

Niti/Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.460 OF 1996

Shaikh Yasir Abdul Mugni	]	
age 19 years, residing at	]	
Room No.63, Second Floor,	]	
Tamaswala Building, Sakhli Street,	]	
Madanpura, Bombay 400 008.	]	
(At present lodged in Nasik Road	]	
Central Prison, Nasik)	]	Appellant/Petitioner

Vs.		
The State of Maharashtra	]	Respondent

.....
Mr. A.P. Mundargi, Senior Advocate a/w Ms. Vilasini Balsubramaniam i/b
Mr. Sanjeev P. Kadam, for the Appellant.

Mrs. M.M. Deshmukh, Additional Public Prosecutor for Respondent-State.
.....

CORAM : S.S. SHINDE AND

PRITHVIRAJ K. CHAVAN, J.J

Reserved on : 11th December, 2019.

Pronounced on : 22nd January, 2020.

JUDGMENT: [Per Prithviraj K. Chavan, J.]:

Feeling aggrieved with and dissatisfied by the judgment and order of conviction dated 7th June, 1996, passed by the learned Additional Sessions Judge, Nashik in Sessions Case No.143 of 1995, the appellant has preferred this appeal amongst following facts and grounds:

2. The appellant has been convicted under Section 302 of the Indian Penal Code (for short 'I.P.C'). He is sentenced to suffer imprisonment for life with fine of Rs.500/-, in default, rigorous imprisonment for six months.

He is further convicted and sentenced under Section 397 of the IPC to undergo rigorous imprisonment for two years and a fine of Rs.300/-, in default, to undergo further rigorous imprisonment for six months.

For the commission of offence under Section 201 IPC, he is sentenced to undergo rigorous imprisonment for five years with fine of Rs.500/-, in default, to undergo rigorous imprisonment for one year. The substantive sentences of imprisonment were directed to run concurrently.

3. The appellant was an engineering student of K.K. Wagh College of Engineering, Nashik. Harpalsingh Gurmukhsingh Chaudhari (for short 'Harpalsingh') who turned to be an approver was his classmate. The appellant was residing in Muslim League Hostel, Nashik whereas Harpalsingh was residing in the college hostel. The appellant had allegedly borrowed Rs.2,000/- from Harpalsingh out of which he could only refund Rs.500/-.

4. On 26th January, 1994, Harpalsingh met the appellant near Meher hotel and demanded the balance amount from him. The appellant, however, avoided and did not pay anything by saying that he was in deep trouble and was being blackmailed by one person. On 27th January, 1994, the appellant along with one person viz: Jamankumar Maheshwari (for short 'deceased') went to the college and inquired if Harpalsingh had been to the college. He did not find Harpalsingh at the college. The appellant introduced the deceased as his friend from Delhi to his another classmate PW10-Nitin Bhambari. The appellant and the deceased went to the room of Harpalsingh where the appellant again repeated the story that he is in trouble and he wants to do away with the person blackmailing him. Due to the persistent demand by Harpalsingh, the appellant called him at the Muslim League Hostel to his room to refund the balance of Rs.1500/- on the following day. Harpalsingh, therefore, went to the room of the appellant at Muslim League Hostel. Deceased was present in the room of the appellant along with him. The appellant introduced the deceased to Harpalsingh. While the three of them were seated in the room, the appellant went out to bring Thums Up bottles i.e. a soft drink. He returned with the bottles. They consumed the same and the appellant went to return the empty bottles. When the deceased and Harpalsingh were reading a Sports magazine, the appellant returned back armed with an axe and immediately dealt a blow on the head of the deceased due to which he collapsed on the floor. The appellant, thereafter,

rolled the dead body and wound up in a carpet. He cleaned the blood stains on the floor and then left the hostel. He returned back with a bag. He stuffed the dead body of the deceased into the said bag and then shifted the same in the neighbouring room.

5. It is further alleged that the appellant and Harpalsingh went to college and brought the scooter of their classmate P.W.7-Rakesh Goyel to the hostel. The appellant then hired a rickshaw. It was brought to the Muslim League Hostel. The bag stuffed with dead body of the deceased was loaded in the said rickshaw. The appellant himself boarded it and asked Harpalsingh to follow him on the scooter. The dead body was carried near Bombay Naka where the appellant unloaded the bag, paid the rickshaw hire charges and kept the bag on the scooter which was being driven by Harpalsingh. It was a LML Vespa scooter. The appellant occupied pillion seat along with the said bag. Harpalsingh drove the scooter on Bombay Agra road towards Bombay. After travelling a distance of about 20 kms., the appellant required Harpalsingh to stop the scooter near a culvert and then he threw the bag down. The appellant dragged the bag in the tunnel of the culvert and returned back with an empty bag requiring Harpalsingh to drive back the scooter to Nashik. On their way back to Nashik, the appellant asked Harpalsingh to take the scooter off the main road. It was driven to some distance by a kaccha road and then the bag was set on fire.

6. The appellant and Harpalsingh then went to Raj Mahal Hotel at Nashik where from the appellant collected a bag. He made payments at the counter and returned. The appellant was thereafter reached to Muslim League Hostel by Harpalsingh. While leaving Muslim League Hostel, the appellant gave the said bag to Harpalsingh which the latter kept at his room and thereafter went to return the scooter to P.W.7-Rakesh Goyel. The appellant, thereafter, went to Bombay with a warning to Harpalsingh that he should not disclose anything about the incident.

7. On 30th January, 1994, the first informant P.W.1-Manik Malunjkar, a villager of Vadi Varhe was goading cattles back home at about 2.00 p.m. from firing range area along side the Bombay Agra road when he got a foul smell. He noticed a dead body of a human being wound up in a bed sheet. He immediately went to the police station of Vadi Varhe and reported the matter. The police personnel of Vadi Varhe police station within no time rushed to the scene pursuant to the information given by P.W.1-Manik Malunjkar and found a dead body of a male wrapped in a bed sheet. An inquest as well as a spot panchanama was drawn. Certain articles found on the person of the deceased as well as at the spot came to be seized. The dead body was sent for post mortem examination. On inquiry, it was revealed that the deceased was a resident of Delhi and was putting up in Raj Mahal Hotel at Nashik on 26th and 27th January, 1994.

8. In the evening of 1st February, 1994, P.W.14-Suresh Deshpande, who was attached to Bhadrakali Police Station as an Assistant Police Inspector received an anonymous call by which it was informed that about 4 to 5 days back Shaikh Yasir i.e. the appellant and Harpalsingh committed murder of a person in room No.9 of Muslim League Hostel. P.W.14-Suresh Deshpande directed P.S.I Davale to inquire by going to the said hostel and to bring the appellant to the police station. Harpalsingh too was summoned at the police station from the college. Both of them were arrested on 2nd February, 1994. The appellant led the police and the witnesses to Muslim League Hostel and showed room Nos.9 and 10. He also took the Police in the compound of the hostel at a particular place which was found burnt and some ash was lying over there. The police machinery had seized certain articles from the spot.

9. On 2nd February, 1994, Harpalsingh led the police to the tunnel of the culvert as well as to the place where the suitcase was burnt. After his arrest, the police had seized some spare parts as well as remnants of the suitcase found lying at the place where it was burnt. The appellant then made a statement before the Police in the presence of witnesses and, thereafter, led the Police team and witnesses to his house at Bombay. He had discovered some articles from his house and on its production before the Police and witnesses, those articles came to be seized, which were later identified as

the belongings of the deceased, which were in his possession as well as some articles which belonged to the Engineering College and few clothes which belonged to the appellant.

10. On 3rd February, 1994, Harpalsingh made a statement in the presence of the pancha witnesses and pursuant to same led the police for the purpose of discovery of facts, in the sense that the bag containing certain clothes from his room which later on were identified to be that of the deceased. The dead body of the deceased was identified to be that of Jamankumar by P.W.8- Durgashankar Maheshwari-brother of the deceased and P.W.21- Kamleshkumar Shraddha-brother-in-law of the deceased. Some of the witnesses had also identified the photograph of the deceased to be that of a person who was seen accompanying the appellant on 27th January, 1994 and was introduced to them by the appellant to be his friend from Delhi. Some witnesses even identified certain clothes to be that of the appellant.

11. The prosecution case further unfolds the mystery by bringing forth the seized register of Raj Mahal Hotel, a college journal hand written by the appellant and a specimen handwriting and signature of the appellant which were got examined and compared and found with substantial similarities. A test identification parade was conducted by the Investigating Officer. The seized articles were got analysed from the chemical analyser. The medical

officer opined that the injuries found on the body of the deceased were sufficient in ordinary course of the nature to cause the death of that person.

12. After the investigation, a charge-sheet came to be filed against the appellant and Harpalsingh in the Court of Chief Judicial Magistrate, Nashik on 2nd May, 1994. On an application moved by the Investigating Officer for recording confessional statement of Harpalsingh, the learned Chief Judicial Magistrate by his order dated 18th April, 1994, directed for production of Harpalsingh before the Special Judicial Magistrate.

13. A confessional statement of Harpalsingh came to be recorded in two parts; firstly on 19th April, 1994 and secondly on 21st April, 1994, the intervening period being one for reflection. On 21st April, 1994, Harpalsingh made an application to the Chief Judicial Magistrate for tendering a pardon to him. Accordingly, an order came to be passed on 31st May, 1994. Thereafter, the learned Magistrate committed the case to the Court of Sessions for trial as the offences were exclusively triable by the Court of Sessions.

14. The appellant appeared before the learned Additional Sessions Judge, Nashik on 27th November, 1995. The learned Additional Sessions Judge framed a charge in terms of **Exhibit 10** under Sections 302, 397 and 201

read with 34 IPC. It was read over and explained to the appellant to which he pleaded not guilty and claimed a trial. The defence of the appellant as emerged from his statement under Section 313 Cr.P.C. as well as from the line of cross-examination was that he has been falsely implicated. An attempt was made to suggest the witnesses that the deceased might have suffered a death due to a shot of a bullet in his head as it was a firing range of the military. No defence evidence has been adduced on his behalf.

15. In order to substantiate the charge, the prosecution examined as many as 28 witnesses, coupled with some documentary evidence, in order to show nexus between the homicidal death of the deceased and the appellant.

16. The learned Additional Sessions Judge, after hearing the learned Counsel for the appellant as well as the learned Additional Public Prosecutor, by the impugned judgment convicted and sentenced the appellant as above. The learned Additional Sessions Judge elaborately and minutely scrutinized the evidence and left no stone unturned to arrive at a finding that it was the appellant and none other who was responsible for intentionally and knowingly causing the death of the deceased. The learned Additional Sessions Judge has relied upon not only the evidence of the approver Harpalsingh, to whom a tender of pardon has been granted, but also the other incriminating material on record.

17. We heard Mr. Mundargi, the learned Senior Counsel for the appellant. We have also meticulously gone through the notes of arguments submitted by the learned Senior Counsel.

18. At the outset, Mr. Mundargi, the learned Senior Counsel has submitted that if a ring, money and watch were found on the person of the deceased when his body was found in the culvert, the prosecution has failed to establish the motive of theft. On the aspect of the panchanama of the hostel room, it is submitted that the pancha witnesses could not identify any aspects of both the rooms, namely one where the incident had alleged to have taken place and the other place where the body was alleged to have been kept. The learned Senior Counsel drew our attention to the fact that the witness had stated that his signatures were obtained over the slip of the paper by which the possibility of pre-planning by the police cannot be ruled out. It is submitted that PW5-Deepak Shelar is a regular stock police witness, who had acted as a pancha witness in several cases pertaining to Bhadrakali police station and, therefore, his evidence cannot be said to be reliable and trustworthy. The fact that the police had recovered a golden chain bearing initials as "J" from the house of the appellant and three cheques for ₹20,000/- drawn on Oriental Bank at Surat cannot be said to be a genuine discovery, since he is a witness who is bound to support the police. The learned Senior Counsel also expressed his doubt as regards

reliability of this witness since police could not recover an axe alleged to have been used in the offence which was thrown by the appellant on the spot from where it could not be recovered. Thus, the learned Senior Counsel contends that there is a doubt about the chain of events.

19. As far as the testimony of the owner of the scooter PW7- Rakesh Goyal is concerned, it is submitted by learned Senior Counsel that when his scooter was seized by the police he was not shown the blood stains. The learned Senior Counsel raised a serious doubt as to how for a period of five days the blood stains remained undetected by this witness. It is also submitted by Mr. Mundargi that if the dead body was transported by loading the same in the rickshaw, how the blood stains could be noticed over the scooter. The learned Senior Counsel has also raised doubts about the truthfulness of the evidence of PW10-Nitin Bhambari, who was also the classmate of the appellant and Harpalsingh. It is submitted as to how PW7- Rakesh Goyal knew that PW10-Nitin Bhambari had met the appellant and the deceased on 4th February, 1994 despite PW10-Nitin Bhambari deposing in cross that he never mentioned to PW7-Rakesh Goyal regarding his meeting with the appellant and the deceased. There is no material to show as to how the police identified the rickshaw and its driver. It is significant in the light of the fact that the statement of the rickshaw driver came to be recorded after three months. There was no reason for the rickshaw driver to

correctly identify the appellant when he had to carry so many passengers in a day. There was no reason for the rickshaw driver to identify and pinpoint the appellant to be the one who transported a big suitcase in his rickshaw. According to the learned Senior Counsel, this creates a serious doubt about the authenticity of his evidence. It is submitted that as per the evidence of the rickshaw driver, the appellant was shown to him in the morning whereas the PI parade was conducted at 3.00 p.m. in the afternoon.

20. So far as the testimony of PW15-Kamlesh Kothari, the bag seller is concerned, it is submitted that even though it is testified by him that the appellant had asked for the largest bag and that he sold a jute bag of 26 inches, there was no question of identifying the appellant correctly, *sans* any special identifying features. Similarly, this witness was not shown the articles during his examination. PW17-Abdul Karim is the roommate of the appellant who turned hostile and so also PW18-Shaikh Rahim. Their evidence is of no assistance to the prosecution.

21. The learned Senior Counsel, thereafter, strenuously assailed the findings of the Trial Court in relying upon the evidence of the approver i.e. Harpalsingh. It is submitted that there were several discrepancies in his evidence right from the fact as to how and when the appellant was along with the deceased. The prosecution has not clarified as to with whom the

appellant had dealt with for purchase of a revolver and in doing so his photographs were taken and that he was being blackmailed. This, according to the learned Counsel, is a mystery in the prosecution story. There has neither been a recovery of any revolver nor the investigation furthers in that direction. The narration of the facts by the approver is entirely exculpatory as if he has deposed as an eye witness and not an accomplice. Our attention is drawn to a fact that according to this witness the keys of the scooter were collected by the appellant from PW7-Rakesh Goyal, which is contradicted by PW7-Rakesh Goyal and, therefore, it can be said that the approver is a highly tutored witness. The entire emphasis was on shifting the blame upon the appellant in its entirety. If the dead body was wrapped in the mattress and was then kept on the scooter, where was the question of blood percolating on the scooter? It is submitted by the learned Senior Counsel that there are several material omissions on record which create a doubt about the prosecution case.

22. The learned Senior Counsel has pressed into service a few decisions of the Hon'ble Supreme Court on the point of tender of pardon to the accomplice, the nature and object of the examination of approver. The learned Senior Counsel has relied upon the judgments of the Supreme Court in cases of;

- [1] Suresh Chandra Bahri V/s. State of Bihar 1995 Supreme Court Cases (1) 80,**
- [2] State of H.P. V/s. Surinder Mohan and Ors. (2000) 2 SCC 396 and**
- [3] Nandini Satpathy V/s. P.L. Dani & Anr. (1978) 2 SCC 424.**

23. We shall discuss the ratio decidendi in the aforesaid decisions in the subsequent paras.

24. Mr. Mundargi, the learned Senior Counsel while concluding submitted that there are several loose ends left by the prosecution without having been completed the chain of circumstances. There is no motive brought forth or proved by the prosecution and, therefore, there is a serious doubt about the credibility of the approver's statement. As such, he prayed for acquittal of the appellant from the charges framed against him.

25. Per contra, Mrs. M.M. Deshmukh, the learned Additional Public Prosecutor has supported the impugned judgment of conviction by drawing our attention to the chain of circumstances. It is submitted by Mrs. Deshmukh that as per the testimony of PW20-Harpalsingh, the approver, the presence of the appellant as well as the deceased at Muslim League Hostel on 27th January, 1994 has been established. The fact that deceased was

introduced with PW10 -Nitin Bhambari has also been established coupled with a CA report on record.

26. According to the learned Additional Public Prosecutor, fact that the deceased was assassinated by the appellant in Room no.9 of Muslim League Hostel, has also been substantiated not only from the testimony of the eye witness i.e. the approver, but is also materially substantiated from the evidence of PW18-Shaikh Rahim, who, even though turned hostile, admits in cross that the carpet (Article no.2) identified by him was lying in Room no.9 for a long period. It was in use of this witness and by other room mates. Similarly, our attention has been drawn to the testimony of PW9-Abdul Sattar, a pancha witness, who testified that a bed sheet (Article no.3) belonged to the appellant. This witness had also identified the mattress, a quilt and underwear of the appellant (Article no.3). The learned Additional Public Prosecutor also drew our attention to the testimony of PW7-Rakesh Goyal, PW11-Anand Modak and PW15-Kamlesh Kothari, the owner of the scooter, the rickshaw driver and the bag seller in a chronological manner, establishing a link as to how the scooter of PW7-Rakesh Goyal was used for transporting the dead body after it was offloaded from the rickshaw of PW11-Anand Modak and also the purchase of the 26 inches jute bag by the appellant from the shop of PW15-Kamlesh Kothari. She drew attention to the testimony of PW27-Prabhakar Baviskar, a Special

Judicial Magistrate, who had conducted a Test Identification parade. As such, the learned Additional Public Prosecutor vehemently urged to dismiss the appeal being devoid of merits as the prosecution has established the guilt of the appellant beyond all reasonable doubts not only from the evidence of the approver but also from the other independent evidence as stated hereinabove.

27. Indubitably, deceased Jamankumar died a homicidal death which fact has been fortified and substantiated not only from the inquest panchanama - **Exhibit 17** indicating injuries found on the person of the deceased i.e. a deep injury over the head with the presence of clotted blood but also from the testimony of PW6-Dr. Haribhau Kawade-**Exhibit 32**. His evidence reveals that he found a contused lacerated wound on the cheek and fracture of the skull on fronto parietal region in the middle. He testified that the injuries were anti mortem and the cause of death was due to the head injury due to the fracture of skull. It is further testified by PW6-Dr. Haribhau Kawade that the contused lacerated wound and the fracture of the skull are sufficient to cause death of a person. The injuries found may possibly be caused due to hard and blunt object such as a blunt side of an axe. Column No.18 of the autopsy report reveals “other injuries discovered by external examination or palpation as fractures etc.” which clearly indicates that external injury was seen on the fronto parietal region and fracture of the

skull was found in that region on palpation. Nothing could be elicited during cross-examination of PW6-Dr. Haribhau Kawade, which would render his testimony unworthy of credit. Even the learned Senior Counsel for the appellant has not seriously challenged the factum of homicidal death of the deceased. We do not find any reason to disbelieve the opinion of the expert. Thus, there is no dispute about the identity of the deceased as Jamankumar and the fact of his homicidal death.

28. Once, it has been established that deceased died a homicidal death, the next question would be as to whether the appellant was responsible for knowingly and intentionally causing the death of the deceased and whether the approver PW20-Harpalsingh was either directly or indirectly concerned in or privy to the said offence and further whether he had made a full and true disclosure of the whole circumstance within his knowledge relating to the murder of the deceased as well as causing disappearance of the evidence?

29. After his arrest and while in police custody, the appellant gave a statement in the presence of PW3-Sunil Thakare pursuant to which he led the team to room No.9 and 8 of Muslim League Hostel at Nashik and in the compound thereof the investigating agency found some ash, bed sheet, etc. PW14-API Suresh Deshpande had supported the testimony of PW3-Sunil

Thakare. It is deposed by the witnesses that the appellant had pointed out to the walls of the said room over which some stains of blood were noticed which were scrapped from the wall, collected and then seized. In the compound of the hostel, a blood stained bed sheet was found, which also came to be seized.

30. Pursuant to an application by PW28-Anilkumar Jagtap, the Investigating Officer on 18th April, 1994 to the Chief Judicial Magistrate praying for recording the confessional statement of Harpalsingh wherein it has been mentioned that the crime was committed in the presence of Harpalsingh, who actively aided the appellant in causing the evidence of commission of offence to disappear, the learned Chief Judicial Magistrate allowed the application, *inter alia*, directing the Special Judicial Magistrate to record the confession. The confession of Harpalsingh came to be recorded on 21st April, 1994 by the Special Judicial Magistrate by taking all the necessary precaution. The application was moved after filing the charge sheet against him and the appellant on 2nd May, 1994. The Chief Judicial Magistrate passed an order on 31st May, 1994, granting tender of pardon to Harpalsingh on the conditions as enumerated in Section 306 of Cr.P.C. By granting pardon to Harpalsingh, he was placed in the category of an approver and witness for the prosecution against the appellant. Harpalsingh was examined as an approver as PW20 - **Exhibit 84**. The question would

be as to whether Harpalsingh would assume a character and a status of an approver or whether he was an accomplice or a participant in the crime. It is also required to be seen as to how much weight is to be attached to his testimony.

31. It is apparent from the application - **Exhibit 114** moved by the prosecution to the Chief Judicial Magistrate for recording the confession of Harpalsingh that the investigating agency was of the view that he was concerned in causing disappearance of the evidence of the offence. The application nowhere states that Harpalsingh was directly or indirectly concerned in the commission of an offence of murder. When the prosecution itself comes out with a case that Harpalsingh and the appellant have together in furtherance of their common intention, disposed of the dead body of the deceased at an isolated place of which Harpalsingh was an eye witness to the murder of the deceased, then, in stricto sensu, Harpalsingh could only be termed as an accomplice in the alleged act of causing disappearance of the evidence of the crime. Since Harpalsingh was tendered pardon, he as an approver, becomes an ordinary witness, who cannot be put on different pedestal than that of a normal witness. The only difference being that the approver is liable to forfeit his pardon and his statement given earlier can be used against him in case of forfeiture of his pardon.

32. The learned Senior Counsel has pressed into service a decision of the Supreme Court in case of **Suresh Chandra Bahri** (supra) wherein the Hon'ble Supreme Court discussed the scope of section 306 of the Cr. P.C. It would be apposite to refer to paragraphs 30 and 42 of the judgment. The relevant portion of which is as follows:

30. A bare reading of clause (a) of sub-section (4) of section 306 of the Code will go to show that every person accepting the tender of pardon made under sub-section (1) has to be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. Sub-section (5) further provides that the Magistrate taking cognizance of the offence shall, without making any further enquiry in the case commit it for trial to any one of the courts mentioned in clauses (i) or (ii) of clause (a) of sub-section (5), as the case may be. Section 209 of the Code deals with the commitment of cases to the Court of Session when offence is tried exclusively by that court. The examination of accomplice or an approver after accepting the tender of pardon as a witness in the Court of the Magistrate taking cognizance of the offence is thus a mandatory provision and cannot be dispensed with and if this mandatory provision is not complied with it vitiates the trial. As envisaged in sub-section (1) of Section 306, the tender of pardon is made on the condition that an approver shall make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence. Consequently, the

failure to examine the approver as a witness before the committing Magistrate would not only amount to breach of the mandatory provisions contained in clause (a) of sub-section (4) of Section 306 but it would also be inconsistent with and in violation of the duty to make a full and frank disclosure of the case at all stages. The breach of the provisions contained in clause (a) of sub-section (4) of Section 306 is of a mandatory nature and not merely directory and, therefore, non-compliance of the same would render committal order illegal. The object and purpose in enacting this mandatory provision is obviously intended to provide a safeguard to the accused inasmuch as the approver has to make a statement disclosing his evidence at the preliminary stage before the committal order is made and the accused not only becomes aware of the evidence against him but he is also afforded an opportunity to meet with the evidence of an approver before the committing court itself at the very threshold so that he may take steps to show that the approver's evidence at the trial was untrustworthy in case there are any contradictions or improvements made by him during his evidence at the trial. It is for this reason that the examination of the approver at two stages has been provided for and if the said mandatory provision is not complied with, the accused would be deprived of the said benefit. This may cause serious prejudice to him resulting in failure of justice as he will lose the opportunity of showing the approver's evidence as unreliable. Further clause (b) of sub-section (4) of Section 306 of the Code will also go to show that it mandates that a person who has

accepted a tender of pardon shall, unless he is already on bail be detained in custody until the termination of the trial. We have, therefore, also to see whether in the instant case these two mandatory provisions were complied with or not and if the same were not complied with, what is the effect of such a non- compliance on the trial?

42. We have already reproduced above Section 306 of the Code the provisions of which apply to any offence triable exclusively by the Court of Special Judge to any offence punishable with imprisonment extending to seven years or with a more serious sentence. Section 306 of the Code lays down a clear exception to the principle that no inducement shall be offered to a person to disclose what he knows about the procedure (sic). Since many a times the crime is committed in a manner for which no clue or any trace is available for its detection and, therefore, pardon is granted for apprehension of the other offenders for the recovery of the incriminating objects and the production of the evidence which otherwise is unobtainable. The dominant object is that the offenders of the heinous and grave offences do not go unpunished, the Legislature in its wisdom considered it necessary to introduce this section and confine its operation to cases mentioned in Section 306 of the Code. The object of Section 306 therefore is to allow pardon in cases where heinous offence is alleged to have been committed by several persons so that with the aid of the evidence of the person granted pardon the offence may be brought home to the rest. The

basis of the tender of pardon is not the extent of the culpability of the person to whom pardon is granted, but the principle is to prevent the escape of the offenders from punishment in heinous offences for lack of evidence. There can therefore be no objection against tender of pardon to an accomplice simply because in his confession, he does not implicate himself to the same extent as the other accused because all that section 306 requires is that pardon may be tendered to any person believed to be involved directly or indirectly in or privy to an offence.

[emphasis supplied]

It is apparent from the observations made by the Hon'ble Supreme Court that the object of section 306 is to allow pardon in cases wherein heinous offence is alleged to have been committed by many persons so that with the aid of the evidence of the person granted pardon the offence should be brought home to the rest. Obviously, the tender of pardon is not to the extent of the culpability of the person to whom pardon is granted, but the principle is to prevent the escape of the offenders from punishment in heinous offence for lack of evidence. This is what exactly had happened in the case at hand wherein the role of the approver is confined to the extent of assisting the appellant in destroying the evidence of the offence. Thus, the argument of the learned Senior Counsel that the approver had acted as a witness rather than an accomplice cannot stand to reason simply because the approver in his confession did not implicate himself to the same extent as of the appellant. It is crystal clear from the very words of section 306 that

pardon may be tendered to any person believed to be involved directly or indirectly in or privy to an offence.

33. However, in the case of **State of H.P. Vs. Surinder Mohan, (2000) 2 Supreme Court Cases 396** (supra), the Supreme Court has taken a detail survey of its various decisions including the decision of **Suresh Chandra Bahri** (supra) and has laid down the ratio descidendi which can be enumerated as under.

Their Lordships after considering the provisions section 306 held thus;

“if the said defect of examining the approver at the committal stage by the Committing Magistrate is rectified later, no prejudice can be said to be caused to an accused person and, therefore, the trial cannot be said to be vitiated on that count”.

Thus, the judgment of **Sureshchandra Bahri** (supra) has been distinguished by the Hon’ble Supreme Court in the case of **Surinder Mohan** (supra).

34. While in the custody of the Bhadrakali police station on 2nd February, 1994, Harpalsingh disclosed that he would show the place where the dead body was concealed and the place where the bag was burnt in which the dead body was stuffed and transported. PW28-I.O. Anilkumar Jagtap after recording statement of Harpalsingh along with witnesses led towards the

said spot which was a road culvert No.435/1 within the precincts of village Vadi Varhe. The evidence of PW28-I.O. Anilkumar Jagtap, PW5- Deepak Shelar, the pancha witness as well as the evidence of PW20-Harpalsingh reveals that no dead body was noticed over there. Thus, there was no discovery of the fact in the sense that the dead body of the deceased was not found at the culvert. It may seem that the said discovery statement of Harpalsingh is inconsequential, nevertheless, it is evident from the testimonies of PW10-Nitin Bhambari, PW2-Ramdas Bhagwat, PW3-Sunil Thakare, PW16-Ashok Shinde and PW13-PSI Hiralal Salunkhe that when the police of Vadi Varhe police station had drawn an inquest near the culvert on the Bombay Agra highway, they noticed along with the dead body of the deceased some articles such as lungi, bed sheet, a mattress, a quilt which were duly seized by drawing a panchanama. It was PW1-Manik Malunjkar, who accidentally noticed the dead body of the deceased while grazing his cattles in the said area. The inquest was drawn on 30th January, 1994 and the dead body was sent for postmortem to the civil hospital on the same day. It was, therefore, impossible to find the body on 2nd February, 1994 when Harpalsingh led the team of Bhadrakali police station along with panchas to the culvert for discovering the said fact. It can thus be safely inferred and conclusively said that the place pointed out by Harpalsingh on 2nd February, 1994 was the same place from where the dead body of Jamankumar was noticed by the police of Vadi Varhe police station on 30th

January, 1994. On an inquiry with Vadi Varhe police station, it was learnt by PW28-Anilkumar Jagtap that an offence under Section 302 IPC has already been registered vide Crime No.9 of 1994 and that the body has already been sent for postmortem examination.

35. Coming to the spot of incident where deceased was done to death, PW14-Suresh Deshpande, the Assistant Police Inspector testified that after having received an anonymous call on 1st February, 1994, when he was at the police station that the appellant and Harpalsingh had committed murder of a person 4 to 5 days before in room No.9 of Muslim League Hostel near central bus stand. The information was promptly recorded in the station diary which is proved at **Exhibit 61**. An entry in the station diary is of vital importance in the sense that it establishes a fact that an information has been received by the police station and has been promptly put in black and white which is reliable for the further course of any investigation or inquiry by the investigating agency. For that matter, every information received at the police station in respect of any offence is required to be recorded by the station diary in charge.

36. PW14-API Suresh Deshpande rushed to Muslim League Hostel and realised that the appellant is a resident of Bombay but was occupying the said room in the hostel as a student of engineering college. PW26-PSI

Subhash Davale was deputed to go to Bombay to bring the appellant to the police station. PW26- PSI Subhash Davale accordingly brought the appellant to Bhadrakali police station where he came to be arrested. While in the police custody, the appellant made a statement and took the police team to his room No.9 at the hostel. In the presence of PW3- Sunil Thakare, the police team noticed blood stains on the western and northern walls of the said room. The stains were scrapped and collected for the purpose of analysis. Likewise, the appellant had also pointed out towards room No.8 wherein blood stains were noticed on the eastern wall which were scrapped and collected. Similarly, as per the direction of the appellant, a place in the compound of the hostel was found burnt and, therefore, the police had collected the ash as a sample for analysis. The appellant had pointed out a bed sheet with reddish and blackish stains which was seized under a panchanama. All the articles were sent for chemical analysis. The report is at **Exhibit 135**. A perusal of the report reveals that **Exhibits A,B,D and G** were stained with human blood, however, the chemical analyser opined that the blood group could not be determined as a result they are inconclusive. However, the fact remains that the blood stains which were found on the walls of the room No.8 & 9 and the bed sheet were of the human blood.

37. PW17-Abdul Karim and PW18-Shaikh Rahim are the roommates of the appellant at the said hostel, who obviously turned hostile. However, it

has been brought out on record from their testimonies that the appellant was present in the hostel on 27th January, 1994. He states that on the day of incident, he had an occasion to shake hand with the appellant. The appellant, Harpalsingh and the friend of the appellant had been to Muslim League Hostel as stated by Harpalsingh and which is further fortified by a suggestion given to Harpalsingh in cross by the defence which reads “it is not correct to state that only I and the deceased were in the room of occurrence at the time of incident and the accused was not at all present there”. The testimony of Harpalsingh to the effect that appellant had brought three bottles of Thums Up when he and the deceased were still in the room has not been controverted which is an additional factor to establish the presence of the appellant in the hostel on the date of the incident.

38. The police personnel of Vadi Varhe police station while drawing inquest seized a lungi, bed sheet, a quilt, a mattress and an underwear which is proved at **Exhibit 56**. PW16-Ashok shinde - **Exhibit 69** is the witness on inquest which was drawn by PW13- PSI Hiralal Salunkhe. Those articles were then handed over to the police station Bhandrakali. PW9-Abdul Sattar, PW17-Abdul Karim and PW18-Shaikh Rahim were the roommates of the appellant. PW17-Abdul Rahim testified that on 3rd February, 1994, he was called at the police station where he identified a lungi, a carpet, an underwear, a bed sheet and a quilt to be the articles which were in his room.

PW18-Shaikh Rahim identified the bed sheet (Article No. 1) to be that of the appellant. He also identified the mattress (Article No.2) to be the one that was lying in room No.9. PW17-Abdul Karim and PW18-Sahikh Rahim have identified the underwear (Article No. 3) to be that of the appellant. PW18-Shaikh Rahim has testified that on 3rd February, 1994 he was called at the police station where PW17-Abdul Karim was present and that they together identified mattress (Article No.2) to be the one that was in their house. The evidence of PW17-Abdul Karim and PW18-Shaikh Rahim with regard to the identification of Articles No.1 to 5 has not been rebutted during cross-examination. There was no reason for these witnesses to testify falsely as they had no axe to grind against the appellant. The panchanama of those articles is proved at **Exhibit 44**. Ordinarily, Articles No.1 to 5 ought to have been found in the room of the hostel they were occupying, but instead, those articles were found in the tunnel of the culvert on the Bombay Agra road which were found used in wrapping the dead body. Moreover, all those articles were stained with blood and a report to that effect issued by the Chemical Analyser is proved at **Exhibit 135**. This is rather a very strong circumstance against the appellant, which is a pointer towards the complicity in the murder of the deceased. This also fortifies the fact that the deceased was done to death in room No.9 of Muslim League Hostel. The walls of those rooms spoke volumes through the blood stains thereon.

39. Returning to the testimony of Harpalsingh, who states that on 27th January, 1994, the appellant came to his room at about 11.30 a.m. It is evident from his testimony that on 27th January, 1994, he was with the appellant and the person accompanying the appellant for almost the whole day and did not attend the college on that day. PW10-Nitin Bhambari had substantiated the said fact by testifying that Harpalsingh did not attend the class on that day. The testimony of PW10-Nitin Bhambari further clarifies the presence of the deceased with the appellant. He testified that on 27th January, 1994, when he was in the college the appellant and a person with him came to the college and were inquiring about Harpalsingh, who was absent from the college on that day. He further testified that the appellant introduced the said unknown person accompanying him as that of his friend from Delhi. The testimony of PW20-Harpalsingh and PW10 Nitin Bhambari if read together would reveal that on 27th January, 1994, the appellant who was with the deceased was searching for Harpalsingh. The fact that the deceased was last seen together with the appellant has further been strengthened from the fact that on 4th February, 2014, when the police had called PW10-Nitin Bhambari at the police station and showed him the photograph of the deceased, he identified that it was the said person who accompanied the appellant in the morning of 27th January, 1994. The photograph - Exhibit 51 was again reaffirmed to be that of the deceased by PW10 Nitin Bhambari. During cross-examination, it has been elicited that

the photograph **Exhibit 51** was snapped by PW16-Ashok Shinde at the instance of PW13-PSI Hiralal Salunkhe at Vadi Varhe police station on 30th January, 1994. Thus, apart from the testimony of approver Harpalsingh the evidence of PW10-Nitin Bhambari on the point of “last seen together alive with the appellant” has been established beyond any doubt.

40. It is the evidence of PW20-Harpalsingh indicates that when the appellant returned to the hostel room after returning the empty bottles of Thums Up, he was armed with an axe of which he suddenly dealt a blow on the head of the deceased. The blow was dealt on the back side top of the head due to which the deceased suddenly collapsed on the floor. He testified that the appellant asked him to bring the bucket full of water. When he came with a bucket of water, he found the appellant removing the blood stains and cleaning the floor. He saw that the body of the deceased was rolled in a mattress and bed sheet. He further testified that the appellant then left the hostel and came back within few minutes with a bag in his hand.

41. It is interesting to evaluate the evidence of PW15-Kamlesh Kothari-a bag seller, from whom the appellant had purchased 26 inches big jute bag. PW15-Kamlesh Kothari testified that he deals in the business of sale of suitcases and bags. He testified that one day during evening hours a boy

came to his shop and expressed his desire to purchase the bag of the biggest possible size. The witness had shown him the bag which was 26 inches made up of jute. He quoted the price as Rs.550/-. The boy bargained and desired to purchase the bag for Rs.500/-. The deal was final, however, the said boy left his shop by saying that he would come back after some time to purchase the same. PW15-Kamlesh Kothari testified that the boy did not return on the same day but came to his shop on the next day around 11.30 a.m. or 12 noon and purchased the said bag after paying Rs.500/-. He testified that on 7th April, 1994, he was called in the Government rest house at Nashik where a test identification parade was carried out. During the said parade, he identified the appellant who was present in the Court and had purchased the bag from his shop. The test identification parade has been duly and properly conducted by the Special Judicial Magistrate PW27-Prabhakar Baviskar, who in his evidence furnished details of the procedures followed by him while conducting the test identification parade. There is nothing in his evidence to indicate that there was any flaw or illegality committed by him while conducting the parade. His evidence remained unshattered during cross. An attempt has been made by the defence to suggest that the person identified by him has already been showed to him beforehand, which he denied. There is no reason to disbelieve the testimony of PW15-Kamlesh Kothari, for, there was a reason for him to remember the appellant as he wanted to purchase a bag of the biggest size and then he

purchased it on the following day. Ordinarily, a purchaser would inform the purpose for which he needs a bag of biggest size which the appellant did not. Secondly, if he had already bargained, he could have purchased it on the very day. This was something unusual. The fact that the appellant had a day previous to the day of incident went to the shop of PW15-Kamlesh Kothari to purchase a bag of biggest size is indicative of the fact that he had made a definite plan in his mind as to how after the commission of the murder, he would dispose of the body of the deceased by stuffing it in the same bag. It is not difficult to comprehend and read the mind of the appellant, who in fact, made a full proof plan to destroy the evidence after commission of the offence in order to screen himself. It is also clear from the said fact that the appellant had a plan and the preparations to take the further course of action after eliminating the deceased.

42. The evidence of Harpalsingh further reveals that after bringing the said bag in the hostel, he stuffed the dead body therein and shifted the bag in the neighbouring room. Having done so, he accompanied the appellant to the college hostel after the appellant had locked the room from outside. The appellant wanted him to accompany with him to the college because the appellant wanted to bring the scooter. At the college they met PW7-Rakesh Goyal. It was the appellant who requested PW7-Rakesh Goyal to lend his scooter on the pretext that he wanted to go to Nashik road to give message

to one of the friends that the father of one of the friends was seriously ill at Bombay. Having made such representation, the appellant collected the key of the scooter from PW7-Rakesh Goyal and then reported to the hostel along with Harpalsingh. PW7- Rakesh testified that on 27th January, 1994, the appellant had taken away his scooter and returned it to him on the same evening by Harpalsingh. Admittedly, his scooter was seized by the police on 3rd February, 1994 under a panchanama - **Exhibit 30**. Obviously, PW7-Rakesh Goyal was innocent and was unaware as to the real purpose for which his scooter was borrowed by the appellant on 27th Janu1994, 1994 till the time it was seized by the police. It has been established from the evidence of PW7-Rakesh Goyal that his scooter was borrowed by the appellant and Harpalsingh on 27th Janu1994, 1994 from the noon till late in the evening.

43. According to Harpalsingh, on return to the hostel from the college along with the appellant after borrowing scooter of PW7- Rakesh Goyal, the appellant left hostel for hiring rickshaw. He loaded the suitcase stuffed with dead body of the deceased in the rickshaw. He asked Harpalsingh to follow the rickshaw on the scooter of PW7-Rakesh Goyal. The appellant had occupied the rickshaw. Harpalsingh followed the rickshaw on the scooter till Bombay naka. The appellant offloaded the suitcase and paid the rickshaw hire charges. The evidence of Harpalsingh reveals that thereafter

the appellant occupied the pillion seat and asked the witness to drive the scooter towards the Bombay Agra road with the suitcase on his lap.

44. PW11-Anand Modak is admittedly the rickshaw owner and driver. The registration number of his rickshaw was MCN 6597. His evidence indicates that his rickshaw was hired by the appellant for carrying the bag from Muslim League Hostel up to Bombay naka. It was about one to one and half year ago. He had parked his rickshaw near Priya hotel. A person came to him and hired his rickshaw by saying that some luggage is to be transported from the hostel to Bombay naka. He had stated that on reaching the hostel the person hiring rickshaw and another person with him carried a bag from inside the room. They kept the bag in his rickshaw. The person hiring the rickshaw boarded it who asked the other person to follow the rickshaw on his scooter. He further testified that the rickshaw was stopped near Bombay naka and the person hiring the rickshaw offloaded the bag and kept it on the scooter which was being driven by the other person. The evidence of PW11-Anand Modak corroborates the evidence of Harpalsingh in material particulars to that effect. The bag stuffed with dead body of deceased was transported first by the rickshaw from Muslim League Hostel up to Bombay naka and thereafter from Bombay Naka up to the culvert on the scooter of PW7-Rakesh Goyal driven by Harpalsingh, which has been duly proved by the prosecution.

45. PW11-Anand Modak during the test identification parade conducted in the month of April, 1994 at the Government Rest House, Nashik had duly identified the appellant from amongst 10 to 12 others to be the person who had hired his rickshaw for carrying the luggage in the form of a bag from Muslim League Hostel to Bombay naka. He had also identified the appellant during the course of his evidence to be the one hiring his rickshaw for transportation of the said bag from Muslim League Hostel to Bombay naka. Minor discrepancies and inconsistencies surfaced during cross, in fact, do not shatter the core of his evidence. PW11- Anand Modak admits in cross that the person he had identified was already taken in the room on the first floor and that he had seen that person being carried by the police to the first floor. It would mean that the identifying witness had seen the person to be identified before the parade was conducted. However, this argument would fade out in the light of the evidence of Special Judicial Magistrate PW27-Prabhakar Baviskar, who testified to the effect that at the time when the accused were taken to the room, their faces were covered with black mask. If that was so and the testimony of PW27-Prabhakar Baviskar has not been rebutted in cross to that effect, then there is no question of holding the said TI parade otiose. It is pertinent to note that it is nobody's case that PW11-Anand Modak had thereafter again visited Muslim League Hostel for transporting a big bag in his rickshaw which was followed by Harpalsingh on his scooter which is something unusual. This might perhaps

be the reason to remember the face of the appellant which otherwise could not have been possible for him to remember the face of each and every passenger carried by him in his rickshaw. Normally, a rickshaw driver transports any number of persons in a day and there is obviously no reason to remember each and every person. However, in these peculiar circumstances, there is every possibility of remembering the face of the appellant as the one who transported the big bag and then in the midst of the road offloaded it on the scooter. Normally, the bag could have been carried to its destination had there been no ill intention in the mind of the appellant.

46. The evidence of PW20-Harpalsingh further reveals that when the scooter was driven to a distance of about 20 kms, the appellant asked him to stop near a small culvert on the road. He pushed the bag from over the culvert which fell on the road to a depth of about 7 to 8 feet. The appellant got down from the scooter, went around and dragged the bag inside the tunnel of the culvert. He returned back with an empty bag. Harpalsingh further testified that while returning back towards Nashik on the scooter at a distance of about half kilometre, it was driven to the right side on a kaccha road to some distance. The appellant threw the bag near a standing hay and then set it on fire. Harpalsingh had shown the place to the police where the bag was burnt by the appellant. Panchanama of the said place was drawn by PW5-Deepak Shelar and one Chandrakant More. They found some 3 to 4

ribets, 2 rings of steel, a zipher, a leather handle partially burnt of suitcase and partially burnt pieces of plywood (Articles no.1 to 25). The panchanama to that effect is proved at **Exhibit 25**. Those articles were identified by PW5-Deepak Shelar and PW28-IO Anilkumar Jagtap before the Trial Court.

47. Harpalsingh then testified that after having made statement before the police on 3rd February, 1994 in the presence of the witnesses that he had in his room a bag containing certain clothes and that he shall discover the same, a memorandum statement to that effect was drawn. Harpalsingh took the police team and the witnesses to his room. He discovered a bag which was found to contain the wearing apparels like shirt, lungi, underwear, towel (Articles No.32 to 41). Those articles were seized under a panchanama- **Exhibit45**. The, memorandum statement of Harpalsingh is proved at **Exhibit 43** by PW9-Abdul Sattar Rahim. PW8-Durgashankar Maheshwari, the brother of the deceased and PW21-Kamleshkumar Shraddha, the brother-in-law of the deceased have identified the bag (Article No.43) and the clothes (Article No.31 to 41) including a pair of shoes to be that of the deceased. There is no cross-examination on this point of the witness Harpalsingh and the identity of the articles.

48. What is to be ascertained now is to see as to how Harpalsingh was found in possession of the articles belonging to the deceased? Harpalsingh being the donjon of the prosecution himself on oath unearthed the truth. He testified that after the bag was burnt by the appellant while returning from the culvert after dumping the body, they went to hotel Raj Mahal. He stood outside while the appellant went in. The appellant came back after sometime with some baggage. He made some payments at the counter before checking out and thereafter both of them returned to the Muslim League Hostel. He further testified that he dropped the appellant at the Muslim League Hostel and when was about to leave the hostel, the appellant handed him over a blue coloured bag. He carried the bag to his room and kept beneath his cot. There is no question of seeking corroboration to this part of the evidence of Harpalsingh since it was an exclusive act between him and the appellant, yet the other attending circumstances, if juxtaposed with the evidence on record would reveal that the appellant must have handed over the said blue coloured bag to Harpalsingh after returning from the hotel. As already stated herein above, Vadi Varhe police station had seized the receipt of Raj Mahal hotel from the person of the deceased. The said receipt being Article No.47 indicates that room No.16 in hotel Raj Mahal was occupied by two adults on 26th January, 1994 at bout 4.30 p.m. and it is this receipt which was found in the shirt's pocket of the deceased. The only plausible inference which would flow from the aforesaid circumstances is that the

deceased, in fact, had occupied room no.16 in Raj Mahal Hotel on 26th Janu1994, 1994 and that is how the receipt was found on his person. There could be no other reason for this receipt to be found in the pocket of the shirt of the deceased and the very next day after they checked in, in the said room. There is one more angle to this fact. If the deceased had occupied the room in the said hotel who had come all the way from Delhi? He must have carried his baggage with him. Harpalsingh's testimony that the bag brought out from the hotel Raj Mahal by the appellant and handed over to him was the same bag which belonged to the deceased and, therefore, it had been rightly identified by PW8-Durgashankar Maheshwari, the brother of the deceased as well as PW21-Kamleshkumar Shraddha, brother-in-law of the deceased to be that of the deceased. These are all the relevant facts as per Section 8 of the Law of Evidence.

49. The evidence of PW9-Abdul Sattar, the panch witness and PW28-Anilkumar Jagtap, the Investigating Officer reveals that on 5th February, 1994, they had been to hotel Raj Mahal from where register of the said hotel was seized under a panchanama - **Exhibit 45**. The register is at **Exhibit 44**. Relevant extract of the register is proved at **Exhibit 94**. The entries in the register at serial No.4072 reveal that room No.16 was occupied on 26th January, 1004 at 4.30 p.m. and was vacated on 27th January, 1994.

50. After his arrest on 2nd February, 1994, the appellant according to PW5-Deepak Shelar and PW28-Anilkumar Jagtap, voluntarily made a statement while in the custody of the police and led them to his house at Bombay. Articles such as golden chain, three Demand drafts, etc. were produced by the appellant from his house. Those articles were exclusively within the knowledge of the appellant and, therefore, it was the fact discovered by him as deposed to while in the police custody. The memorandum statement of the appellant is at **Exhibit 26**, which was drawn in the presence of the pancha witness and PW28-Anilkumar Jagtap. PW26-Subhash Davale, who was the Police Sub-Inspector had been to Bombay as per the instructions of the appellant. The panchas also accompanied with the team to Bombay in a vehicle. They came to Madanpur locality in room No.63 in Phanuswala building. The said building was pointed out by the appellant. The appellant rang the door bell of room No.63 which was opened by a woman. She was informed by the police of their purpose of visit and thereafter the appellant entered the house followed by PW26-Subhash Davale. The appellant took out three drafts from amongst the books kept in the cupboard bearing draft Nos.576318, 576319 and 576320 (Article no.27). He produced those drafts before the police. The evidence of PW26-PSI Subhash Davale further indicates that thereafter the appellant pointed out a golden chain with a pendulum having an English inscription as letter "J". The appellant had also produced two engineering instruments

called 'theor light' and he had also produced a jeans pant and a shirt. All those articles were seized under a panchanama - **Exhibit 26**. The golden chain and drafts were produced before the Trial Court and marked as articles No.26 & 27. The jeans and the shirt are at article No.30 and 31. The engineering instruments referred herein above were returned to the engineering college as it has been testified by PW19-K. Venkatachallaya the Vice Principal of K.K. Wagh College of Engineering that they belong to the college. Admittedly, a report was lodged as regards theft of those instruments by the college.

51. PW12 Tanaji Kajale - **Exhibit 52** had acted as a pancha witness. Though he had turned hostile, it has come in his evidence that Head Constable Mandlik of Vadi Varhe police station had seized a pink coloured shirt, a pant, an underwear and a banyan, a pair of socks and a golden ring on its production by constable Garave. As per the inquest panchama - **Exhibit 17**, the deceased had a golden ring in his finger with an inscription of a letter "J". PW13-PSI Hiralal Salunkhe testified that at the time of drawing inquest, the golden ring could not be removed from the finger of the deceased and, therefore, it was required to be removed at the time of the postmortem and, thereafter, it was collected by constable Garave. After the postmortem examination, the said ring came to be seized and it was produced along with the clothes on the person of the deceased by Head

Constable Mandlik. As such, there is definite evidence of PW13-PSI Hiralal Salunkhe to the effect that the golden ring with an inscription of letter “J” was in the finger of the deceased. PW8-Durgashankar Maheshwari and PW21-Kamleshkumar Shraddha have unequivocally testified that they had identified the golden ring and golden chain at the police station to be that of the deceased Jamankumar when they were summoned on 3rd February, 1994. They could identify the golden article because of the inscription of the letter “J” on the golden ring and inscription of the letter “J” on the pendulum of the golden chain which depicts the first letter of the name of the deceased “Jamankumar”. The evidence as regards identity of the golden ring and chain remained unchallenged during cross. There is no reason to disbelieve the cogent and trustworthy evidence of PW5- Deepak Shelar and PW26-PSI Subhash Davale as regards discovery of the said golden chain and golden ring at the instance of the appellant from his home in Bombay.

52. According to PW21-Kamleshkumar Shraddha, the deceased was residing with him in Delhi. Deceased left Delhi on 24th January, 1994 for Surat at his instance for the purpose of certain goods which were required for their business. While leaving Delhi, the deceased had carried cash of Rs.15,000/- along with three drafts each worth the value of Rs.20,000/- purchased from the Oriental Bank of Commerce, Rajendra Nagar Branch, New Delhi drawn in the name of Mukeshkumar, Jamankumar and

Ashokkumar payable at Surat. The drafts are at Article No.27. As per the testimony of PW14-API Suresh Deshpande, he had been to Delhi and met the Branch Manager of Oriental Bank of Commerce, Rajendra Nagar Branch, New Delhi. He had collected the cheques against which the Demand Drafts were purchased and which according to PW5-Deepak Shelar and PW26-Subhash Davale were discovered by the appellant from his residence. As per the evidence of PW21-Kamleshkumar, he held an account with the Oriental Bank of Commerce. Cheques at **Exhibit 89, 90 & 91** were written by him and signed by the deceased. The handwriting over these three cheques were in his hand and the signatures were of the deceased. He testified that he wrote the cheques for the deceased because the deceased could not write anything but signatures. The cheques were seized by PW14-API Suresh Deshpande vide panchanama-**Exhibit 63**. Thus, there is a concrete evidence to show that the drafts discovered by the appellant were with the deceased and were purchased against the cheques at **Exhibit 89, 90 & 91**.

53. PW19-K. Venkatachallaya, the Vice Principal of K.K. Wagh College of Engineering, testified that as required by PW28- Anilkumar Jagtap the college authority had produced a journal in the handwriting of the appellant which was seized by the police. The journal is at **Exhibit 83**. Admittedly, the appellant was a student of K.K. Wagh College of

Engineering on the date of incident. According to PW19-K. Venkatachallaya, the journals are required to be written by the student and examined by their instructors. He further states that journals are required to be kept in the college. The journal - **Exhibit 83** indicates that it is in the name of the appellant. A perusal of the journal makes it abundantly clear that in the said journal the students are required to draw the diagram and make a short note of the job/work done by them in the journal. The appellant in his statement under Section 313 Cr.P.C. denied the fact of seizure of the journal by police, but mere denial does not serve the purpose in view of the positive evidence of PW19-K. Venkatachallaya as well as PW28-Anilkumar Jagtap.

54. According to PW28-Anilkumar Jagtap, he obtained the specimen handwriting of the appellant on 5th January, 1994 in the presence of the witnesses vide **Exhibit 119 to 124**. Specimen signatures were obtained vide **Exhibit 125**. The investigating officer had forwarded the register of the Raj Mahal Hotel (Article No.4), register of the hotel Bombay Palace (Article no.45), the three cheques (**Exhibit 89 to 91**), the college journal (**Exhibit 83**) and 6 loose sheets with the specimen writing and loose sheets with the signatures of the appellant to the handwriting expert at Pune along with the covering letters - **Exhibit 126 and 127**.

55. PW25-Jaysinghrao Landge is the handwriting expert His evidence at **Exhibit 25** reveals that after having received the documents containing the natural and admitted writings of handwriting contained in the cheques, the specimen writings and the signatures on the loose sheets and the journal for its examination and comparison with the disputed handwriting in the register at article Nos.44 and 45 and for his opinion whether the natural writings and the disputed writings is in the hands of one and the same person. The disputed writing in the register was marked as Q1 and Q2 and A1 and A2, respectively. The specimen writing was marked by the expert for the purpose of identification as S1 to S6. The specimen signature was marked by him as S7. The writings in the journal were marked as N1 to N6. The signatures on the cheques - **Exhibit 89 to 91** as B1 to B3. The writings on the reverse of the cheque were marked as B1(r) to B3(r). PW25-Jaysinghrao Landge testified that he has been working as an Assistant State Examiner of handwriting and documents since the year 1979 and has received training in the examination of handwriting. As such, he had till that date examined thousands of documents and gave his opinion.

56. P.W.25-Jaysinghrao Landge testified that on examination of the questioned documents received by him by adopting different methods such as by applying the comparison process, optical instrument and using photographs found with the person, who wrote the writings and signatures

marked S1 to S6, N1 to N6 also wrote the writings and signatures Exhibit Q1 and Q2. He, however, states that it was not possible to express any definite opinion on the writings and signatures **Exhibit A1 and A2** in comparison with the signatures marked B1 to B3 and B1(r) to B3(r) for want of adequate writings for the purpose of comparison. On completion of the examination of the documents, he gave his opinion at **Exhibit 10** and the grounds thereof vide **Exhibit 103**. He had also produced before the Court the negatives of the photographs he had taken of the handwriting and 19 positive enlarged prints which are marked as **Exhibit 104**.

57. One thing is quite certain and clear from the opinion rendered by this witness is that the appellant who is the author of the specimen writings and the signatures (**Exhibit 115 to 119**) and that of the writings in **Exhibit 83** has made the writings in the register (Article 44) dated 26th January, 1994, extract of which is at **Exhibit 94**. It is quite clear from the register entry **Exhibit 44** dated 26th January, 1994 in respect of room No.16 that two adults had occupied said room in Raj Mahal hotel on 26th January, 1994 and it was vacated on 27th January, 1994.

58. The appellant was one of the occupants of the said room in hotel Raj Mahal has not only been established from the evidence of the approver Harpalsingh but also from the evidence of the handwriting expert. The

appellant, in fact, did accompany the deceased in the said Raj Mahal hotel. It is quite obvious and evident that the receipt of the hotel (Article-47) was found in the shirt's pocket of the deceased. The appellant, perhaps, could not have anticipated that the said receipt will establish his nexus with the crime. The appellant did not possess the clairvoyance about the trail left behind. The aforesaid oral and documentary evidence *qua* the occupation of the hotel room by the deceased and the appellant has been fortified and confirmed if the aforesaid evidence is juxtaposed. There cannot be any third adult other than the deceased and the appellant occupying room No.16 in view of all the attending circumstances. It is, therefore said that a man may lie but not the circumstances. It has been proved to the hilt that the deceased and the appellant checked in, in the hotel and the appellant checked out on 27th January, 1994. Thus, the deceased and the appellant were together till 27th January, 1994. As already stated hereinabove, as per the version of Harpalsingh in the preceding paras as to how the appellant had dealt a fatal blow on the head of the deceased by means of an axe while they all were together in room No.9 of Muslim League Hostel near the central bus stand at Nashik.

59. The kind of weapon used and the part of the body chosen by the appellant to inflict a fatal blow is evident of his mens rea. He wanted to eliminate the deceased and that he had full knowledge and intention that

because of his act the deceased would die. There is neither any provocation from the deceased nor the deceased was armed with any other weapon. The intention of the appellant is writ large from the mode and manner in which he had committed the murder of the deceased. The fact that he had already planned to purchase a big bag for stuffing the corpse of the deceased is indicative of the fact that he already had in his mind as to how he would be destroying the evidence after accomplishing his act by taking due care even in burning the said bag. It is apparent from the evidence of Harpalsingh that the appellant had expressed his mind before him that he wants to do away with the person blackmailing him. It could be none other than the deceased. The appellant had made all the possible preparations to carry out his plan into action. He even went to the extent in lodging himself and the deceased in Raj Mahal hotel in fake name as Shamendra Gaur showing place of his residence as Hanjar Villa, Bandra Bombay. It was found to be a fake address as per the testimony of PW13 API Hiralal Salunkhe. There was no building by name Hanjar Villa in Bandra locality of Bombay.

60. The Investigating Officer, by sheer dint of his hard work, intellect and investigating skills unearthed the truth and succeeded in nabbing the culprit who had faced the trial. The golden chain and drafts discovered at the instance of the appellant in the presence of the pancha witnesses proved to be that of the deceased and, as such, in view of Section 114 illustration (a)

of the Evidence Act, it can be safely presumed that the appellant robbed the deceased and while doing so used a deadly weapon resulting into the death of the deceased. The appellant was found in possession of the property belonging to that of the deceased presumed to have come into his possession by illegal and unlawful means either by having committed the theft thereof when the deceased was alive or may have misappropriated the same soon after his death.

61. In his statement under Section 313 of Cr.P.C., when a question was asked about the discovery of articles at his instance he answered that it is false. When it was asked as regards the evidence of the witnesses qua a golden chain, golden wrist watch, the drafts and the clothes belonging to the deceased to which the appellant exhibited his ignorance by saying that he does not know which obviously means that the appellant does not claim his entitlement to the golden chain and the demand drafts. Since the appellant failed to explain as to how those articles were found in his possession which in fact belonged to the deceased, he could not give any answer. The argument that if the appellant intended to commit theft of the golden chain or the demand drafts then he could have also removed the golden ring from the finger of the deceased does not stand to reason. Such argument can be countered from the evidence of PW13 API Hiralal Salunkhe. As stated herein above the golden ring could not be removed as it was fitting tightly in

the finger of the deceased which could only be removed at the time of conducting post mortem examination. The appellant perhaps could not remove it despite an attempt.

62. The appellant had produced his pant and shirt (article 30 and 31) before the police which were found in his house at Bombay. Those articles were seized under a panchanama - **Exhibit 27**. After examination of the pant the chemical analyser vide his report **Exhibit 135** noticed stains of blood which were washed. Harpalsingh has testified that there were stains of blood on the pant of the appellant at the time of the incident. Though there are a few contradictions and omissions which were brought on record which also came to be proved but neither those contradictions or omissions are material nor they would otherwise create any dent in the evidence of the prosecution witnesses. Normal discrepancies and contradictions bound to occur as it is quite natural.

63. Having considered the facts, entire evidence and circumstances on record, the learned Additional Sessions Judge has rightly found the appellant guilty of the offences with which he has been charged. The prosecution has, in fact, proved the charge against the appellant beyond all reasonable doubts. The entire chain of circumstances coupled with the evidence of the approver established that it was none other than the appellant who had

committed the murder of the deceased by inflicting blow of an axe over his head in the presence of Harpalsing. We do not find any reason to interfere in the judgment of the Trial Court. Consequently, there are no merits in the appeal which needs to be dismissed and as such it stands dismissed.

The convict is directed to surrender to his bail bonds. The convict is further directed to surrender before the learned Sessions Judge, Nashik within four weeks from today, failing which, the learned Sessions Judge, Nashik shall issue a warrant of his arrest and thereafter proceed further as per Section 388 (2) of the Cr. P.C by issuing a committal warrant to the Jailer for serving out the sentence awarded to the convict.

[PRITHVIRAJ K. CHAVAN, J.]

[S.S. SHINDE, J.]