

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.42 OF 2017

**BANDU @ BANDYA MAHENDRA @ RASHID)
PATHAN)...APPELLANT**

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Ms.Leena Patil, Advocate for the Appellant.

Mrs.M.R.Tidke, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 11th JANUARY 2019

ORAL JUDGMENT :

1 This appeal is taken up for final hearing as the appellant/accused is behind bars from the year 2014 and as the bail application moved by the appellant/accused was not pressed with a request for final hearing of the matter.

2 By this appeal, the appellant/accused is challenging the impugned judgment and order dated 5th December 2016 passed by the learned Additional Sessions Judge, Nashik, in Sessions Case No.305 of 2014 thereby convicting him of the offences punishable under Section 304 (Part-I) of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 10 years apart from direction to pay fine of Rs.15,000/- and in default to undergo further rigorous imprisonment for 2 years.

3 Facts in brief, leading to the prosecution of the appellant/accused, can be summarized thus :

- (a) Appellant/accused no.1 Bandu @ Bandya Mahendra Pathan is a resident of Village Gonde Shivar in Igatpuri Taluka of Nashik District. PW1 Chandrabhan Nathe – the First Informant is also a permanent resident of Village Gonde Dhumal. Kalpesh Kacharu Dhongade (since deceased) is cousin of PW1 Chandrabhan Nathe. Kalpesh Dhongade (since deceased) was earning his livelihood by working as a driver. PW1 Chandrabhan Nathe was owner of a road side

eatery named Baba ka Dhaba near Raymond Factory at Village Gonde Dhumal. PW1 Chandrabhan Nathe had given that road side eatery for running to appellant/accused Bandu @ Bandya Pathan. Accused no.2 Santosh Kumar was was in employment of appellant/accused no.1 Bandu @ Bandya Pathan at that dhaba.

- (b) About five months prior to the incident, appellant/accused no.1 Bandu @ Bandya Pathan along with Kalpesh Dhongade (since deceased) had purchased a second hand Bolero jeep in the name of Kalpesh Dhongade (since deceased) from PW8 Prabhakar Borhade of Shubham Motors. Some amount was paid to the seller for that vehicle. However, as the entire consideration could not be paid to PW8 Prabhakar Borhade, possession of the vehicle was again taken back by PW8 Prabhakar Borhade. According to appellant/accused no.1 Bandu @ Bandya Pathan, Kalpesh Dhongade (since deceased) could not obtain loan in time and he had obtained loan of meager amount requiring them to return

the vehicle to the owner. For this reason, dispute between appellant/accused no.1 Bandu @ Bandya Pathan and Kalpesh Dhongade (since deceased) arose.

- (c) According to the prosecution case, a day earlier to the incident i.e. on 17th June 2014, appellant/accused no.1 Bandu @ Bandya Pathan and Kalpesh Dhongade (since deceased) were quarreling with each other throughout the day. PW5 Yashwant Nathe – another cousin of Kalpesh Dhongade (since deceased) got information about this quarrel at the ending hours of 17th June 2014. He, therefore, went to the Baba ka Dhaba and tried to pacify both of them. However, neither appellant/accused no.1 Bandu @ Bandya Pathan nor Kalpesh Dhongade (since deceased) were in a position to listen. PW5 Yashwant Nathe, therefore, took Kalpesh Dhongade (since deceased) with him to the village on his motorcycle. On the way to the village, Kalpesh Dhongade (since deceased) was getting calls from appellant/accused no.1 Bandu @ Bandya Pathan.

Ultimately, by informing PW5 Yashwant Nathe that he was called by appellant/accused no.1 Bandu @ Bandya Pathan, Kalpesh Dhongade (since deceased) went towards Baba ka Dhaba.

- (d) In the morning hours of 18th June 2014, PW1 Chandrabhan Nathe – the First Informant had received information that his cousin Kalpesh Dhongade (since deceased) was lying in an injured condition near Raymond Factory at Mumbai-Nashik Highway. PW1 Chandrabhan Nathe went to the spot of the incident and saw Kalpesh Dhongade (since deceased) with injury on his neck. He, then, took Kalpesh Dhongade (since deceased) to Civil Hospital, Nashik, for medical treatment.
- (e) At Civil Hospital, Nashik, according to the prosecution case, after surgical operation of Kalpesh Dhongade (since deceased) on 18th June 2014 itself, in presence of police from Wadivarhe Police Station, Nashik, he made a written

dying declaration Exhibit 35 by asking for a pen and paper from the police. This was done in presence of PW1 Chandrabhan Nathe as well as panch witnesses PW2 Kailash Sonawane and Ratan Jadhav. This dying declaration, according to the prosecution case, was given in presence of PW11 Nisar Sayyad, Police Sub-Inspector of Wadivarhe Police Station, Nashik.

- (f) On 18th June 2014 itself, PW1 Chandrabhan Nathe lodged report Exhibit 36 with PW11 Nisar Sayyad, Police Sub-Inspector of Wadivarhe Police Station at the Civil Hospital, Nashik. He also produced written dying declaration Exhibit 35 which came to be seized under Panchnama Exhibit 38 on 18th June 2014 itself by PW11 Nisar Sayyad, Police Sub-Inspector. On the basis of the report lodged by PW1 Chandrabhan Nathe, Crime No.101 of 2014 came to be registered against appellant/accused no.1 Bandu @ Bandya Pathan and accused no.2 Santosh Kumar.

- (g) During course of investigation, clothes of injured Kalpesh Dhongade (since deceased) came to be seized. The spot was inspected in presence of PW4 Pandurang Kale and Spot Panchnama Exhibit 44 came to be drawn. From the spot of the incident blood stained grass and soil as well as a mobile phone came to be seized. Appellant/accused no.1 Bandu @ Bandya Pathan as well as accused no.2 Santosh Kumar came to be arrested on 18th June 2014 itself. Their personal search was conducted in presence of PW6 Bhaskar Bhor and under Seizure Panchnama Exhibit 53, one mobile phone each came to be seized from both the accused persons.
- (h) On 21st June 2014, appellant/accused no.1 Bandu @ Bandya Pathan made a confessional statement Exhibit 64 in presence of panch witness PW9 Shantaram Jadhav, which ultimately led to recovery of a blood stained knife vide Panchnama Exhibit 65.

- (i) On 24th June 2014, Kalpesh Dhongade (since deceased) was shifted from Civil Hospital to Vakratund Hospital of Nashik, where he was treated by PW12 Dr.Sagar Mandlik. Ultimately, Kalpesh Dhongade (since deceased) succumbed to the injury on 26th June 2014, leading to addition of Section 302 read with 34 of the Indian Penal Code to the Case Diary of the crime in question.
- (j) Dead body of Kalpesh Dhongade (since deceased) was then sent for autopsy and PW7 Dr.Juned Shaikh of Civil Hospital, Nashik, performed postmortem examination on the dead body. Routine investigation followed and on completion of investigation, appellant/accused no.1 Bandu @ Bandya Pathan so also accused no.2 Santosh Kumar came to be charge-sheeted for the offence punishable under Section 302 read with 34 of the Indian Penal Code.

- (k) The learned trial court framed Charge for the offence punishable under Section 302 read with 34 of the Indian Penal Code. It was explained to the accused persons. They pleaded not guilty and claimed trial. In order to bring home the guilt to appellant/accused no.1 Bandu @ Bandya Pathan and accused no.2 Santosh Kumar, the prosecution has examined in all 13 witnesses. First Informant Chandrabhan Nathe is examined as PW1 and the report lodged by him is at Exhibit 36. PW2 Kailash Sonawane is examined to prove the written dying declaration Exhibit 38, as a panch thereon. PW3 Sandip Nathe is a panch witness to the Seizure Panchnama Exhibit 41 by which clothes of deceased Kalpesh Dhongade came to be seized on 18th June 2014. PW4 Pandurang Kale is a panch witness to the Spot cum Seizure Panchnama Exhibit 44. PW5 Yashwant Nathe – cousin of the deceased Kalpesh Dhongade is examined in support of the last seen theory. PW6 Bhaskar Bhor is a panch witness to the seizure of two mobile phones from appellant/accused no.1 Bandu @ Bandya Pathan and accused no.2 Santos

Kumar vide Panchnama Exhibit 53. Autopsy Surgeon Dr.Juned Shaikh is examined as PW7. Exhibit 57 is the Postmortem Report of deceased Kalpesh Dhongade. PW8 Prabhakar Borhade of Shubham Motors is examined to prove the motive behind the crime in question. PW9 Shantaram Jadhav is a panch witness to the confessional statement Exhibit 64 and the resultant recovery at Exhibit 65. PW10 Balasaheb Wade, Assistant Police Inspector, has investigated the subject crime. Exhibit 53 is the Arrest Panchnama of accused persons. Exhibit 68 is the letter sent by him to the Civil Hospital, Nashik. This witness has recorded the confessional statement and effected the resultant recovery. Nisar Sayyad, Police Sub-Inspector attached to Wadivarhe Police Station, Nashik, is examined as PW11. He had recorded the First Information Report (FIR) and had seized the written dying declaration of the deceased Kalpesh Dhongade. Dr.Sagar Mandlik of the Vakratund Hospital of Nashik is examined as PW12. Sachin Shinde, Nodal Officer working in Idea Cellular Company is

examined as PW13 in order to prove the fact that there was continuous exchange of telephonic calls between the deceased and the accused persons.

- (1) The defence of the accused persons was that of total denial. After hearing the parties, by the impugned judgment and order, the learned trial court came to the conclusion that appellant/accused no.1 Bandu @ Bandya Pathan had inflicted injury on neck of deceased Kalpesh Dhongade causing his death. Accused No.2 Santosh Kumar stood acquitted. However, the learned trial court was pleased to hold that there was no premeditation or overt act on the part of the appellant/accused no.1 Bandu @ Bandya Pathan and therefore, the prosecution has established the offence punishable under Section 304 (Part I) of the Indian Penal Code. With this, only appellant/accused no.1 Bandu @ Bandya Pathan is convicted of the offence punishable under Section 304 (Part I) of the Indian Penal Code and sentenced as indicated in the opening paragraph of this judgment.

4 I have heard the learned counsel appearing for the appellant/accused. She argued that the prosecution has failed to establish guilt of the appellant/accused by cogent and sufficient evidence. According to the learned counsel, the case is based on circumstantial evidence and the circumstances alleged to be proved by the prosecution are not sufficient to infer guilt of the appellant/accused.

5 The learned APP supported the impugned judgment and order of conviction and the resultant sentence by arguing that there were several calls exchanged between the accused persons as well as the deceased soon before the incident and the tower location of those telephonic calls was Village Gonde Dhumal in Igatpuri Taluka of Nashik District. There is evidence to show that the deceased was lastly in company of the appellant/accused Bandu @ Bandya Pathan.

6 I have carefully considered the rival submissions and also perused the record and proceedings including the oral as well as documentary evidence adduced by the prosecution.

7 The entire case of the prosecution is based on circumstantial evidence and there is no direct evidence to demonstrate that it was the appellant/accused Bandu @ Bandya Pathan who had inflicted the cut throat injury on neck of the deceased Kalpesh Dhongade. What is the standard of proof in cases based on circumstantial evidence can be gathered from catena of judgments of the Honourable Supreme Court. In reference to cases where there is no direct evidence and the decision has to rest on circumstantial evidence, the Honourable Supreme Court in the matter of Brijlala Pd. Sinha etc. vs. State of Bihar¹ has held thus in paragraph no. 9 :

“9 In a case of circumstantial evidence the prosecution is bound to establish the circumstances from which the conclusion is drawn must be fully proved; the circumstances should be conclusive in nature; all the

1 1998 Supreme Court 2443

circumstances so established should be consistent only with the hypothesis of guilt and inconsistent with the innocence; and lastly the circumstances should be a great certainly exclude the possibility of guilt of any person other than the accused. **[See (1992) 3 SCC 300 : (1992 AIR SCW 2417)]**. The law relating to circumstantial evidence no longer remains res integra and it has been held by catena of decisions of this Court that the circumstances proved should lead to no other inference except that of the guilt of the accused, so that, the accused can be convicted of the offences charged. It may be stated as a rule of caution that before the Court records conviction on the basis of circumstantial evidence it must satisfy that the circumstances from which inference of guilt could be drawn have been established by unimpeachable evidence and the circumstances unerringly point to the guilt of the accused and further all the circumstances taken together are incapable of any explanation on any reasonable hypothesis save the guilt of the accused.”

Similarly, in the matter of Pritviraj vs. State of Rajasthan² the Hon'ble Rajasthan High Court has held thus in paragraph nos.23, 25 and 26 :

“23 In reference to cases where there is no direct evidence and the decision has to rest on circumstantial evidence, the Hon'ble Supreme Court in a line of decisions has consistently held that such evidence must satisfy the following tests :-

- 1 The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
- 2 Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.
- 3 The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
- 4 The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation on any other

² 2004 CRI.L.J. 2190

hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

“25 It is also well settle that the prosecution has to establish each circumstance by independent evidence and the circumstances so established should form a complete chain without giving room to any other hypothesis and should be consistent with his guilt and are inconsistent with his innocence.”

“26 It may be stated here that while appreciating the circumstantial evidence in criminal cases, strict scrutiny of each of the facts placed by circumstantial evidence and their cumulative effect has to be taken into consideration and if they are of such nature as to be incompatible with the innocence of the accused then only conviction can follow.”

Valuable reference can be had to this proposition from the judgment of the Honourable Supreme Court in the matters of Ashok Kumar Chatterjee vs. State of Madhya Pradesh³, Padala Veera vs. State of Andhra Pradesh⁴ and Kuldeep vs. State of Rajasthan⁵.

8 Now let us examine whether the prosecution has established the fact that deceased Kalpesh Dhongade died homicidal death on 26th June 2014. Evidence of PW1 Chandrabhan Nathe unerringly points out that in the morning hours of 18th June 2014, he had seen his cousin Kalpesh Dhongade (since deceased) lying in an injured condition near the Raymond Factory with an injury on his neck. This evidence is not at all shattered in the cross-examination. PW12 Dr.Sagar Mandlik had treated deceased Kalpesh Dhongade at Vakaratund Hospital, Nashik. As per version of this witness, the victim had cut throat injury which was infected with pus. PW12 Dr.Sagar Mandlik has stated that deceased Kalpesh Dhongade died because of

3 AIR 1989 SC 1890

4 AIR 1990 SC 79

5 (2000) 5 SCC 7

septicemia due to cut throat injury on 26th June 2014. Autopsy Surgeon PW7 Dr.Juned Shaikh in his evidence has stated that he had performed postmortem examination of the dead body of deceased Kalpesh Dhongade on 26th June 2014 and came to the conclusion that deceased Kalpesh Dhongade died because of septicemia consequent to cut throat injury. Evidence of PW7 Dr.Juned Shaikh is duly corroborated by contemporaneous report of postmortem examination of dead body of deceased Kalpesh Dhongade which is at Exhibit 57. This report reveals that the deceased was having cut throat injury of size 7x1x4 cms. over front and left side of the neck. This overwhelming evidence leads to hold that deceased Kalpesh Dhongade died homicidal death on 26th June 2014 because of cut throat injury.

9 Now let us examine whether the prosecution has established that appellant/accused Bandu @ Bandya Pathan is the author of cut throat injury caused to deceased Kalpesh Dhongade. The most important evidence which is sought to be pressed in service by the prosecution is that of written dying

declaration of deceased Kalpesh Dhongade, made in presence of First Informant/PW1 Chandrabhan Nathe and two panch witnesses including PW2 Kailash Sonawane. The case of prosecution gives indication that the written dying declaration was made in presence of PW11 Nisar Sayyad, Police Sub-Inspector of Wadivarhe Police Station, Nashik. The dying declaration can form the sole basis for conviction provided the same is found to be truthful and reliable. In order to pass the test of reliability, a dying declaration is required to be subjected to a very close scrutiny, keeping in mind the fact that such statement has been made in absence of the accused who had no opportunity of testing the veracity of such statement by means of cross-examination. If the dying declaration fails to pass the test of reliability and truthfulness, then the same is required to be ignored from consideration. In the case in hand, the FIR Exhibit 36 lodged by PW1 Chandrabhan Nathe contains an averment that during the course of his medical treatment at the Civil Hospital, Nashik, on 18th June 2014, at about 1.30 p.m. deceased Kalpesh Dhongade regained consciousness. The FIR mentions the fact that this

happened after deceased Kalpesh Dhongade had undergone surgical operation. The FIR avers that the First Informant/PW1 Chandrabhan Nathe then asked deceased Kalpesh Dhongade as to who had assaulted him. Thereupon, deceased Kalpesh Dhongade demanded pen and paper by gestures and wrote names of assailants in English language. While in the witness box, PW1 Chandrabhan Nathe on similar lines deposed that at about 2 to 2.30 p.m. of 18th June 2014, deceased Kalpesh Dhongade regained consciousness. At that time, police from the Wadivarhe Police Station were present and they made enquiry with him. PW1 Chandrabhan Nathe further deposed that deceased Kalpesh Dhongade was not in a position to speak, and therefore, he asked for a pen and paper from police by gestures. As deposed by PW1 Chandrabhan Nathe, then in his presence deceased Kalpesh Dhongade wrote names of both accused persons in English language and signed that paper. This witness claims to have signed that paper so also the panch witnesses named Ratan Jadhav and PW2 Kailash Sonawane. Thus, though the FIR is not disclosing the fact that the written dying declaration was made by

deceased Kalpesh Dhongade in presence of the police, First Informant /PW1 Chandrabhan Nathe has specifically deposed that the written dying declaration at Exhibit 35 was made by the deceased Kalpesh Dhongade in presence of the police and by demanding pen and paper from the police.

10 PW2 Kailash Sonawane claims to be a panch witness to the dying declaration Exhibit 35. By towing the line of First Informant/PW1 Chandrabhan Nathe, this witness has also deposed that by asking for a pen and paper from the police from Wadivarhe Police Station, injured Kalpesh Dhongade had written two names on that paper and then he signed that paper as a panch witness. In a similar fashion, Ratan Jadhav had also signed that paper. As deposed by PW2 Kailash Sonawane, then police drew Panchnama Exhibit 38 and seized that dying declaration Exhibit 35.

11 On this backdrop, if the dying declaration at Exhibit 35 claimed to have been written by deceased Kalpesh Dhongade is

perused, then it is seen that in a very shaky handwriting names of two persons namely Bandu Pathan and Santosh are written on a piece of paper. The writing is barely legible. There is signature of the declarant below these two names. That signature is in cursive handwriting and with a sharp strokes. Then, there is an endorsement to the effect that 'The above stated writing is made in my presence'. The signature of PW1 Chandrabhan Nathe is appearing under this writing. Thereafter, under the title 'Signatures of the Panchas' signatures of Ratan Jadhav and PW2 Kailash Sonawane are appearing. The dying declaration Exhibit 35 is showing that all this is done in presence of Police Sub-Inspector of the Wadivarhe Police Station at Camp at Civil Hospital, Nashik. The dying declaration at Exhibit 35 mentions the fact that it is written in presence of the Police Sub-Inspector of Wadivarhe Police Station. Signature of PW11 Nisar Sayyad, Police Sub-Inspector, is appearing apart from the rubber stamp below the names of the accused persons as well as alleged signature of the declarant, on the dying declaration Exhibit 35. However, oral evidence adduced by the prosecution to prove the truthfulness of this dying declaration is totally contradictory to the contents thereof.

12 If this position, as reflected from the dying declaration Exhibit 35, is compared with evidence of PW11 Nisar Sayyad, Police Sub-Inspector, then it becomes clear that the dying declaration at Exhibit 35 was not made in presence of this witness. As per version of PW11 Nisar Sayyad, Police Sub-Inspector of Wadivarhe Police Station, when he went to the Civil Hospital, Nashik, he noticed that patient Kalpesh Dhongade was already operated and was not in a position to give his statement. Then, as per version of PW11 Nisar Sayyad, PW1 Chandrabhan Nathe lodged the report Exhibit 36 and produced a chit (Exhibit 35) which came to be seized by him in presence of two panch witnesses by Panchnama Exhibit 38.

13 Thus, though PW1 Chandrabhan Nathe and PW2 Kailash Sonawane are claiming that dying declaration Exhibit 35 of deceased Kalpesh Dhongade was written in presence of the police, and that too, on supply of pen and paper by the police, PW11 Nisar Sayyad, Police Sub-Inspector, is not supporting this fact. The prosecution has not explained in its evidence as to who

were the police personnel, who were present when the dying declaration at Exhibit 35 was written at the Civil Hospital, Nashik, by deceased Kalpesh Dhongade. Apart from this fact, bare perusal of the dying declaration Exhibit 35, which is infact containing two written names, makes it clear that handwriting of the declarant while writing those two names is barely legible, whereas the signature of the declarant thereon is in cursive English with sharp slants.

14 At this juncture, it needs to be mentioned that as per version of First Informant/PW1 Chandrabhan Nathe, the dying declaration Exhibit 35 of deceased Kalpesh Dhongade was recorded soon after his operation. Similar is the averment made by him in his FIR Exhibit 36. This fact is also clear from evidence of PW2 Kailash Sonawane, who in cross-examination has admitted that hands of declarant Kalpesh Dhongade were engaged due to bandage and saline. PW2 Kailash Sonawane further stated in his cross-examination that deceased Kalpesh Dhongade was not in a position to sit nor was he allowed to speak. Cross-examination of this witness shows that dying declaration of deceased Kalpesh

Dhongade was written by him after performing operation of his neck.

15 Deceased Kalpesh Dhongade had sustained fatal cut throat injury of sized 7x1x4 cms. as stated by PW7 Dr.Juned Shaikh, so also by PW12 Dr.Sagar Mandlik. He had undergone operation just before he is alleged to have made the dying declaration. It is a matter of common knowledge that such an operation cannot be performed without administering anesthesia. Similarly, it is a matter of common knowledge that effect of anesthesia is spread over hours together after the operation. In the light of this factual position, PW1 Chandrabhan Nathe and PW2 Kailash Sonawane have deposed that soon after the operation, deceased Kalpesh Dhongade had made a written dying declaration Exhibit 35. To crown this all, no Medical Officer is examined by the prosecution to establish the fact that soon after his operation, deceased Kalpesh Dhongade was in a position to write names of his assailants by holding a pen as well as the paper. On the contrary, evidence of Investigating Officer PW10

Balasaheb Wade shows that the Medical Officer of the Civil Hospital, Nashik, in response to his letter Exhibit 68 made an endorsement to the effect that deceased Kalpesh Dhongade was unable to give any statement. This happened on 18th June 2014 itself. Thus, when the Medical Officer is certifying that deceased Kalpesh Dhongade is unable to give statement on 18th June 2014, how he was in a position to give his written dying declaration Exhibit 35 on the very same day, which is not supported by PW11 Nisar Sayyad, Police Sub-Inspector, though the said dying declaration contains an endorsement that it is recorded in his presence, is a fact which is not at all explained by the prosecution in its evidence. All these factors make the written dying declaration Exhibit 35, allegedly made by deceased Kalpesh Dhongade, highly doubtful and suspicious. No explicit reliance can, therefore, be placed on the said dying declaration.

16 The prosecution has propounded the last seen theory in order to demonstrate that deceased Kalpesh Dhongade was in company of appellant/accused Bandu @ Bandya Pathan in the

night intervening 17th June 2014 and 18th June 2014. 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 said crime becomes impossible. In the case in hand, evidence of PW5 Yashwant Nathe – another cousin of deceased Kalpesh Dhongade is pressed in service for establishing the fact that deceased Kalpesh Dhongade was lastly seen in company of appellant/accused Bandu @ Bandya Pathan. However, PW5 Yashwant Nathe nowhere states that he had lastly seen deceased Kalpesh Dhongade alive in company of appellant/accused Bandu @ Bandya Pathan. All that what this witness says is, at about 10.00 p.m. of 17th June 2014, he heard about the quarrel between deceased Kalpesh Dhongade and appellant/accused Bandu @ Bandya Pathan. He, therefore, took deceased Kalpesh Dhongade on his motorcycle for taking him to the village. On the way, deceased Kalpesh Dhongade had told him that he (deceased Kalpesh Dhongade) was being called by appellant/accused Bandu @ Bandya Pathan. PW5 Yashwant

Nathe further testified that then deceased Kalpesh Dhongade went towards the Dhaba and he went to his home. PW5 Yashwant Nathe has candidly stated in his cross-examination that he had not personally seen or he was not personally aware as to whether deceased Kalpesh Dhongade had reached Dhaba or not. This makes it clear that PW5 Yashwant Nathe had not seen deceased Kalpesh Dhongade joining company of appellant/accused Bandu @ Bandya Pathan in the night intervening 17th June 2014 and 18th June 2014. As such, it cannot be said that deceased Kalpesh Dhongade was lastly seen in company of appellant/accused Bandu @ Bandya Pathan and soon thereafter deceased Kalpesh Dhongade was found with a cut throat injury to his neck. Thus, the prosecution has not established the last seen theory to point out the accusation fingering towards appellant/accused Bandu @ Bandya Pathan.

17 The next circumstance relied by the prosecution is exchange of phone calls between the accused and the deceased. For this purpose, the prosecution has examined PW13 Sachin

Shinde, Nodal Officer, and it was sought to be established that some calls were exchanged in the night intervening 17th June 2014 and 18th June 2014 in between mobile phone number 9850923366, mobile phone numbers 9657652721 and 7721909432. The latter two mobile phone numbers are stated to be mobile phone numbers of appellant/accused Bandu @ Bandya Pathan and co-accused Santosh Kumar whereas mobile phone number 9850923366 is claimed to be belonging to deceased Kalpesh Dhongade. However, the prosecution has adduced no evidence to show that deceased Kalpesh Dhongade was having a mobile phone bearing no.9850923366. The prosecution has satisfied itself by examining PW4 Pandurang Kale to prove that the mobile phone was seized from the spot of the incident and it was having number 9850923366. The Spot Panchnama Exhibit 44 is mentioning this number. However, there is no evidence coming from mouth of any of the witnesses examined by the prosecution that this mobile phone number belonged to deceased Kalpesh Dhongade.

18 In the result, it cannot be said that prosecution has established a chain of circumstances so complete as to giving only hypothesis of guilt of the appellant/accused and that the proved circumstances are incompatible with the innocence of appellant/accused Bandu @ Bandya Pathan. Resultantly, appellant/accused Bandu @ Bandya Pathan is entitled for benefit of doubt. Hence, the order :

ORDER

- i) The appeal is allowed.
- ii) The impugned judgment and order dated 5th December 2016 passed by the learned Additional Sessions Judge, Nashik, in Sessions Case No.305 of 2014, between the parties, thereby convicting appellant/accused Bandu @ Bandya Pathan of the offences punishable under Section 304 (Part-I) of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 10 years apart from direction to pay fine of Rs.15,000/- and in default to undergo further rigorous imprisonment for 2 years, is quashed and set aside.

- iii) Appellant/accused Bandu @ Bandya Pathan is acquitted of the offence punishable under Section 304 (Part I) of the Indian Penal Code.
- iv) He be set at liberty if not required in any other case.
- v) Fine, if any, paid by him, be refunded to him.

(A. M. BADAR, J.)