

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.132 OF 2014

Dilip Namdeo Gade,
Age : 44 years,
Occupation : Labour Work,
R/o Gajraj Nagar, Ahmednagar,
District Ahmednagar.
(Presently, Yerwada Central Prison, Pune)

...APPELLANT/ ACCUSED

-VERSUS-

The State of Maharashtra.
Through the MIDC Police Station,
Ahmednagar.

...RESPONDENT

...
Shri Sunil B. Jadhav, Advocate, appointed for the Appellant/ accused.
Shri R.V. Dasalkar, APP for the Respondent/ State.
...

**CORAM : RAVINDRA V. GHUGE
&
B. U. DEBADWAR, JJ.**

DATE :- 26th November, 2020

JUDGMENT (Per Ravindra V. Ghuge, J.) :-

1. By this Appeal, the appellant seeks to challenge the judgment dated 27.08.2013 delivered by the learned Additional Sessions Judge, Ahmednagar in Sessions Case No.423/2012. The appellant has been convicted for having committed an offence punishable under Section 302

of the Indian Penal Code and has been sentenced to suffer imprisonment for life. He has also been convicted for committing an offence punishable under Section 324 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one year. Fine has also been imposed and the sentences are to run concurrently.

2. We have heard the extensive submissions of Shri Jadhav, learned advocate appointed through the High Court Legal Services Sub-Committee, Aurangabad, for the appellant/ accused and the learned Prosecutor on behalf of the State. With their assistance, we have gone through the appeal paper book and the record and proceeding, threadbare. By order dated 23.11.2020, we had directed the production of the station diary and by order dated 24.11.2020, we have noted the relevant entry Nos.13 and 16 in the police station diary No.260/2012 dated 16.09.2012.

3. A crime was registered by the informant Ambadas Khedkar on 16.09.2012 alleging that his sister Pushpa Nakade was murdered at about 07:30 AM on the said date by the accused/ appellant Dilip Namdeo Gade, who is the neighbour of the deceased. The informant is the biological brother of the deceased, who stated in the First Information Report (F.I.R.) that he had travelled along with his wife Prayagbai on 15.09.2012 to reach Gajraj Nagar, Ahmednagar in order to meet the deceased. Pushpa used to live in her house along with her married daughter Bhagyashri

Nitin Chakor.

4. On 16.09.2012, at about 06:00 AM, Ambadas and other family members woke up and had tea. At about 07:30 AM, Ambadas went to the bathroom with the intention of taking a bath. His deceased sister Pushpa kept a bucket of hot water in the bathroom and went out of the house in the adjacent open space to bring cold water for Ambadas. As Ambadas was taking a bath, he heard Pushpa screaming and therefore, he came out of the bathroom and saw, in the front yard, the accused Dilip assaulting Pushpa with an axe. Due to the assault and blows of the axe, Pushpa fell down and the appellant/Dilip continued to inflict axe blows on her legs, hands and her back. Ambadas made a desperate attempt to prevent further blows in order to save Pushpa. The appellant/Dilip inflicted an axe blow on the chest of Ambadas. At the same time, the wife of Ambadas, Prayagbai (PW-2) and the daughter of the deceased, Bhagyashri (PW-3), had also rushed out of the house on hearing the screams of Pushpa and saw the appellant/ Dilip inflicting axe wounds on Pushpa and delivering a blow to Ambadas.

5. The injured Ambadas recorded the F.I.R. at about 09:35 AM. After the police arrived, he is said to have showed them the crime spot. He was taken to the hospital and a medical report was prepared at 10:40 AM. Considering his injury, he was admitted in the hospital and was subsequently discharged on 17.09.2012. The police began recording of the

spot panchanama at 11:00 AM and completed the same at 11:30 AM, on 17.09.2012. Two panchas and the I.O. have signed upon the spot panchanama (Exhibit-24). It is undisputed that the first informant Ambadas Khedkar died under natural circumstances after two months on 20.11.2012 and it is not the case of the prosecution that Ambadas died owing to complications arising out of the axe injury that he had sustained.

6. The prosecution brought forth two eyewitnesses and in all, examined 09 witnesses. As Ambadas had died, there was no chance of recording his testimony. As such, the F.I.R. was proved through the testimonies of the Investigating Officer (PW-9), Prayagbai (PW-2) and Bhagyashri (PW-3). By the impugned judgment, the Trial Court has held the accused guilty and has convicted him for the offences punishable under Sections 302 and 324 of the Indian Penal Code.

7. The strenuous submissions of the learned advocate representing the appellant/ accused can be summarized as under :-

- (a) The informant Ambadas and his wife PW-2 Prayagbai had no reason to visit the residence of Pushpa and they were not present in the house of the deceased in Gajraj Nagar on 16.09.2012.
- (b) If at all Ambadas had suffered any injury, it was not on account of any offence committed by the appellant.
- (c) PW-3 Bhagyashri is the married daughter of Pushpa and there

was no festival or occasion for which, PW-3 and/or PW-2 had to come to the residence of Pushpa.

- (d) Ambadas lodged the F.I.R. at 09:35 AM and directly went to the hospital. If this is to be believed, how would Ambadas be present for the spot inspection, which began at 11:00 AM since he was already hospitalized keeping in view the medical report (Exhibit 14), which shows time as 10:40 AM being the time of his examination.
- (e) It has come in the evidence of PW-8 Ashok Mahadev Ingale, Assistant Sub Inspector, that he received an anonymous phone call at 04:00 AM (Marathi version) that Pushpa Nakade has been murdered (wrongly typed as 04:00 PM in the English version at Exhibit 35).
- (f) If PW-8 received the anonymous call at 04:00 AM, it means that somebody else had already murdered Pushpa and merely because the appellant had strained relations with Pushpa that he has been implicated in the said murder.
- (g) The I.O. PW-9 Chandrashekhar Vitthalrao Sawant has also mentioned in his deposition (Exhibit 36) that the Police Station had received an anonymous call. As such, the murder of Pushpa must have occurred elsewhere and at a different time and the brother, PW-2 and PW-3 are implicating the

appellant/ Dilip so as to cause his conviction.

- (h) Though nine witnesses have been examined, not a single independent witness was examined by the prosecution.
- (i) Nine witnesses allegedly consists of two eyewitnesses viz. PW-2 and PW-3, who are close relatives of the deceased, some are the Panchas (PW-5, PW-6 and PW-7), PW-1 is Dr.Vijaya Amit Sardesai, who examined the complainant Ambadas and issued the medical report at Exhibit-14 and PW-4 is Dr.Sahadeo Kisan Sonawane, who conducted the postmortem on the body of Pushpa.
- (j) The complainant, PW-2 and PW-3 are manufactured witnesses to lend credence to the story prepared by the close relatives.
- (k) There is no motive for the accused to murder Pushpa, all of sudden in the absence of any recent incident of confrontation or a tiff, between the two.
- (l) The nature of the alleged dispute between Pushpa and the accused has never been disclosed.
- (m) For a minor dispute on account of sour relationship, the accused would never have taken such a drastic step for killing Pushpa.
- (n) Even in the testimony of the alleged eyewitness PW-2, Exhibit-15, no details about any dispute between Pushpa and the

accused have been mentioned.

- (o) Even PW-3 does not mention the nature of the dispute between her deceased mother and the accused, except the details of a recent incident.
- (p) PW-5 (Balu Shankar Kurhade) is the panch witness with regard to the spot panchanama and the seizure of the clothes of the complainant, Exhibit-25.
- (q) PW-6 (Suresh Shinde) is the panch witness with regard to the seizure of the weapon viz. axe (article-10).
- (r) PW-7 (Balasaheb Jagtap) is the panch witness of seizure of the clothes of the accused, Exhibit-34.
- (s) The discovery and seizure of the murder weapon axe and the clothes of the accused under Section 27 of the Evidence Act is a farce.
- (t) PW-9 I.O. admits that the Sr.No.16 entry in the station diary, as regards the receiving of an anonymous call pertaining to the murder of Pushpa, was not before the Court.
- (u) The report of the Regional Forensic Science Laboratory (RFSL), exhibit-41, does not indicate the blood group of the deceased.
- (v) The test as regards the blood group of the deceased is inconclusive and so is the test as regards the blood found on

the murder weapon axe.

- (w) The blood group of the accused is established to be “B” (exhibit-42), which does not establish that he has committed the murder of Pushpa.
- (x) Though this Court has taken the efforts of calling for the station diary, which has been perused even by the learned counsel, no reliance should be placed on entry No.16 dated 16.09.2012 that PW-8 received the murder call at 08:15 AM on 16.09.2012.

8. The learned APP has strenuously defended the impugned judgment and prays for the rejection of this appeal. His submissions can be summarized as under :-

- (a) There are two eyewitnesses and seven other witnesses, who have proved the guilt of the accused beyond any doubt.
- (b) The testimonies of the prosecution witnesses are consistent.
- (c) The deceased Pushpa was running a small tea stall for her livelihood and was a self made person.
- (d) As she was living alone, her married daughter PW-3 used to frequently visit her and so would her brother Ambadas.
- (e) The accused cannot dispute the presence of Ambadas, his wife PW-2 and daughter of Pushpa (PW-3) being present when the

crime occurred since the police has also recorded their statements with promptitude.

- (f) A dispute between Pushpa and the accused was the cause for the accused to make an unprovoked attack on Pushpa.
- (g) When there are two eyewitnesses and seven other witnesses, whether, the motive underlines the murder or not, is insignificant.
- (h) Though the appellant contends that there was no injury on the vital parts of Pushpa, the autopsy surgeon PW-4 (Dr.Sahadeo Sonawane) has deposed about 08 injuries which caused the death of Pushpa. Severe axe blows were suffered by Pushpa and the photographs were placed before the Trial Court, which would indicate the brutality of the axe blows.
- (i) The murder weapon “axe”, article-10, was recovered vide the memorandum panchanama (Exhibit-32) under Section 27 of the Evidence Act.
- (j) The panch PW-6 (Suresh Shinde) has proved the memorandum exhibit-31 and the recovery panchanama exhibit-32. Though the signature of PW-6 does not appear on the label of article 10, his signature appears on exhibit 31 and exhibit 32 and there was no suggestion to PW-6 or the I.O. PW-9 that the axe was planted by the prosecution.

- (k) PW-5 is the panch to the panchanama, Exhibit-25 with regard to the recovery of the clothes of the complainant and PW-7 is the panch to the panchanama, Exhibit-34 with regard to the recovery of the clothes of the appellant. Both memorandum panchanamas under Section 27 have been proved.
- (l) The evidence of the witnesses was recorded after about 10 to 11 months after the date of the incident. PW-8 Ashok may have committed a mistake as he may not have been able to memorize the exact time when he received an anonymous call as regards the murder of Pushpa and may have inadvertently mentioned the time of receiving the call as 04:00 AM.
- (m) This Court as well as the counsel have perused the station diary, which indicates that PW-8 commenced his duty in the police station at 08:00 AM on 16.09.2012 and the entry of taking charge in the police station is found at Sr.No.13. At Sr.No.16, he has made the entry at 08:15 AM with regard to the anonymous call that Pushpa Nakade was murdered.
- (n) Since the witnesses are not supposed to go through the record without the permission of the Court prior to entering the witness box, there are examples when the investigating agency or even witnesses commit mistakes about the timing.
- (o) The entry of the anonymous call at 08:15 AM would establish

the link between receiving of the call, the Police party going to the spot of the crime, Ambadas showing the crime spot prior to the spot panchanama and then Ambadas proceeding to the Government Hospital nearby for the treatment of his axe injury.

- (p) The report of the RFSL dated 24.06.2013 indicates at Exhibit-41 that the blood found on the body of the deceased and the axe, is of human origin i.e. human blood.
- (q) There is no dispute that the blood of the accused was determined to be of “B” group, as per Exhibit-42.
- (r) Since the blood on the nine out of ten articles was of human origin and the blood group could not be determined due to passage of time, does not demolish the case of the prosecution.
- (s) The blood found on the earth sample (label-1), bangle pieces (label-3), saree (label-4), petticoat (label-5) and blouse (label-6), would indicate that it was the blood of the deceased Pushpa since the earth sample was collected from the spot of the crime and the bangle pieces, saree, petticoat and blouse were taken off from the body of Pushpa at the time of the postmortem.
- (t) It is undisputed that the appellant was not injured and his

blood was not spilt at the spot of the crime. However, the clothes recovered from him like his full pant (label-8) and T shirt (label-9), after his arrest, under the panchanama Exhibit-34, carried blood stains. The said blood was determined to be of human origin and the appellant could not explain the cause of the appearance of the said blood on the said clothes.

WHETHER, THE DEATH OF PUSHPA NAKADE IS HOMICIDAL?

9. We have perused the postmortem report of the deceased Pushpa Exhibit-22, which would indicate the following 08 wounds at Sr.No.17:-

- “1) Chop wounds over rt.lower leg (12x5x5) cm.*
- 2) # Rt. Tibia & fibula upper end.*
- 3) Chop wound over rt. Lower forearm (5x2x5) cm.*
- 4) Rt. Lower end of radius & ulna #.*
- 5) Chop wound over Lt. Forearm (12x5x2) cm.*
- 6) # Lt. Radius & Ulna lower end.*
- 7) Chop wound over upper back (30x5x5) cm.*
- 8) Chop wound over lower back (10x3x2) cm.”*

10. PW-4 Dr.Sahadeo Sonawane has deposed at Exhibit-20. He had performed the postmortem on the dead body in between 12:45 PM to 01:45 PM. He has specifically stated that all injuries were ante mortem and the death of Pushpa has occurred due to haemorrhagic shock on account of multiple chop wounds. He has perused the postmortem report and has identified his signature and has proved it's contents at Exhibit-22.

He has opined that the injuries in column 17 are sufficient to cause the death in the ordinary course of nature. He has then seen the axe article 10 and has stated that the injuries appearing in column 17 can be caused by such a weapon. In cross-examination, he has specifically denied that the injuries in column 17 could be caused by various types of weapons. He has also opined that if the medical treatment was given within time, there was a possibility that the death of Pushpa could have been avoided.

11. We have also perused the spot panchanama Exhibit-24 and we find that the said spot panchanama with regard to the death of Pushpa is corroborated by the version of PW-1. It is, therefore, evident that Pushpa suffered a homicidal death.

DISCREPANCY OF TIMING AS REGARDS THE PHONE CALL TO THE POLICE STATION INFORMING THE DEATH OF PUSHPA.

12. The learned counsel for the appellant has strenuously attempted to establish that the investigating machinery was set in motion only on the basis of an anonymous call received by the Police Station. He submits that if the Marathi version of the testimony of PW-8 is considered, the Police Station had received a call at 04:00 AM. The English version of the deposition is apparently a typographical error with regard to such timing. He, therefore, raises an issue as regards the discrepancy in the time of death of Pushpa. He contends that if the Police authorities received

a call at 04:00 AM, Pushpa's murder must have taken place at least 15 to 30 minutes prior thereto which is a normal time lag for a person to make an anonymous call to the Police Station. He has contended that we should ignore the station diary since it is not a part of the record and proceedings.

13. No doubt, the learned counsel for the appellant would be justified in contending that we should ignore the station diary. We find that there is an evidence in the form of two eyewitnesses to indicate that Pushpa was hacked to death with an axe at about 07:30 AM on 16.09.2012. The complainant was the person who had thrown himself in between Pushpa and the appellant to save her and in the said process, he suffered an axe wound on his chest. In the light of the evidence available, we intended to go to the root of the issue as to when did the police station receive the call intimating Pushpa's murder and whether, the testimony of PW-8 that he received such call at 04:00 AM, could be a statement made out of inadvertence and the jumbled up memory of PW-8. Our endeavour to have a look at the station diary was only to find out whether, PW-8 had inadvertently mentioned a wrong time. We found that PW-8 had taken charge of his duties on the concerned date at 08:00 AM and he had made the entry at Sr.No.16 of receiving the anonymous murder call at 08:15 AM. We perused several pages and entries prior to the entry at Sr.No.16 and also went through the subsequent entries and pages of the station

diary. We found that the station diary was in original form and which exhibited its age of about 08 years. There was no interpolation and we did not find any such entry, which would indicate any manipulation.

14. Even otherwise, as the complainant had died after two months of the murder, the F.I.R. was proved by the I.O.. The chain of evidence as regards the statements of the complainant, PW-2 and PW-3, that they had rushed out of the house on hearing the screams of Pushpa and the arrival of the police and the recording of the F.I.R. at 09:30 AM, is well interlinked. So also, the F.I.R. was proved through PW-9 I.O., which lends credence to the contents of the F.I.R.. It appears quite logical to us that PW-8 took charge of his duties at 08:00 AM, received the anonymous murder call at 08:15 AM, the arriving of the police party thereafter and the lodging of the F.I.R., to form a sequence of events. We, therefore, find that the purported discrepancy would not demolish the case of the prosecution.

DISCREPANCY OF TIMINGS AS REGARDS THE ADMISSION OF
AMBADAS IN THE HOSPITAL AND PREPARATION OF THE
PANCHANAMA

15. It is apparent that the Police Station received an anonymous call informing the murder of Pushpa at 07:30 AM on 16.09.2012. Ambadas reached the Police Station, as the Police had already arrived due

to the anonymous call, for registering his F.I.R. at 09:30 AM. Thereafter, the Police had reached the crime spot and the spot panchanama indicates that Ambadas had shown the spot. The discrepancy pointed out by the learned advocate for the appellant is that the medical report of admitting Ambadas in the Hospital shows the time as 10:40 AM and the spot panchanama has been drawn in between 11:00 AM to 11:30 AM. He, therefore, contends that Ambadas could not have been in the hospital as well as at the crime spot at the same time.

16. The learned APP has explained the situation by contending that the spot panchanama does not require the signature of the informant. If the accused is present and available and willing to sign, his signature can be obtained by the Investigating Officer on the spot panchanama. The informant is, therefore, not necessarily required to wait at the spot till the spot panchanama is completed. Such panchanama necessarily carries the signatures of two panchas and Investigating Officer.

17. We find the explanation of the learned APP to be quite plausible since Ambadas was in a state of shock due to the brutal killing of his sister and having suffered an axe blow on his chest. The anonymous call to the Police Station had brought the Police at the crime spot. Ambadas travelled to the Police Station to lodge the First Information Report and had travelled back to point out the spot for the preparation of the spot inspection. He must have left thereafter to go to the hospital for

medical assistance. We, therefore, do not find a glaring discrepancy which can be said to be fatal to the case of the prosecution.

INTERESTED WITNESSES

18. The learned advocate for the appellant has strenuously canvassed that the prosecution has examined only interested witnesses though there were several villagers, who had gathered at the spot. The Investigating Officer could have easily examined any villager in addition to PW-2 and PW-3.

19. The learned APP submits that eyewitnesses may be related to the victim/ deceased. The contention of “interested witnesses” would not survive against such witnesses for the sheer reason that they are eyewitnesses.

20. In our view, the argument of the appellant on this count would not be sustainable since the incident of Pushpa’s murder had occurred in the front yard of the house and it was quite natural that close relations have been eyewitnesses. Ambadas had rushed out from the bathroom on hearing the screams of Pushpa and so had PW-2 and PW-3. This was a normal behaviour of normal human beings and the concept of “interested witnesses” would not apply to the present case. Had Ambadas been alive, he would have also deposed since he had suffered a serious axe injury on his chest. We, therefore, reject the contention of the

appellant that the deposition of PW-2 and PW-3 should be discarded.

MOTIVE BEHIND THE MURDER

21. It is well settled that motive is a strong factor, especially in cases resting purely on circumstantial evidence. However, in ***Vivek Kalra vs. State of Rajasthan, (2014) 12 SCC 439***, the Honourable Supreme Court has held that if the chain of circumstances in a case resting purely on circumstantial evidence is extremely strong and firm, the absence of motive would not restrain the Court from convicting the accused. In the instant case, PW-3 (Bhagyashri) had witnessed her deceased mother (Pushpa) being abused by the appellant. She was aware that the appellant despised the deceased and had strained relations with her. PW-3 has stated in her deposition that the appellant had abused her deceased mother earlier. Notwithstanding this factual aspect, the ocular evidence in the form of two eyewitnesses would render “motive” insignificant.

DID THE APPELLANT COMMIT THE MURDER OF PUSHPA

22. It has been proved before the Trial Court and we do not find any infirmity about the story narrated by the complainant Ambadas in the F.I.R. of waking up at about 06 O'clock, having tea and preparing for his bath. The statements made by Ambadas in the F.I.R. that he heard loud screams of Pushpa, which compelled him to come out of the bathroom,

are established through the substantive evidence of PW-2 and PW-3 as they also rushed out for the same reason and saw the appellant giving axe blows to Pushpa. They also saw that Ambadas had made an attempt to save Pushpa and had suffered an axe blow on his chest. This version of Ambadas is corroborated by his medical report Exhibit-14.

23. It has been strenuously canvassed before us by the learned counsel for the appellant that the presence of Ambadas, PW-2 Prayagbai and PW-3 Bhagyashri is doubtful as there was no occasion or festival, which would call for a family gathering. We would not be convinced by the said submission since it cannot be presumed that the brother of Pushpa, his wife and the married daughter of Pushpa would not have visited her unless there was a festival. Their presence at the scene of the crime cannot be washed away with such an argument as their presence at the scene of crime has been proved beyond any doubt.

24. Husband of PW-2, Ambadas/ informant, was an eyewitness and a victim of an axe blow, who unfortunately died after two months of the incident. The testimony of PW-2 is unshaken in cross-examination. Merely because she is the sister-in-law of the deceased would not convince us to ignore her testimony by doubting it on the ground of “interested witness”.

25. The appellant has made similar submissions as regards the testimony of PW-3 Bhagyashri, who is the married biological daughter of

Pushpa. We find no convincing reason to hold that PW-3 may not have been in the residence of Pushpa. The spot panchanama would indicate the death of Pushpa. The statements of PW-2 and PW-3 were recorded under Section 161 of the Code of Criminal Procedure. The testimony of PW-3 was not disturbed when she was subjected to cross-examination. She had stated in her cross-examination that earlier the appellant had abused Pushpa and PW-3 was aware of the strained relations. She also stated that she was scared of intervening as the appellant had launched a brutal axe attack and her uncle Ambadas had tried to intervene to save Pushpa.

26. We have perused the testimonies of PW-5, PW-6, PW-7 and PW-9. The seizure of clothes from the appellant and the recovery and seizure of the murder weapon constitutes the links that fit into the chain of circumstantial evidence. The appellant has shown the precise way to the place where the axe was hidden and guided by his directions, the police party had reached a spot where the accused had asked the police vehicle to stop. He himself reached the spot where he had hidden the axe and he himself brought out the axe, which was seized by the police under the panchanama Exhibit-32. The recovery and seizure of the murder weapon was purely at the behest of the accused and he alone could have the exclusive knowledge of the place where the axe was hidden.

27. Insofar as the blood appearing on the articles submitted to the RFSL is concerned, it cannot be disputed that the clothes from the body of

the deceased were taken for chemical analysis. The source of the blood was only the body of Pushpa as there is no material before us to indicate that the blood could have found its source from any other person's body.

28. It has been strenuously canvassed by the learned advocate for the appellant that unless the blood group is determined, it cannot be concluded that the blood found on the articles was that of Pushpa. In the *State of Rajasthan vs. Teja Ram, AIR 1999 SC 1776*, the Honourable Supreme Court has held that the failure of the Serologist to detect the origin of the blood due to disintegration of the serum, does not mean that the blood stuck on the articles would not have been human blood at all. It does happen, either because the stains are too insufficient or due to haematological changes and plasmatic coagulation, that the Serologist might fail to detect the group of blood. It is not the case of the appellant that the blood was planted on the articles.

29. In *Rupesh Radhakisan Chaudhari vs. State of Maharashtra*, Criminal Appeal No.654/2014 decided by us on 25.09.2020, we had considered a similar situation as regards the source of the blood and we had concluded that as the victim bled profusely and that was the only source for heavy blood flow staining her clothes, even if the blood group could not be established for the reasons approved by the Honourable Supreme Court in *Teja Ram (supra)*, it has to be accepted that the blood had flown from the body of the deceased.

30. We had relied upon paragraphs 20 to 27 in the State of **Rajasthan vs. Teja Ram (supra)**, which read as under :-

- "20. Another reason which the High Court advanced to repel the testimony of such a good number of probable witnesses is that they are all close relatives of the deceased and that independent witnesses were not examined by the prosecution. The over-insistence on witnesses having no relation with the victims often results in criminal justice going awry. When any incident happens in a dwelling house, the most natural witnesses would be the inmates of that house. It is un-pragmatic to ignore such natural witnesses and insist on outsiders who would not have even seen any thing. If the Court has discerned from the evidence or even from the investigation records that some other independent person has witnessed any event connecting the incident in question then there is justification for making adverse comments against non-examination of such person as prosecution witness. Otherwise, merely on surmises the Court should not castigate a prosecution for not examining other persons of the locality as prosecution witnesses. Prosecution can be expected to examine only those who have witnessed the events and not those who have not seen it though the neighbourhood may be replete with other residents also.
21. One of the circumstances which the trial court relied on as incriminating the accused is the recovery of two axes (Kulhadis) on the strength of statements of A1 Teja Ram and A2 Ram Lal. They were subjected to chemical examination and the result is that both axes were found stained with blood. When they were further subjected to test by a Serologist, the blood on one axe was found to be of human origin, while the blood stain on the other axe was found to have so disintegrated that its origin became undetectable. Ex.P10 is the report of the Serologist.
22. The axes hidden beneath the rags were disinterred with the help of information elicited from the accused. According to PW 21 (the Investigation Officer) A1 Teja Ram told him "I have concealed the axe under some rags and kept it at the left corner of the hut in my farm at Dhokwa." The axe recovered pursuant thereto on 20.9.1981 as per Ex.P14 seizure memo was marked as Article No.8. Similarly, A2 Ram Lal has told the Investigating Officer that "I have concealed

the axe under some rags and placed it on a slab in the store of my house." On the said information another axe was recovered on 23.9.1981 as per Ex.P3 Seizure Memo. That axe has been marked as Article 1.

23. *The facts discovered from the aforementioned statements and recovery of the axes are that those weapons were concealed by the said two accused.*
24. *Normally, the above circumstance should have been given weighty consideration in the evaluation of circumstantial evidence. But the High Court down staged it on a reasoning which is difficult to sustain. This is what the High Court has observed regarding the evidence relating to the recovery of the two axes (Kulhadis):*

"The evidence of the blood stained Kulhadi is not sufficient as the prosecution has not been able to prove that Kulhadi which was stained with human blood was recovered from whom. Thus it is not clear whether the recovered Kulhadi was of Teja Ram or of Ramlal. The other infirmity in the Chemical Examiner's Report is that it does not mention the extent of blood seen on the Kulhadi. It has not been established clearly as to which particular accused, the incriminating axe belonged. As such, it can not be used against any one of these two accused."

25. *Failure of the Serologist to detect the origin of the blood, due to disintegration of the serum in the meanwhile, does not mean that the blood stuck on the axe would not have been human blood at all. Sometimes it happens, either because the stain is too insufficient or due to hematological changes and plasmatic coagulation that a Serologist might fail to detect the origin of the blood. Will it then mean that the blood would be of some other origin? Such a guess work that blood on the other axe would have been animal blood is unrealistic and far-fetched in the broad spectrum of this case. The effort of the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which a judicially conscientious mind entertains with some objectivity no benefit can be claimed by the accused.*
26. *Learned counsel for the accused made an effort to sustain the rejection of the above said evidence for which he cited the decisions in Prabhu Babaji Navle v. State of Bombay, AIR 1956 SC 51 and Raghav Prapanna Tripathi vs. State of U.P., [AIR 1963 SC 74]. In the former, Vivian Bose, J. has observed*

that the Chemical Examiner's duty is to indicate the number of blood stains found by him on each exhibit and the extent of each stain unless they are too minute or too numerous to be described in detail. It was a case in which one circumstance projected by the prosecution was just one spot of blood on a dhoti. Their Lordships felt that "blood could equally have spurted on the dhoti of a wholly innocent person passing through in the circumstances described by us earlier in the judgment". In the latter decision, this Court observed regarding the certificate of a chemical examiner that inasmuch as the blood stain is not proved to be of human origin the circumstance has no evidentiary value "in the circumstances" connecting the accused with the murder. The further part of the circumstance in that case showed that a shirt was seized from a dry cleaning establishment and the proprietor of the said establishment had testified that when the shirt was given to him for dry cleaning it was not blood stained.

27. *We are unable to find out from the aforesaid decisions any legal ratio that in all cases where there was failure of detecting the origin of the blood the circumstance arising from recovery of the weapon would stand relegated to disutility. The observations in the aforesaid cases were made on the fact situation existed therein. They cannot be imported to a case where the facts are materially different."*

31. We have, therefore, observed in paragraphs 51 to 53 in

Rupesh Chaudhari (supra) as under :-

"51. *Thus, the issue is settled by the Honourable Apex Court that the failure of the Serologist to detect the origin of the blood due to disintegration of the serum, in the meanwhile, does not mean that the blood stuck onto the murder weapon would not have been human blood. It does happen, either because the stain is too insufficient or due to haematological changes and plasmatic coagulation that the serologist might fail to detect the origin of the blood. The Honourable Apex Court, therefore, questioned as to "Will it then mean that the blood would be of some other origin? Such a guess work that blood on the other axe would have*

been animal blood is unrealistic and far-fetched in the broad spectrum of this case. The effort of the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which a judicially conscientious mind entertains with some objectivity, no benefit can be claimed by the accused."

52. *In the case in hand, there is no dispute that the deceased bled profusely and her blood was found on the entire clothing including her innerwear as noted above. The blood fallen on the soil where she lay after the assault, was also analyzed and the blood stains found on the knife, shirt and pant worn by the appellant, all belonged to blood Group A, human blood group. The learned Senior Counsel has contended that if the blood of the deceased could not be determined, this entire evidence is to be discarded and ignored. The answer to his contention is found in paragraph 27 in the case of State of Rajasthan V. Teja Ram (supra) wherein, the Honourable Apex Court has concluded that the failure of detecting the origin of the blood, the circumstances arising from recovery of the weapon, would not stand relegated to dis-utility. It was in these circumstances that the judgment of acquittal delivered by the High Court, while upsetting the conviction handed down by the Trial Court, was interfered with by the Honourable Apex Court and the accused was held guilty. The conviction and sentence passed by the Trial Court was restored.*

53. *We find from the case in hand that it is not the case of the defence that the deceased had never bled or the blood found on her entire clothing was planted by the police. In fact, as noted above, exhibit-49 pertaining to these clothing and the blood stains found thereon as recorded in the panchanama and these documents have been admitted in evidence by the defence. Exhibit 106 is the lab report dated 17.12.2012 delivered by the Regional Forensic Science Laboratory wherein, the blood stains found on the earth mixed with grass were kept in paper packet labelled 1 and 2, the gown (which was cut to be taken out) was wrapped in the paper packet labelled 3, the sweater in paper packet labelled 4, the petticoat (cut open) in paper packet labelled 5, the bra (cut open) in paper*

packet labelled 6 and the nicker (cut open) kept in paper packet labelled 7, were determined to be human species origin. The blood group to the extent of label 1 was inconclusive and no blood was found in the paper packet labelled 2. However, the blood found on the entire clothing item Nos.3 to 7 was determined to be human blood group A.”

32. Considering the above, we are of the firm view that the appellant Dilip alone has axed Pushpa to death and has injured Ambadas with an axe blow on his chest.

WHETHER, SECTION 302 OR SECTION 304?

33. At this juncture, the learned advocate for the appellant submitted that if this Court is of the view that the appellant has caused injuries to Pushpa, it will have to be assessed whether, such conduct would attract Section 302 or would fall under either parts of Section 304 of the Indian Penal Code. He submits that the purported dispute between Pushpa and the appellant appeared to be very trivial and was not of such severe proportion that the appellant would develop a feeling or intention or motive of killing Pushpa.

34. Considering the above, we have perused Sections 299, 300, 302 and 304 of the Indian Penal Code, which read as under :-

"299. Culpable homicide.—Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by

such act to cause death, commits the offence of culpable homicide.

Illustrations

(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

Explanation 1.—A person who causes bodily injury to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born."

"300. Murder.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

2ndly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to

cause the death of the person to whom the harm is caused, or—

3rdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

4thly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

Exception 1.—When culpable homicide is not murder.—Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and

sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

The above exception is subject to the following provisos:—

First.—That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly.—That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly.—That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation.—Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Illustrations

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him, but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him

from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, inasmuch as the provocation was giving by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

Exception 2.—Culpable homicide is not murder if the offender in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Illustration

Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3.—Culpable homicide is not murder if the offender, being a public servant or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant and without ill-will towards the person whose death is caused.

Exception 4.—Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation.—It is immaterial in such cases which party

offers the provocation or commits the first assault.

Exception 5.—Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

Illustration

A, by instigation, voluntarily causes Z, a person under eighteen years of age to commit suicide. Here, on account of Z's youth, he was incapable of giving consent to his own death; A has therefore abetted murder."

"302. Punishment for murder.—Whoever commits murder shall be punished with death or [imprisonment for life], and shall also be liable to fine."

"304. Punishment for culpable homicide not amounting to murder.—Whoever commits culpable homicide not amounting to murder, shall be punished with [imprisonment for life], or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

35. We find from the testimony of the autopsy surgeon PW-4 that he has clearly opined that the eight axe inflicted injuries would surely cause the death of Pushpa in natural course. Section 300 sets out exemptions to culpable homicide amounting to murder. Even if it is believed that an axe is found in every house in villages as it is a matter of

necessity, than retained for preservation of life, property or protection, the second, third and fourth clause of Section 300 would govern the conduct of the appellant. Since the appellant had taken out the axe early morning at 07:30 AM and had launched a vicious attack on Pushpa, it would not have been done except with the intention of causing such bodily injury which the offender knows that such injuries are likely to cause the death of a person. His conduct indicates that he was aware that such bodily injuries were sufficient to put the victim to death. The blows struck on Pushpa were not exactly on the neck or her skull. However, the blows were struck on her abdomen, her thighs, her legs and hands. One large incise injury appears just below the neck on the upper back of Pushpa, meaning that the blow marginally missed her neck and struck her just below the neck. He struck her all over her body. The photographs exhibited are disturbing.

36. The learned advocate for the appellant submits that as PW-4 has opined that Pushpa may have been saved if she was taken to the hospital immediately and therefore, her case would fall under explanation-II to Section 299 and hence, his act would not amount to culpable homicide amounting to murder. We find that such opinion has been expressed by PW-4 on a suggestion and it was not her firm opinion in her examination-in-chief. Be that as it may, the testimony of two eyewitnesses indicates that Pushpa has died instantly. So also, the attempt

by Ambadas to rescue Pushpa was foiled by the appellant since he struck an axe blow on the chest of Ambadas who had intervened, thereby, exposing his intention of killing Pushpa and for that reason, he was not willing to be restrained by any indulgence for saving her. We, therefore, do not find that explanation II to Section 299 could be a ground to conclude that the act of the appellant would not amount to culpable homicide.

37. In view of the above, this appeal fails and the same is, therefore, dismissed.

38. Considering the appointment of Shri Jadhav to represent the appellant and his strenuous efforts in conducting this matter, we quantify his fees at Rs.15,000/- (Rupees Fifteen Thousand) to be paid by High Court Legal Services Sub-Committee, Aurangabad.