# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
## CRIMINAL APPELLATE JURISDICTION
## CRIMINAL APPEAL NO. 126 OF 2013

Tanaji Maruti Kolekar
Age - 23 years Occu. Agriculturist
R/o. Awar Pimpri, Tal. Parand,
Dist.Osmanabad
(At present lodged in Solapur District Prison) ...**Appellant (Ori. Accused no.1)**

**Versus**

The State of Maharashtra ...**Respondent**

Mr. Daulat G. Khamkar, for the Appellant.
Ms. P. P. Shinde, APP for the State/Respondent.

CORAM: SMT. SADHANA S. JADHAV & N. J. JAMADAR, JJ.
RESERVED ON : 27th October, 2020
PRONOUNCED ON: 8th December, 2020

**JUDGMENT :** (Per: N.J. Jamadar, J.)

**1.** The appellant (original accused no.1) takes exception to the judgment and order dated 18th December, 2012 in Sessions Case No.147 of 2012, passed by the learned Additional Sessions Judge-2, Solapur, whereby and whereunder accused no.1 came to be convicted for the offences punishable Sections 302, 201, 420, 467, 468 and 471 of the Indian Penal Code, 1860 ("the Penal Code") for having committed murder of Kasturabai Tonape ("the deceased"), caused disappearance of evidence thereof in

order to screen himself from legal punishment, committed cheating by impersonation, forged a purported power of attorney for the purpose of cheating and also used the said power of attorney as genuine despite having known that it was a forged document, and sentenced to suffer imprisonment for life and pay fine of Rs.2,000/- on the first count and for varying terms of rigorous imprisonment and fine of Rs.1,000/- each, on rest of the counts, with default stipulation. Accused no.1 was, however, acquitted of the offences punishable under Sections 364 and 120B of the Penal Code. Accused nos.2 to 6 were acquitted of all the offences; punishable under Sections 302, 201, 364, 420, 467, 468 and 120B of the Penal Code.

**2.** The gravamen of indictment against the accused runs as under:

(a) Kishor Mahadeo Tonape (PW-12), the first informant, is the resident of Kurduwadi, Taluka Madha, District Solapur. He runs a dairy at Pune. His father, who retired from RPF, and mother Kasturabai (the deceased) were staying at Kurduwadi. Agricultural land bearing Block no.94 situated at Awar Pimpri, Taluka Paranda, District Osmanabad, stood in the name of the deceased. The land of accused no.1 Tanaji was located adjacent to the said land of the deceased. Accused no.1 cultivated the

land of the deceased on crop share basis. Accused no.1 had also evinced interest in purchasing the land of the deceased and had paid an earnest of Rs.30,000/- to the deceased.

(b) On 17th January, 2012, the father of the deceased left their home at Kurduwadi to meet his daughter Minakshi. He returned to Kurduwadi on 19th January, 2012. The house was locked. It transpired that on 18th January, 2012 at about 3.30 pm. the deceased left the house. The first informant and his father could not reach the deceased on her cellphone. They did search for the deceased. However, the whereabouts of the deceased could not be traced till 29th January, 2012. Thus, the first informant initially lodged a missing report (Exhibit-87), on 29th January, 2012.

(c) In the meanwhile, the first informant came across a postpaid bill of the cellphone, which was being used by the deceased. It revealed that the deceased had received numerous calls from cellphone No.9689868477, then being used by accused no.1. On being confronted, accused no.1 apprised the first informant that the deceased had executed a power of attorney in respect of the land at Awar Pimpri in favour of accused no.1 and received a sum of Rs.10,00,000/- towards consideration thereunder. Accused no.1 had also shown

documents / receipts in respect of the said claim. Accused no.1 further claimed to have paid the said sum of Rs.10,00,000/- in the presence of a person, whom the deceased called *Bhau* (brother). The said claim could not be substantiated. Likewise, accused no.1 hazarded a guess that the deceased might have deposited the said amount in her account with Pandharpur Bank. The said claim also turned out incorrect. When accused no.1 learnt that the first informant lodged a missing report, accused no.1 made himself scarce.

(d) During the course of inquiry in the missing report, it transpired that on the last day i.e. 18th January, 2012 accused no.1 had made numerous calls on the cellphone of the deceased. As the suspicion grew stronger, inquiry was made in the office of Sub-Registrar, Paranda. It was found that a forged power of attorney was got registered by impersonating the deceased. Thereupon, the first informant lodged report of abduction in order to commit murder. Crime was registered at CR No.14 of 2012 initially for the offence punishable under Section 364 of the Penal Code at Kurduwadi Police Station. Investigation commenced.

(e) During the course of investigation accused no.1 came to be apprehended on 5th February, 2012. On the very day,

accused no.1 Tanaji made a disclosure statement leading to the recovery of the dead body of the deceased from the field of the deceased (Gat no.94) and the spade with which the deceased was done to death. The body of the deceased was exhumed in the presence of the Executive Magistrate, Paranda. Inquest was held. The body was sent for postmortem examination. The autopsy surgeon opined that the cause of death was head injury. The clothes on the body of the deceased were seized. Accused no.1 produced the clothes which he wore at the time of the occurrence and those clothes were also seized. Accused no.1 made further discovery and pointed out the place where the mobile phone of the deceased was thrown in the river. The motorcycle which accused no.1 had used in the commission of offence was also seized.

(f) The investigation also revealed the complicity of accused no.2 Kalidas Abhang; the then Sub-Registrar, Paranda, accused no.3 Ravindra Sawant; the Bond Writer, accused no.4 Ajij Mujawar, another Bond Writer, in forging the power of attorney by impersonating the deceased, who was shown to have been fraudulently identified by accused no.5 Tukaram Markad and accused no.6 Paresh Dixit. The investigation further revealed that in pursuance of the criminal conspiracy accused nos.1 to 6 had forged the purported power of attorney and used

it as genuine for the purpose of cheating despite having known that it was a forged document. Thus, charge-sheet was lodged against the accused for the offences punishable under Sections 302, 364, 201, 420, 467, 468, 471 and 120B of the Penal Code.

(g) Upon committal, the learned Sessions Judge framed charge against accused no.1 Tanaji for the offences punishable under Sections 302, 201, 120B, 420, 467, 468 and 471 of the Penal Code and accused nos.2 to 6 for the offences punishable under Sections 120B, 420, 467, 468 and 471 of the Penal Code. The accused abjured their guilt and claimed for trial.

(h) At the trial, the prosecution examined 16 witnesses, including Kishor Tonape (PW-12); the first informant, Smt. Sangita Bhosale (PW-11); a relative of the deceased, Smt. Vaishali Patil (PW-10); the Executive Magistrate in whose presence the body of the deceased was exhumed, Popat Hake (PW-13); in whose favour accused no.1 had executed Sale Deed dated 15th October, 2011 (Exhibit-89) on the strength of the allegedly forged power of attorney dated 14th October, 2011, and Dr. Abrar Alikhan M. Umarkhan Pathan (PW-16); the Autopsy Surgeon, apart from the public witnesses to the discoveries and the seizures of articles and the Investigating Officers namely Harun Hamid Shaikh (PW-14) and Annasaheb Bandgar (PW-15).

The accused did not lead any evidence in their defence, which was of denial and false implication.

(i) After appraisal of the evidence and the material on record, the learned Sessions Judge was persuaded to enter a finding of guilt against accused no.1 Tanaji only for the offences punishable under Sections 302, 201, 420, 467, 468 and 471 of the Penal Code and impose the sentence, as indicated above. The learned Sessions Judge was of the view that the circumstantial evidence squarely incriminated accused no.1 and the proved circumstances were not explainable on any other hypothesis than that of the guilt of accused no.1. The learned Sessions Judge, however, held that the prosecution could not succeed in establishing the criminal conspiracy and abduction, qua accused no.1 Tanaji. Likewise the prosecution failed to substantiate the indictment against accused nos.2 to 6.

**3.** Being aggrieved by and dissatisfied with the impugned judgment of conviction and order of sentence, accused no.1 Tanaji is in appeal.

**4.** We have heard Mr. Khamkar, the learned Counsel for the appellant and Ms. P. P. Shinde, the learned APP for the State at length. With the assistance of the learned Counsels we have also perused the evidence and material on record.

**5.** Mr. Khamkar, the learned Counsel for the appellant took a slew of exceptions to the impugned judgment. At the outset, it was urged, with a degree of vehemence, that the learned Sessions Judge completely misdirected himself in entering the finding of guilt without scrupulously adhering to the governing principles of evaluation of circumstantial evidence. The learned Sessions Judge, according to Mr. Khamkar, lost sight of the fact that the circumstances pressed into service by the prosecution were not fully and cogently established. Neither those circumstances were of conclusive tendency. Nor the chain of circumstances was complete. The evidence of recovery of the dead body of the deceased, on the alleged pointing out by the accused no.1, which was the linchpin of the prosecution case, was extremely fragile. There was no disclosure statement preceding the alleged discovery. Thus, the said evidence did not fall within the ambit of Section 27 of the Evidence Act. The other discoveries were also fraught with material infirmities.

**6.** Mr. Khamkar would further urge that the learned Sessions Judge committed a grave error in placing reliance on the testimony of Kishore Tonape (PW-12) and Smt. Sangita Bhosale (PW-11). It was submitted that in the missing report (Exhibit-87), which was lodged after about 10 days of the deceased

having gone missing, there was no needle of suspicion against accused no.1 Tanaji. Thus the evidence of Kishor Tonape (PW-12) and Smt. Sangita Bhosale (PW-11), which is a creature of afterthought, could not have been taken into account. It was further urged that the learned Sessions Judge was swayed by the fact that the power of attorney was forged, which fact was also not established by cogent evidence. At any rate, it would be preposterous to draw an inference of murder on the basis of alleged forgery of the documents, without anything more, urged Mr. Khamkar.

**7.** Per contra, Ms. Shinde, the learned APP joined the issue by canvassing a submission that the circumstantial evidence in the case at hand is so strong and unassailable that no other finding is conceivable. Motive for the crime is writ large. The endeavour on the part of accused no.1 to assail the discovery leading to the recovery of the dead body of the deceased was stated to be futile as the said discovery was made within hours of the arrest of accused no.1. There is no explanation as to how accused no.1 came to know about the body of the deceased having been buried in the said field. The call record details, which indicate that accused no.1 had made numerous calls on 18th January, 2012, the day the deceased was last seen alive,

also point unerringly to the guilt of the accused no.1. To add to this, the conduct of the accused is highly incriminating. There is evidence to indicate that accused no.1 made repeated efforts to mislead the first informant. Lastly, the fact that accused no.1 had executed the Sale Deed on the very next day of creation of the forged power of attorney in favour of Popat Hake (PW-13) establishes the complicity of accused no.1 beyond the shadow of doubt. Moreover, accused no.1 had not offered any explanation, much less plausible, in respect of the aforesaid incriminating circumstances, which in itself, constitutes an additional link in the chain of circumstances and also provides the "missing link", urged Ms. Shinde.

**8.** Evidently, the fate of the prosecution hinges upon circumstantial evidence. The prosecution professes to establish the guilt of the accused on the strength of the circumstances which are borne out by the evidence adduced by it. A brief resume of the evidence which bears upon the guilt or otherwise of the accused no.1 would facilitate the appreciation of the aforesaid submissions in a correct perspective.

**9.** Kishor Tonape (PW-12), the first informant, unfolded the core of the prosecution case. After apprising the Court about the deceased being the holder of the agricultural land bearing

block no.94 and accused no.1 being an adjoining land holder, Kishore Tonape (PW-12) endeavoured to impress upon the Court that accused no.1 was cultivating the land of the deceased on crop-share basis and also desired to purchase the said land, towards which accused no.1 had paid an earnest of Rs.30,000/-. Kishor Tonape (PW-12) affirmed that the deceased was using a cellphone bearing no.9011009479, the subscriber of which was his brother-in-law Pravin Mane. On 18th January, 2012, he could not reach the deceased on cellphone as it was stated to be switched off. And despite search by him and his father the deceased could not traced.

**10.** Kishor Tonape (PW-12) wants the Court to believe that he had telephonic conversation with accused no.1. The latter apprised him that the deceased had entered into a transaction with him in respect of the said land and had received a consideration of Rs.10,00,000/- towards the same. Kishor Tonape (PW-12) thereafter met accused no.1. The latter had shown a copy of document purported to be a power of attorney and receipt. Accused no.1 further informed him that the payment of Rs.10,00,000/- was made to the deceased in the presence of another person. Accused no.1, later on informed him that the deceased deposited the said amount of

Rs.10,00,000/- in her account maintained with Pandharpur Urban Bank, Modnimb Branch. Kishor Tonpe (PW-12) wants the Court to believe that the identity of the person, in whose presence accused no.1 allegedly made the payment, could not be ascertained despite efforts and no amount was found to have been credited in the account of the deceased with the Pandharpur Urban Bank, Modnimb. Kishor Tonape thus claimed to have lodged the missing report (Exhibit-87).

**11.** Kishor Tonape (PW-12) further testified to the fact that, in the wake of suspicion, the record in the office of the Sub-Registrar, Parand, was inspected. It transpired that the power of attorney, purported to have been executed by the deceased in favour of accused no.1, was got executed fraudulently by impersonating the deceased. Accused no.1 swiftly alienated a portion of the land of the deceased in favour of Popat Hake (PW-13) on the strength of the said forged document. Thus, Kishore Tonape (PW-12) lodged FIR (Exhibit-90). Kishor Tonape (PW-12) also deposed to the events which transpired post the arrest of the accused, especially the recovery of the dead body of the deceased, at the pointing out by accused no.1, in the presence of the Executive Magistrate.

**12.** The claim of Kishore Tonape (PW-12) that accused no.1 alienated a portion of the suit land in favour of Popat Hake (PW-13) by executing a conveyance was sought to be corroborated by the transferee, Popat Hake (PW-13). The factum of the conveyance was deposed to by Popat Hake (PW-13) in clear and explicit terms. Mr. Popat Hake (PW-13) was forthright in asserting that accused no.1 approached him to purchase a portion of land bearing block no.94, he made enquiries with the office of the Sub-Registrar about the transferability of the said land and thereafter accused no.1 executed the Sale Deed (Exhibit-89) on 15th October, 2011, on the strength of the power of attorney annexed thereto, purported to be executed on 14th October, 2011. The execution of the Sale Deed (Exhibit-89) by accused no.1, in the capacity of the constituted attorney of the vendor, was duly proved by Popat Hake (PW-13).

**13.** The fact that the deceased was seen alive on 18th January, 2012, the day she went missing, was sought to be established by examining Smt. Sangita Bhosale (PW-11). It is in the evidence of Smt. Bhosale (PW-11) that on 18th January, 2012, she had met Kasturabai, her matrimonial aunt, at the bus-stand Kurduwadi. On enquiry, the deceased had informed her that she was on her way to the field. Smt. Sangita Bhosale (PW-11) further affirmed

while she was engrossed in conversation with the deceased, the latter had received a call on her cellphone from accused no.1.

**14.** The discovery leading to the recovery of the dead body of the deceased was sought to be established by examining the public witnesses to the discovery and Smt. Vaishali Patil (PW-10), the Executive Magistrate, in whose presence the body of the deceased was disinterred. Mr. Vivek Shinde (PW-2) informed the Court that on 5th February, 2012, the accused made a disclosure statement to show the spade. Its memorandum (Exhibit-66) was drawn. The accused thereafter laid the police party to the field at Awar Pimpri and produced the spade which was kept, in a concealed state, in the sugarcane crop. It was seized under seizure memo (Exhibit-63).

**15.** Mr. Harun Shaikh (PW-14), the Investigating Officer, deposed to the fact that accused no.1 had made a disclosure statement to show the place where the body of the deceased was buried and also produce the spade. Mr. Shaikh (PW-14) further affirmed that accused no.1 had pointed out the place situated in the land, block no.94 of village Awar Pimpri, of the deceased, where the body of the deceased was buried. Mr. Harun Shaikh (PW-14), thus claimed to have addressed a letter (Exhibit-97) to

the Executive Magistrate, Paranda to exhume the body of the deceased therefrom.

**16.** Smt. Vaishali Patil (PW-10) lends support to the claim of Mr. Harun Shaikh (PW-14). Smt. Vaishali Patil (PW-10) affirmed that when she reached block no.94, Awar Pimpri, accused no.1 pointed out the spot where the body of the deceased was buried. Thereupon, Smt. Vaishali Patil (PW-10) claimed to have exhumed the body of the deceased by taking assistance of a JCB machine and the labourers. The body of the deceased was disinterred. Kishor Tonape (PW-12) identified the body of the deceased. A scarf was tied on the head and mouth. There were dried bloodstains on the backside of the head. Sahaji Jagtap (PW-3), the witness to the disinterring of the body of the deceased under panchnama (Exhibit-65), sought to lend corroboration to the claim of Smt. Vaishali Patil (PW-10).

**17.** The prosecution claimed that accused no.1 Tanaji had made further discoveries. Bharat Jagtap (PW-5), a public witness, testified to the fact that on 11th February, 2012, accused no.1 voluntarily made a disclosure statement to show the place where the ladies slippers of the deceased, of Lakhani make, were concealed. Post memorandum (Exhibit-72), accused no.1 led the police party to block no.94 Awar Pimpri, Taluka

Paranda and took out the ladies slippers from the sugarcane field, which were seized under the seizure memo (Exhibit-73). Mr. Vilas Jagtap (PW-4), another public witness, claimed that on 15th February, 2012, accused no.1 Tanaji volunteered to show the place wherefrom he had thrown the mobile phone handset in the river. Accused no.1, thereafter, led the police party to the said place and pointed out the spot near the field of Ghashiram Jain.

**18.** In support of the prosecution case that on 18th January, 2012, accused no.1 had made multiple calls to the deceased, the record of call details (Exhibit-96), was pressed into service. The record of call details indicates that the subscriber of phone no.9689868477 was accused no.1 Tanaji and the subscriber of 9011009479 was Pravin Mane. It reveals that on 18th January, 2012 in between 1.00 pm. to 5.15 pm. the deceased had received five calls from accused no.1 Tanaji.

**19.** Lastly, it may be apposite to briefly note the evidence of Dr. Abrar Ali Khan Pathan (PW-16), the Autopsy Surgeon. On external examination, Dr. Pathan (PW-16) claimed to have noticed the following injuries:

> "On occipital region of scalp, oblique injury seen from right side descending obliquely to left side measuring about 8 cm. X 10 cm. gap in scalp with underlying skull injury."

On internal examination the following injury was noticed:

> "On occipital region of scalp depressed fracture of bone seen. Oblique in nature from right side to oblique downwards to left side with toal bone thickness measuring about 4 cm. X 6 cm. X 2 cm."

**20.** In the opinion Dr. Pathan (PW-16) the cause of death was head injury. The aforesaid injuries were sufficient in the ordinary course of nature to cause death. They were possible by means of the spade. Death might have occurred prior to 10 days. Dr. Pathan further affirmed that the body of the deceased had not yet decomposed. He opined that, a dead body lying in the open space decomposed faster than a buried body.

**21.** Noting material could be elicited in the cross-examination of Dr. Pathan (PW-16) to rule out the homicidal nature of the death. Dr. Pathan (PW-16) flatly denied the suggestion that the injury of the kind sustained by the deceased was possible on account of fall on a hard surface. Evidently, the deceased was assaulted by means of a hard object, from behind. The nature of the grievous injury resulting in the depressed fracture of the bone coupled with the circumstances in which the dead body was found leads to no other inference than that of homicidal death. We are thus persuaded to hold that the

factum of homicidal death of the deceased is established beyond the pale of controversy.

**22.** This takes us to the moot question of the authorship of the homicidal death which the deceased met. On the strength of the evidence, which we have adverted to above, the prosecution professed to fasten the liability upon the accused, resting upon the following circumstances which, according to the prosecution, incriminate accused no.1 Tanaji:

**(i)** A strong motive to liquidate the deceased as accused no.1 fraudulently alienated the land of the deceased.

**(ii)** Accused no.1 had forged a document purported to be a power of attorney by impersonating the deceased, on 14th October, 2012.

**(iii)** On the very next day, the Sale Deed (Exhibit-89) was executed in favour of Popat Hake (PW-13) falsely claiming to be a constituted attorney of the deceased.

**(iv)** When the deceased was last seen alive on 18th January, 2012, she had informed that she was proceeding to the field at Awar Pimpri.

**(v)** Accused no.1 made multiple calls to the deceased on 18th January, 2012.

**(vi)** Accused no.1 made discovery and pointed out the

place wherefrom the body of the deceased was disinterred.

(**vii**) Accused no.1 made discovery leading to the recovery of the weapon of assault i.e. spade.

(**viii**) Accused no.1 made discovery resulting in the seizure of the ladies slippers, which the deceased wore.

(**ix**) Accused no.1 had also pointed out the spot wherefrom he had flung the mobile phone handset of the deceased into river.

(**x**) Accused no.1 made conscious and deliberate attempt to mislead the first informant Kishore (PW-12) by, firstly, claiming that he had paid a sum of Rs.10,00,000/- to the deceased in the presence of another person and, later on, asserting that the deceased might have deposited the said amount in her account with Pandharpur Urban Bank, which turned out to be false.

(**xi**) Accused no.1 did not offer any explanation much less plausible in respect of any of the aforesaid incriminating circumstances.

**23.** Before adverting to evaluate each of the aforesaid circumstances it may be advantageous to note that there is not much controversy over certain primary facts. Indisputably, the

deceased was the holder of the agricultural land bearing block no.94. By and large, it is not disputed that accused no.1 is an adjoining land holder though the claim of Kishor Tonape (PW-12) that accused no.1 cultivated said land on crop-share basis was sought to be contested. The relationship between the first informant Kishor Tonape (PW-12) and the deceased and the fact that the first informant ran a business at Pune and the deceased was residing at Kurduwadi, along with her husband, were not put in contest. The exhumation of the body of the deceased from the land bearing block no.94 is also not much in dispute. The controversy revolves around the knowledge of the accused about the said concealment and the consequences which emanate therefrom.

**24.** The legal position as to when the guilt of the accused can be legitimately sustained on the strength of circumstantial evidence is well recognized. It would be suffice to make a profitable reference to the judgment of the Supreme Court in the case of ***Sharad Birdhichand Sarda vs. State of Maharashtra***[1], wherein the principles were illuminatingly postulated. They read as under:

> "**1.** The circumstances from which the conclusion of guilt is to be drawn should be fully established.

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**1** 1984 AIR 1622.

2. The facts so established should be consistent with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

3. The circumstances should be of a conclusive nature and tendency.

4. They should exclude every possible hypothesis except the one to be proved.

5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

25. Circumstance nos. (i), (ii) and (iii):

On the aforesaid touchstone readverting to the appraisal of the evidence on record, the proof of motive for the crime depends upon the alleged forgery and cheating by impersonation so as to grab the immovable property of the deceased. In our view, the evidence of Mr. Popat Hake (PW-13) is of critical significance. His claim that accused no.1 Tanaji had offered to sell part of agricultural land bearing block no.94 and post negotiations executed the conveyance finds unflinching corroboration in the instrument (Exhibit-89). The identity of accused no.1 Tanaji as the executant of the said instrument is established beyond the pale of controversy by its intrinsic evidence. The conveyance was executed by accused no.1 in the capacity of constituted attorney of the deceased. To vouch for the said capacity, a copy of the purported power of attorney

executed by the deceased in favour of the accused was annexed thereto. It would be contextually relevant to note that the claim of the Kishor Tonape (PW-12) that the executant of the said power of attorney was impersonated as neither the power of attorney bears the signature of the deceased nor her photograph, went unimpeached.

**26.** No endeavour was made by accused no.1 to draw home the point that the deceased had indeed executed the power of attorney in his favour. Instead, a device of denial of anything and everything was adopted by accused no.1. However, the registered conveyance (PW-89) executed in the capacity of the constituted attorney forecloses the escape route for accused no.1. What accentuates the situation is the execution of the Sale Deed (Exhibit-89) on the very next day of the creation of the power of attorney. The intent to defraud is betrayed unmistakably. The extract of the instruments executed on 14th October, 2011 (Exhibit-104), maintained in the office of Sub-Registrar, Paranda, establishes the identity of accused no.1 Tanaji as the person who had tendered the said power of attorney for registration and had also received the original instrument. In the face of such overwhelming documentary

evidence, which nails accused no.1 Tanaji conclusively, mere denial is of no avail.

**27.** The time-lag between the execution of the Sale Deed (Exhibit-89) (15th October, 2011) and the date the deceased went missing (18th January, 2012) is also of some significance. The fear of the fraud being unearthed was clear and present. Viewed through this prism, in the facts and circumstances of the case, the motive for the crime can be said to have been proved.

**28.** **Circumstance nos. (iv) and (v):**

Smt. Sangita Bhosale (PW-11) endeavoured to impress upon the Court that she met the deceased at Kurduwadi bus-stand on 18th January, 2012. The deceased had told her that she was on her way to the field. No endeavour was made in the cross-examination of Smt. Sangita (PW-11) to impeach her aforesaid claim of having met the deceased. In contrast, it was brought out that Smt. Sangita (PW-11) met the deceased at Kurduwadi bus-stand in between 3.45 pm. to 4.30 pm. and there was rush of passengers thereat. It is not uncommon for the villagers to bump into the relatives at the bus-stand of a small town. The claim of Smt. Sangita (PW-11) that the deceased had apprised her that she was proceeding to the field cannot be said to be untrustworthy as that would be the first

line of inquiry with a relative or acquaintance whom one comes across at the bus-stand.

**29.** Although an omission was elicited in the cross-examination of Smt. Sangita (PW-11) that she did not inform the police that while she was engrossed in conversation with the deceased, accused no.1 Tanaji had called the deceased on the latter's phone, yet, the said omission does not impair the prosecution as there is independent evidence on the aspect of the telephone calls exchanged by and between the accused and the deceased.

**30.** Mr. Harun Shaikh (PW-14), the Investigating Officer, claimed to have obtained the record of call details (Exhibit-96). Pertinently, during the course of the cross-examination of Harun Shaikh (PW-14), an effort was made to demonstrate that the record of call details (Exhibit-96) does not reveal the conversation between the persons who made and received the calls. The claim of the prosecution witnesses that the deceased was using the cellphone having no. 9011009479 and the accused used the cellphone having no. 9689868477 was not sought to be assailed. Nor the genuineness, authenticity and reliability of the record of call details (Exhibit-96) was questioned.

**31.** The call details of cell no.9011009479, which was being used by the deceased, furnished by the Idea Cellular Ltd., the service provider, indicates that on 18th January, 2012 in between 1.00 pm. to 7.09 pm., seven calls were exchanged between the numbers 9011009479 (the deceased) and 9689868477 (the accused). Five calls were made by the accused. The record of call details in respect of cellular no.9689868477 (of the accused) furnished by the Idea Cellular Ltd., the service provider, reveals that the calls were so made and received on 18th January, 2012.

**32.** The fact that accused no.1 had made multiple calls to the deceased a short while before and after the deceased left her home at Kurduwadi, cannot be said to be inconsequential or immaterial. As many as seven calls in less than six hours cannot be explained away as mere incidental. Moreover, no effort was made to throw light on the circumstances which constrained accused no.1 to make calls with such alarming frequency to the deceased, on the day she was last seen alive.

**33.** **Circumstance nos. (vi), (vii), (viii) and (ix):**

The prosecution alleged that the accused, with a view to destroy the evidence, had thrown the mobile phone handset which the deceased used in the river. Reliance was placed on the evidence of Vilas Jagtap (PW-4), a public witness to the

discovery. The claim of Vilas Jagtap (PW-4) that accused no.1 Tanaji had made a disclosure statement on 15th February, 2012 to the effect that he would show the place wherefrom he had thrown mobile phone handset in the river and thereafter pointed out the said spot near the field of Ghashiram Jain, even if accepted at par, does not advance the cause of the prosecution. It cannot be said that any fact was discovered pursuant to the disclosure statement made by accused no.1 Tanaji. In the absence of any discovery, the correctness of the statement allegedly made by accused no.1 Tanaji cannot be said to have been confirmed. In our view, the evidence of pointing out of the place simpliciter is of no evidentiary value.

**34.** Before we delve into the discovery which allegedly led to the disinterring of the body of the deceased and the recovery of the weapon of the offence i.e. spade, on 5th February, 2012, we deem it appropriate to appraise the evidence of the discovery leading to the seizure of the ladies slippers (circumstance viii). Bharat Jagtap (PW-5), a witness to the discovery allegedly made by accused no.1 Tanaji on 11th February, 2012, testified to the fact that accused no.1 volunteered to produce the slippers belonging to the deceased, and thereafter led the police party to his field situated at Awar Pimpri. The accused took out the pair

of slippers (Article 13) from the sugarcane field. It was seized under seizure memo (Exhibit-73).

**35.** Despite an incisive cross-examination nothing material could be elicited to discard the claim of Bharat Jagtap (PW-5). Bharat Jagtap (PW-5) did concede that the slippers (Article 13) are readily available in the market. However, this general admission is not sufficient to jettison away the claim of Bharat Jagtap (PW-5). It is imperative to note that when the body of the deceased was disinterred, certain clothes and ornaments were found on her person. However, the footwear were not found. The recovery of the footwear of the deceased pursuant to the discovery made by accused no.1 Tanaji from his field thus constitutes an incriminating circumstance.

**36.** In proof of discovery leading to the disinterring of the body of the deceased and the recovery of weapon of offence i.e. spade, the prosecution banked upon the testimony of Vivek Shinde (PW-2). Mr. Khamkar, the learned Counsel for the appellant, advanced a serious criticism against the evidence of Vivek Shinde (PW-2). It was pointed out that Vivek Shinde (PW-2) did not depose to the fact that accused no.1 Tanaji made a statement to the effect that he would show the place where the body of the deceased was buried. Nor Vivek Shinde (PW-2)

affirmed that the accused had shown the said spot. The testimony of Vivek Shinde (PW-2) is simply restricted to the recovery of the spade (Article 6).

**37.** Secondly, according to Mr. Khamkar, a serious doubt arises about the credibility of the claim of Vivek Shinde (PW-2) as the time-lines do not match. The memorandum (Exhibit-62) is shown to have been drawn in between 17.30 to 17.40 pm. and the seizure memo is shown to have been drawn in between 17.40 to 18.45 pm. Accused no.1 Tanaji conceded in the cross-examination that the distance between Kurduwadi police station where the disclosure statement was made and the field wherefrom the spade was recovered was about 10 km. and it took around an hour to reach the said field from the police station. Vivek Shinde (PW-2) further asserted that they reached the field at 6.40 pm. These admissions, according to Mr. Khamkar, render it unsafe to rely upon the alleged discovery.

**38.** It is true that Vivek Shinde (PW-2) did not dispose to the disclosure statement allegedly made by accused no.1 Tanaji regarding the spot where the body of the deceased was buried. The evidence of Vivek Shinde (PW-2) touches the aspect of recovery of the spade (Article 13) only. The situation which thus obtains is that though there is evidence which indicates that

pursuant to the discovery made by accused no.1 Tanaji, spade (Article 13) was recovered, yet the testimony of Vivek Shinde (PW-2) is of no assistance to the prosecution on the point that accused no.1 had shown the spot where the body of the deceased was buried. The variance in time, in our view, however, is not of much significance.

**39.** Mr. Harun Shiakh (PW-14), the Investigating Officer, on his part, specifically deposed to the disclosure statement made by accused no.1 Tanaji to show the place where the body of the deceased was buried and the place where the weapon of offene i.e. spade was kept. Mr. Harun Shaikh (PW-14) further affirmed that after accused no.1 Tanaji pointed out the place where the body of the deceased was buried, he gave requisition (Exhibit-97) to the Executive Magistrate to exhume the dead body. Apart from suggestions, which were stoutly denied by Mr. Harun Shaikh (PW-14), nothing material could be elicited in the cross-examination so as to jettison away the claim of Mr. Harun Shaikh (PW-14).

**40.** Smt. Vaishali Patil (PW-10), the Executive Magistrate, wants the Court to believe that accused no.1 Tanaji had pointed out the spot situated in block no.94 at Awar Pimpri, Taluka Paranda, where the body of the deceased was buried.

Thereupon, the body of the deceased was exhumed from the said spot with the assistance of a JCB and the labourers.

**41.** Shahaji Jagtap (PW-3) ventured to support the claim of Smt. Vaishali Patil (PW-10). Shahaji Jagtap (PW-3) affirmed that on being enquired by Smt. Vaishali Patil (PW-10) accused no.1 Tanaji had pointed out the place where the body of the deceased was buried. The said spot was dug up. The body of the deceased was found thereat.

**42.** In the aforesaid backdrop, it was urged that the claim of Smt. Vaishali Patil (PW-10) and Shahaji Jagtap (PW-3) is of no assistance to the prosecution as there was no preceding statement so as to make the alleged discovery of the body of the deceased admissible under Section 27 of the Evidence Act.

**43.** The fact that there is no preceding statement, by itself, does not render the aforesaid evidence of the accused pointing out the place where the dead body of the deceased was buried, totally irrelevant. Under Section 8 of the Evidence Act, the conduct of the accused which influences or is influenced by any fact in issue or relevant fact also becomes relevant. For want of preceding disclosure statement the recovery of the dead body at the instance of the accused may not be admissible under Section 27 of the Evidence Act. However, the aforesaid evidence

of the accused having led the police party and pointed out the place where the dead body was buried would be admissible under Section 8 of the Evidence Act as the conduct of the accused.

**44.** A profitable reference, in this context, can be made to a judgment of the Supreme Court in the case of ***A.N. Venkatesh & Anr. Vs. State of Karnataka***[2]***,*** wherein, the accused therein had abducted a boy for ransom, killed him and buried the dead body, and, on being apprehended by police, had shown the place where the dead body was buried. The Supreme Court held that the said act of the accused of pointing out the place from where the dead body of the deceased was exhumed would be admissible as conduct under Section 8 of the Evidence Act irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27.

**45.** The observations in paragraph 9 are material :

> "**9** By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simplicitor, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in Prakash Chand Vs.

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**2** (2005) 7 SCC 714

> State (AIR 1979 SC 400). Even if we hold that the disclosure statement made by the accused appellants(Ex. P14 and P15) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW4 the spot mazhar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the accused. Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible under Section 8 of the Evidence Act.
>
> (emphasis supplied)

**46.** The aforesaid judgment was followed by the Supreme Court in the case of ***Harivadan Babubhai Patel Vs. State of Gujarat*** [3]

**47.** In the light of the aforesaid legal position, reverting to the facts of the case, the evidence of Smt. Vaishali Patil (PW-10), Shahaji Jagtap (PW-3), Harun Shaikh (PW-14), that accused no.1 Tanaji had pointed out the spot where the body of the deceased was buried does not suffer from any significant infirmity. We are, thus, impelled to hold that the evidence on the aspect of pointing out the place where the body of the deceased was buried, by accused no.1, Tanaji allures confidence. This act of the accused of pointing out the said place wherefrom the body of the deceased was disinterred thus becomes admissible as conduct influenced by the fact in issue.

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**3** (2013) 7 SCC 45.

**48.** It would be contextually relevant to make a reference to the judgment of the Supreme Court in the case of ***State of Maharashtra vs. Suresh***[4]***,*** wherein the Supreme Court adverted to the possibilities which are conceivable when an accused points out the place where a dead body was concealed. The observations of the Supreme Court in paragraph 26 are instructive. They read as under:

> "**26**. We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was conceded by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because accused is the only person who can Offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court mat the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act."
>
> (emphasis supplied)

**49.** In the case at hand, accused no.1 Tanaji made no effort to explain the circumstances in which he came to know about the concealment of the body of the deceased at the said place. This factor is required to be appreciated in the backdrop of the concomitant circumstances. There is evidence to indicate that the accused had not only forged the document to show that he

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**4** (2000) 1 Supreme Court Cases 471.

was the constituted attorney of the deceased but also went ahead to execute a conveyance by falsely claiming to be the constituted attorney of the deceased. On the day on which the deceased was last seen alive, accused no.1 had made multiple calls on the cell phone of the deceased. The fact that on the very day the deceased had informed Smt. Sangita (PW-11) that she was on her way to the field, wherein the body of the deceased was found in an buried state, also weighs in. The weight of these circumstances cast an obligation upon the accused to offer a plausible explanation about the knowledge of the concealment of the body of the deceased.

50. Circumstance nos.(x) and (xi) :

The claim of Kishor Tonape (PW-12), the first informant, that accused no.1 Tanaji had represented to him that the deceased had executed a power of attorney in his favour and had accepted a consideration of Rs.10,00,000/- thereunder, in the presence of another person, and that the deceased might have deposited the said amount in her account with Pandharpur Urban Bank, Modnimb Branch, (which was found to be untrue) was not at all impeached in the cross-examination. This claim of Kishor Tonape (PW-12) that accused no.1 Tanaji made false representations, with a view to exculpate

himself and misdirect the inquiry is of material significance. These representations cannot be said to be innocuous. The deceased was done to death. The claim that the deceased had executed the instrument after receipt of consideration was with a desire to thwart the possible challenge to the alienation of the suit land by accused no.1 Tanaji, which was purported to be effected by executing conveyance in favour of Popat Hake (PW-13), on 15th October, 2010 itself. In the circumstances of the case, these false representations bear upon the guilt of accused no.1 Tanaji.

**51.** Indeed no effort was made by accused no.1 Tanaji to offer any explanation, much less reasonable and plausible one, to any of the aforesaid incriminating circumstances put to accused no.1. Accused no.1 Tanaji adopted the device of denial simpliciter. The aforesaid circumstances are of defentive tendency and highly incriminatory in nature. The failure of the accused to offer explanation despite opportunity thus constitutes an additional link in the chain of circumstances.

**52.** The fact that in the missing report (Exhibit-87), the first informant Kishor Tonape (PW-12) had not made allegations against accused no.1 Tanaji does not detract materially from the prosecution case. Till the lodging of the missing report, on

29th January, 2011, the matter was in the realm of inquiry. After it was found that a forged instrument was got executed and, resultanly, the fraud was unearthed, the complicity of the accused no.1 came to light. Thus, the fact that no suspicion was entertained when the missing report (Exhibit-87) was lodged is not of determinative significance.

**53.** The upshot of aforesaid consideration is that except circumstance of pointing out the place from where the mobile phone handset of the deceased was allegedly thrown into the river, (circumstance no.ix), rest of the circumstances can be said to have been firmly and cogently established. The circumstances are of definite tendency and cumulatively incriminate accused no.1. The chain of circumstances is complete. On balance, the circumstantial evidence in the instant case leads to no other inference than that of the guilt of accused no.1 Tanaji. The possibility of any person other than accused no.1 Tanaji being the perpetrator of the offence is ruled out by the weight of the aforesaid circumstances. There was a clear motive for the accused to eliminate the deceased. The proved circumstances, adverted to above, are plainly incompitible with the innocence of accused no.1 Tanaji.

**54.** We are also of the view that the evidence adduced by the prosecution, especially the testimony of Popat Hake (PW-13), on the aspect of cheating and forgery, establishes the guilt of the accused for the offences punishable under Sections 420, 467, 468 and 471 of the Penal Code beyond reasonable doubt.

**55.** For the foregoing reasons, we do not find any infirmity in the impugned judgment of conviction and order of sentence. No interference is warranted in the impugned judgment. Thus, the appeal, being devoid of substance, deserves to be dismissed. Hence, the following order:

**: O r d e r :**

The appeal stands dismissed.

**[N. J. JAMADAR, J.]** **[SMT. SADHANA S. JADHAV J.]**

V. S. Parekar
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