

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 260 OF 2016

Annasaheb @ Macchindra Pandurang
@ Muktaji Vaidya,
Age 56 years, Occupation Convict No.648,
R/o At Present In Open Prison Yerwada
Dist. Pune. ...Appellant

Versus

The State of Maharashtra
Through P.S.I. Akole Police Station,
Akole Taluka and Dist. Ahmednagar. ...Respondent

Mrs. Bharti Gunjan, Advocate appointed as Amicus Curiae for
appellant.
Mr. S. J. Salgare, Addl. Public Proscutor for respondent –
State.

WITH

CRIMINAL APPEAL NO. 315 OF 2012

The State of Maharashtra ...Appellant

Versus

Mandabai Annasaheb @ Macchindra
Vaidya, Age 42 years, R/o Surgon Kd.
Tq. Akole Dist. Ahmednagar. ...Respondent

Mr. S. J. Salgare, Addl. Public Proscutor for Appellant – State.

CORAM : T. V. NALAWADE &

SMT.VIBHA KANKANWADI. JJ.

**Date of reserving
the order : 18th September, 2018.**

**Date of pronouncing
the order : 15th October, 2018.**

ORAL JUDGMENT : (Per SMT. VIBHA KANKANWADI, J.)

1. Since both these appeals are arising out of the same Judgment and order, they are proposed to be disposed of by common Judgment. Criminal Appeal No. 260 of 2016 has been preferred by original accused No.1 to challenge his conviction under Section 302 and 201 of Indian Penal Code awarded in Sessions Case No. 27 of 2005, by learned Additional Sessions Judge, Sangamner Dist. Ahmednagar on 05-11-2011, whereas Criminal Appeal No. 315 of 2012 has been preferred by the prosecution to challenge the acquittal of original accused No.2 for the offences punishable under Section 302, 201, 364, 362 of Indian Penal Code in the same case. Parties would be hereafter referred to as per their status before the Trial Court.

2. The prosecution has come with a case that, informant Suresh Rangnath Mandlik is resident of Sangamner. He had sister by name Taramati @ Tarabai Asaram Raut. Taramati was residing separately from her husband since about five to six years prior to 2005 with her son Mahesh at Sangamner. She was a vegetable vendor. Her

daughter Rohini was married and was also residing at Dholewadi, Sangamner. It was the routine of Taramati to go to Nehru Chowk in Sangamner around 08.00 a.m. for selling vegetables and to return to house around 06.00 p.m. On certain occasions she used to go to Akole, Rajur, Nashik for purchasing vegetables. Taramati was earning her livelihood from the said business. She has purchased gold ornaments from her business. She used to go to market by putting those ornaments on her person. Informant had told her many times that it is not safe for her to go with ornaments on person but she had not listened to his suggestion. Informant had seen one person along with her in Nehru Chowk. That person was also seen by other vegetable vendors who used to sit adjacent to the place where Taramati used to sit for selling vegetables. Upon inquiry by informant, Taramati had disclosed the identity of that person as Anna Vaidya from Sugao i.e. accused No. 1 and she had also disclosed that he was going to help her in purchasing a house. Accused No. 1 was also seen in the house of Taramati. A month prior to missing of Taramati, she had met her brother and requested for extending amount of Rs.20 to 25 thousand as hand loan for purchase of plot. She had also disclosed that, she would be taking loan from Bank of Baroda. Her brother had told her that, he would inform her after he collects the amount. Some days prior to her missing she had got certain amount from Bank of Baroda. The extra

amount was demanded by her to her brother, but he told that she should make arrangement from other source for a time being and after he gets amount he would extend it to her. Thereafter, informant was informed by Mahesh- son of Taramati on 04-06-2001 that his mother has not returned from market since 28-05-2001 after she had left house to sell vegetables. Mahesh was told to make enquiry with the relatives but Taramati could not be found. They had also made inquiry with the adjacent vendors and it was revealed that, Taramati left the place of business at about 05.00 p.m. on 28-05-2001 on the pretext that she would go home. When Taramati could not be found till 21-11-2001, informant lodged report about the same with Sangamner City Police Station on the ground that, somebody has abducted her on the count of amount.

3. It is the further prosecution story that, informant had returned at about 05.00 p.m. from Osmanabad on 06-06-2005. He came to know from a news clippings that, some skeletons and clothes as well as articles have been found in the field of accused No. 1. Informant therefore went to Akole Police Station on 07-06-2005 along with daughter of deceased and cousin brother. In the Police Station, he found parrot green colour saree, parrot green colour petticoat, green blouse and green bangles kept with human skeleton No.1. From the articles it was identified by informant and others that, that skeleton was of Taramati. Adjacent vegetable vendor Housabai Gaikwad was

also along with them to identify the clothes. Thereafter, all these persons went to the house of accused No. 1 at Sugaon. A lady came out and she was asked by these persons as to from where the skeletons were found. That lady told them that, her husband has eliminated many persons and they should not indulge in the matter otherwise her husband will not keep them alive. At that time Suresh Sahadu Mandlik, the jeep driver told informant that, on the day when Tamramati went, at that time accused had travelled along with Taramati in his jeep with accused No. 1 and the said lady in his house. He considered her as passenger along with others. It was also told that the lady had boarded in the jeep from Sangamner. Informant then got confirmed that, accused No. 1 has committed murder by abducting her on the ground that he would give amount to her for construction of plot and then he has taken her gold ornaments and the amount which she had withdrawn from the bank. The First Information Report was lodged on 07-06-2005 with Akole Police Station. On the basis of said First Information Report, offence vide Crime No. 58 of 2005 came to be lodged under Section 302, 364, 392, 201 of Indian Penal Code.

4. After the FIR was lodged, investigation was carried out. Prior to that, P.W.23 PSI Baliram Gitte from Akole Police Station was investigating the Crime No. 53 of 2005 under Section 379 of Indian Penal Code. It was alleged in the said crime by one Tukaram Vaidya

that, Anna Vaidya i.e. accused No. 1 had stolen his electric motor, foot wall and electric wire. When they were digging to search these articles in the field of accused, human skeleton was found. On the basis of same, accidental death was registered with Akole Police Station bearing 30 of 2005. During the course of the enquiry of the A.D. certain parts of human skeleton, clothes and articles were seized. It is also the case of the prosecution that, when initially some part of the skeleton was found, the work was stopped by Tukaram Vaidya and the intimation was given to police, and thereafter, the excavation work has been done by police.

5. The skeletons were sent to the Medical Officer for opinion. They were also sent for expert opinion from Anatomy Department. In the meantime statements of the witnesses were recorded by P.W.25 Sanjay Patil – Additional Superintendent of Police. The identification of the bones were done through clothes and articles. At the time of excavation / exhumation work, video shooting was done, CD was prepared and the said CD was seized by drawing panchanama. Documents from bank of Baroda regarding the loan given to the deceased Taramati were collected. It was transpired that accused No. 2 is also involved in the crime. Both the accused came to be arrested. Accused No. 1 gave memorandum and discovered gold bids and four silver foot rings (Jodvi), etc. Those articles were identified by the informant. The human skeleton and

bones were also sent for DNA test. The panchanama of the spot was carried out in the inquiry of the A.D. Map of the spot was got prepared from Circle Officer / Executive Magistrate, Akole. After the completion of the investigation, charge-sheet was filed against two persons.

6. Both the accused appeared before learned Adhoc Additional Sessions Judge, Sangamner, charge was framed against both of them. They pleaded not guilty. Trial has been conducted. Prosecution has examined in all 25 witnesses in order to bring home the guilt of the accused persons. After taking into consideration the evidence on record and hearing both sides, the learned Additional Sessions Judge, Sangamner has acquitted accused No.2 from all the offences. Accused No.1 has been acquitted of the offence punishable under Section 364 and 392 of Indian Penal Code. Accused No.1 has been held guilty of committing murder of Taramati and while awarding conviction under Section 302 of Indian Penal Code, he has been sentenced to undergo imprisonment for life and pay fine of Rs.1,000/-, in default, to undergo simple imprisonment for three months. He has been further convicted for the offence punishable under Section 201 of Indian Penal Code and has been sentenced to undergo rigorous imprisonment for three years. The said Judgment and order is thus challenged by accused No.1 from his conviction and by the prosecution for the acquittal of accused

No.2.

7. Heard learned advocate Mrs. Bharti Gunjal appointed as Amicus Curiae for the appellant in Criminal Appeal No. 260 of 2016. Heard learned Additional Public Prosecutor Mr. S. J. Salgare, for State in Criminal Appeal No. 260 of 2016 as well as in Criminal Appeal No. 315 of 2012. Perused the record and proceedings.

8. It has been submitted on behalf of the appellant - accused No.1 that the learned trial Court has not appreciated the evidence properly. The learned trial Court failed to see that even the missing report was filed after the 15 days. There is also unexplained delay of more than five months for lodging First Information Report. The case is filed after four years of alleged murder. Naturally the human body had decomposed and only the human skeleton had remained. The identification is done only on the basis of clothes and ornaments. However, it is hard to believe that, for four years the clothes and ornaments will remained in the same condition. The learned trial Court also failed to consider that, there was contradiction in the identification of clothes. The case of the prosecution was mainly based on the circumstantial evidence that too on the point of last seen together. The theory of last seen together is not at all reliable in this connection, it appears to be concocted. Even after the alleged missing report lodged only after

15 days both the persons who had allegedly seen lastly accused and deceased together i.e. P.W.11 Suresh Mandlik, driver of the jeep as well as P.W.16 Pundlik Shankar Abhang as well as P.W.15 Housabai, the adjacent vegetables vendor. It has come on record that, P.W.11 Suresh Mandlik is the cousin brother of the deceased. How he could not have identified his sister going with somebody else and had no talk with her on the day when she had allegedly travelled in his jeep with accused No. 1. The vegetable vendor P.W.15 Housabai says that, she had seen deceased Taramati till 05.00 p.m. and then Tamaramati left on the ground that, she is going towards house. The place where she was selling vegetables was at Sangamner and the skeleton has been found at Akole. Under such circumstance her testimony cannot be believed. The medical evidence in respect of skeleton is inconclusive. Even the DNA test, though, it is alleged that the samples were sent, has not been done. The learned Additional Sessions Judge failed to consider that there was absolutely no evidence regarding motive. The material, discrepancies, contradictions and improvements in the testimony of the witnesses have not been considered. When the identification of the skeleton that it is of Taramati itself is not proved beyond reasonable doubt, accused No.1 ought not to have been held guilty of committing murder of Taramati. A statement has also been made by the learned Advocate that, in respect of another skeleton

that was found in the field of accused No.1, he was tried and convicted but the said conviction was challenged before this Court in Criminal Appeal No. 737 of 2008. This Court by order dated 27-10-2010 allowed the criminal appeal and acquitted accused No.1. In that case also present accused No.2 was accused No.2 and both of them were convicted by the learned trial Court and both of them have been acquitted by this Court. In that case also the identification of the human skeleton was on the basis of articles.

9. The learned advocate Amicus Curiae relied on the decision in ***Bhujang Mahadu Panpatte Versus State of Maharashtra***, reported in **2014 (3) Bom. C.R. (Cri.) 518**. In this case also there was no eye witness to the murder and the skeleton was identified by the brother of the deceased on the basis of the saree and bangles. This Court has not accepted the said piece of evidence on the ground that the identification cannot be on the basis of clothes.

10. Per contra, the learned Addl. Public Prosecutor submitted that, the skeletons were found in the field of accused No.1. They were found when digging work was undertaken by villagers on the allegations of theft of electric motor and wire by accused No. 1. Said panchas who were present at the time of exhumation, the panchas who had seized the CD wherein video recording of exhumation was done as well as the police person who was present

at the spot have been examined. Accused No.1 has been identified by informant, P.W.15 Housabai, P.W.22 Rohini, daughter of deceased, as the person who was in contact with the deceased. He has been also identified by P.W.11 Suresh Mandlik who had taken deceased from Sangamner to Akole in his jeep. Therefore, the evidence regarding last seen together, fact that the skeletons were found in the field of accused No.1 coupled with discovery of gold ornaments from accused No.1 which has been supported by P.W.10 Diagmber Maid who was the goldsmith to whom the ornaments were sold and P.W.12 Balasaheb Papal, the panch witness, as well as the Investigating Officer have proved it under Section 27 of the Indian Evidence Act. Considering all these pieces of evidence a chain of circumstances has been formed and each segment of the chain is pointing out towards the accused No.1 to be the culprit. Further it has come on record that, accused No.2 had helped accused No.1 in the commission of the crime but evidence as against accused No.2 has not been properly considered by the learned trial Court. The prosecution has preferred appeal No. 315 of 2012. He therefore, prayed for the dismissal of the appeal preferred by accused No.1 and allowing the appeal filed by the State.

11. The prosecution in this case has relied on the circumstantial evidence only. In ***Sharad Birdhichand Sarda v/s. State of Maharashtra [AIR 1984 SC 1622]***, while dealing with

circumstantial evidence, it has been held that, "The onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent before conviction could be based on circumstantial evidence, must be fully established. They are :

"(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established;

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

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) they should exclude every possible hypothesis except the one to be proved; and

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

Therefore, when it is a case based on circumstantial evidence then the prosecution should establish from each segment of the circumstance that author of the crime is only the accused. In order

to prove the guilt of the accused persons, the prosecution has relied on following circumstances, first is discovery of skeleton in the field of accused No.1, second is last seen together, third is discovery of ornaments of the deceased.

12. Now in order to prove the first circumstance i.e. the discovery or recovery of skeleton and other articles from the field of the accused No.1 prosecution has examined P.W.17 Tukaram Shivrath Vaidya, who was the Police Patil of village Sugao where the field belonging to the accused No.1 is situated. P.W. 13 Dayanand Vaidya, is the panch witness, who was present at the time of seizure of clothes of the deceased, P.W. 18 Tahsildar Bhimrao Shinde was then posted at Akole and he was present on 03-06-2006 when the skeletons were found while excavating the land. The further excavation has been carried out in his presence. P.W. 20 Ramesh Tekale was in the team of searching operation of the electric motor belonging to Balasahbe Nehe allegedly stolen. He was amongst the excavating team wherein later on the skeleton was found. P.W.21 Balashaeb Nehe is the person whose electric motor and cable wires were allegedly stolen from the bank of Pravara river on 02-06-2005 and he was searching his articles in the field of accused No.1. While digging the land in the field of accused No.1, they found the skeletons. P.W.23 Baliram Gitte PSI was investigating crime No. 58 of 2005 registered on the basis of First Information Report lodged by

Balasaheb Nehe. P.W.24 Arjun Bhongale had reduced into writing the intimation given by P.W.17 Tukaram Vaidya and then started the excavation work. P.W.2 Baburao Jadhav is the panch witness in whose presence the informant and others identified the clothes of the deceased i.e. green colour blouse, parrot green colour six yard saree, green colour bangles and other as well as P.W.1 Sandesh Mandlik is the another panch in whose presence, the CD and video cassettes in which the excavation work was recorded, were seized. Taking into consideration the testimony of all these witnesses a fact which can be said to have been established is that, on 02-06-2005 the electric motor and cable wires belonging to P.W.21 Balasaheb Nehe were stolen and then he says that they had been to the field of accused Annasaheb to search the electric motor and wire. He says that, Annasaheb was in habit of committing theft so on suspicion they were taking search of his field. At the outset it can be said that, it was a highhanded act on the part of P.W.21 Balasaheb, P.W.17 Tukaram that they had undertaken excavation work / digging work in the field of accused No.1 without his consent. They could not have even entered the field of accused No.1 without his permission. P.W.21 Balasaheb says that, he along with Uttam Vaidya, Shantram Vaidya, Police Patil Tukaram Vaidya and other villagers were searching missing articles in the field of accused No.1. When they were digging on the eastern side of the well, they found

human bones, saree, and therefore, they stopped the digging work as it was late. On the next date Police Patil gave intimation to the police. The said intimation has been got proved through P.W.17 Tukaram and it is at Exhibit 78. Though P.W. 17 Tukaram was the then Police Patil yet it is to be noted that he could not have entered the field of accused No.1 in his absence because none of these witnesses have stated that accused No.1 was present when the excavation work was done. Under which authority P.W. 17 Police Patil had started the digging work has not been explained by the prosecution. Merely on the basis of some kind of suspicion the villagers cannot take law in their hand.

13. On the intimation (Exhibit 78) given by P.W.17 Tukaram, the police authorities moved. They had called P.W. 18 Tahsildar Bhimrao Shinde, P.W. 13 Dayanand Vaidya, so also P.W. 20 Ramesh Tekale and P.W. 24 ASI Arjun Bhongale had dug at two places and they had found two skeletons of women along with sarees, blouse and other articles. It will not be out of place to mention here that, another skeleton and saree is stated to be that of one Pushpa. In respect of the case of murder of Pushpa, the present accused No.1 and accused No.2 were prosecuted in Sessions Case No. 04 of 2006. The Additional Sessions Judge, Sangamner by Judgment dated 25-03-2008 had convicted both of them for the offence punishable under Section 302, 201 read with 34 of the Indian Penal Code. The said

conviction was challenged by both of them in Criminal Appeal No. 737 of 2008 before this Court and the Division Bench of this Court on 27-10-2010 allowed the said appeal. The copy of said decision is made available. Now the prosecution has come with a case that, as regards the first ditch in which a skeleton with green colour blouse, parrot green colour saree, bangles were found was that of Taramati. At the most from the testimony of all the above referred witnesses it can be said that a skeleton with such articles was found in the field of accused No.1.

14. Now in order to have a further link we are required to assess the evidence. The spot panchanama which was prepared at that time (Exhibit 72) shows that, the ditch in which allegedly Taramati's skeleton and articles were found, was measuring 4 feet x 6 feet x 4 feet. According to Police Patil P.W. 17 Tukaram Vaidya, P.W.20 Ramesh Tekale and P.W.21 Balasaheb Nehe the saree which was found at the first excavation was parrot green colour, that means the prosecution intended to say that, the skeleton which was found in the first ditch was that of Taramati. The basic question is that, these witnesses were searching for a electric motor and wire. Whether it would have been practicable for a person to dig a ditch and then bury electric motor and wire which he had allegedly stolen. After the electric item is buried, it will not be of any use. Therefore, the reason for concealing electric motor beneath the earth ought to have

been brought on record. Another fact is that in order to search these two articles whether it was necessary for these persons to dig a pit of such a depth. We cannot get an answer from the testimony of these witnesses as to why they had dug such a huge ditch on that day. They have not stated that on the next day, police had carried out digging work in the said pit also.

15. Further taking into consideration the testimony of P.W.17 Tukaram Vaidya, P.W.20 Ramesh Tekale, P.W.21 Balasaheb Nehe and P.W.2 Baburao Jadhav as well as P.W.7 Suresh Mandlik – informant, P.W.22 Rohini Gadekar - daughter of the deceased, as well as the contents of the spot panchanama and seizure panchanama that the blouse which was of green colour was seized. How much part of it was decomposed has not been narrated by anyone of them. In fact the reference to decomposition is only in the panchanama and not in the oral evidence. Further neither in panchanamas nor in the oral evidence these witnesses are saying that the saree was in any way decomposed. We cannot miss a point that Taramati went missing from 28-05-2001 and the skeleton was found on 02-06-2005. That means, almost after four years the skeleton has been found and it is stated that along with it the clothes were found. The place where from they are found is the agricultural land. None of these witnesses have stated that, during these four years of period, the land was never ploughed. One more point cannot be missed is that, there

would have been rains during the said period of four years. Under such weather conditions, at a depth of four feet below the earth how saree will remain intact? The same question was posed by the Division Bench of this Court while deciding Criminal Appeal No. 737 of 2008. In fact in that case the deceased was alleged to have been missing since 1998, yet her saree was found to be intact. The same question is now before this Bench and the prosecution has not been able to throw any kind of light about the same. It will not be out of place to mention here that, in his testimony P.W. 17 Tukaram has stated that, they had also found wire and football of electric pump near the well at the time of digging. But then in the cross – examination he says that the football found by them was new. Thus, at the most a fact can be said to have been proved by these witnesses is that, a human skeleton which is said to be of a lady was found from that place, but there is every kind of doubt as regards the saree and blouse which are stated to be found at that place.

16. P.W. 18 Tahsildar Bhimrao Shinde, P.W. 24 ASI Arjun Bhongale P.W.23 PSI Baliram Gitte who were also present at that time have stated that, in their presence the land was excavated during which the human skeletons, saree, blouse and bangles were found. It is to be noted that, the villagers who had started the digging work say that when they found human bones they had stopped the work. There is discrepancy in their testimonies. As per P.W. 17 Tukaram

they had found skull and saree of yellow green colour at the time of digging and then they had stopped the work. P.W. 20 Ramesh also says that, they had found woman bones and then a Police Patil lodged the intimation with the police. But the tenor of his deposition would show that they had found woman skeleton, bones of hands and legs, parrot green colour saree, blouse, green colour bangles etc., in the presence of police, Tahsildar and medical officer. P.W. 21 Balasaheb Nehe says that, after they found human bones and saree they stopped the digging work and the further excavation work has been done on the next day in presence of Tahsildar and police. Thus they are not certain as to exactly where they had stopped, what was found on the first day. P.W.23 PSI Baliram Gitte who was present at the time of excavation work on the next day says that, the intimation given by Tukaram Patil was treated as accidental death and it was registered as A.D. No. 30 of 2005. It was handed over to P.W.24 ASI Arjun Bongale for inquiry. These two persons so also the Tahsildar do not say that on 03-06-2005 they had given any kind of intimation to accused No.1 that, they would be carrying out excavation work and he should remain present. It is also to be noted that none of these two police officers say that, after 03-06-2005 they had made inquiry with accused No.1 as to whose skeletons are. Here in this case the First Information Report has been lodged by P.W.7 Suresh on 07-06-2005. Then what kind of inquiry in respect

of skeletons were done by these two police officers from 03-06-2005 to 07-06-2005 has not come on record. Therefore, we are required to consider the further evidence from 07-06-2005.

17. The evidence in respect of activities which occurred from 07-06-2005 i.e. from the date of the First Information Report or even prior to that, i.e. since when deceased Taramati has allegedly went missing from 28-05-2001 are required to be considered. In order to prove what had happened between 28-05-2001 to 07-06-2005, the prosecution is relying the testimony of P.W.7 Suresh Rangnath Mandlik, P.W.11 Suresh Sahadu Mandlik, P.W.15 Housabai Dattatraya Gaikwad and to some extent P.W.22 Rohini Gorakh Gadekar, the daughter of deceased. As per the testimony of P.W.7 Suresh Mandlik, he had seen accused No.1 with Taramati and when asked about him, Taramati had told him the name of accused No.1 and also told that he would be helping her in purchasing house. Except the said fact she has not disclosed as regards the relationship between her and accused No.1. P.W.22 Rohini, the daughter also says that, she had seen accused No.1 in the house of deceased when she was pregnant. She had heard the conversation between Taramati and accused in respect of construction of a house. These two things *per se* cannot attribute anything towards accused No.1.

18. P.W.7 Suresh Mandlik has deposed that, on 04-06-2001 son of

Taramati went to him and told that, Taramati has not returned since 28-05-2001. Important point to be noted is that, he is also residing in Sangamner and Taramati was also residing in Sangamner. Then the question arises as to why the son of Taramati had not informed about missing of his mother since 28-05-2001 till 04-06-2001 to her brother. Further according to the informant they had searched for Taramati till 20-11-2001 and then he lodged missing report on 21-11-2001. Interesting point to be noted is that, in para 03 of the examination-in-chief of the informant he says that, on 21-11-2001 he lodged the complaint in the police station against accused No.1 stating that, he had committed murder of Taramati to grab ornaments and money from Taramati. Accordingly the criminal case was filed in the Court against the accused No.1 and he was tried. If this fact is taken as true then how he could have filed FIR (Exhibit 52) on 07-06-2005 is a question. Further this fact is also mentioned in his FIR (Exhibit 52), however it appears that, the certified copy of the Judgment in that case has not been filed on record. Further there is no explanation by prosecution as to how accused could have been tried for the second time for the murder of Taramati? However, it appears that an order dated 18-07-2006 passed by Deputy Secretary to the Government of Maharashtra Home Department has been produced at Exhibit 155 wherein it is stated that, the report that was lodged under Section 364 of Indian Penal Code against the

accused No.1 and he was acquitted by Additional Sessions Judge, Sangamner in Sessions Case No. 08 of 2002, on 29-10-2004. That means, that FIR was not for the offence punishable under Section 302, 201, 392 read with 34 of the Indian Penal Code, and therefore, in the exercise of powers conferred under Section 300 of Code of Criminal Procedure the Government had accorded consent to prosecute accused No.1 in the present case that is Sessions Case No. 27 of 2005. What is exaggerated by the informant is that in his earlier report, he had also stated that accused No.1 had committed murder of Taramati.

19. Accused No. 1 was tried and acquitted for the offence punishable under Section 364 of Indian Penal Code, earlier in said Sessions Case. The report in that case was also investigated and charge-sheet was filed after due investigation. Under such circumstance, it is hard to believe that there was no investigation about whereabouts of Taramati. Accused No. 1 ought to have been interrogated at that time also. There is no evidence to ascertain what was the stand of the prosecution in respect of Taramati in that case. Therefore, every prosecution story in this case is tainted with doubts.

20. As per the testimony of P.W.11 Suresh and P.W.15 Housabai they both have seen Taramati lastly on 28-05-2001. P.W.15 Housabai

Gaikwad has stated that, she had seen accused No.1 with Taramati earlier, and therefore, she was knowing him. On the day of incident Taramati left the her usual place of business around 04.30 p.m. In clear words she does not say that, she had seen accused No.1 with Taramati at 04.30 p.m. therefore, her testimony cannot be taken on the point of 'last seen together'. P.W.11 Suresh says that, on 28-05-2001 he was taking passengers for Akole trip in his jeep around 05.00 to 05.30 p.m. At that time his cousin sister Taramati came and she wanted to go to Akole. Taramati along with accused No.1 and one lady sat in his jeep for going to Akole and he left all of them to Akole around 06.30 p.m. According to him P.W.7 Suresh had made enquiry with him three to four days after 28-05-2001 about Taramati and at that time itself he had told the informant that he had seen Taramati along with accused No.1 and one lady and he had dropped them at Akole. As per his version informant had lodged the report with Sangamner Police Station thereafter. Interesting point to be noted is that the Investigating officer who had investigated the earlier case that is for the offence punishable under Section 364 of the Indian Penal Code, has not been examined in this case. In spite of a specific information that, deceased was seen with accused No.1, what inquiry he had made with accused No.1 ought to have come on record in this case also. P.W.7 Suresh Rangnath Mandlik does not corroborate to what P.W.11 Suresh Sahadu Mandlik is saying

regarding passing of his information regarding Taramati going with accused No.1 on 28-05-2001. On the contrary the testimony of the informant would show that, after he came to know about the news clipping on 06-06-2005 and lodging the report to police (Exhibit 52) when they all had gone to make inquiry with accused No.1, at that place P.W.11 Suresh Sahadu Mandlik had disclosed that, he had seen Taramati with accused No.1 on the day when she went missing. P.W. 11 Suresh is the only witness who is disclosing the fact that Taramati went to Akole with accused No. 1 from Sangamner in that day. He being cousin brother of deceased, possibility of planting him or he being a got up witness can not be ruled out. If we ignore his evidence, then there is nothing in the prosecution to connect the accused No. 1 with the crime. It appears that under forced circumstance, prosecution/ investigating agency was required to take help of theory of 'last seen together'. One more fact that is required to be noted is that, here in this case the dead body was not found but whatever is found is the skeleton. On the basis of skeleton it has not been ascertained as to when the death would have occurred. What was the cause of death? Therefore, in order to press the theory of 'last seen together' is hard to apply in such case. In ***State of U.P Versus Satish***, reported in ***A.I.R. 2005 S. C. 1000***, it has been held that,

"The last seen theory comes into play where the time-gap between the point of time, when the accused and

the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime is impossible."

Therefore, here the time of death is uncertain and therefore only "lastly seen" is different from "last seen together" theory which can be invoked in a criminal trial.

21. The last point on which the prosecution is further relying is the discovery of ornaments of deceased at the behest of accused No.1. In order to prove the same, the prosecution has examined P.W.3 Bharat Jadhav - the panch witness, P.W.12 Balasaheb Ramkisan Papal, also the panch to the memorandum (Exhibit 42). Both these witnesses have stated that, while in police custody the accused has given memorandum that he has sold the ornaments to a goldsmith from Sangamner namely Dnyaneshwar Jankiram Kajale. After the memorandum (Exhibit 41) was reduced into writing, all of them proceeded towards the shop of the goldsmith. Said goldsmith had admitted that, the gold ornaments have been sold in the year 1998 by accused to him on the pretext that he was in need of money for the illness of his wife, when the gold ornaments were produced. He also told that, on the second occasion i.e. in 2001 again the accused had sold gold ornaments under the pretext that his son is ill. The prosecution intends to connect the ornaments allegedly sold by the

accused in 2001 to this case. As per memorandum panchanama (Exhibit 42) what has been produced is 190 gold bids, other 04 bids, 02 gold ornaments that is part of Mangalsutra, a pair of ear tops and four silver foot rings were seized. The surprising part which creates every kind of doubt over the said memorandum and panchanama is that the murder was allegedly committed in 2001, the gold ornaments were in fact sold at that time and they were not hypothecated or mortgaged to the goldsmith. Then the question is why the goldsmith will keep those articles in the same form till 2005. Here in this case unfortunately the said goldsmith Dnyaneshwar Kajale has not been examined. He could have thrown light on the point as to why he had not made ingots of all those articles when as per panchanama (Exhibit 42) he had made statement before the panchas that the accused had given the ornaments for melting to him. An ordinary goldsmith will not behave in such manner, when the gold and silver articles are sold to him. Therefore, such a memorandum and panchanama on which there are every kind of clouds of doubt, cannot be relied upon. It rather cast doubt over the investigation also.

22. As per the prosecution story the police had excavated the land after the information was lodged and the bones and the saree as well as the other articles were found. The saree as well as gold ornaments have been identified by the witnesses but merely on the

ground of identification of the saree and the ornaments after such a long period it can not be said that the prosecution is established. The cause of death is not proved. Merely on the basis of buried skeleton, it can not be concluded that death was homicidal. The evidence led by the prosecution is absolutely not convincing / trustworthy. The chain of circumstances is not at all pointing finger towards the accused No.1 being the only author of the crime. What was the role played by accused No.2 has also not been stated by anybody. There is absolutely no evidence on that point. It can rather be said that, even only on the basis of saree, blouse it cannot be stated that, the said skeleton was of Taramati. The identification on the basis of super imposition could have been done but unfortunately the said piece of evidence has not come on record. Therefore, with such kind of scanty evidence it cannot be stated that the evidence adduced by the prosecution was sufficient to prove the charge against both the accused beyond reasonable doubt.

23. The learned trial Court has rightly acquitted accused No.2 because it is the possible view that could have been taken in respect of him on the basis of evidence adduced. However, the learned trial Court erred in believing in the evidence on last seen together, discovery of the skeleton from the field of accused No.1 and the discovery of ornaments of the deceased allegedly done by accused No.1. Therefore, the conviction against the accused No.1 deserves

to be set aside. His appeal deserves to be allowed. We therefore proceed to pass following order.

ORDER

- 1) Criminal Appeal No. 315 of 2012 filed by the State is hereby dismissed.
- 2) Criminal Appeal No. 260 of 2016 filed by original accused No.1 Annasaheb @ Macchindra Pandurang @ Muktaji Vaidya is hereby allowed.
- 3) The conviction to the appellant under Section 302, 201 of Indian Penal Code awarded by Additional Sessions Judge in Sessions Case No. 27 of 2005, dated 05-11-2011 is hereby quashed and set aside.
- 4) The appellant stands acquitted of the offences punishable under Section 302, 201 of the Indian Penal Code.
- 5) He be set at liberty, if not required in any other case.
- 6) The fine amount paid by him, if any, be refunded to him.
- 7) He should execute P. R. Bond of Rs.15,000/- (fifteen thousand) under Section 437 – A of the Code of Criminal Procedure and the duration of the said bond would be for six (06) months.
- 8) It is clarified that, order as regards disposal of muddemal is concerned passed by the learned Additional

Sessions Judge, Sangamner is hereby maintained.

9) Fees of the Amicus Curiae is hereby quantified at Rs.5,000/- (Rupees Five Thousand Only), which should be paid through High Court Legal Services Authority, Sub-committee, Aurangabad.

(SMT. VIBHA KANKANWADI)
JUDGE

(T. V. NALAWADE)
JUDGE

vjg/-.