

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

CRIMINAL APPEAL NO. 1024 OF 2012

Vaibhav Shantaram More,
Age 25 years, Occupation Service,
Residing at 23/2, Dfhansukh Bhavan,
Krantivir Rajguru Marg, Borbhat Lane,
Girgaon, Mumbai-400004.
(At present in Judicial Custody and
lodged at Nashik Central Prison)

...Appellant.

Vs.

The State of Maharashtra
(At the instance of Shahu Nagar Police
in their CR No.244/2010, CC No.201/PW/2011).

...Respondent.

Mr. Abhaykumar Apte for the Appellant.
Mr. Arfan Sait, APP for the State.

**CORAM : B.P. DHARMADHIKARI &
MRS. SWAPNA S. JOSHI, JJ.**

**DATE : Reserved on 5th July, 2019
Pronounced on 30th September, 2019**

JUDGMENT : (PER MRS. SWAPNA JOSHI, J.)

1. This appeal has been directed against the Judgment and Order dated 11.7.2012 passed by the Additional Sessions Judge, at Sewree, Mumbai in Sessions Case No.165 of 2011 (hereinafter appellant will be referred to as “accused” for the sake of brevity).

By the said Judgment and Order the learned Additional Sessions Judge has convicted the accused under **Section 363** of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.500/-, in default to suffer rigorous imprisonment for two months. The accused was further convicted under **Section 377** of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.5000/-, in default to suffer rigorous imprisonment for one year. The accused was also convicted under **Section 302** of the Indian Penal Code and sentenced to suffer life imprisonment and to pay a fine of Rs.5000/-, in default to suffer rigorous imprisonment for one year. The accused was further

convicted under **Section 201** of the Indian Penal Code and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs.1000/-, in default to suffer rigorous imprisonment for two months.

2. The prosecution case in brief is that Prabhakar Jagtap is the complainant (P.W.1). He is having one daughter by name Pratiksha and was having a son by name Harishchandra (deceased). They were resident of Dhansukh Bhavan, Opp. Mugalwadi Sahitya Sangh Natyagruha, Girgaon. They were residing in a rented premises. The accused was their neighbour. Due to the acquaintance and neighbourhood, accused always used to visit the house of the complainant. He used to carry Harishchandra, without informing his parents. The complainant then shifted to Matunga. The brother of the accused is the neighbour of the complainant. Accused started residing in the house of his brother and due to the prior acquaintance he continued frequently visiting the house of the complainant and he used to take Harishchandra with him behind back of his parents.

On 24/09/2010, at the time of Ganpati festival, without informing the parents of Harishchandra, he was taken by the accused to his native place. The parents of Harishchandra ousted the accused as well as Harishchandra from their house. Thereafter accused reached Harishchandra to the house of complainant. On 28.9.2010, deceased Harishchandra was again taken by the accused without informing his parents to Girgaon where accused was previously residing, however he reached Harishchandra to complainant's house.

3. On the day of incident i.e. on 29.10.2010 at about 8.00 a.m. the complainant as well as his wife left the house for their work leaving behind Pratiksha and Harishchandra in his house. At about 8.30 p.m., when they returned to their house they did not notice Harishchandra in their house. They made enquiry in neighbourhood but in vain. Missing complainant was then lodged by the complainant at Shahunagar Police Station on the next day i.e. 30.10.2010. On 30.10.2010, the neighbour of the complainant Smt. Ashwini Bhaud (P.W.3) informed to the complainant that

accused was seen with Harishchandra on 29th October 2010 at 5.30 pm. Considering the antecedents, the complainant suspected that accused must have kidnapped his son with same ill intention and therefore, he proceeded to the police station and lodged complaint (Exh.8) against the accused on 31.10.2010. On the basis of the said complaint, offence was registered vide CR No.244/2010 and investigation commenced.

4. The police recorded the statements of various witnesses. During the course of investigation it was transpired that on 29.10.2010, the accused had kidnapped Harishchandra and carried him to a lonely place in the shrubs at Kanjurmarg area and then he committed unnatural sexual intercourse with Harishchandra and to conceal the said act throttled Harishchandra which resulted into murder. The dead body of Harishchandra was recovered at the instance of the accused. The inquest panchanama was drawn. The dead body was sent for autopsy. The Medical Officer opined that, circumference of the anus is extended and that the possibility of unnatural intercourse

cannot be ruled out. It was further opined that, the deceased might have died within a period of 24 hours prior to the postmortem.

5. On 31.10.2010, the accused was arrested by Shahunagar Police. He showed his willingness to point out the place where he had hidden the dead body and foot wear of deceased. PW8 recorded the memorandum panchanama (Exh.21). The accused then led the police and panchas to Kanjurmarg Vikhroli area. There were shrubs and ditches of water. It was informed by one person from that area that a body was taken out and removed from the ditch by Kanjurmarg Police. However, his footwear were found, which were taken charge (Art.C) by Shahunagar Police. Accordingly, panchanama of that place was prepared vide Exh.22 by Shahunagar Police Station. Inquest panchanama of dead body was prepared vide Exh.24. The statement of witnesses were recorded. After completion of investigation, charge sheet was submitted in the court of Learned J.M.F.C. and then the case was committed to the Court of Sessions. The learned Additional Sessions Judge on recording evidence and

after hearing both the sides convicted the accused as aforesaid.

6. The prosecution has examined in all 13 witnesses to prove the guilt of the accused namely father of the deceased Prabhakar Jagtap (P.W.1), Panch witness Anant Bhond (P.W.2), Ashwini Anant Bhond (P.W.3), sister of deceased Pratiksha Prabhakar Jagtap (P.W.4), friend of the accused Anand Malak (P.W.5), Pandurang Gonabare (P.W.6), Dinesh Bhatre (P.W.7), Tatya Narayan Bhaud (P.W.8), PSI Shivaji Maruti Chavan (P.W.9) PSI Khudabaksh Issak Momin (P.W.10), Medical Officer Babanrao Shinde (P.W.11), Investigating Officer Tajuddin Sultan Shah Sayyed, P.I.Shahu Nagar Police Station (P.W.12) and Dr. Amit Chavan, Medical Officer, Rajawadi Hospital (P.W.13).

7. The defence of the accused is of total denial. It was not disputed that accused used to take Harishchandra with him very often. He had also taken him at his native place. However, on the point of incident it was his case that he has been falsely implicated in the present crime.

8. Learned Advocate for the accused vehemently argued that the learned Trial Judge has not assessed the evidence adduced by the prosecution in its proper perspective and has erroneously convicted the accused. It is submitted that the chain of circumstances has not been proved by the prosecution. It was submitted that the accused was seen in the company of deceased on the date of incident i.e. on 29.10.2010. The said fact was informed by P.W.3 to P.W.1 on the same day however, instead of lodging complaint against the accused, P.W.1 lodged the missing complaint in respect of his son. According to learned counsel for the accused, false case has been concocted against the accused. It is submitted that even the statement of P.W.7 who had allegedly last seen the deceased in the company of the accused, his statement has been recorded belatedly by the police. Similarly the footwear of the deceased were found at the place of incident itself and the spot panchanama was recorded on 31.10.2010. However, the discovery of the said footwear was shown at the instance of accused, after his arrest on 31.10.2010 at 8.50 a.m. by the police

which cannot be termed as discovery under the provisions of Section 27 of the Evidence Act. Learned Advocate for the accused urged for acquittal of the accused.

9. *Per contra*, the learned APP contended that the prosecution has established the chain of circumstances. The accused has taken away the deceased with him who was a child aged about 10 years studying in 7th standard, sodomised him and thereafter committed his murder.

10. Circumstances pressed into service by learned APP are i) accused and deceased were acquainted with each other; ii) on 29/10/2010 victim was last seen with the deceased and iii) PW-1 the father of victim named accused in his complaint to police at 7.00 a.m. on 31/10/2010.; iv) Vaibhav was arrested at 9.30 a.m. on 31/10/2010 at Mahim; v) Vaibhav, accused made disclosure under section 27 of the Evidence Act leading police to a pond in which body of deceased was hidden. Footwear of deceased was recovered from that place at his instance and vi) He had given

extra judicial confession to PW-5-Anand that the boy was with him and went missing from his custody.

11. In the backdrop of these circumstances, learned APP states that the burden is upon accused to explain how the boy in his custody has been murdered.

12. In order to consider the rival contentions of both the sides, it will be advantageous to go through the evidence led by the prosecution witnesses.

13. It is not disputed that deceased Harishchandra died a homicidal death. The Medical Officer Dr. Amit Chavan (P.W.13) has opined the cause of death as asphyxia due to throttling.

14. The testimony of P.W.1 Complainant Prabhakar Jagtap shows that he was acquainted with the accused as he was his neighbour. Three years prior to the incident the accused was

residing in his neighbourhood at Girgaon. According to P.W.1 accused always used to take his son from his house, he told the accused not to carry his son however, the accused did not listen to him. On one occasion, the accused had carried his son at his Village during Ganpati festival. Thereafter the accused brought back his son. On the date of incident i.e. on 29.10.2010, P.W.1-Prabhakar and his wife proceeded for their work at about 8.00a.m. Their daughter Pratiksha and son Harishchandra were at home. At about 8.30p.m. when they returned to their house, Harishchandra was not seen in the house. His daughter Pratiksha informed that Harishchandra had left the house for playing at 5.30p.m. however, he did not return home. P.W.1 searched for Harishchandra in the vicinity as well at their relatives place. However, Harishchandra was not found. On the next day i.e. on 30.10.2010 P.W.1 along with his wife proceeded to the police station and informed the police about the missing of their son. In the mean time, P.W.1 enquired with his neighbour Ashwini Bhond (P.W.3). She informed P.W.1 that accused was seen with Harishchandra at about 5.30 p.m. Therefore, P.W.1 proceeded to the police station

and lodged complaint at Exh.8 against the accused on 31.10.2010 at 7.30 a.m. According to P.W.1 as he suspected that his son was kidnapped by accused and he must have committed murder of his son, he lodged complaint against the accused.

15. During the cross examination P.W.1 admitted that as he was not present in the house on 29.10.2010 he did not know as to who carried his son on that day. P.W.1 stated that he enquired with P.W.3-Ashwini Bhond about his son two days after missing of his son.

16. In this context, the testimony of P.W.3 Ashwini shows that she was neighbour of P.W.1 Prabhakar. On the day of incident i.e. 29.10.2010 she was sitting at the door of the house. She saw accused along with Harishchandra at about 5.30 p.m. In the evening mother of Harishchandra visited her house and enquired with her about Harishchandra. P.W.3 deposed that she informed to the mother of Harishchandra that the accused had taken Harishchandra with him at about 5.30 p.m. After dinner again

P.W.3 went to the house of P.W.1 to enquire about Harishchandra. The mother of Harishchandra informed her that, she tried to contact the accused Vaibhav More on cell phone however, he was not responding.

17. During the cross examination, P.W.3 further stated that when she visited the house of Harishchandra after dinner, the parents of Harishchandra and his sister were present. She disclosed the father of Harishchandra that accused had taken Harishchandra with him. The testimony of P.W.3 thus makes clear that on the date of incident i.e. 29.10.2010 mother of Harishchandra made enquiry about Harishchandra and at that time P.W.3 informed her that she had seen Harishchandra with the accused at 5.30 p.m. Again during the night time, she visited the house of Harishchandra and informed his father that she had seen accused taking away Harishchandra at 5.30p.m.

18. Thus, first witness on last seen is PW-3-Ashwini, neighbour. She deposed that on 29/10/2010 in the evening she

had apprised the mother of victim about it. In cross examination she has stated that in the evening after dinner when she visited house of deceased, his parents and sister (PW-4) were present. Even at that juncture, she told father (PW-1) that accused had taken deceased.

19. As against this PW-1 father deposed that he inquired with PW-3 after two days. The answer given by him in paragraph No.9 during cross examination runs counter to deposition in chief in paragraph No.3. He has stated that during search he inquired with his neighbour PW-3 who informed that accused had taken his son.

20. Missing complaint lodged by him on 30/10/2010 at about 11.00 p.m. does not name accused at all. On 31/10/2010 in the morning at 7.00 a.m. he has lodged complaint under section 363 of IPC against appellant/accused. PW-10-Khudabaksh Momin, night PSO mentions recording of missing complaint by PW-1 after 8.30 p.m. on 30/10/2010. He pointed out that in the morning on

next day he lodged complaint against accused. He also states that he arrested accused at 9.00 a.m. at Mahim.

21. PW-4-Pratiksha, sister of deceased, 14 years old on 24/2/2012 has deposed that on 29/10/2010 her brother left house for playing at 4.30 p.m. Her parents returned at about 8.00 p.m. as her brother had not returned, she was asked to inquire with PW-3 and PW-3 had then told her that accused had taken deceased.

22. This evidence of PW-4 militates with the evidence of PW-1. Normally in such situation report should have been lodged immediately against accused. However, missing report itself is lodged after about 24 hours and then within 10-11 hours another report under section 363 of IPC came to be lodged against the present appellant.

23. The evidence of P.W.7 Dinesh explicits that on 29.10.2010 he visited the home at about 2.00 p.m. for lunch and thereafter at about 5.30 p.m., he proceeded for his work. At that

time, he noticed accused with Harishchandra passing through a lane. P.W.7 was knowing accused as he had seen him in the house of P.W.1. P.W. 7 was serving in Studio at Shivaji Park, Dadar. He stated that as the accused used to take Harishchandra always, he did not suspect any foul thing. Thus, P.W.7 had seen the deceased Harishchandra in the company of the accused on 29.10.2010.

24. P.W.5 testified that accused was his maternal brother. In the month of October 2010, one day he received phone call from one Prashant (not examined) to the effect that accused Vaibhav More is standing at Priyadarshani. On receipt of the said message, P.W.5 along with other persons went to search the accused. The accused was not seen near the said building. He tried to contact the accused however, he could not contact him on cell phone. After about 45 minutes, P.W.5 received phone call from the accused. Accused informed him that he was standing at the bus stop near Kanjurmarg. Therefore, P.W.5 along with others proceeded to Kanjurmarg. They reached there at about 9.30 p.m. Accused was seen standing at the bus stop. On making enquiry

accused disclosed that son of Jagtap was with him and from his custody said boy was missing. Accused further informed him that, when he had gone for urinating somebody gagged his mouth and thereafter Harishchandra was found missing. Accused also informed that he had brought the son of Jagtap on the pretext of giving him fire crackers. On receipt of said information P.W.5 along with accused and others went to the concerned police station. According to P.W.5, the accused informed him that he had brought son of Jagtap on the pretext of giving fire crackers and from his custody said son is missing. According to P.W.5, therefore, he along with accused and others went to the nearest police station and the concerned police station referred them to another police station. The testimony of P.W.5 does not reveal as to on which particular date he met with the accused. It appears to be a vague statement.

25. About the incident though he was not aware of date, he told that accused gave a call to one Prashant and informed that accused was standing at Priyadarshani. He and others went in

search of accused and did not find him at Priyadarshani. They could not contact him on phone. 45 minutes thereafter accused called him and informed that he was standing at Bus stop near Kanjurmarg. They reached at Kanjurmarg at about 9.30 p.m. Appellant then told him that boy was with him and had gone missing. He also disclosed that missing boy was son of PW-1. He stated that when accused was answering nature's call somebody gagged his mouth and thereafter he found boy missing. Therefore the accused and others went to nearest police station and police there asked them to report the matter to proper police station.

26. Thus, this evidence shows knowledge to PW-1 and also to PW-5. Police have not examined Prashant and no CDR has been placed on record to substantiate the assertions of this witness. This witness claims that he went to Shahu Nagar Police Station 4-5 days after the incident. But his statement was not recorded by Police.

27. In this context, it would be useful to peruse the testimony of P.W.9 PSI Shivaji Chavan. His testimony shows that

on 30.10.2010 he was on night duty as PSI in Vikhroli Police Station. At about 11.00 p.m. three persons attended the police station as there was scuffle amongst them on the road. They were residents of Dharavi. On making enquiry they disclosed him that one boy from Dharavi is missing. P.W.9 directed them to lodge complaint in concerned police station. P.W.9 stated that accused was amongst those three persons. P.W.9 fairly admitted in his cross examination that he had not made any entry in the station diary regarding appraisal made with those persons. They all were unknown. Thus, the testimony of P.W.9 is not found to be reliable one. He had not made any entry in respect of accused visiting police station along with three others and informing him that boy from Dharavi was missing. Thus, testimonies of P.W.5 and P.W.9 are not useful to the prosecution. The testimony of P.W.5 does not make clear that accused was having Harishchandra with him prior to the incident. Similarly, P.W.5 has not informed about the fact that Harishchandra was with accused at about 9.30 p.m., on the given date to the father of Harishchandra (P.W.1). Similarly nothing in writing was recorded by P.W.9 PSI Chavan in Vikhroli

Police Station diary, in respect of missing of Harishchandra, when he was in the company of accused. Thus, the testimonies of P.W.5 and P.W.9 do not assist the prosecution case.

28. This brings us to circumstance of arrest of accused and discovery of body and footwear at his instance.

29. PW-10-Khudabaksh deposes that he arrested accused at Mahim and accused volunteered to discover the spot. Hence he called panch witness and memorandum was prepared. Accused then took them to Kanjurmarg and pointed out the spot. Spot panchanama was prepared vide Exhibit 22. He identified footwear of deceased recovered from the spot. He also stated that during inquiry at the spot they found that Kanjurmarg Police had already taken body. They went to Kanjurmarg Police Station and he was informed that body was in Rajewadi hospital. He then called parents of deceased to identify the body. Clothes of deceased were seized under panchanama.

30. His cross examination shows that he was not remembering the time when accused was sent for medical examination or then when they returned to Police station, he further stated that accused was examined initially at Sion hospital and then at Nagpada police hospital on same day. Again he could not remember the time thereof. He stated that accused was produced before Bandra Court in the afternoon but he could not give time thereof. He stated that accused was produced after memorandum panchanama. He stated that at the time of arrest clothes on his person were not seized.

31. He has stated that they might have reached Kanjurmarg Police station at 12.00 O'clock i.e. after arrest and he might have returned to the police station at about 2.00 p.m. He accepted that while lodging complaint PW-1 father did not disclose description of clothes or footwear of deceased.

32. P.W.6 is the neighbour of P.W.1 Prabhakar. He was knowing the accused as he was from his native place and he was

residing with him. Accused was working in Magesty Book Stall. According to P.W.6, P.W.1 was his neighbour during the period from 2007 to 2008. Accused used to take child of P.W.1 for outing. In 2008 P.W.1 shifted to Matunga. The brother of the accused was also residing at Matunga. The accused used to visit his brother Vinayak More at that place. On Saturday and Sunday accused used to bring Harishchandra to his room. Twice in a month he used to bring Harishchandra. Accused had also taken Harishchandra to his native place at Narvan, Taluka Guhagar during Ganpati festival. P.W.6 deposed that on one occasion, P.W.1 enquired with him about Harishchandra and the accused. P.W.6 then contacted Vinayak and enquired with him whether accused Vaibhav and Harishchandra had been to him. Vinayak answered in negative. Two three days thereafter P.W.6 came to know that Harishchandra and accused Vaibhav had been to Narvan and thereafter accused and Harishchandra were brought to Mumbai. Thus, according to P.W.6 accused was in habit of taking Harishchandra with him to the room of P.W.6 as well as he had taken Harishchandra at his native place at Narvan, Taluka Guhagar. P.W.6 stated that once at

11.00 p.m. accused had brought Harishchandra to his house without informing his parents. Thereafter P.W.1 came to his house and took Harishchandra with him. Vinayak had scolded accused about the same. According to P.W.6, during the period of incident P.W.1 enquired with him about Harishchandra however, he informed that he was not aware about the whereabouts of Harishchandra. P.W.1 however came to know that accused committed murder of Harishchandra. In the cross examination, P.W.6 admitted that as and when accused used to bring Harishchandra at his house, Harishchandra never complained against the accused. The evidence of P.W.6 indicates that accused was in habit of bringing Harishchandra in his house however, Harishchandra never complained against the accused to P.W.6.

33. PW-8 Tatya is claimed to be witness on memorandum under section 27 of the Evidence Act. He states that he was called in police station at about 1.30 in the afternoon on 31/10/2010. He then pointed out that accused took them to area having shrubs and water at Kanjurmarg and dead body was not found. He pointed

out that chappal of deceased boy was however found out from said place by accused. He also accepted that PW-1 told him that he was required in police station.

34. Panchanama Exhibit 21 has been recorded since 13.30 hours and its disclosure part is shown to be over at 13.45 hours. Exhibit 22 is the actual recovery and in it, it is mentioned that it's recording started at 13.30 hours and was completed at 16.10 hours. This timing therefore militates with time of 12 O'Clock or time of 2.00 p.m. deposed initially in paragraph No.6 by PW-10.

35. PW-2 Anant is witness on seizure of clothes on person of accused. He was called to Police station at 8.30 p.m. on 31/10/2010. It is important to note that there is no separate arrest panchanama of accused.

36. The evidence of P.W.2 shows that from the accused his clothes were taken charge under panchanama Exh.11 on 31.10.2010 at 8.30p.m. Those clothes were stained with mud.

P.W.2 admitted that there is no reference or presence of mud on T-Shirt and underwear in the panchanama. In this context no doubt C.A. report does not show semen on the clothes of the accused as well as clothes of the deceased, however, mud is found on the clothes of the accused which tallies with the mud found at the place where the dead body was found. In this respect, in the seizure of clothes of accused there is no reference about the presence of mud on the T-shirt and underwear of the accused in the panchanama Exh.11. In view thereof, C.A. report is of no assistance to the prosecution case.

37. In Record and Proceedings of the matter at page No.63 time of arrest has been shown as 8.50 a.m. and Court below has been informed that accused disclosed that body was thrown at Khadi in Vikhroli. Police remand of 7 days has been sought. This fact therefore shows that accused was produced in Court before recording his section 27 disclosure. But then this falsifies version of PW-10 that after searching for body at Kanjurmarg pond he went to Kanjurmarg Police at about 12 O'clock in noon. He claims

that he was back at police station at about 2.00 p.m. He was on spot for one hour before 2.00 p.m. This version therefore totally falsifies the two documents Exhibit 21 and 22 mentioned supra. Even the inquest panchanama Exhibit 24 drawn on 31/10/2010 shows that its recording commenced at Rajewadi hospital at 17.35 hours and lasted up to 18.10 hours.

38. As noted supra mud stained clothes on person of accused are seized at 8.30 p.m. in the police Station. These clothes and mud on it are cited as a circumstance to show that accused No.1 got it when he entered pond to hide the body and chappals. Prosecution has surprizingly forgotten the fact that before 8.30 p.m. it had taken accused to very same spot. Accused wearing those clothes only entered pond and searched for body and took out chappal. This exercise of seizure of mud stained clothes at 8.30 p.m. therefore again falsifies the prosecution story.

39. The lacunae raise grave suspicion on bonafides of prosecution.

40. Considering the over all arguments advanced by the learned APP, it appears that the prosecution case is not cogent and consistent. Even the chain of circumstances is not proved by the prosecution beyond reasonable doubt. As discussed above, the evidence on record shows that P.W.3-Ashwini has already informed about the accused seen in the company of deceased Harishchandra on 29.10.2010 itself. She also informed about the said fact to the wife of P.W.1-Prabhakar however, surprisingly no steps were taken by P.W.1 on that day and on the next day i.e. on 30.10.2010 missing complaint was lodged. On 31.10.2010, the dead body was found by police from Kanjur marg Police Station and ADR was registered. FIR came to be lodged on the same day vide Exh. 8 at 7.30 a.m. at Shahunagar Police Station by PW1-Prabhakar. In this context, arrest of the accused was made by the police at 9.30 a.m. on 31.10.2010. If at all the accused was arrested at 9.30 am on 31.10.2010 and the dead body was found by Kanjur Marg Police prior to that at 8.30 a.m., then it is not clear in the light of findings above as to how at the instance of

accused the spot panchnama was prepared and footwear was discovered at 1.30 p.m., at the same place, at the instance of accused.

41. Medical evidence of Dr. Amit Chavan (P.W.13) indicates that he examined the dead body of Harishchandra and issued autopsy report at Exh.42. He also found injuries as indicated in Col. No.17 of the postmortem report as mentioned above. The cause of death was due to asphyxia due to throttling. The Medical Officer noticed that there was anal dilatation, patulous with old heal scar mark noted. Thus, the evidence of P.W.13 does not show fresh injury marks on the anus of the deceased or the semen. It however makes clear that death of the deceased was caused due to asphyxia due to throttling. Thus, the entire prosecution case is under shadow of doubt. Significantly, deceased never complained of any ill-treatment or torture by accused. There is nothing on record to show any abnormal or unnatural relationship between the deceased and the accused. The prosecution has failed to establish that accused had performed

unnatural intercourse with the deceased and thereafter committed his murder.

42. In view of the aforesaid circumstances, we are of the considered opinion that the prosecution has failed to establish that deceased Harishchandra died a homicidal death and accused was the author of the crime. Thus, there is absolutely no evidence on record to prove the guilt of the accused. Learned trial Judge should have considered the evidence led by the prosecution in its proper perspective. In view therefore, the Judgment needs interference, Hence, the following order.

ORDER

- a) Criminal Appeal No.1024 of 2012 is allowed.
- b) The impugned judgment and order of conviction and sentence dated 11.7.2012 passed by the Additional Sessions Judge, at Sewree, Mumbai in Sessions Case No.165 of 2011 is hereby quashed and set aside. The appellant is acquitted of the offences charged against him.
- c) Fine amount, if any, paid by the accused be returned

back to him.

d) His bail bonds stand cancelled.

(MRS.SWAPNA S.JOSHI. J.)

(B.P.DHARMADHIKARI, J.)

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