

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

CRIMINAL APPEAL NO.402 OF 2012

- | | | | |
|----|--------------------------------------|---|---------------|
| 1) | Manoj @ Manya Pandurang Kadam` |] | |
| | Aged-25 years, Occupation-Business; |] | |
| 2) | Pranay @ Pintya Ramesh Pawar, |] | |
| | Age-23 years, Occupation-Business; |] | |
| 3) | Pradeep @ Dadya Atmaram Pawar, |] | |
| | Age-25 years, Occupation-Agriculture |] | |
| | All R/at. Usar Khurd, Khalchi Ali, |] | |
| | Taluka Tala, District - Raigad |] | .. Appellants |

Versus.

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|----|-----------------------------------|---|----------------|
| 1) | State of Maharashtra |] | |
| | At the instance of Mangaon Police |] | |
| | Station, District - Raigad |] | |
| 2) | Yeshwant Vithoba Sawant, |] | |
| | Age - 49 years, |] | |
| | R/at. Usar Khurd, Khalchi Ali, |] | |
| | Taluka Tala, District - Raigad |] | .. Respondents |

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Mr.Ashish Sawant a/w. Mr.Amol Patankar, Mr.Ramesh Ghag and
Mr.Vatsal Thakkar, Advocate for the Appellants.

Mr.V.V. Gangurde, APP for the Respondent-State.

Mr.Pratap P. Bhosale, Advocate for Respondent No.2.

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**CORAM : B. P. DHARMADHIKARI AND
PRAKASH D. NAIK, JJ.**

**RESERVED ON : MARCH 25, 2019.
PRONOUNCED ON : JUNE 12, 2019.**

JUDGMENT (PER : PRAKASH D. NAIK, J):

Appellants are convicted for the offence under Section 302 read with 34 of Indian Penal Code ("IPC", for short) and sentenced to undergo imprisonment for life and to pay fine of Rs.10,000/-, each, vide judgment and order dated 29th February, 2012, passed by Additional Sessions Judge, Mangaon, District-Raigad, in Sessions Case No.42 of 2010.

2 In brief, the prosecution case is as follows:

- (a) Complainant Yashwant Vithoba Sawant is the father of deceased Mangesh Sawant. He is resident of Usar Khurd, Taluka-Tala, District-Raigad. Deceased Mangesh was residing at his sisters place in Mumbai and he was working as a wireman. He had shifted to Mumbai two years prior to the alleged incident.
- (b) The incident in question took place between the intervening night of 23rd November, 2008 and 24th November, 2008. Body of the deceased was found in hanging position in the padavi of accused no.1.

- (c) On 24th November, 2008, at about 6:00 hrs., police patil of Usar Khurd Shri Sharad Ghag took the complainant to the house of appellant no.1/ accused no.1 where they found the body of Mangesh deceased hanging in the Varanda of the house of accused no.1. His both hands were tied on the back by towel having two knots.
- (d) Information was given by police patil to the police and police attached to Mangaon police station visited the spot. PSI Mane arrived at the spot. Complainant told to police that his son Mangesh has not committed suicide and that he had been murdered and his body is hanged. Police ignored the complaint and did not take cognizance of complainant's grievance. Police prepared accidental death report being ADR No.66 of 2008 under Section 174 of Code of Criminal Procedure. Spot panchanama and inquest panchanama were recorded and the body was sent to Mangaon Government Hospital for postmortem. Subsequently, body was handed over to the relatives of the deceased for performing last rites.
- (e) News of death of Mangesh was published in Newspapers. Police did not register any crime against accused. Complainant

forwarded complaint to various authorities. He wrote to Home Minister of the State and forwarded his complaint to him. Police were directed to look into the complaint. Despite the directions to the police, no action was initiated. According to complainant Mangesh and appellant no.1 were doing electrical work at Mangaon. While doing work, they had quarrel. Mangesh had told him that Manoj took him to Mangaon for work but he used to give abuses to him. Appellant no.2 had borrowed loan of Rs.10,000/- from Mangesh. He had not repaid the amount. All the three accused used to take Mangesh with them whenever they go

- (f) On 22nd May, 2009, complainant filed a private complaint before the Judicial Magistrate First Class, Mangaon in Regular Case No.45 of 2009. The trial Court vide order dated 22nd May, 2009 called report under Section 156(3) of Cr.P.C. investigation then proceeded. Statement of various persons were recorded. On the report submitted by police, process was issued.
- (g) Charge was framed against accused by order dated 24th November, 2010, for the offences punishable under Section 302 read with 34 of IPC. As per charge, on 23rd November, 2008, in

the night time, at village Usar Khurd, Khalchi Ali, Tal.-Tala and particularly in the house of accused no.1 Manoj, they have committed murder of Mangesh Sawant and hanged him to show that he has committed suicide and thereby committed an offence punishable under Section 302 read with 34 of IPC.

3 Prosecution examined eight witnesses in support of its case. Statements of accused were recorded under Section 313 of Cr.P.C. The defence of the accused was of total denial. Vide judgment and order dated 29th February, 2012, the appellants were convicted. Hence, the impugned judgment and order of conviction has been challenged by preferring this Appeal under Section 374(2) of Cr.P.C.

4 Prosecution case is based on circumstantial evidence. There is no eye witness to the incident. The prosecution has relied upon the oral evidence of witnesses and the documents collected during investigation. Trial Court has held that there was motive for the accused to commit crime. After killing the deceased, they hanged him to show that it was a case of suicide and a chit was written to substantiate suicide. The story of suicide has been negated by the circumstances. Police did not carry out proper investigation. Death of Mangesh is homicidal and the accused have shared common intention

to commit the murder. Death of Mangesh being custodial one, strong explanation was required to be given by accused more specifically accused no.1. Trial Court relied upon confessions in meeting conducted by Tanta Mukti Samiti and condemned the inaction of police in conducting investigation.

5 We have heard both the sides. We have scrutinized the evidence on record. The defence has contended that the prosecution has failed to prove its case, whereas, the prosecution contends that there is enough evidence to prove the circumstances against the accused.

6 Mr.Sawant, learned counsel for the appellant vehemently contended that the charge against the accused is not proved beyond doubt. The chain of circumstances has not been established. Doctor's evidence is uncertain about homicidal death of victim. The witnesses had admitted that they have not heard any shouts in the night of the incident. Motive has not been established. There are contradictions in evidence of P.W.1 and P.W.6. Relationship between accused and the deceased was cordial. The statement before Tanta Mukti Samiti is not admissible in law and cannot be relied upon. Investigation officer has stated that during the investigation, he could not find any evidence

against the accused. Expert's evidence do not support the prosecution case. Hand writing expert has not been examined. Section 106 of Evidence Act has been erroneously invoked by the trial Court, since the prosecution has failed to discharge its burden to show that the deceased was in custody of appellants. There is no *iota* of evidence against appellant nos.2 and 3. If the accused had any intention of killing deceased, they would not have hanged him in their premises. There are missing links between the circumstances tried to be established by the prosecution.

7 Mr.Sawant relied upon decision of Privy Council in the case of ***Pakala Narayan Swami Vs. Emperor¹, Shambu Nath Mehra Vs. State of Ajmer², Keshav Dutt Vs. State of Haryana³ and Reena Hazarika Vs.. State of Assam⁴***.

8 Learned APP submitted that circumstantial evidence put-forth by the prosecution is sufficient to convict the appellant. There are sufficient circumstances to indicate that the deceased was in company of the appellants in the house of appellant no.1 at the time of the incident. Accused therefore had a special/specific knowledge of

1 AIR 1939 Privy Council 47

2 AIR 1956 SC 404

3 (2010) 9 SCC 286

4 AIR 2018 SC 5361

circumstance and the burden was cast upon them to explain as to how the death of the deceased had occurred in view of Section 106 of the Evidence Act. The accused has failed to discharge such burden. No explanation has been tendered in the statement under Section 313 of Cr.P.C. The defence of the accused is of total denial. The victim died in a suspicious circumstances. His body was found hanging in Varnada of the house of accused no.1. The deceased was hanging to the wooden beam of the house with a Nylon rope. His feet were touching the floor. His hands were tied behind with towel. The circumstances therefore indicate that he was killed and hanged. He submitted that the person whose hands were tied behind by towel would not be in a position to commit suicide. The postmortem report and the evidence of medical officer who conducted postmortem indicate that the death was due to asphyxia. It is a homicidal death. He further submitted that the handwriting experts report do not indicate that the chit was in the handwriting of the deceased. Therefore, it is clear that the said document was planted by the accused. It is submitted that the accused had made extra judicial confession before the Tanta Mukti Samiti, wherein it was admitted that the deceased was brought by the accused in the house of accused no.1, which corroborates the prosecution case. He, therefore, submitted that the prosecution has established its case and the trial Court has rightly convicted the

appellant. The reasons assigned by the trial Court do not require any interference. Hence the Appeal may be dismissed. Learned counsel for respondent no.2 supported arguments of prosecution and judgment of trial Court.

9 We have perused the evidence of witnesses and the documents on record. With a view to deal with the submissions advanced by both the sides, it would be relevant to analyse the evidence of the witnesses examined by the prosecution. P.W.1 Yashwant Vithoba Sawant is the complainant. He is the father of deceased. He has stated that Mangesh and Manoj (accused no.1) were doing electrical work at Mangaon. Mangesh had told him that Manoj used to abuse him. Accused no.2 was on visiting terms to his house. He had borrowed Rs.10,000/-, from Mangesh, which were not repaid by him. All the three accused used to take his son with them wherever they go. On 24th November, 2008, police patil accompanied him to the place of incident. He noticed that dead body of Mangesh was hanging in Padavi of accused no.1. His hands were tied on the back by towel having two knots. His legs were touching floor and they were bent at knee. Knee was having soil. Rope was tied with the lofter of the roof. He suspected that his son has been killed and dead body is shown hanging. Police arrived at spot. Dead body was brought down. There was a cool response from police. Complaints were made to

authorities inspite of directions of Home Minister, no action was initiated. Hence, he filed private complaint, in which direction was given for investigation. He further deposed that meeting of Tanta Mukti Samiti was held. Accused and police were present. Accused no.1 stated that Mangesh was drunk on the day of incident and he was asked to sleep on the cot in the house of accused no.1. Accused no.2 stated that he along with Mangesh went to beer bar at Mangaon and returned to village on the motor-cycle. Parents of accused no.1 had gone to Alandi. In the cross-examination, he stated that he did not find injury on the person of deceased. His clothes were not torn. His eyes were closed. He do not know Meghna Chalke. She was not on visiting terms at his place. He denied any break-up of relationship between the victim and Ms.Chalke. He admitted that his son was having close association with accused no.1 and he was visiting his place. The Padavi is made up of mud. The witness has brought on record document, such as, complaint to Home Ministry and the police authorities.

10 P.W.2 Shriram Pawar had acted as a panch witness to spot panchanama (Exhibit-30), inquest panchanama (Exhibit-31), Chit (Exhibit-32) and seizure panchanama at Exhibit-33. Hand writing of accused nos.1 to 3 (Exhibit-34). Specimen hand writing of accused nos.1 to 3 is at Exhibit - 35/1, to 35/6, 36/1 to 36/6 and 37/1 to 37/6.

He has also deposed that after one month of the incident, meeting was conveyed in the Panchayat Office of Usar Khurd. Dy.S.P. Kurne was present with PI Parulekar, API Mane. Complainant and his relatives were present. Accused were present. Dy.S.P. Kurne inquired with the accused about the incident. Accused no. 2 stated that he brought the deceased from Mangaon to Usar during night time. In the cross-examination, he stated that presently, he is Deputy Sarpanch Usar, when he went to the house of the accused, legs of the victim were hanging in the air. He was at the spot till arrival of the police. He also stated that at the spot, father of the deceased did not level any allegation against the accused. Police arrived at the spot. They took dead body for postmortem. There was no injury on the person of the deceased. The distance between the house of deceased and accused is 100 feet. He had not heard from anybody that any shouts were heard during the night time. P.W.3 Sharad Ghag is police patil of the village. He had seen the dead body hanging to the rope, feet were touching floor and legs were bent at the knee. Hands were tied with towel on the back side. Deceased was wearing Baniyan and Chaddi. He informed police about the incident. Police came to the spot and reduced his information into writing. Police had conveyed meeting of Tanta Mukti Samiti in the Gram Panchayat office of Usar after one month of the incident. Shriram Pawar was the president of Tanta

Mukti. He was uncle of accused no.3. Police made inquiries about the suspicion with villagers and father of deceased. No one had shown any suspicion. Accused were present in the meeting. Police called them. PSI Parulekar informed to the gathering that Pintya has brought deceased from Mangaon to Usar. PSI Mane apologized for delay in the investigation. In the cross-examination, he stated that since the incident till arrest, accused were present in the village. The relations between family of accused and deceased were cordial. None of the villagers disclosed that during night time they have heard shouts from anywhere. Till cremation, none of the relatives made any allegation against the accused. Sister of Mangesh resides at Mumbai.

11 P.W.4 Dr.Vidya Kamble is the medical officer attached to District Hospital, Mangaon. On 24th January, 2008, she conducted postmortem on the dead body of Mangesh Sawant. On seeing the dead body, she noticed skin over palms, soles, cyanosed, nail beds cyanosed and skin over face was pale. During external examination, she noticed ligature mark/imprint abrasion, pale yellowish brown dry hard seen over the neck just above thyroid cartilage extending from mastoid to mastoid. She found dry hard white band of subcutaneous tissues, underneath the ligature mark, patchial hemorrhage present. Injury was ante mortem. She noticed larynx trachea and bronchi.

There was fracture of posterior horn of thyroid cartilages. Tongue was inside. Viscera was not preserved. There was no free fluid. Cause of death is asphyxia due to hanging. She further stated that she had gone through inquest panchanama. On seeing photographs, there are two possibilities as per medical jurisprudence, that victim may hang himself and or some other persons may hang him. If hands are tied from back side, it may be homicidal death. In the cross-examination, however, she deposed that the possibility she had narrated may happen in the case of suicide. She agrees with the opinion expressed in Parekh's Medical Jurisprudence. Asphyxial death includes suicidal, homicidal and accidental death. Person to commit suicide may tie his hands. She further stated that dry hard white band of subcutaneous tissue underneath ligature mark along with petechial hemorrhage present are seen upon dissection in case of hanging. Hanging is ante-mortem.

12 P.W.5 Kamlakar Mhatre was the ASI attached to Mangaon Police Station. Police patil gave him information about the incident. He went to Usar. He visited spot of incident. Police patil was present there. In the Padavi of the house of accused no.1, dead body of the deceased was hanging. Feet of the deceased were on the floor and the body was bent near waist. Rope was around his neck. Both the hands

were tied with towel on the back side. He obtained complaint of police patil (Exhibit-39). PSI Mane visited spot with the photographer. Photographs were taken. In the cords-examination, he stated that on the spot he has seen one chair. It was lying on the ground. One chit was found at the spot. The contents were regarding affair. He did not make any inquiry regarding the chit. He did not show the chit to the father of the deceased. He did not make any inquiry with the father of deceased regarding the chit. He also did not make any inquiry with the relatives of the deceased about chit. PSI Mane did not show any chit to anyone.

13 P.W.6 Megha Chalke is residing at Wadala, Mumbai. She was knowing deceased Mangesh. Sister of deceased was residing near her house. Hence, she was knowing them. She had no relations with Mangesh. Disha (sister of deceased) was residing at Wadala, Mumbai, since 2007. Mangesh was residing with Disha. P.W.6 and family of Disha were having cordial relations including Mangesh and Sandesh. At the time of marriage of her sister, Mangesh and his brother has helped them in domestic duty. She had seen father of Disha when she had gone to see Ganpati and at the time of delivery of sister of Mangesh. When she went to parents of Disha she stayed there overnight. She also stated that father of deceased is present int eh

Court. She knows accused no.2. When she came to Mangaon, deceased and accused no.2 was present outside the house and Mangesh had introduced her to accused no.2. She came to know about the death of Mangesh about 2 to 3 days. P.W.7 Arvind Parulekar was attached to Mangaon Police Station. He had forwarded documents to the handwriting expert. Letter was issued to handwriting expert under signature on 28th February, 2009. He obtained handwriting of accused. In the cross-examination he has stated that he had conveyed meeting of Tanta Mukti when the investigation was pending with him. During the meeting, father of accused and father of deceased were present. The meeting was conveyed to bring truth. During his investigation, nothing was transpired to him as to who are the assailants. The letter forwarded to handwriting expert was marked as Exhibits-52 and 53. The specimen hand writing of the accused no.1 is marked as Exhibit-55/1 to 55/6, the specimen handwriting of accused no.2 is marked as Exhibit-56/1 to 56/6 and specimen handwriting of accused no.3 is marked as Exhibit-57/1 to 57/6.

14 P.W.8 Dilip Mane, is the main investigating officer. He was attached to Mangaon Police Station. He went to the spot of Usar Khurd on the day of incident. He saw the dead body hanging in the Padavi and the hands of the victim were tied from back side. He had

drawn spot panchanama. He found suicidal note. He prepared inquest panchanama. ADR was recorded. Statements of relatives of the deceased were recorded. Body was sent for postmortem. He collected advance cause of death certificate. Statement of witnesses were recorded. He seized diary for ascertaining natural handwriting of the accused. In the cross-examination he stated that deceased was having injury of ligature mark and soil was seen on his knees. At that time, hands of the deceased were tied behind. He had maintained the case diary of ADR. He made inquiries with suspects. He found no evidence against the accused, and, hence, no offence was registered against them. Tanta Mukti meeting was conveyed by PI Paruekar. In that meeting father of the deceased, accused and relatives and villagers were present. He was present in the meeting. When the father of the deceased had been to the spot, he had seen suicidal note. During investigation, chit was in his possession and it was not shown to the father of the deceased again. He made inquiries with the relatives of the deceased regarding love affair of the deceased, but, nothing was revealed during inquiry. During investigation with father of the deceased, he stated that Megha had been to their place during Ganesh festival. Statement of Megha was recorded. She had disclosed that deceased had introduced Pranay Pawar to her when she had been to the village.

15 Handwriting experts opinion is as under:

"Having carefully examined the documents, I am of the opinion that :

- (1) The red encircled writing mark Exh Q-1 to Q-3 are not written by any of the writer who wrote the writings marked Exh N-3, S-1 to S-6, N-4, S-7 to s-12, N-5, s-13 to s-18 and N-6*
- (2) In absence of proper and adequate standards for comparison, it has not been possible to express a definite opinion as regards the identity or otherwise of the red encircled writings and signature marked Exh Q-1 to Q-3 and Q-4 with the writings marked exh N-1, N-2".*

16 The expert could not determine whether the chit is in the handwriting of the deceased. The expert could not also determine that the chit was in the handwriting of the accused. The prosecution did not examine the handwriting expert.

17 Analysing evidence, it is apparent that the entire case of the prosecution is based on circumstantial evidence. Trial Court has drawn an adverse inference against accused on the basis of the circumstance that the chit which was purportedly found at the place of incident was not written by the deceased. The handwriting expert's

opinion indicate that it was not in the writing of the deceased, hence it find support to the contention of the prosecution that if Mangesh wanted to commit suicide, it was possible for him to do so before coming down to Usar Khurd. It is also observed that there is nothing to indicate that he was in love with Megha Chalke, as contended by the defence during the cross-examination of the witnesses. Trial Court has also relied upon statement allegedly made by accused during the meeting conducted by Tanta Mukti Samiti in the village in the presence of the relatives of deceased, accused, villagers and police officers. Trial Court has also opined that the fact that the hands of the deceased was tied behind and the evidence of the Doctor, P.W.4 proves that the death was homicidal and not suicidal. It was also held that the victim was in the custody of the accused and in consequence with Section 106 of the Evidence Act, the accused were required to explain the circumstance which would to their knowledge as to how the death has occurred. It is held that in furtherance of common intention the accused have committed murder of deceased Mangesh. It was further observed that the defence of the accused is disproved by the evidence of P.W.6 Megha Chalke. Accused cannot take benefit of lapses in the investigation. There was failure in discharge of duty by the police and accused cannot take advantage of the same. The statement made by the accused before Tanta Mukti Samiti amounts to extra judicial

confession. Hence, on the basis of the aforesaid findings, the trial Court has come to the conclusion that the chain of circumstances has been established to prove the charge against the accused.

18 On going through the evidence, we find that the findings of the trial Court were erroneous. The prosecution has not been able to establish the case beyond all reasonable doubts. The circumstances put forth by the prosecution are not sufficient to prove the charges against the appellants. There is absolutely no evidence to establish connivance of accused nos.2 and 3. The expert's evidence do not support the prosecution. It is, however, pertinent to note that the expert's evidence also do not indicate that chit which was allegedly planted to show that the deceased had committed suicide due to love affair, is in the writing of the accused. The prosecution, for the reasons known to them has not examined the handwriting expert. The defence has not been given opportunity to cross-examine the expert. Trial Court, however, has drawn an adverse inference against the accused by observing that the chit was not in the handwriting of the deceased. It is relevant to note that the purported writing of the deceased was produced by P.W.1. It is not established by the prosecution that the same were admitted writings of the deceased. It is not established as to from where the said writings were produced

and whether the handwriting appears in the said documents is that of the deceased.

19 The death of the deceased had occurred in suspicious circumstances. It is true that there are lapses in the investigation. However, on account of the conduct of police and lapses in investigation, the accused cannot be convicted by drawing any adverse inference in the absence of any cogent evidence. The evidence of P.W.1 and P.W.6 runs counter to each other. P.W.1 has stated that he do not know Megha Chalke. She had not visited his place. He also denied that the deceased was having affair with her. The defence of the accused was that there was an affair between the deceased and P.W.6 and on account of break-up in their relation, out of frustration, he committed suicide. P.W.1 Chalke tried to suppress the acquaintance of P.W.6 with deceased and his family. However, on perusal of evidence of P.W.6, it is apparent that she was acquainted with deceased and his family. She has deposed that she was residing at Mumbai and the sister of the deceased, Disha was her neighbour. P.W.6 was frequently visiting house of sister of Disha. She also stated that Mangesh and his brother were staying with Disha. They were acquainted with each other. She also stated that she visited house of the deceased during Ganesh festival and had stayed there overnight.

She had seen father of Disha (P.W.1) when she had gone to see Ganpati and at the time of delivery of sister of Mangesh. She recognized father of the deceased (P.W.1) in the Court. She has also stated that family of Disha and she was having family relations including Mangesh and Sandesh. Mangesh had introduced her to accused no.2, when she met him first. The evidence of P.W.6 therefore shows that she knows family of Mangesh. She was closely acquainted with sister of Mangesh. P.W.1, however, tried to suppress this acquaintance which is evident from his deposition. It is also pertinent to note that P.W.8 have stated in his evidence that during investigation with P.W.2, he had stated that Megha had been to their place during Ganesh festival and her statement came to be recorded by him.

20 The evidence of P.W.1 indicate that Mangesh was having close association with accused no.1 and he was visiting his place. The motive attributed by P.W.1 appears to be weak. It is alleged that Mangesh and Manoj were doing electrical work at Mangaon and during the work they had quarreled and Mangesh had told P.W.1 that he used to abuse him. It is also alleged that accused no.2 was on visiting terms at his house and he had borrowed Rs.10,000/-, from Mangesh, which was not repaid by him.

21 The motive attributed to the accused do not appear to be a strong circumstance to infer that the accused have committed murder of the deceased. The evidence of the witnesses also indicate that in the intervening night between 23rd November, 2008 and 24th November, 2008, nobody had heard shouts of the deceased. The dead-body of the deceased was, however, noticed on 24th November, 2008. The prosecution is also relying upon the statement of accused purportedly made during the Tanta Mukti Samiti meeting. P.W.1 have stated that the meeting was attended by accused, SDPO Kurne, PSI Parulekar and PSI Mane. According to P.W.1, accused no.1 have stated that Mangesh was heavily drunk on the day of incident and he was asked to sleep on the cot of the accused no.1. Accused no.2 stated that he had gone to Mangaon along with Mangesh and consumed beer and he returned to village on the motor-cycle. Accused no.3 did not say anything. The prosecution on the basis of the said statement is trying to establish that the deceased was in custody of the accused. P.W.2 has stated that accused no.2 during the meeting of Tanta Mukti Samiti have stated that he brought deceased from Mangaon to Usar during night time. There is variation between the deposition of P.W.1 and P.W.2. As per the version of P.W.2, the accused no.2 had stated to have brought deceased from Mangaon to Usar. The said statement is not incriminating in any manner and do not show the presence of the

deceased in the house of accused no.1. The version, as referred to by P.W.1 is, however, contrary/contradictory. In any case, even according to P.W.1, accused no.1 has not admitted that he had committed murder of the deceased in connivance with the co-accused, P.W. 3 has also referred to the meeting of Tanta Mukti Samiti in his evidence. He stated that the police made inquiry about suspects with villagers and father of deceased and nowhere has shown any suspicion. Father of the deceased was insisting for justice. Accused were present in the meeting. PSI Parulekar informed to the gathering that Pintya has brought Mangesh from Mangaon to Usar. Thus, according to P.W.3, PSI Parulekar (P.W.7) had disclosed about the statement made by accused no.2 about bringing the deceased from Mangaon to Usar. It is, therefore, clear that the evidence of P.W.2 and P.W.3 with regards to the meeting of Tanta Mukti Samiti is at variation with P.w.1. P.W.7 has also stated that he had conveyed meeting of Tanta Mukti. However, he has not deposed as to what had transpired in the meeting and whether any accused have made statement about their involvement in the crime. P.W.8, the investigating officer has also referred to Tanta Mukti meeting conveyed by PI Parulekar. He was present in the meeting. Attempts were made to bring truth on record. However, he has not disclosed as to what has transpired in the meeting. In this circumstances, no reliance could have been placed on the alleged

conversation of the accused during the Tanta Mukti meeting. Learned counsel for the appellant has relied upon the decision of the Privy Council in the case of ***Pakala Narayan Swami Vs. Emperor (Supra)***, wherein it was observed that Section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation. Section 27 seems to be intended to be a proviso to Section 26, which includes any statement made by a person whilst in custody of the police and appears to apply to such statements to whomsoever made example to a fellow prisoners, a doctor or a visitor. Such statement are not covered by Section 162. The declarant was not in the custody of police and no discovery was made in consequence of his statement. The words of Section 162 are wide enough to exclude any confession made to a police officer in the course of investigation whether the discovery is made or not. Learned counsel for the appellant had contended in the alleged meeting conducted by Tanta Mukti Samiti, the police officer, such as Deputy Superintendent of Police SDPO and police inspector were present and, therefore, no reliance could be placed on such statement. As stated above, we have considered the conversation transpired during the alleged Tanta Mukti Samiti. Considering the variation and nature of the conversation, no reliance could be placed on such statements.

22 Apart from the above, it is apparent from the deposition of witnesses that on the day of incident till the final rites were performed, the complainant has not raised any suspicion against the accused. It is apparent that the accused and victim were acquainted with each other. They were having friendly relations. P.W.1, however, has contended that there was animosity between the accused. The presence of accused no.3 has not been established in any manner.

23 The evidence of P.W.4 who had conducted the postmortem indicate the cause of death of the deceased was asphyxia due to hemorrhage. The witnesses have deposed that they did not see any injury on the body of the deceased. P.W.4 have stated that there were ligature mark on the body of the deceased. She is also deposed that there are two possibilities as per the medical jurisprudence, victim may hang himself or some other person may hang him. If hands are tied on back side, it may be homicidal death. In the cross-examination, however, she has stated that the possibilities she had narrated may happen in the case of suicide. She agree with the opinion laid down in Parekh's Medical Jurisprudence. She has also stated that there is one type of death - violent asphyxial death, which includes suicidal, homicidal and accidental death. She also stated that dry hard white band of subcutaneous tissue underneath ligature mark alongwith

patechial hemorrhage present which are seen upon dissection in case of hanging and that hanging is ante-mortem. The witnesses not certain about cause of death.

24 Trial Court has also drawn an adverse inference on the basis of Section 106 of the Evidence Act. It is pertinent to note that the prosecution has to first establish that the deceased was in the custody of the accused. Spot panchanama indicates that there were articles, such as, iron chair fallen at the place of incident, chit with ball pen, nylon rope. On entry in the house, clothes of deceased bag kept on table with electrical instruments, phone number chit. The panchanama further indicates the description of articles seized such as nylon rope, towel, chit written by accused and phone chits, which would mean other articles were not seized. The incident had occurred in the padavi (Varanda of the house of accused no.1. There were no injury of assault on the person of the deceased. The articles, which were referred to in the spot panchanama allegedly belonging to deceased were not produced during the course of the evidence before the Court. It is not established that the same belonging to the deceased. Thus, the telephone number, chits, which were allegedly found in the room, was not proved to be in the hand writing of the deceased. The towel, which was used for tying the hands of the

deceased was not identified and produced in the evidence. It is not established that victim was in custody of accused. The prosecution has suppressed the best evidence and relying on circumstances which do not prove the case beyond doubt. Hence, it cannot be said that the prosecution has laid any foundation in the form of evidence to invoke Section 106 of the Evidence Act.

25 In the decision of Apex Court in **Reena Hazarika Vs. State of Assam (Supra)** in paragraph 8, it is observed as follows:

“8 The essentials of circumstantial evidence stand well-established by precedents and we do not consider it necessary to reiterate the same and burden the order unnecessarily. Suffice it to observe that in a case of circumstantial evidence, the prosecution is required to establish the continuity in the links of the chain of circumstances, so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. Mere invocation of the last seen theory, sans the facts and evidence in a case, will not suffice to shift the onus upon the accused under Section 106 of the Evidence Act, 1872 unless the prosecution is unable to establish a prima facie case, leaving open the possibility that the occurrence may have taken place in some other manner, the onus will not shift to the accused, and the benefit of doubt will have to be given.”

In ***Shambu Nath Mehra Vs. State of Ajmer (Supra)*** , while interpreting Section 106 in paragraph no.9 it is observed as follows:

“9 This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word “especially” stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are *Attygalle Vs. Emperor* (AIE 1936 PC 169) and *Seneviratne Vs R.* (1936) 3 All ER 36, 49.”

In ***Keshav Dutt Vs. State of Haryana (Supra)***, it was observed that the trial Court ought to have allowed the appellant opportunity to cross examine the expert and both trial Court and High Court erred in denying him such opportunity and shifting the onus on accused to disprove exhibit which was not formally proved by the prosecution.

26 The law is well-settled when it relates to the case of circumstantial evidence. In our considered opinion, the following 3 conditions are required to be satisfied :-

- (i) *The circumstances from which an inference of guilt is sought to be drawn, must be proved by cogent and reliable evidence;*
- (ii) *The circumstances should be of definite tendency unerringly pointing towards the guilt of the accused;*
- (iii) *The circumstances taken jointly should form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else and it should be incapable of explanation of any other hypothesis than that of the guilt of the accused.*

27 In the case of **Gian Mahtani Vs. State of Maharashtra, etc⁵**, the Apex Court has observed as follows :-

“.....according to the system of jurisprudence which we follow, conviction cannot be based on suspicion nor on the conscience of the court being morally satisfied about the complicity of an accused person. He can be convicted and sentenced only if the prosecution proves its case beyond all reasonable doubt.”

28 In the case of **Anil Shamrao Sute and Anr. Vs. State of Maharashtra⁶**, the Supreme Court was pleased to observe that suspicion however strong, cannot place of proof. Clear and impeccable evidence is necessary to convict the person.

28 In the case of **Gambhir Vs. State of Maharashtra⁷**, the Apex Court, in para 9 of the said decision, has observed as follows :-

“9. It has already been pointed out that there is no direct evidence of eye witness in this case and the case is based only on circumstantial evidence. The law regarding circumstantial evidence is well-settled. When a case rests upon the circumstantial evidence, such evidence must satisfy

5 AIR 1971 SC 1898

6 2913 CRI.L.J. 2223 (Supreme Court)

7 1982 SCC (CRI) 431

three 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 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. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

30 The *locus classicus* of the decision of the Supreme Court is the one rendered in case of ***Hanumant Govind Nargundkar and another v. State of Madhya Pradesh***⁸, it was observed as follows:-

"In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore it is right to recall the warning addressed by Baron Alderson, to the jury in Reg v. Hodge , where he

8 A.I.R. 1952 Supreme Court 343

said :-

"The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

31 In the case of ***Shivaji Sahabrao Bobade and Anr. Vs. State of Maharashtra***⁹, the Supreme Court is pleased to observe in para 19 that **it is a primary principle that the accused *must be* and not merely *may be* guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.**

32 In the case of ***Sharad Birdhichand Sarda Vs. State of Maharashtra***¹⁰ (*supra*), which is another landmark decision of the Apex Court on appreciation of circumstantial evidence as well as other principles of criminal jurisprudence, the Court had referred to the earlier decisions of Hanumant's case and Shivaji Bobade's case and on analysis of the said decisions, it was observed that the following conditions must be fulfilled before a case against an accused can be said to be fully established :-

- (i) The circumstances from which an conclusion of guilt is to be drawn, should be fully established;**
- (ii) The facts so established, should be consistent with the hypothesis of the guilt of the accused, that is to say they should not be explainable on**

9 1973 (2) SCC 793

10 (1984) 4 SCC 116

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;

(v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion that in human probability, the act must have been done by the accused.

These five golden principles constitute the panchsheel proof of a case based on circumstantial evidence.

33 The cardinal principle of criminal jurisprudence is that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. These principles were laid down in various cases by the Apex Court viz. ***Anant Chintaman Lagu V. State of Bombay***¹¹, ***Lagu case***¹² as also the principles enunciated by the Apex Court in ***Hanumant case***¹³ have been uniformly and consistently followed in all later decisions of

11 (1960) 2 SCR 460 : AIR 1960 SC 500 : 1960 Cri LJ 682

12 (1960) 2 SCR 460 : AIR 1960 SC 500 : 1960 Cri LJ 682

13 1952 SCR 1091 : AIR 1952 SC 343 : 1953 Cri LJ 129

*the Hon'ble Apex Court without any single exception. To quote a few cases – **Tufail case**¹⁴, **Ramgopal case**¹⁵, **Chandrakant Nyalchand Seth Vs. State of Bombay**¹⁶, **Dharambir Singh v. State of Punjab**¹⁷. There are a number of other cases where although Hanumant case has not been expressly noticed but the same principles have been expounded and reiterated, as in **Naseem Ahmed vs. Delhi Administration**¹⁸, **Mohan Lal Pangasa vs. State of U.P.**¹⁹, **Shankarlal Gyarasilal Dixit v. State of Maharashtra**²⁰ and **M. G. Agarwal v. State of Maharashtra**²¹—a five-Judge Bench decision.*

34 The Apex Court, in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra** (*supra*) has observed as follows :-

“It will be seen that this Court while taking into consideration the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation

14 (1969) 3 SCC 198 : 1970 SCC (Cri) 55

15 AIR 1972 SC 636 : (1972) 2 SCC 625

16 Criminal Appeal No.120 of 1957, decided on February 19, 1958

17 Criminal Appeal No.98 of 1958, decided on November 4, 1958

18 (1974) 2 SCR 694, 696 : (1974) 3 SCC 668, 670 : 1974 SCC (Cri) 198, 200

19 AIR 1974 SC 1144, 1146 : (1974) 4 SCC 607, 609 : 1974 SCC (Cri) 643, 645

20 (1981) 2 SCR 384, 390 : (1981) 2 SCC 35, 39 : 1981 SCC (Cri) 315, 318-19 : 1981 Cri LJ 325

21 (1963) 2 SCR 405, 419 : AIR 1963 SC 200 : (1963) 1 Cri LJ 235

can be used as additional link, the following essential conditions must be satisfied :-

- (1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,***
- (2) the said circumstance points to the guilt of the accused with reasonable definiteness, and***
- (3) the circumstance is in proximity to the time and situation."***

35 In the light of principles enunciated in aforesaid precedents and in the facts and circumstances of the present case and evidence analysed hereinabove, we are of the considered opinion that the benefit of doubt ought to be given to the appellants. Hence the conviction of the accused/appellants is required to be set aside.

36 Hence, we pass the following order:

:: ORDER ::

- (i) Criminal Appeal No.402 of 2012, is allowed;

- (ii) The impugned judgment and order dated dated 29th February, 2012, passed by Additional Sessions Judge, Mangaon, District-Raigad, in Sessions Case No.42 of 2010, is quashed and set aside;
- (iii) The conviction of the appellants under Section 302 read with 34 of Indian Penal Code imposed vide judgment and order dated 29th February, 2012, passed by Additional Sessions Judge, Mangaon, District-Raigad, in Sessions Case No.42 of 2010, is set aside and the appellants are acquitted of all the charges;
- (iv) Appellant no.1, who is in custody may be set at liberty forthwith unless required in any other case;
- (v) Criminal Appeal stands disposed of.

(PRAKASH D. NAIK, J.)

(B.P. DHARMADHIKARI, J.)