKANWADI, JJ.**

RESERVED ON : 24th September, 2018.

PRONOUNCED ON: 04th October, 2018.

JUDGMENT: (Per T. V. Nalawade, J.)

. The appeal is filed against the judgment and order of Sessions Case No.301 of 2013, which was pending in the Court of learned Additional Sessions Judge, Ahmednagar. The Trial Court has convicted all the Appellants for the offences punishable under Section 302 read with 34 of the Indian Penal Code. Each of the Appellants is sentenced to suffer imprisonment for life and to pay fine of Rs.10,000/-.

2 Both the sides are heard.

3 In short, the facts leading to the institution of the appeal can be stated as follows:

Deceased Ganpat Shingade was the real brother of first informant, Subhash. Accused No.2, Jyoti is the widow of Ganpat. Initially, Ganpat was living with Accused No.2 in joint family with

Subhash in Kombadwadi. In front of this house, there is a grocery shop of Accused No.1, Firoj. Deceased, his parents and Subhash used to earn livelihood by grazing sheep and goats and by labour work. They used to remain out of the house for work for entire day. Deceased had two issues aged about 4 years and 3 years at the relevant time. Only Accused No.2, Jyoti used to remain in the house during the entire day.

4 The villagers had noticed that Accused No.1 was visiting the house of Accused No.2 from Kombadwadi when other members of the house were not present and he used to remain there for considerable long time. The villagers informed about it to Ganpat and other members of his family. They realized that Accused No.2, Jyoti had developed illicit relations with Accused No.1. For some time, Ganpat and others tried to convince Accused No.2 to behave well, but the relationship was continued by her. To avoid trouble and more dispute, Ganpat shifted with his family to Khadakwadi situated at some distance from Kombadwadi. At Khadakwadi also, there is house of joint family and there Ganpat started cohabiting with Accused No.2. This was about six months prior to the date of

incident.

5 Accused No.1 continued relations with Accused No.2 and he started visiting the house of Ganpat at Khadakwadi on his motorcycle. Accused No.1 used to take Accused No.2 for drive on his motorcycle and this was also learnt by Ganpat and his brother. Ganpat questioned about this to Jyoti and then she gave threat of life to Ganpat as he was creating obstruction in the relationship. Accused No.1 had given a mobile for the use of Accused No.2 and he used to remain in touch with Accused No.2 by using this mobile phone. Due to this relationship, Ganpat had developed fear in his mind. He had disclosed about the fear to his brother and other relatives.

6 On 29th June, 2013 at about 06:00 pm, Ganpat contacted his brother Subhash on his phone and he requested Subhash to come to Khadakwadi. On his motorcycle, Subhash went Khadakwadi at 07:30 pm. Ganpat disclosed that on that day also he had seen Accused No.1 near his house and when he had questioned Accused No.1, Accused No.1 gave threat of life to him. Subhash somehow convinced Ganpat that nothing will happen.

7 After having talk with Ganpat when Subhash was returning to Kombadwadi, at Varvandi Shivar in the headlight of the motorcycle, he noticed that Accused Nos.1, 3 and 4 were present together and Accused No.1 was having his passion motorcycle and there was a white rope in his hand. He had eye contact with Accused No.1 and he felt that Accused No.1 was looking at him with anger. He returned to Kombadwadi and went to bed.

8 At 12:23 hours of night between 29th June, 2013 and 30th June, 2013, Accused No.2 contacted Subhash on phone and she informed that Ganpat was on bed, but he was not making any movement. Subhash rushed to Khadakwadi. Only Accused No.1 was present in the house and she was crying. Subhash realized that Ganpat was dead and he called his parents and others to Khadakwadi. Somebody from Khadakwadi informed to police. Police visited the house of Ganpat and shifted the dead body for postmortem examination after completing formalities.

9 On 30th June, 2013, postmortem was conducted on the

dead body of Ganpat and opinion was given that the death took place due to strangulation and due to injury caused on head. In the hospital, three persons like Manik Thorat, Bhaskar Kale and Sopan Shingade informed Subhash that on the previous night at about 12:15 hours when they were proceeding on the motorcycle and when they were by the side of the house of Ganpat, they had seen all the Accused near the house of Ganpat and they had seen them in headlight of their motorcycle. After learning about this incident, Subhash approached police and gave report against all the Accused. Crime came to be registered at 12:00 noon on 30th June, 2013 for the aforesaid offence.

10 During the course of investigation, all the four Accused came to be arrested. Spot *Panchanama* was prepared. During investigation, Accused no.1 gave statement and on that basis, ligature material, rope used for the offence was recovered. Clothes of Accused Nos.1 to 3 were recovered. Blood was detected on their clothes. Statements of aforesaid witnesses came to be recorded. Articles taken over were sent to C.A. office. It transpired that the murder was committed in the house of Ganpat from Khadakwadi and

Ganpat was assaulted first by hitting a metal pot on his head and then he was strangled. It also transpired that on 29th June, 2013, Accused Nos.3 and 4 were in the company of Accused No.1 immediately prior to the incident and they had visited a hotel together. Statements of persons from hotel came to be recorded. Charge-sheet was filed for the aforesaid offence.

11 All the four Accused pleaded not guilty when the charge was framed and plea was recorded. Prosecution examined in all 13 witnesses to prove the offence. In the statement given under Section 313 of the Code of Criminal Procedure, Accused No.2, Jyoti admitted that on the evening of 29th June, 2013 Subhash was called to the house by Ganpat and she had also called Subhash in midnight hours. She, however, contended that Subhash had evil eye on her and as she did not allow him to have physical relations with her, she and others are falsely implicated. The other Accused took the defence of total denial.

12 The Trial Court has believed all the prosecution witnesses. The Trial Court has given conviction on the basis of

evidence given on following circumstances:

- a) Motive, illicit relations between Accused No.1 and Accused No.2;
- b) Disclosures made by Ganpat to Subhash about fear developed in his mind as the threats were given by Accused Nos.1 and 2 to him;
- c) The last disclosure made to Subhash on 29th June, 2013 by Ganpat;
- d) Evidence of Subhash that he had seen Accused Nos.1, 3 and 4 together on 29th June, 2013 at 09:30 pm, when he was returning from Khadakwadi to Kombadwadi;
- e) Evidence of a witness from hotel to the effect that Accused No.1 had visited hotel on that night and Accused Nos.3 and 4 were in his company;
- f) Evidence of a witness, who had seen all the Accused together near the house of Ganpat at the relevant time;
- g) Evidence of discovery of rope on the statement given by Accused No.1 and the presence of human blood on

the rope;

- h) Evidence of recovery of clothes of Accused Nos.1 to 3 and presence of human blood on the clothes; and
- i) The circumstance that murder was committed in the house where Accused No.2 was cohabiting with Ganpat and she has not given explanation about the cause of death.

13 In the statement given under Section 313 of the Code of Criminal Procedure, Accused Nos.1 and 2 have denied that it is homicide. They have gone to the extent in saying that it was not homicide, but false record is created by police by joining hands with Subhash and others to show that Ganpat died homicidal death.

14 There is evidence of Sambhaji Garde (PW-3) Panch witness to prove the inquest *Panchanama* in respect of dead body of Ganpat. It was prepared in Rural Hospital, Rahuri. He has given evidence that there was head injury, which was bleeding and there were marks like nail marks on the face. He has given evidence that there was ligature mark circle encircling the neck and accordingly,

inquest *Panchanama* at Exhibit-40 was prepared. He has admitted in the cross-examination that Subhash, brother of deceased was present when the *Panchanama* was prepared. It is suggested to him that there was no ligature mark around the neck and there was no injury on the dead body, but these suggestions are denied. The inquest *Panchanama* at Exhibit-40 was prepared on 30th June, 2013 between 08:15 am and 08:45 am. The contents of this document are consistent with the substantive evidence. The dead body was identified by Subhash. The *Panch* witnesses are from Varvandi. There is no suggestion to show as to how and whether these witnesses had interest in the matter. There is virtually no reason to disbelieve these witnesses.

15 Dr. Rajendra Vairagar (PW-11) did the postmortem examination in the Rural Hospital, Rahuri. His substantive evidence and the postmortem report at Exhibit-67 show that the postmortem was conducted between 09:45 am and 10:45 am on 30th June, 2013. He found four surface wounds on the dead body and they were *ante-mortem* in nature. They were as under:

- “(1) There was ligature mark encircling neck, horizontally, below thyroid cartilage with multiple abrasions, anteriorly below the ligature mark having size of 9” x 1/4th inch with ecchymosed subcutaneous areolor issue.
- (2) There was CLW on left temporal region having size 1.5” x 1”.
- (3) There was CLW over left temporal region 1” x 0.5” parallel to second injury, edges were ragged.
- (4) There was a CLW over left infra-orbital region, one inch below left medium canthus 1” x 0.25”.”

16 The doctor has given evidence that the face was congested, eyeballs were prominent, there was froth having blood coming from the mouth and according to the doctor (PW-11), these were the signs of asphyxial death.

17 Doctor (PW-11) noticed subaponeurotic hematoma extending to parietal region due to the head injury. On the basis of these circumstances, the doctor has given evidence that the death took place due to aphasia due to strangulation with head injury. The postmortem report Exhibit-67 is duly proved in his evidence. He has given evidence that the aforesaid surface injuries associated with the

internal injuries are sufficient to cause death in ordinary course of nature.

18 Dr. Rajendra (PW-11) has given evidence that the rope, article 10 shown to him can cause aforesaid injury (1) mentioned by him in postmortem report and this injury No.1 is in itself sufficient to cause death in due course. Dr. Rajendra (PW-11) has given evidence that the injury Nos.2, 3 and 4 mentioned above can be caused, if article 3, metal pot is hit from edge side. Thus, both the articles, which were allegedly used as weapons were shown to the doctor and he has given evidence of aforesaid nature.

19 In the cross-examination of PW-11, it is brought on record that he noticed struggle marks on the dead body, which were multiple abrasions below ligature mark. No suggestion is given to this doctor that there were no such injuries though defence of aforesaid nature is taken in the statement under Section 313 of the Code of Criminal Procedure. There is no reason to disbelieve this doctor and the Trial Court has rightly believed the evidence of inquest *Panchanama* and the evidence given by Dr. Rajasthan (PW-11). This evidence is more

than sufficient to prove that it is a case of homicide.

20 The defence has not disputed that the death took place in the house of Ganpat. The spot *Panchanama* (Exhibit-33) is proved in the evidence of Anna Kale (PW-1). He is resident of Khadakwadi. In his evidence, spot *Panchanama* is proved and he has given substantive evidence on the things seen by him. His evidence and Exhibit-33 show that a pot having blood stains was found there. His evidence shows that there was a quilt and pillow having blood stains. Articles like the pot, pillow and quilt are identified by him in the substantive evidence. When the spot *Panchanama* was prepared between 13:15 hours and 14:40 hours on 30th June, 2013, there was no dead body as it was already shifted.

21 Panch witness Anna Kale (PW-1) was cross-examined by defence to bring on the record circumstances like distance between the road and house etc. As Exhibit-33 is proved in his evidence, the contents of this document describing the house and surroundings can be read in evidence.

22 The spot *Panchanama* Exhibit-33 shows that at the distance of about 100 feet from the house of the deceased, there is a cartway called as Varvandi / Mula Dam road. On eastern side, there was a big courtyard and beyond that there was a house of one Dharma Barde. On the backside of this house, there was a grocery shop and house of Gangaram Shinde, which was on western side. On southern side, there was house of Vithal Barde facing towards north and on southern side, there was a big open space and beyond that the aforesaid east-west Varvandi / Mula Dam road.

23 In the statement given under Section 313 of the Code of Criminal Procedure, Accused No.2 has specifically contended that on that night, deceased returned to home when she was sleeping and the deceased had gone to bed. She has contended that at about 12:00 hours of the night when she woke up, she attempted to wake up the deceased, but he was not making any movement and so she called Subhash, brother of deceased by calling him on mobile phone. Though she has tried to say that when Subhash came to their house in the night time to see as to what had happened, there were no injuries on the dead body, this contention cannot be given much

weight as her statement shows that only she could have noticed as to who had inflicted injuries to the deceased in that house, may be before arrival of Subhash, before 12:00 hours of the night or after arrival of Subhash. Due to these circumstances, the burden was heavy on Accused No.2 to explain the things. The provisions of Section 106 of the Evidence Act is clearly applicable against Accused No.2 and as she has not offered plausible explanation, the inference can be drawn against her as provided under Section 114 of the Evidence Act.

24 Subhash (PW-4), first informant, has given evidence on motive. He has deposed that in the past, Accused No.2, deceased and their children were living with him in village Kombadwadi. He has deposed that Ganpat used to do labour work at that time and he used to remain out of the house for entire day. He has given evidence that grocery shop of Accused No.1 is situated in front of their house from Kombadwadi and he was personally running the shop. He has deposed that he and his parents used to remain out of the house as they were grazing sheep and Accused No.2, Jyoti used to remain in the house alone. He has deposed that the villagers like Tukaram

Kadam and Sopan Shingade had informed that Accused No.1 was visiting their house when Ganpat and others used to remain out of the house. He has given evidence that he had also personally seen Accused No.2 having talk with Accused No.1 in their house and also in the grocery shop. He has deposed that they believed that Accused No.2 and Accused No.1 had physical relationship. He has given evidence that when Ganpat realized that there was such relationship, to avoid further harassment, he shifted to Khadakwadi. He has given evidence that Accused No.1 kept visiting the house of Ganpat even at Khadakwadi and when Ganpat realized that, he questioned Accused No.1 about that. He has given evidence that 15 days prior to the date of incident, Ganpat had disclosed to him the incident, in which Accused No.1 had given threat of life to Ganpat when Ganpat had questioned to him. He has given evidence that he had seen personally Accused No.1 taking Accused No.2 for drive on his motorcycle and he had seen Accused No.2 using mobile handset. He has given evidence that they had then realized that the mobile handset was given by Accused No.1 to Accused No.2 and they realized that Accused No.1 and Accused No.2 were in touch with each other. He has given evidence that due to this relationship and

conduct of Accused No.1, Ganpat had become frightened.

25 Subhash (PW-4) has given evidence that on the day of incident i.e. on 29th June, 2013, Ganpat called him on phone and requested him to come to Khadakwadi. He has deposed that he reached there at 07:30 pm and at that time Ganpat and Accused No.2 were present in the house. He has given evidence that Ganpat disclosed that on that day he had noticed Accused No.1 near his house and when he had questioned Accused No.1 about his conduct, Accused No.1 had given threat to finish him as Ganpat was proving to be obstacle in the relationship of Accused No.1 and Accused No.2. He has given evidence that Ganpat told that he was very much frightened. Here only it needs to be mentioned that Accused No.2 has admitted in the written statement given under Section 313 of the Code of Criminal Procedure that Subhash (PW-4) had visited their house on that evening.

26 Subhash (PW-4) has given evidence that he left Khadakwadi at 09:30 pm on 29th June, 2013 for his house and on the way, near Hindustan Agro. Company Limited office, he noticed that

Accused Nos.1, 3 and 4 were present on the road and they were having some talk. He has given evidence that he had seen white rope in the hands of Accused No.1 on that night and he felt that Accused No.1 was looking at him with anger. The exact distance between the spot where (PW-4) noticed these Accused from the house of deceased is not given, but evidence is given that they were on the road and they were together. This circumstance is used by the Trial Court for convicting Accused Nos.3 and 4 also by using Section 34 of the Indian Penal Code.

27 Subhash (PW-4) has given evidence that on that night when he received call of Accused No.2 that Ganpat was not making any movement, he went to Khadakwadi on his motorcycle. He has deposed that when he saw Ganpat, he noticed that Ganpat was dead and he noticed ligature mark on his neck and some injuries on his face. He has given evidence that he then called his parents and other persons were also called and a person by name Vilas Gaikwad from Khadakwadi informed to police about the death of Ganpat and then police come to the house of Ganpat. He has given evidence that in the morning he gave report about the death of Ganpat, which is at

Exhibit-44. Accused No.2 has not disputed that on that night she had called Subhash to her house after midnight hours. The record shows that the police reached before giving of report including A.D. report. This circumstance shows that a person of that locality had informed police about the death of Ganpat. This circumstance shows that everybody was sure that Ganpat was murdered and that is why the person of that locality had contacted police.

28 Exhibit-44, first report given by Subhash (PW-4) to police shows that after 12:30 hours of that night when he noticed that Ganpat was not making any movement, he went to parents to call them. He has given evidence that the neighbours had also gathered in the house of Ganpat and after some time police came and police shifted the dead body of Ganpat to the hospital of local body. In Exhibit-44, he had requested the police to make inquiry about the death of Ganpat. This report was registered by police at 07:15 am on 30th June, 2013. It is surprising that in this report even suspicion was not expressed by him against Accused No.2 and Accused No.1 and the injuries were not mentioned. Against Subhash allegations are made by Accused No.2 that Subhash had evil eye on her. The

circumstance that the motive was not mentioned in Exhibit-44 by Subhash creates doubt about his knowledge about motive and so his evidence about motive needs close scrutiny. Similarly, his evidence against Accused Nos.1, 3 and 4 that they were together on that night and he had seen them on the road also needs close scrutiny.

29 Subhash (PW-4) has given evidence that after giving A.D. report, Exhibit-44, he went to Rahuri Municipal Hospital where the dead body was taken for postmortem examination. He has given evidence that there he learnt from the doctor that the death took place due to head injury and strangulation. There is one more circumstance like preparation of inquest report in the hospital itself and not in the house of the deceased. The spot *Panchanama* at Exhibit-33 shows that there were electronic gazettes like T.V. in the house and there was one bulb showing that there was supply of electricity. The spot *Panchanama* was prepared between 13:15 hours and 14:40 hours on 30th June, 2013. Thus, the dead body was shifted in the night time and it was submitted for State that there is possibility that the injuries, which were on the dead body were not that clearly visible when the dead body was being shifted from the house of Ganpat to the hospital

of local body. It can be said that the police did not act competently, but it cannot be said that they were not fair to the Accused. These circumstances need to be kept in mind while considering the evidence given by Subhash (PW-4) that he realized only after the information supplied by doctor that the death took place due to head injury and due to strangulation. This does not explain as to why Subhash did not even express suspicion against Accused Nos.1 and 2 when he gave report at Exhibit-44. It can be said that the metal pot was hit on the head first, which caused the surface injuries mentioned above on the head and then there was strangulation. There was bleeding from head injuries and there were injuries even on face. These circumstances also rule out the possibility that Accused No.2 did not know as to who had assaulted the deceased on that night.

30 Subhash (PW-4) has given evidence that in the hospital of Municipality, persons like Manik Thorat, Bhaskar Kale and Sopan Shingade met him and they told him that at about 12:15 am on that night when they were proceeding on their motorcycle towards dam and when they had reached near the house of deceased, in the headlight of their motorcycle, they had seen Accused No.2, Accused

No.1 and other two Accused standing in front of the house of Ganpat. They had informed him that when the focus of the headlight of the motorcycle fell on these persons, they attempted to hide their faces. Subhash has given evidence that after this information when he realized that Ganpat was murdered due to illicit relations of Accused No.1 with Accused No.2, he gave report against them. The report at Exhibit-45, which was treated as FIR is proved in his evidence and it is consistent with the substantive evidence of Subhash (PW-4).

31 In the cross-examination of Subhash (PW-4) questions are asked about the presence of two issues of Ganpat in the house, but he has given evidence that he cannot say as to whether they were present in the house on that night. On this point, Accused No.2 could have said something, but she had not said anything. In any case, they were kids and considering their age, it cannot be said that there were reasons for them to wake up from sleep, if they were present in the house on that night. Their age was below 5 years.

32 In the cross-examination, Subhash (PW-4) has admitted that on that night police came to the house of Ganpat, but he did not

make complaint to police about the death. In his evidence, it is brought on record that the office of Hindustan Agro. Company Limited is situated at a distance from Khadakwadi. It is also suggested to him that he did not visit the house of Ganpat on 29th June, 2013 at 07:30 pm and it is denied by him. It is already observed that Accused No.2 has admitted that at 07:30 pm Subhash had visited their house as he was called there. It is also suggested to him that he did not visit the house of Ganpat at 12:23 hours on that night and it is also denied by him. The cross-examination shows that only suggestions are given in respect of substantive evidence given in chief examination by Subhash and they are all denied by him.

33 There is circumstance that Accused Nos.1, 3 and 4 had engaged the same counsel for their defence. There is other circumstance like the counsel for Accused No.2 adopted the cross-examination made by the counsel for Accused Nos.1, 3 and 4. Thus, no separate defence was taken during the cross-examination of Subhash for Accused No.2 and no suggestion was given to him with regard to the contentions made against Subhash in the statement given under Section 313 of the Code of Criminal Procedure.

34 Bhaskar Kale (PW-7) is other important witness of prosecution. He is resident of Varvandi, which is a part of Khadakwadi. He has given evidence that he knew Ganpat, his brother Subhash and their family from the time when they were living at Kombadwadi. According to him, he knew Accused No.1, Firoj also and the physical relations, which Accused No.1 had with Accused No.2. He has given evidence that in the absence of Ganpat, Accused No.1 used to visit the house of Ganpat from Khadakwadi and he used to take Accused No.2 for drive on his motorcycle. He has given evidence that he knew that Accused No.1 had given threat of life to Ganpat and this fact was disclosed by Ganpat to him. He has given evidence that Accused No.2 used to give abuses to Ganpat and she had also given threat of life to Ganpat and that thing was also disclosed by Ganpat to him. Thus, PW-7 has given evidence on motive as against Accused Nos.1 and 2. The tenor of cross-examination shows that the defence is not disputing that he is resident of Khadakwadi and he knew the family of Ganpat. Though the distance between his house and the house of Ganpat is said to be around 1 to 1.5 kilometer, the circumstances already discussed and

the evidence given by this witness that total population of the village was hardly 800, it can be said that the distance between the two houses of the village was comparatively more.

35 Bhaskar Kale (PW-7) has given evidence that on 30th June, 2013 after midnight hours, he, Sopan and Manik were proceeding on one motorcycle towards Mula dam side and when they were passing by the side of house of Ganpat, they noticed that all the four Accused were present in front of the house of Ganpat. He has given evidence that in the focus of the headlight of the motorcycle, he could see all the Accused and after the focus was there of the headlight, they tried to hide themselves. He has given description of clothes of Accused No.1 by saying that he was wearing yellow colour jerkin. This description can be important as there is circumstantial evidence with regard to recovery of clothes of Accused No.1. However, the clothes seen in the past also can be described at the time of giving evidence on such incident. This evidence is relevant as Accused No.2 has come with specific case that after 12:00 hours of that night, she had contacted Subhash to inform him that Ganpat was probably dead. Further, Subhash (PW-4) has given evidence that

from these three persons, he learnt that Accused Nos.1, 3 and 4 were present in front of the house of Ganpat on that night before the information was given to him by Accused No.2. This information was incorporated by Subhash in the FIR. The police statement of Bhaskar Kale (PW-7) was recorded on 30th June, 2013 itself and he gave statement under Section 164 of the Code of Criminal Procedure before the Magistrate on 20th July, 2013. The said statement is proved as Exhibit-52 and it is consistent with the version given by PW-7 in the Court. It corroborates the version of PW-7.

36 In the cross-examination of Bhaskar Kale (PW-7), he has fairly admitted that Ganpat was his friend and he had visited the hospital where the dead body of Ganpat was taken. In the cross-examination, he has admitted that he disclosed the incident even to police after 07:30 am on 30th June, 2013. FIR is shown to be recorded first. Surprisingly, suggestion is given to him that he and his two friends had committed murder of Ganpat and he was arrested by police on 30th June, 2013. These suggestions are denied and there is nothing of that sort on the record. His evidence shows that he knew all the four Accused. The distance between the road and the house

of Ganpat is around 100 feet. It was night time and so it was necessary for this witness to explain as to how or why focus of the headlight of the motorcycle went towards the house. It is true that Accused Nos.3 and 4 had no motive similar to the motive, which Accused Nos.1 and 2 had. So evidence as against Accused Nos.3 and 4 need to be convincing.

37 The evidence of Bhaskar Kale (PW-7) creates one probability that after learning about the aforesaid incident from Bhaskar Kale (PW-7), Subhash created incident, a circumstance that he had seen Accused Nos.3 and 4 in the company of Accused No.1 after 09:30 pm, when he was returning to Kombadwadi from Khadakwadi. Thus, there is possibility that Subhash (PW-4) tried to exaggerate the things by saying that he had also seen Accused Nos.1, 3 and 4 together on that night. The time gap between the time when Bhaskar had seen them together and Subhash had allegedly seen them together, was quite big, of more than 2 hours and this circumstance also needs to be kept in mind. Further, there is no concrete evidence on the exact distance between the company named by PW-4 and the house of Ganpat. The distance between

Kombadwadi and Khadakwadi was few kilometers and the said company is situated on the way leading to Khadakwadi from Kombadwadi.

38 The prosecution has examined one more witness Rajkumar (PW-8) to give evidence that Accused Nos.1, 3 and 4 were together on 29th June, 2013. Rajkumar runs hotel Ganraj and he knew Accused No.1 from prior to the date of incident as Accused No.1 was his customer. He runs a bar also and it is on Nagar-Manmad highway in Nandgaon Shivar.

39 Rajkumar (PW-8) has given evidence that on that day, he was present in the hotel and he was sitting at the counter. He has deposed that at 07:45 pm, Accused Nos.1, 3 and 4 came together to his hotel and they occupied table No.14 from the hotel. He has given exact distance between the counter and the said table as 15 feet in the cross-examination. He has given evidence that these Accused placed order of two beer bottles, cigarettes, snacks and two boiled eggs. He has given evidence that waiter by name Vijay served them. He has given evidence that all the edibles were finished by Accused

and they paid bill of Rs.388/-. He has given evidence that he had prepared bill and it was issued to the Accused. The bill is given Exhibit-61.

40 The evidence of Rajkumar (PW-8) shows that his statement was recorded on 10th July, 2013 as during interrogation, Accused No.1 had taken police to his hotel to show the place of incident, visited on that day. He identified all the three Accused in the Court. In the cross-examination, he has admitted that when police had brought the Accused to his hotel, their names were given by police to him and accordingly, he stated the names of the Accused. He has not specifically stated that he knew Accused Nos.3 and 4 and so from that angle, the evidence of this witness needs to be scrutinized carefully. Unfortunately, the distance between the hotel of Rajkumar and Khadakwadi is not given. But it can be said that they left his hotel at 08:46 pm on 29th June, 2013 if the bill at Exhibit-61 is believed and used in the case. His evidence does not show that Accused No.1 was wearing yellow jacket and was holding cotton rope.

41 Witness Baba Deokate (PW-9), maternal uncle of the

deceased is examined by the prosecution to give evidence on motive. He has given evidence that he knew about the physical relationship between Accused No.1 and Accused No.2 and the deceased had talked about it with him on many occasions. He has given evidence that the deceased had disclosed that Accused No.2 had also given threat of life to him. This disclosure was made about 1 to 1.5 months prior to the incident in question. He knew Accused No.1 from prior to the date of incident as shop of his sister, mother of deceased is situated in front of the house of Accused No.1. His evidence in the cross-examination shows that he knew everything about the family matters of Subhash and Ganpat and his evidence is consistent with the evidence of Subhash. In the cross-examination, he has stated that the distance between Kombadwadi and Khadakwadi is around 4 kilometers.

42 Arjun Yele (PW-2) is examined by prosecution to prove the seizure of clothes of deceased and also seizure of mobile handsets of Babasaheb (Accused No.4) and Firoj (Accused No.1). He has given evidence that the clothes of the deceased, which were already with police were seized under *Panchanama* Exhibit-35. The

mobile handset of Accused No.1 was seized under Exhibit-37 and it was produced by Accused No.1 on 30th June, 2013 itself. He has given evidence that the mobile handset of Accused No.4 was seized on 30th June, 2013. The time of seizure of two mobiles is given as 07:30 pm of 30th June, 2013. There is evidence on seizure of mobile handset, which was in the custody of Accused No.2 and that evidence is given by Rajendra Ingale (PW-12), API, who made the investigation. That *Panchanama* is proved at Exhibit-84. The description of IMEI number and simcards, which were present in the three mobile handsets is given in the *Panchanama*. Unfortunately, the investigating agency did not collect CDR record in respect of simcards, which were found in the three mobile handsets and also the record of mobile location and so there is no need to discuss this evidence more.

43 Two *Panch* witnesses Janardhan Hiware (PW-5) and Baban Jadhav (PW-6) have turned hostile. They were expected to give evidence on the incident of seizure of ligature material, rope on the basis of statement given by Accused No.1 and seizure of clothes of Accused persons. The evidence is given on these seizures by

investigating officer, Rajendra Ingale (PW-12).

44 The evidence of Ingale (PW-12), API, who made investigation shows that he arrested Accused Nos.1, 2 and 4 on 30th June, 2013. *Panchanamas* of arrest are proved at Exhibits 70, 71 and 72. Similar evidence is given by PW-12 in respect of arrest of Accused No.3 and he was arrested on 1st July, 2013 under *Panchanama* proved at Exhibit-73. This record is not disputed by the defence. In the record, the addresses of these Accused are shown as Varvandi, Tahsil Rahuri and the evidence on record shows that it is in the vicinity of Khadakwadi.

45 Ingale (PW-12) has given evidence that Accused No.1, Firoj while in custody gave statement to him on 2nd July, 2013 that he was ready to produce his motorcycle, his cloths and a rope. He has deposed that the memorandum of this statement was prepared by him in the presence of *Panch* witnesses and the memorandum is proved at Exhibit-74. It is already mentioned that *Panch* witnesses have turned hostile, but they have admitted their signatures on this memorandum.

46 Ingale (PW-12) has given evidence that on 2nd July, 2013, Accused No.1 took Police and *Panchas* to his village, Varvandi and there he showed his house and from there motorcycle of Accused was recovered and seized. He has deposed that Accused No.1 then took Police and *Panchas* to a cart, which is described as a vehicle and which is generally used by Benjo party (music band party). This vehicle was present in the vicinity of house of Accused No.1 and evidence is given by PW-12 that it was found covered with plastic cover and after removing plastic cover, Accused No.1 produced articles like pant, shirt, jacket and cotton rope. PW-12 has given evidence that all these articles were seized by him under *Panchanama* at Exhibit-75. The evidence of (PW-10) Ganesh Choudhary is given to show that all the articles from the present matter were carried by him on 30th July, 2013 to C.A. office with covering letter at Exhibit-64. Exhibit-64 shows that articles were reached to Nashik C.A. office on 31st July, 2013. The carrier constable is not cross-examined by the defence counsel.

47 The evidence of covering letter at Exhibit-64 and C.A.

report at Exhibit-71 show that articles 8 to 11 were produced by Accused No.1 as per the statement given under Section 27 of the Evidence Act. All these articles were having human blood as per the C.A. report. The blood group could not be detected.

48 Both the *Panch* witnesses have turned hostile and there is evidence of only PW-12, police officer on the statement given by Accused No.1 under Section 27 of the Evidence At. Further, these articles were sent to C.A. office after more than 25 days of recovery. No explanation at all is given on the delay caused in sending the articles to C.A. office. Though Dr. Rajendra (PW-11) has given evidence that the ligature mark found on the neck of the dead body can be caused by article 10, rope of the present matter, the width of the rope is not on record and it is not described in the *Panchanama* of seizure. In the postmortem report, the length of ligature mark is given as 9 inches and the width is given as 1/4 inches. The seizure *Panchanama* shows that rope had 4 twists. There is no such description in the ligature mark of postmortem report. The police had not sent this rope to doctor to obtain the opinion and the doctor gave evidence first time as the opinion in the Court. All these

circumstances have created doubt about the evidence given on the statement of Accused No.1 under Section 27 of the Evidence Act, on recovery of these articles and also on the opinion given by the doctor in respect of use of this rope as ligature material. In view of description of rope, photograph of ligature mark and further description of ligature mark was necessary.

49 Ingale (PW-12) has given evidence that on 10th July, 2013, Accused No.1 gave one more statement under Section 27 of the Evidence Act and he showed willingness to show the person from whom the simcard was purchased by him, which was allegedly given to Accused No.2 by him. Memorandum is produced at Exhibit-87. The evidence is also given by PW-12 that Accused No.1 had taken police to a person by name Imbran Khan of Rahuri. Said person is not examined. Though one simcard is shown to be recovered with mobile handset on the basis of statement given by Accused No.2 under Section 27 of the Evidence Act, no corresponding record was collected by police like ownership of that simcard, tower location and also CDR record. In view of these circumstances, this part of evidence given as against Accused No.1 is of no use to the

prosecution. Some evidence is given by the prosecution on the recovery of mobile handsets from all the Accused, but there is no connecting evidence in respect of those simcards or mobile handsets. This material was collected very late after arrest and further the relevant record in respect of mobile handsets and simcards is not collected by police and so no more discussion in respect of that material is necessary.

50 Ingale (PW-12) has given evidence against Accused No.1 that on 10th July, 2013, after giving statement under Section 27 of the Evidence Act (Exhibit-87), Accused No.1 took police and *Panchas* to one hotel from Nandgaon Shivar. He has deposed that witness by name Rajkumar, owner of the hotel produced a copy of receipt allegedly given to Accused No.1 in respect of articles served to him on 29th June, 2013. The *Panchanama* of seizure of that copy of receipt dated 29th June, 2013 is at Exhibit-88.

51 Rajkumar (PW-8) has given evidence that on 29th June, 2013, Accused Nos.1, 3 and 4 had visited his hotel together. He has given evidence that he knew Accused No.1 form prior to 29th June,

2013. He has deposed that on that day, when these Accused visited his hotel, articles ordered by them were served and they left the hotel at 09:30 pm. Exhibit-61 is the copy of the said receipt, but it does not bear the certificate as required under Section 65-B of the Evidence Act. On the basis of this receipt, it cannot be said that this receipt was prepared on 29th June, 2013 and it was for Accused No.1. Printout of the record of computer for entire week ought to have been produced alongwith certificate and only after that Court could have considered this circumstance. Further, there is no evidence given about the period for which the owner was preserving this record and when he used to change the numbering. In absence of such evidence, not much weight can be given to Exhibit-61 and also the oral evidence given by the hotel owner. Further, Exhibit-61 shows that one Vijay, waiter attended the persons to whom bill was issued, but that Vijay is not examined. He could have been the best witness to give evidence against Accused No.1 and also other two Accused. It was night time and there was beer bar attached to the hotel. Bill number is 3876 and particulars like bill number, date, time, items ordered, mode of payment, rate and total amount are all typed. No matter is self generated. Due to this lacuna, there is serious doubt about the record

of bill prepared by this hotel and the substantive evidence given by Rajkumar.

52 Ingale (PW-12) has given evidence on the statement given by Babasaheb (Accused No.4) under Section 27 of the Evidence Act. Memorandum is at Exhibit-76 and the statement was given on 3rd July, 2013. PW-12 has given evidence that Accused No.4 then took police and *Panchas* to his house from Varvandi and from there he produced his clothes like T-shirt and pant and they were having blood stains. Seizure *Panchanama* is proved at Exhibits 77, 78 and 79 (separate portions of same *Panchanama* are separately exhibited). C.A. report in respect of these articles shows that human blood was detected on these articles. The circumstances, which have created doubt about the similar evidence given as against Accused No.1 are already quoted and for the same circumstances, this Court holds that the evidence given as against Accused No.4 on this circumstance is also doubtful in nature. PW-12 has given similar evidence as against Accused Raju (Accused No.3). Memorandum of his statement is at Exhibit-80 and *Panchanama* of seizure of his clothes like shirt and pant is at Exhibits 81 to 83. For the same

reason, this Court holds that this piece of evidence given as against Accused No.3 is doubtful in nature and it cannot be safely accepted as reliable.

53 The evidence of Rajkumar (PW-8), hotel owner, does not show that he had noticed that Accused No.1 was wearing yellow jacket or he was carrying yellow jacket and he was holding a rope. The evidence of Bhaskar (PW-7) shows that he was on motorcycle when he was proceeding by the side of the house of deceased. No specific evidence is given as to whether he was riding the motorcycle or he was pillion rider. It needs to be kept in mind that as per the version of Bhaskar, they were three persons on one motorcycle. There was no facility of street light on the road and it is not the evidence that in the courtyard of the house of deceased, there was facility of any light. The *Panchanama* shows that inside of the house, there was facility of light.

54 No evidence is given by prosecution in respect of land of three persons, who according to Bhaskar were present on the motorcycle. There is no evidence of electricity meter showing that

they had taken connection for their land. There is no evidence to show that there was availability of water at the relevant time at the dam for irrigation purpose. The distance between the road on which motorcycle of Bhaskar (PW-7) was present and the house of Ganpat was around 100 feet. There is nothing on record due to which inference can be drawn that focus of headlight of the motorcycle of Bhaskar had gone towards the house of Ganpat. The *Panchanama* does not show that the road had a turn at any point near the house of Ganpat. The evidence of Bhaskar does not show that he could notice colour of clothes of any other Accused. He did not describe the clothes by describing them as a T-shirt or shirt. It was month of June, summer and people do not wear jacket in summer. The evidence on record does not show that there was rain and so there was reason to wear jacket. *Panchanama* shows that there were some houses in the vicinity, but no neighbour had witnessed Accused Nos.1, 3 and 4 near the house of Ganpat and if they had noticed, the investigating officer would have definitely collected such material. Bhaskar had admitted that Ganpat was his friend. If Ganpat was his friend and Bhaskar knew about the relationship between Accused No.2 and Accused No.1 and if there were three persons on motorcycle and they had

seen all the Accused at the odd hours of the night in front of the house of Ganpat, they would have certainly stopped their motorcycle to make inquiry. Thus, the version of Bhaskar shows that the things did not happen in ordinary course of nature. This shows that the story given by Bhaskar is not probable in nature.

55 The evidence of Subhash (PW-4) shows that he had seen Accused Nos.1, 3 and 4 at 09:30 pm. This version is also not probable as there is evidence of hotel owner showing that these persons left his hotel at 09:30 pm. There is no evidence on the distance between that hotel and the place where these three persons were found by Subhash on that night. No map of scene of offence was prepared even to show the location of the house of Ganpat, location of road and obstacles, if any, between the house and the road like of trees and structures. Thus, there is inconsistency in the evidence of hotel owner and the evidence of PW-4 on time. Further, there is nothing with prosecution to show that as to what Accused were doing from 09:30 pm till 12:00 hours of that night. From the record, it can be said that no investigation was made by police on that line. All these circumstances create probability that due to suspicion as against

Accused No.1, his name was taken and there is probability that as other Accused used to remain in the company of Accused No.1, their names are taken. This evidence is not that convincing and circumstances already discussed have created serious doubt about the evidence given against Accused Nos.1, 3 and 4.

56 The evidence discussed above shows that Ganpat was murdered inside of his house. One metal pot was used to inflict injuries on his head and they were *ante-mortem* injuries. Metal pot was taken over under pot *Panchanama* on 30th June, 2013. Similarly, quilt and pillow, which were under the dead body were also taken over as there was blood on it. No blood was noticed at any other place of the house as per the spot *Panchanama*.

57 Accused No.2 was cohabiting with deceased in the house where murder took place. The evidence of Subhash (PW-4), if it is believed, and the evidence of postmortem report show that the murder took place after 09:30 pm. In the postmortem report, Exhibit-67, there is mention that semi-digested food was found in the stomach. Thus, the death took place after few hours after 09:30 pm.

If Bhaskar is believed, it can be said that before his reaching the house of Ganpat, Ganpat was murdered and that time is midnight hours. Accused No.2 has admitted in her statement given under Section 313 of the Code of Criminal Procedure that she was present in that house throughout the night. Her evidence shows that Ganpat was alive as she had noticed that Ganpat had entered the house on that night and he was last person to enter the house. Her statement shows that she had noticed that Ganpat went to bed. In ordinary course, the door of the house must have been closed from inside as it was night time and every member of the house was inside of the house. In the statement given under Section 313 of the Code of Criminal Procedure, Accused No.2 has specifically admitted that at midnight hours, she realized that Ganpat was probably dead as he was motionless. It is not her case that entrance door of the house was kept open on that night or it used to remain in open condition every night. Thus, the statement given by Accused No.2 under Section 313 of the Code of Criminal Procedure and the prosecution evidence is sufficient to infer that only Accused No.2 had opportunity to commit the murder of Ganpat. There is clear probability that either Accused No.2 herself committed murder of Ganpat or she took the

help of some other persons in the murder.

58 Due to the evidence given on motive by the prosecution, it can be said that Accused No.2 was interested in finishing Ganpat. If the evidence as against other Accused is ignored, one can safely infer that it is Accused No.2, who committed the murder of Ganpat. There was no such motive for Accused Nos.3 and 4. Nothing is on record to say as to why Accused Nos.3 and 4 would have helped Accused No.1 or Accused No.2 for commission of such offence. It can be said that there was strong suspicion as against Accused No.1 due to motive and if Accused Nos.3 and 4 used to remain in the company of Accused No.1, then there was reason to have suspicion as against them. It is already observed that even after collecting mobile handsets of these Accused, the investigating agency avoided to produce on record the documents like CDR record, tower location of mobile, record of ownership of simcards etc. These circumstances have created doubt about the entire case of prosecution as against Accused Nos.1, 3 and 4 and they show that the investigation was not made fairly.

59 The evidence of Subhash (PW-4) shows that he learnt about the death prior to 12:30 hours of that night. Exhibit-44, first report given by Subhash, does not show that he had noticed any injury on the dead body or he had felt that it was a case of murder. He simply informed to police at about 07:00 am of 30th June, 2013 that Ganpat was dead and inquiry into death needs to be made. Evidence of police constable (PW-13), who first reached house of Ganpat shows that he felt that the clothes of Ganpat were changed probably after the incident of murder and clean clothes were used. Though there is such evidence, other set of clothes is not shown to be recovered by police. In any case, the circumstance that Subhash (PW-4) did not inform police in Exhibit-44 that it was murder and he had suspicion as against any Accused due to aforesaid physical relationship, creates serious doubt about the evidence given by Subhash against Accused Nos.1, 3 and 4. This circumstance is not properly appreciated by the Trial Court and it shows that there is possibility of false implication of Accused Nos.1, 3 and 4 in the matter. However, in view of the circumstances already discussed, which are as against Accused No.2 and the provisions of Sections 106 and 114 of the Evidence Act and as no plausible explanation is given by

Accused No.2, the only inference which is possible is that Accused No.2 committed the murder of Ganpat.

60 For the Appellants, reliance was placed on the following 10 reported cases:

- i) **2009 12 SCC (Cri) 97**, (Sonali Mukherjee & Another Vs. Union of India & Others);
- ii) **2008 ALL MR (Cri) 1647**, (Ramesh Govind Thakur Vs. State of Maharashtra);
- iii) **2014 0 ALL MR (Cri) 3532**, (Hari Sambhaji Borade Vs. State of Maharashtra);
- iv) **2006 ALL MR (Cri) 2262**, (Surendra Gyanchand Chawla Vs. State of Maharashtra);
- v) **(2008) 2 Supreme Court Cases 210**, (Sattatiya alias Satish Rajanna Kartalla Vs. State of Maharashtra);
- vi) **2006 ALL MR (Cri) 15**, (State of Maharashtra Vs. Ashok Hanmant Atkar);
- vii) **[2006] 0 AIIMR (Cri) 95**, (State of Maharashtra Vs. Jagannath Kisan Mane);

- viii) **1979 SCC (Cri) 982**, (Bahadul alias Ghanshyam Padhan Vs. State of Orissa);
- ix) **(2011) 8 Supreme Court Cases 300**, (Rafiq Ahmad alias Rafi Vs. State of Uttar Pradesh);and
- x) **(2013) 8 Supreme Court Cases 60**, (Babu alias Balasubramaniam and another Vs. State of Tamil Nadu).

61 The provisions of Sections 3, 8, 9, 27 and 114 of the Evidence Act and Section 313 of the Code of Criminal Procedure are discussed in the reported cases. The facts and circumstances of each and every criminal case are always different. This Court has already observed that the provisions of Section 106 and 114 of the Evidence Act can be used as against Accused No.2 and similarly, the admission given by her in the statement given under Section 313 of the Code of Criminal Procedure can also be used against her. It is observed that the circumstances brought on record as against Accused Nos.1, 3 and 4 are not convincingly proved and further those pieces have not completed the chain of circumstances. This Court holds that the benefit of doubt needs to be given to Accused No.1 and as there is no convincing evidence as against Accused Nos.3 and 4,

they are entitled to acquittal. Thus, the appeal of Appellant Nos.1, 3 and 4 deserves to be allowed. But the appeal of Appellant No.2 needs to be dismissed. In the result, the following order is passed:

ORDER

- I. The appeal of Appellant No.1 / Accused No.1 (Firoj Akbar Shaikh), Appellant No.3 / Accused No.3 (Raju Bhausahab Dive) and Appellant No.4 / Accused No.4 (Babasaheb Sabaji Bare), is allowed. The judgment and order of the Trial Court given against them in Sessions Case No.301 of 2013, is hereby set aside. These Accused stand acquitted of the offences for which they were charged and tried.
- II. Before releasing Appellant No.1 / Accused No.1 (Firoj Akbar Shaikh), Appellant No.3 / Accused No.3 (Raju Bhausahab Dive) and Appellant No.4 / Accused No.4 (Babasaheb Sabaji Bare), personal bonds are to be obtained from them of Rs.15,000/- from each of them with one surety of like amount as

provided in Section 437-A of the Code of Criminal Procedure. Fine amount, if any, deposited by them, is to be returned to them.

III. The appeal of Appellant No.2 / Accused No.2 (Jyoti Ganpat Shingade) stands dismissed.

[SMT. VIBHA KANKANWADI, J.]

[T. V. NALAWADE, J.]

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