

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

CRIMINAL APPEAL NO. 334 OF 2011

Suraj Harisingh Bahadur

...Appellant
(Orig. Accused)

Versus

The State of Maharashtra

...Respondent
(Orig. Complainant)

.....

Gaurav Bhawnani i/b. Mr. Khan Abdul Wahab, Advocate for the Appellant.
Mr. S. V. Gavand, APP for the Respondent – State.

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**CORAM : PRASANNA B. VARALE AND
PRAKASH D. NAIK, JJ.**

DATE : 12TH AUGUST, 2020.

JUDGMENT : (Per - Prakash D. Naik, J.) :-

1. The appellant is convicted for offence under Section 302 of Indian Penal Code, 1860 ('IPC' for short) and sentenced to suffer Life Imprisonment and to pay fine of Rs. 1,000/- (One Thousand) in default of payment of fine to suffer simple imprisonment for Six months. The impugned Judgment and Order dated 8th March, 2011 passed by 1st Ad-Hoc Additional Sessions Judge, Sessions Court for Greater Bombay, in Sessions case No. 58 of 2010, convicting the appellant is under challenge in this appeal preferred under Section 374 of Code of Criminal Procedure, 1973 ('Cr.PC').

2. In a brief outline of the material aspect, it may be noticed

that in the present case, the appellant was charged with the imputation that he killed his father by strangulation. The appellant/accused was serving as a Watchman and residing in temporary premises i.e. Pump House room of building known as Duck Villa situated at 17/3, Aazad Nagar, Char Road, RAK Marg Police Station, Wadala Mumbai. It is alleged that the father of accused Harisingh Bahadur (deceased) was also residing at the said premises. On receipt of information, police reached the spot of incident. They found dead body of deceased. Spot Panchanama was prepared. Dead body was sent for post-mortem. Accidental Death Report ('ADR' for short) bearing No. 79 of 2009 was registered. Subsequently, offence was registered vide C.R. No. 266 of 2009 punishable under Section 302 of IPC. The accused was arrested. On completing investigation, charge-sheet was filed. Case was committed to Court of Sessions. The prosecution has examined 14 witnesses. Statement of the accused was recorded under Section 313 of Cr.PC. After hearing submissions of both the sides, the trial Court convicted the appellant.

3. There is no eye witness to the incident of murder. The prosecution's case rests on circumstantial evidence. Trial Court opined that there are several circumstances in favour of prosecution. It was observed that accused was present in the premises at the relevant time and it can be gathered that several facts were within his inconclusive knowledge and therefore it was necessary for the accused to explain these facts. He has not given any explanation as how his father sustained injuries which

resulted into his death, and who had caused the same, and how his death had occurred. It is further held that Section 106 of Evidence Act would help the prosecution, as the accused had knowledge of several facts and he preferred to remain silent.

4. The law is well settled when it relates to case of circumstantial evidence. The circumstances from which an inference of guilt is sought to be drawn, must be proved by cogent and reliable evidence. The circumstances should be of definite tendency unerringly pointing towards the guilt of the accused. The circumstances taken jointly should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should be incapable of explanation of any other hypothesis than that of guilt of the accused.

5. With the assistance of the learned advocate representing the appellant and learned APP appearing for State, we have scrutinised the evidence adduced before the Trial Court on the basis of which finding of guilt was given. PW-1 Shankar Prasad Shivrul Prasad Sharma is the panch witness for spot/inquest panchanama. He stated that, he was called by the police to act as pancha at Duck Villa building. He is resident of said building. He saw one person lying dead between two buildings. There is one pump room. Son of deceased who was working as a watchman in the building, was also present. He is the accused in the present case. Clothes

of the deceased and Chaddar were seized from the spot. Belt was also seized. He identified the articles. The panchanama marked as exhibit '10'. In cross-examination, he deposed that, the building in which he residing is having compound wall from all the sides and height of the said compound wall is 3 to 4 feet. Both building are within one compound. At the back side of the building, there are residential chawls. Watchman is appointed to both buildings. Watchman is looking after supply of drinking water. He had not seen any quarrel between deceased and the accused.

6. PW-2, Dinesh A. Kolate is the pancha witness. According to him, police had seized the clothes of deceased. The Panchanama was proved vide exhibit '13'. PW- 3, Umesh Jaiswal is another pancha witness. He was called by the police, at police Station. Accused was called there. There were some abrasions on elbow joint, to back side of right ear and below left ear. The arrest panchanama was recorded, it was marked as exhibit '16'.

7. PW-4, Dr. Pratap D. Anand has deposed that he was on duty as Medical Officer at Nagpada Police Hospital, Mumbai on 26th September, 2009. The accused was brought for medical examination by API Nikam (PW-9). Before examination, written consent of accused was taken. Short history was noted by him. Injured Suraj Harisingh (accused) gave history that he killed his father Harisingh on 25.09.2009 at 1.00 a.m. by throttling and during struggle he got injury to his left ear. He examined accused and

found linear, multiple abrasions 0.1 x 0.2 cm in length on lateral aspect of left-pinna reddish colour, tender, age of injury was within 24 hours. It was caused by hard, sharp and pointed object. No other external injury was noted on body. He issued certificate (exhibit '20'). History mentioned in exhibit '20' was as per the version of Suraj Bahadur (accused). The certificate bears signature of accused in connection with taking his consent. Identification marks were also noted in the certificate. He identified the injured. In the cross-examination he stated that his name is not referred anywhere in certificate exhibit '20'. Police had brought the accused in his hospital. When the accused was sent to him, covering letter mentioning the short history of the case was also sent to him.

8. PW-5, Sharad Halankar is the photographer. He was called by the police on 25.09.2009. He took photographs at the place of incident. He took photographs of the dead body. He also took photographs of one boy who was present at the spot. He identified accused as the person, who was present at the spot. Photograph was marked as exhibit '22'. In the cross-examination, he stated that he is not government appointed photographer, and running his business privately. No seizure panchanama was prepared, when he handed over photographs to the police. He did not state to the police while recording statements that he took the photograph by digital camera. The spot where he took photographs, was backside portion of the building. He entered the premises from the backside. He do not have any shop and license for business of photography. Whenever

police called him, he used to come for taking photographs. He has having good relation with the police. PW-6 Prakash Shankar Kadam, is the pancha witness. He was called by police on 26.09.2009. The accused was present at the police station. The clothes of the accused were seized. Seizure panchanama was prepared. It was marked as exhibit '24'. He identified the clothes before the Court. In cross-examination, he stated that he had no personal talk with accused.

9. PW- 7, Vijay Chalke, was attached to RAK Marg Police Station, Wadala as ASI. On 25.09.2009, he was on duty. He received message about dead body lying at the Duck Villa building. He proceeded to the spot alongwith his staff. They went to the backside of Duck Villa building where water pump room is situated. Son of the deceased was found sitting near him. He made enquiry with the boy. He disclosed name of his father as Harisingh Bahadur. The accused is the same boy who is son of deceased and sitting near the body of deceased. Incident was narrated to API, Nikam on phone. API, Nikam came to the spot. In the cross, he stated that entry was made in the diary about receipt of information. On 25.09.2009 and 26.09.2009 no enquiry was made with him by his superior, Mr. Raje, and both these days his statement was not recorded. His statement was recorded on 27.09.2009. He gave information about the incident to the police station but personally he did not file any report in respect of incident. At the spot, he made enquiry with son of deceased, who was found sitting there. Statement of accused was recorded

by Shri Sanjay Nikam (PW-9). He was at the spot of incident from 1.50 p.m. to 4 p.m.. 5 to 6 relatives of accused were present at the spot. He did not make any enquiry with those relatives. His superior Shri Nikam, made enquiry with relatives.

10. PW- 8, Laxman Dharmkuwar Bahadur has deposed that he is working as watchman at Sainath Bar. He knows accused and his father, as they are from his village. Father of the accused used to come at his service place to meet him. Accused is working as watchman at Duck Villa building. On 24.09.2009, Harisingh (deceased) had been to him. He told him that there was dispute between him and his son. His son had threatened him that he would kill him. He advised him not to sleep with his son. Next day on 25.09.2009, he was cleaning his vehicle at Krishna Kunj building. Sagar (PW-10) who is from his village told him that Harisingh is dead. The witness told Sagar that Harisingh was complaining against his son. Police made enquiry with him. In the cross-examination, he stated that before entering into witness box, police told him what he has to depose before the Court. Harisingh was not his friend. Harisingh was not disclosing all details to him. After death of Harisingh, he had not been to his house to see his dead body. From 25.09.2009 to 30.09.2009 he was working at his workplace. From 25.09.2009 to 30.09.2009 he used to visit Krishna Kunj building daily for cleaning vehicles. Before giving statement to police, he had not disclosed to anybody that Harisingh had met him at his workplace on 24.09.2009. Besides disclosing this facts to

Sagar he did not disclose to anybody that Harisingh was complaining against his son Suraj to him. He came to know about death of Harisingh on 25.09.2009. Till 30.09.2009 he had not been to police at his own accord for giving statement. Sagar is working at Sahakar Nagar. There are two gates to the compound of Duck Villa building. In both buildings people are residing. Only one watchman is working in both buildings, where Suraj (accused) was working as watchman.

11. PW-9, Sanjay Nikam, was attached to RAK Marg, police station as API. Information was received by the police station, about death of one person at Duck Villa building. He went to the spot along with staff. Dead body was lying at the backside of the building, where pump house is situated. Temporary hut was seen at pump house. One boy was found sitting near the dead body. The dead person was his father. The statement of the boy (accused) was recorded. ADR No. 79 of 2009 was recorded. Spot panchanama was prepared. Chaddar and belt were seized from the spot. Photographer had taken photographs. Post-mortem was conducted. Complaint was filed against unknown person. First Information Report ('FIR' for short) was marked as exhibit '30'. The accused was arrested. Clothes of the deceased were seized. In cross-examination, he stated that investigation of ADR was started on the basis of statement of ASI, Chalke. On that day he did not record the statement of ASI, Chalke. Investigation was handed over to PI, Raje. He did not make any enquiry with the persons on the spot of incident. Before filing FIR, he did not record

statement of any witnesses, besides the statement of accused. Although, he went at the spot, he did not record the statement of any witness at the spot on that day.

12. PW-10, Sagarsingh Damarsingh Singh has deposed that he knows accused and his father. The deceased was residing with accused. On 24.09.2009 at about 8 p.m., after finishing his duty, he was going towards his house. Both father and son met him at Duck Villa building. Quarrel was going on between them. Suraj snatched the key from the hands of his father. He tried to convince them. Harisingh slapped accused twice. Accused said that it would be his last day or last day of his father. Quarrel was going on between them and they were talking to each other in Nepali. On the next day, accused told him that his father is dead. He went inside the building to see Harisingh. He saw Harisingh when Chaddar was on his person. After coming from that place nobody met him. Laxman was cleaning vehicle at Krishna Kunj building. He told Laxman about death of Harisingh. At that time, Laxman told him that Harisingh was complaining against his son to Suraj. In cross-examination, he stated that, Laxman is his good friend, as he is from his village. On 24.09.2009, he did not meet Laxman. After knowing death of Harisingh, he had been to the spot. When he went there in the morning nobody was there. After 2 to 3 days of incident, he was called by police. Enquiry was made with him by police, on 27.09.2009, He did not disclose anything about quarrel between deceased and the accused till recording his statement by police. At his own

accord, he had not been to the police station for disclosing that quarrel took place between deceased and his son. He did not disclose, the dialogue between accused and deceased which was in Nepali. He did not know the reason for quarrel between them. After the incident of quarrel, Harisingh was with him up to Wadala Railway Station. He do not know where Harisingh went from Wadala Railway Station.

13. PW-11, Rajesh Singh has stated that, he is serving at Sainath Bar. He knows the accused and his father, as they are from his village. Suraj was not in good term with his parents. On 24.09.2009, he had been to Aazad Nagar, to see fair at 12.30 a.m.. He returned from the fair at 1.45 a.m. and went to Duck Villa building for sleeping. Since he was late, he used to go for sleep at Duck Villa building, he went there to sleep. Suraj was lying on bed. He slept next to him on his bed. Suraj woke up and told him that there was quarrel between him and his father, and went to sleep. In the morning, at about 5.45 a.m., Manager of Gym came there. Suraj had opened the door of Gym. The witness went to sleep near another gate in the same building. Suraj told him that his father is dead. Prior to that he entered into room, the witness also entered in room. Suraj told him that he should go to Santacruz and inform his relatives. He went to Santacruz and returned at 1.45 p.m.. In the cross-examination, he stated that he is working at Sainath Bar with Laxman. There are two gates to the compound of Duck Villa building. Both gates used to remain open in night time. Both gates are touching the road and one gate is near Gym.

From another gate one can go to backside of the building. On 24.09.2009, he slept near the gate, which is adjacent to Gym. The height of compound wall is upto 4 feet. One can enter in compound by jumping the compound wall. No quarrel took place between the accused and his parents in his presence. On 24.09.2009, Harisingh had been to Sainath Bar and he told him that quarrel had taken place between him and his son, and that he is going to Santacruz. On the day of incident, he did not state to the police in respect of quarrel between the accused and his father. He did not state to anybody about the quarrel between the accused and the deceased. Till 30th September, 2009 on his own accord, he did not state to police anything about the quarrel between accused and his father.

14. PW-12, Binni Shridharan, has stated that, his Gym is at ground floor of Jayant Villa building, which is adjacent to Duck Villa building. Both the buildings are in same compound. In 2009, only one watchman was appointed for both buildings. Accused was appointed as watchman for both buildings. He was residing along with his father in pump house, which is at the backside of both the buildings. When the accused was not present, one Karan was allowed to reside at pump house room. Karan told him that accused and his father are not in good terms, and they are quarreling on the point of money. On 23.09.2009, at about 10 p.m., when he was about to close gym, he saw accused in front of gym and there was swelling on his forehead. On asking he told that due to water in backside portion, he fell down. On 24.09.2009, at about 6.00

a.m. he was told by his trainer that father of Suraj has expired. When he went to gym, he made enquiry with Suraj. He told that he was sleeping in front of gym, and when he went to see his father, he was found dead. He went to pump house, and saw body of deceased. Suraj called his relatives by phone, which was in gym. In the cross-examination, he stated that people are residing in both buildings. Several other residential buildings are near the Duck Villa and Jayant Villa building. Both buildings are adjoining each other, and there are two gates in the compound of the building. Gates are not open continuously, and watchman used to open the gate for enter for vehicles. He is not available at gym for 24 hours. Outsides also attend gym. He did not state police anything on his own. His statements was recorded after 3 days of occurrence of incident. On 24th September, 2009 in the morning, when the police came to the spot, he had stated them about the incidents. He do not know whether police recorded his statements on that day.

15. PW-13, Dr. Dhritimanh Ratneshwar Nath have deposed that he was attached to K.E.M. Hospital. He conducted autopsy on the dead body of Harisingh alongwith Professor Walter Vaz on 26.09.2009. On external examination he noticed following injuries:

“1. Impact abrasion over forehead size 0.7 cm x 0.4 cm vertically placed over forehead with lower pole 3 cm above fronto nasal angle and its inner limit just touching mid line.

2. rough trapezoidal area of blackish bruising 9.00 cm long, 7.00 cm at its base, 4.00 cm at its upper limit, 9.00 cm along its side, extending up from cavical over left side

of neck with its inner limit 2.00 cm to the left of sternal notch.

3. Two linear areas of blackish bruising 7.00 cm x 0.8 cm and 5.5 cm x 0.5 cm obliquely placed over right side of neck parallel to each other and 2.00 cm apart with their inner limits 6 cm above the upper border of right cavical and 3.00 cm above the upper border of right cavical respectively and their inner tips 6.00 cm to the left of mid line.

4. Irregular area of pin point impacted lesions 1.5 cm x 1.00 cm in dimension over left side of back of trunk in lumber region with its inner limit 16 cm above natal cleft and 7.5 cm to the left of mid line.

5. Reddish multiple impact injuries linear area of 18 cm x 10 cm dimension over front and upper aspect of left thigh and knee extending upwards from knee joint. All the said injuries are ante-mortem”.

The injuries were anti-mortem, injury no. 2 and 3 can caused death in ordinary course of nature. The cause of death was “cerebral anoxia and apoplexy as a result of instrumental strangulation(unnatural)”. In the cross-examination, it was stated that at the relevant time Prof. Walter Vaz was senior to him. Entire post-mortem was conducted by Prof. Walter Vaz. The description of injury was given to him by Prof. Walter Vaz. He also taken description of injuries from his own observations. In the post-mortem report, age of injuries has not been mentioned. Abrasion can be caused if a person falls down. Blackish bruising means, if a person is hit by any stick or there is any impact, there would be collections of blood under the skin of that spot. Without going through the internal examination, he can say that injury no.2 and 3 are serious. In column no. 21 of Post-mortem report, relating to additional remark nothing has been mentioned relating to time of death. On being question that he has not

mentioned the instrument of instrumental strangulation, he deposed that unless the said instrument is shown to him by I. O., he would not be in position to disclose the said instrument which caused strangulation. The Post-mortem report was marked as exhibit '42'.

16. PW-14, Prashant Raje, conducted investigation. He was attached to RAK Marg, police station, as PI.. According to him, API Sanjay Nikam (PW-9) registered ADR no. 79 of 2009 on 25.09.2009. After receiving preliminary cause of death, he filed report at Police Station which was accepted and crime was registered vide C.R. No. 266 of 2009 under Section 302 of IPC. Accused was arrested on 26.09.2009. Injuries were found on his person. He was sent for medical examination. Statements of witnesses were recorded. Charge-sheet was filed on 26.11.2009. During cross-examination, he deposed that the day on which the message was received he visited the spot at 2.00 p.m.. He made some enquiry with witnesses who were present at the spot. He did not record statement of any witnesses. ADR report was not filed in the Court. Generally, SHO register an offence. On 25.09.2009, PSI, Gaikwad was SHO at police station. He did not receive information in respect of present crime. ASI, Ughade who was relieving officer for PSI, Gaikwad. He has not register any FIR. Duck Villa is residential as well as commercial building. There was no complaint with his police station, between accused and deceased prior to the incident. They did not get any witness to show that in the night of incident, there was quarrel between accused and deceased. There is pump

house in the compound of Duck Villa building and it is to the backside of the building. Person who is residing in society has given information to the police regarding the incident relating to the deceased. The rough sketch of the spot of incident, is prepared. There is no reason for him not to file the said map in this case. Society is not maintaining visitor register. There is only one gym in the building and he has not collected the register from the gym. Outsider also come to the gym. The evidence of carrier is not important in this case. He did not mention the fact in the panchanama that enquiry was made with pancha witnesses, whether they acted as panch in the past. Blood stains were not found either on the clothes of accused or deceased. He did not file station diary in this case.

17. Learned Advocate for the appellant made following submissions in support of, challenge to the impugned judgment convicting the appellant for the offence under Section 302 of IPC.

- (a) There is no eye witness to the incident. The entire case is based on circumstantial evidence. The prosecution has to establish the chain of circumstances to prove the guilt of accused.
- (b) The evidence of the witnesses does not inspire confidence and conviction cannot be based on such evidence.
- (c) The alleged confession, in the form of history recorded by Medical Officer (PW-4) cannot be relied upon, as it is hit by Section 26 of Evidence Act.
- (d) The evidence of previous quarrel, last seen together suffers

from serious discrepancies. Statements of PW-8, PW-9, PW-10, PW-11 and PW-12, were recorded belatedly. Their version speaks volume of doubt.

(e) Section 106 of Evidence Act, could not have been invoked against the accused as it has not been established that the accused and the deceased were together at the same premises on the date of incident. The prosecution has failed to establish the involvement of the appellant in the offence, and in the absence of cogent evidence, the accused cannot be convicted with the aid of Section 106 of Evidence Act.

(f) No adverse inference could be drawn against the appellant, on account of alleged injuries found on his person. During his cross-examination. PW-4 has deposed that the injury was within 24 hours. The circumstances would indicate that the incident had occurred 45 hours before his examination.

(g) The cause of death has not been established beyond doubt. PW-13, has stated that cause of death is due to cerebral anoxia and apoplexy as a result of instrumental strangulation(unnatural). However, he stated that unless the instrument is shown to him he would not be in position to disclose which instrument has caused strangulation.

18. Learned counsel for the appellant has relied upon filling decisions:

- (i) Shambhu Nath Mehra v/s. State of Ajmer AIR 1956 SC 404.
- (ii) Ram Singh v/s. Sonia and Others. (2007) 3 SCC 1.
- (iii) Gargi v/s. State of Haryana (2019) 9 SCC 738.
- (iv) Mayur Parmar and Anr. v/s. State of Maharashtra (2016 (3) BOM. C. R. (CRI) 201).

19. Learned APP supported the judgment of Trial Court convicting the appellant, and contended that there are circumstances, to indict the appellant in the crime. His submissions can be summarised as follows:

- (i) Judgment of the Trial Court is based on evidence and cogent reasons.
- (ii) Although the case is based on circumstantial evidence, there are several circumstances, which establish the guilt of the accused.
- (iii) The evidence of the witnesses is reliable. There is no reason for PW-8, 9, 10, 11 and 12 to depose against the appellant.
- (iv) The prosecution has established that the appellant and the deceased were not in good terms. There were previous quarrels, threats, hence appellant had motive to commit crime.
- (v) The appellant and the accused were occupying the same premises. The presence of the appellant at place of incident has been established. The body of deceased was found in the pump house, where small hut was erected. The accused and deceased were occupying same premises. In the circumstances, the accused had special knowledge, as to how the victim had died and who killed him. In the absence of explanation, recourse can be taken to

Section 106 of Evidence Act for considering it as one of the link to connect the appellant in the crime.

(vi) There is evidence of last seen together. On the day of incident, there was quarrel between the accused and deceased, which is deposed by witnesses.

(vii) There is nothing to indicate that any other person must have killed the deceased. The nature of relationship between the deceased and the accused, has been referred to by the witnesses, which indicate that there was animosity between them.

(viii) The deceased was strangled. Belt was recovered from the scene of offence. The Medical Officer has opined that it is the case of instrumental strangulation.

(ix) Injuries were found on the person of the accused. This fact is evident from the deposition of PW-4. There is no explanation from the accused for injuries sustained by him. The injuries had occurred during the scuffle with the deceased.

(x) The conduct of the accused after incident, would indicate that he was not found disturbed, on account of death of his father and did not take immediate steps to lodge complaint with the police.

(xi) The accused made confession to PW-4 while providing history that he has caused death of his father by throttling and injuries were caused to his left ear during the struggle. The evidence of PW-4 confirms the cause of those injuries.

20. On assessing the evidence of the witnesses, it is apparent that, the prosecution case is based on following circumstances:

- (i) Nature of relationship between the accused and the deceased on account of quarrels between them. Threat given by accused to the deceased prior to death of deceased.
- (ii) The deceased and accused are father and son, and they were occupying the same premises. The incident has occurred in the premises, occupied by them. There is no explanation from the accused about the special knowledge with regards to cause of death.
- (iii) The deceased and the accused were last seen together on the day of incident.
- (iv) Extra-judicial confession of the accused to PW- 4.
- (v) Conduct of the accused.
- (vi) Injuries on the person of the accused.
- (vii) Death by strangulation.

21. On scanning the evidence, it is apparent that the evidence relied by the prosecution is not full proof. The evidence on record does not establish the case beyond all reasonable doubt against the accused. When it comes to circumstantial evidence, the circumstances should be of conclusive nature. There must be chain of evidence far complete not to leave any reasonable ground for conclusion, consistent with the innocence

of accused.

22. The deceased is the father of the appellant/accused. The alleged incident had occurred in the night of 24.09.2009 and 25.09.2009. The accused was working as watchman at Duck Villa building. From the evidence of PW-1, it appears that dead body was lying between the two buildings i.e. Duck Villa building and Jayant Villa Building. There was one pump room. The accused was present at the spot, the clothes of the deceased were seized along with the belt, which was lying at the scene of offence. PW-1, witness is resident of Duck Villa. He has deposed that the buildings were having compound wall from all the sides with height of 3 to 4 feet. There are residential chawls at the backside of the building. One watchman was appointed for both the buildings. The evidence of PW-1 elicits that the accused was present at the spot. He had not seen any quarrel between the deceased and the accused. The conduct of the accused is reflected through his evidence, indicating that he did not flee from the scene of offence. He was found sitting near body of deceased. There was nothing to indicate at first blush that he is involved in crime. No one suspected him. The deposition of PW-1 is not clear, with regards to exact location, where the incident had occurred. He has stated that the body was lying between two buildings. He has not specifically stated that deceased was lying below the hut or inside the pump house. In the panchanama exhibit '10', however, it is mentioned that on the rear side of Duck Villa building, there is pump house, and in front of the pump house,

temporary hut is erected and the dead body was found in front of the door of pump house below the hut. We do not find that evidence of this witness has any incriminating value against the accused. PW-2 is the panch witness. He was called at the police station for seizure of clothes of the deceased. The evidence of this witness also cannot be held to be adverse against the accused. PW-3, is the pancha witness for arrest panchanama. He has referred to the fact that he was called at the police station and the accused was introduced to him by police. He noticed abrasion on elbow joint, backside of right ear and below left ear. It is apparent that the accused was called at the police station and arrested. He never tried to evade arrest.

23. PW-5 is the photographer. He was called at the spot to take photograph of the body of the deceased. He has stated that no seizure panchanama was prepared, when photographs were handed over to police. The spot was backside portion of the building. He entered the premises from the backside. PW-6 is the pancha witness for seizure of clothes of accused. The seizure is not incriminating evidence against the appellant.

24. We have analysed the evidence of PW-08, PW-10, PW-11 and PW-12. The prosecution is relying on the evidence of these witnesses with regards to previous quarrels, previous threats and last seen together circumstances to connect accused with crime. PW-8, is working as watchman at Sainath Bar. According to him the accused and the deceased

(Harisingh) are from his village. Deceased used to come to his service place to meet him. On 24.09.2009, Harisingh (deceased) had been to him and he told about the quarrel with his son(accused). Harisingh also informed that he has been threatened by the accused that he would be killed. He was advised not to sleep with the son. On the next day, Sagar Singh (PW-10) informed about the death of Harisingh. The evidence of this witness is apparently after thought. The statement has been recorded after the arrest of the appellant. He stated that before entering witness box, police had told him what he has to depose before the Court. He also stated that Harisingh (deceased) was not his friend. He was not disclosing all details. After his death, he did not visit his house to see his dead body. In the light of this version, it is difficult to accept his deposition that the deceased had visited him and told him about the quarrel and threat issued to the deceased by accused. It is also pertinent to note that he was working in Sainath Bar as well as cleaning vehicles at Krishna Kunz building, where he used to visit daily. But he did not disclose the fact that Harisingh had visited him on 24.09.2009 to anybody. He has stated that he has disclosed the fact to Sagar and not to anybody that Harisingh complaining against his son. Although, death took place on 25.09.2009 which came to his knowledge on that day, he did not visit the place of incident nor visited police station on his own accord. Evidence of this witness with regards to the previous quarrel and threat, do not inspire confidence. PW-10, Sagar Singh, is the witness whose reference is made by PW-8. This witness have referred to quarrel between the accused and

his father on 24th September, 2009 at about 8.00 p.m. and threat issued by the accused to his father. He has stated that the accused and the deceased were talking with each other in Nepali language. On the next day, accused told him that his father is dead. He went to the spot. He met Laxman and spoke to him about death of Harisingh. At that time, Laxman told him that Harisingh was making grievance against Suraj. From his evidence, it is disclosed that he knew about death of his father on 25th September, 2009. Laxman had told him about the complaint of Harisingh about his son. He did not understand the nature of version during the quarrel between accused and the deceased. He was called by the police after 2 to 3 days. He did not disclose anything about the quarrel between deceased and the accused till recording his statements by police. He did not visit police on his own accord. Thus, although he was aware about the alleged previous quarrel, and his statement was recorded belatedly to introduce the theory of previous quarrel and threat. He visited the spot in the morning, when no one was there. According to Harisingh was with him up to Wadala Railway Station after the quarrel on 24th September, 2009. He do not know where he went from Wadala Railway Station. Thus, post quarrel and threat, the deceased accompanied him. He stated that he did not understand the reason for quarrel. The accused and deceased were talking with each other in Nepali. Thus, no reliance can be placed on the evidence of this witness to establish charge against the appellant.

25. PW-11, has deposed that he is serving at Sainath Bar, where

PW-8 is also employed. On 24.09.2009, he went to attend fair at 12.30 a.m., and returned at 1.45 a.m.. He went to Duck Villa building to sleep. Suraj (accused) was sleeping on bed. Thus, from his evidence it is disclosed that he used to visit said place for sleeping. He saw accused sleeping in the room. He did not notice deceased at the place where the accused was sleeping. He also stated that the accused was woke up told him about quarrel with his father, and went to sleep. The version of this witness, does not inspire confidence. It is not established that on the night of incident the accused and deceased were sleeping together in the same premises. It is difficult to accept that accused woke up only to tell him that there was a previous quarrel. Undisputedly, he did not disclose that he assaulted his father. Taking the prosecution case as it is, the premises were utilized allegedly by the deceased, the accused and PW-11 and one more person Karan. He did not notice anything suspicious in the night of 24th and 25th September, 2009. He woke up in the morning on visit of the Manager of the Gym. The door of Gym was opened by accused. Thereafter, the witness went to sleep near another gate in the same building. Accused told him that his father is dead, and prior to that he entered into the room. Thereafter, the accused entered in room and saw dead body of Harisingh. The version of this witnesses is confusing. He entered into the premises at about 1.45 a.m.. He slept there. He woke up at 5.45 a.m. till then there was nothing to indicate that deceased was killed at the said place by accused. In the morning, according to him, he went to sleep at another gate. Thereafter, it was disclosed by accused that

his father is dead. Thus, it is not clear as to what time the victim was killed. If deceased was found in the room in the morning, then why this witness has not referred to his presence in room, when he was sleeping with the accused. It is not clear whether the accused, PW-11 and the deceased were sleeping in the same room. From his evidence, it is also revealed that both the gates of building are open even in night time. There is every possibility that some outsider has entered into the premises and committed the crime. PW-11 stated that no quarrel took place in his presence between accused and deceased. On the day of incident he did not state to the police in respect of quarrel between accused and his father. He also did not disclose this fact to anybody. On 30.09.2009 on his own accord he has not stated to police anything about the quarrel between the accused and his father. Thus, the circumstances of disclosure by the accused about the quarrel is creation of this witness. We do not find that the evidence of this witness can be considered as strong circumstance against the accused.

26. PW-12, conduct Gym, situated at Duck Villa building. He has disclosed that the accused and the deceased were residing together in the pump house, which is to the backside of both the building. He also stated that room was allowed to be occupied by one Karan in the absence of accused. Thus, one more person had access to the pump room. Karan told him that the relation between the accused and deceased are not good. It is not clear whether statement of Karan was recorded during investigation.

He has not been examined. According to him on 23.09.2009, he noticed swelling on the forehead of the accused for which he gave explanation that he slipped on the backside portion of the building. On 24.09.2009 he learnt about the death of deceased. The case of the prosecution is that the incident had occurred in the night of 24.09.2009 and 25.09.2009. The swelling on the forehead referred to by this witness, is insignificant as it was noticed by him on 23.09.2009. In any case, the injury allegedly noticed by PW-4 is contrary to evidence of PW-12. According to him he learnt about the incident on 24.09.2009. The body of deceased was found on 25.09.2009. He also deposed that there are several other residential buildings near Duck Villa and Jayant Villa buildings. He did not state anything to police on his own accord. Police recorded the statement. Subsequently, on 24.09.2009, police came to the spot in the morning time. He informed police about the incident. He does not know whether his statement was recorded by police. Apparently, his statement was recorded on 29.09.2009, which was brought on record, at the instance of the prosecution by preferring application exhibit '35'. He has disclosed the incident to police on 29.09.2009. Thus, it is very difficult to believe the version of the witness which suffers from serious doubt.

27. From the evidence of these witnesses, it cannot be said that the prosecution has established the links to connect the appellant with the crime. From the evidence of PW-1, it has revealed that the dead body of deceased was found between two buildings. He has referred to pump

room. He has also referred to presence of accused. Thus, the accused was sitting near the body of deceased and his movements were not suspicious. PW-7, ASI, Vijay Chalke has also stated that the accused was sitting at the spot, near the body of deceased. Even, PW-9, Sanjay Nikam have deposed that the accused was present near the body of deceased. No adverse inference could be drawn against the appellant with regards to his conduct post the incident of death of his father. PW-7, received the message from control room about the death of deceased. He reached the spot. He did not suspect involvement of the appellant in crime. His statement was recorded on 27.09.2009. He did not file report on 25.09.2009. He made enquiry with the accused, who was sitting at the spot of incident. Although, he was at the spot from 1.50 p.m. to 4.00 p.m., he did not notice anything incriminating against the accused. According to him, statement of accused was being recorded by API, Nikam (PW-9). From the evidence of PW-9, it can be seen that message was received by the police station about death of one person at Duck Villa building, and the said message was given to ASI, Chalke (PW-7). PW-09, went to the spot. PI, Rajee (PW-14) and PSI, Kokare were present at the spot. Accused was found sitting near dead body of his father. Enquiry was made with him. Statement of accused was recorded, and ADR No. 79 of 2009 was registered. Thus, inspite of enquiry with the accused, his involvement was not disclosed, and ADR came to be registered. The accused was present all throughout during enquiry and investigation. He never attempted to flee from place of incident. It is unclear on what basis, the involvement of the accused was disclosed on

26.09.2009, the day on which he was arrested. It is pertinent to note that the statements of PW-8, PW-10, PW-11 and PW-12 were recorded subsequently. It would indicate that the appellant was arrested without any incriminating evidence and the statements of the witnesses were recorded subsequently to create evidence against the appellant. The version of those witnesses, is afterthought and concocted. It is relevant to note that the FIR was registered on 26.09.2009 by PW-9 against unknown person. The time of recording the FIR is 2.00 p.m.. General diary reference was made at 2.30 p.m.. The appellant was arrested on 26.09.2009 at 16.40 p.m..

28. From the evidence of witnesses, it is elicited that the dead body was found at the backside of Duck Villa building. There are two gates to the building. There were two buildings adjacent to each other. There is a compound wall which is about 3 feet in height. The two buildings were residential. Gym is conducted in one of the building. The gates used to be open. Outsiders had access to the gym. There were residential chawls outside the compound of the buildings. The pump house room had access to persons other than the accused and deceased. The possibility of deceased being killed by any other person, cannot be ruled out.

29. PW-1, is the resident of Duck Villa building. He had never seen any quarrel between the accused and the deceased. The other resident of the building were not examined. PW-7, and PW-9 did not notice

injury on the person of the accused. They did not suspect involvement of the appellant at inception.

30. PW-4, has been examined with dual purpose to establish that there were injuries on person of accused and that the accused has made extra judicial confession to this witness. It is pertinent to note that the dead body of deceased was found in the morning of 25.09.2009. The alleged incident had occurred between the night of 24.09.2009 and 25.09.2009. The appellant was arrested on 26.09.2009 at about 16.40 p.m.. As per certificate issued by PW-4 exhibit '20', accused was examined by him on 26.09.2009 at 8.00 p.m.. PW-4, have deposed that the injury found on the person of the accused, was within 24 hours. The accused was examined almost after 45 hours from the time of alleged incident. Exhibit 20 mentions that the accused have consented for his physical examination and he has put up his thumb impression as well as signature. Below the signature and thumb impression, writing was executed on exhibit '20' about marks of identification and the injuries like linear, multiple obression, 0.1 to 0.2 mtr. In length, on lateral aspect of left pinna redish in colour, tender within 24 hours. The cause of injuries is hard, sharp pointed object. No external injury was noted on body. The said certificate also records history allegedly given by the accused that he killed his father Harisingh on 25.09.2009 at about 1.00 a.m. by throttling and during struggle he got injury to his left ear. We have noted hereinabove that PW-7, PW-9 and PW-14, did not suspect the involvement of the

appellant/accused. The FIR was registered against unknown person, even after interrogating the accused. They have not referred to presence of any injuries on the person of the accused. The signature and thumb impression is related to consent for his physical examination and not to the other content of exhibit 20. There is every possibility that the history reflected in exhibit-20, was copied from the covering letter mentioning the short history of the case sent while the accused was brought by the police to the hospital. Apart from the above discrepancies, it is difficult to accept that the content of exhibit – 20 would amount to extra-judicial confession by accused to PW-4.

31. The evidence of witnesses discloses that the appellant was arrested on 26.09.2009 and he was produced for examination on the same day at 8.00 p.m.. Thus, the appellant was in custody of police. PW-4 has also stated that the accused was brought for medical examination by API, Nikam (PW-9). Any confession made by the accused while in police custody to any person would be hit by Section 26 of Evidence Act. Hence, the alleged confession has no legal sanctity and cannot be relied upon against the accused.

32. Section 26 of the Evidence Act reads as follows:

“Section 26 -No confession made by any person whilst he is in the custody of a police officer, unless, it be made in the immediate presence of a Magistrate, shall be proved as against such person.

In this Section “Magistrate” does not include the head of a village discharging Magisterial functions in the

Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882)."

The extra-judicial confession allegedly made by the accused to PW-4 is hit by Section 26 of the Evidence Act, since, assuming that the accused has provided the history in the nature of confession, it was made while in police custody and consequently cannot be admitted into evidence.

33. PW-13, conducted autopsy, cause of death according to him, was cerebral anoxia and apoplexy as a result of instrumental strangulation(unnatural). However, the prosecution has not been able to establish as to who has caused the death and how. It is not proved as to which instrument was used in commission of crime. Belt was recovered from the place of incident. PW-13, has not stated that the victim was strangled by leather belt. No opinion was sought, whether death can be caused by leather belt, seized by police. PW-13, has categorically stated that he has not mentioned the instrument of instrumental strangulation, since unless the instrument is shown to him by I.O. he would not be in position to disclose the instrument which caused strangulation. The instrument was not shown to him either during investigation or while record his evidence.

34. The prosecution had tried to invoke Section 106 of the

Evidence Act. The trial Court has also relied upon the said provision and opined that there is no explanation from the accused, which was considered as one of the circumstances to prove his guilt. On scrutiny of evidence of witnesses, it is apparent that the prosecution has failed to establish that the appellant is author of crime, the appellant and the deceased were together in the same premises at the time of incident and no other person had access to the place of incident. Section 106 of Evidence Act can be quoted for reference, which reads as follows:

“Section 106- When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations- (a) when a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.”

It is settled principle of law that the prosecution must discharge the initial burden of establishing prima facie the guilt of the accused beyond all reasonable doubt.

35. Thus, we are of the opinion that the prosecution has failed to establish the circumstances against the accused. It is difficult to arrive at a conclusion that the circumstances taken jointly form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused, and none else.

36. In Kishorchand V/s. State of Himachal Pradesh 1991 (1) SCC 286, it was observed that in a case of circumstantial evidence, all circumstances from which the conclusion of the guilt is to be drawn should be fully and cogently established and the proved circumstances must bring home the offences to the accused beyond all reasonable doubt. In assessing the evidence imaginary possibilities have no role to play. What is to be considered are ordinary human probabilities. It is not necessary that each circumstance by itself be conclusive but there must be a chain of evidence so far consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that in all probability the act must have been done by the accused and the accused alone. Paragraph 6 of this decision would be relevant which reads as follows:

“Para 6- In assessing the evidence to find these principles, it is necessary to distinguish between facts which may be called primary or basic facts on one hand and inference of facts to be drawn from them, on the other. In regard to the proof of basic or primary facts, the court has to judge the evidence in the ordinary way and in appreciation of the evidence in proof of those basic facts or primary facts, there is no scope for the application of the doctrine of benefit of doubt. The Court has to consider the evidence and decide whether the evidence proves a particular fact or not. Whether that fact leads to the inference of the guilt of the accused or not is another aspect and in dealing with this aspect of the problem, the doctrine of benefit would apply and an inference of guilt can be drawn only if the proved facts are inconsistent with the innocence of the accused and are consistent only with his guilt. There is a long distance between may be true and must be true. The prosecution has to travel all the way to establish fully all the chain of events which should be consistent only with hypothesis of the guilt of the accused and those circumstances should be of conclusive nature and tendency and they should be such as to exclude all hypothesis but the one proposed to be

proved by the prosecution. In other words, there must be a chain of evidence so far consistent and complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that in all probability the act must have been done by the accused and the accused alone.”

37. In the aforesaid decision the Supreme Court has further observed that an unambiguous extra-judicial confession possesses high probative value force as it emanates from the person who committed the crime and is admissible in evidence provided it is free from suspicion and suggestion of its falsity. Court has to look into the surrounding circumstances and to find whether the extra-judicial confession is not inspired by any improper or collateral consideration or circumvention of the law suggesting that it may not be true one. For this purpose, the Court must scrutinise all the relevant facts such as the person to whom the confession is made, the time and place of making it, the circumstances in which it was made and finally the actual words used by the accused. Section 26 provides that no confession made by any person while he is under custody of the police officer, unless it be made in the immediate presence of a Magistrate shall be proved against such person. In the fact of case before the Supreme Court, it was observed that with a view to avoid rigour of Section 25 and 26, the witness created artificial scenario of his leaving for further investigation and kept the accused in custody of another witness who is the pradhan of village to make an extra-judicial confession. It would be legitimate to conclude that the accused was taken into police custody and while in custody extra-judicial confession was obtained

through witness to accommodate the prosecution. Thus, by operation of Section 26 of the Evidence Act, the confession made by the accused to the witness while he was in custody of police officer, shall not be proved against the accused.

38. In Ram Singh V/s. Sonia & Others (Supra) it was observed that the confession by the accused while in police custody not to be proved against him. Temporary disappearance of police from the scene at the time when accused making extra-judicial confession to scientific assistant would be hit by Section 26 of Evidence Act, since it was made by accused while in police custody. The confession was made by accused after his arrest while he was in police custody, although at the point of time when the confession was made, the police personnel went away from the scene temporarily. It would be hit by Section 26 of the Evidence Act and cannot be admitted into evidence.

39. In Gargi V/s. State of Haryana (Supra) the Apex Court has reiterated the principles governing circumstantial evidence. It was observed that circumstantial evidence is one whereby other facts are proved from which existence of fact in issue may either be logically inferred, or atleast rendered more probable. The circumstantial evidence, in the context of crime, essentially means such facts and surrounding factors which do point towards complicity of charged accused and then, chain of circumstances means such unquestionable linking of facts and

surrounding factors that they established only guilt of charged accused beyond reasonable doubt, while ruling out any other theory or possibility or hypothesis. The Supreme Court also considered Section 106 of Evidence Act and observed that the conduct of the accused post alleged incident of murder would be considered if unnatural and manifested guilt of accused. However, the accused in that case who was the wife of the deceased neither concealed herself nor altered the scene of crime in any manner and there had not been any oddity in her manners and demeanour.

40. In Shambhunath Mehra V/s. State of Ajmer (Supra) the Apex Court has dealt with the principles underlying Section 106 of Evidence Act which has been explained beautifully in paragraph 9, 10 and 11 of the said decision which reads as follows:

"Para-9, This lays down the general rule that in a criminal case the burden of proof is on the prosecution and [section 106](#) is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are preeminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are [Attygalle v. Emperor](#)(1) and [Seneviratne v. R.](#) (2).

10. *Illustration (b) to [section 106](#) has obvious reference to a very special type of case, namely to offences under [sections 112](#) and [113](#) of the Indian Railways Act for travelling or attempting to travel without a pass or ticket or with an insufficient pass, etc. Now if a passenger is seen in a railway carriage, or at the ticket barrier, and is unable to produce a ticket or explain his presence, it would obviously be impossible in most cases for the railway to prove, or even with due diligence to find out, where he came from and where he is going and whether or not he purchased a ticket. On the other hand, it would be comparatively simple for the passenger either to produce his pass or ticket or, in the case of loss or of some other valid explanation, to set it out; and so far as proof is concerned, it would be easier for him to prove the substance of his explanation than for the State to establish its falsity.*

11. *We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused. This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts."*

41. The division bench of this Court in *Mayur Malji Parmar and Anr V/s. State of Maharashtra* 2016 (3) Bom.C.R. (CRI) 201 has observed that, Section 106 is designed to meet certain exceptional cases where the prosecution is unable to prove certain facts which are specially within the knowledge of the accused. This section however, does not absolve the prosecution from discharging its initial burden of proving the guilt of the accused. The burden to establish the basic factum probans is solely and

exclusively on the prosecution. It is from such established facts that the Court can infer and presume, probability about existence or non-existence of a further fact. It is only then that Section 106 would apply to cases where the accused by virtue of his special knowledge is required to offer explanation regarding such facts which are preeminently and exclusively within his knowledge. Failure to offer explanation of such facts specially within the knowledge of the accused would authorise the Court to draw a different inference. It has also to be borne in mind that the said explanation is not tested or evaluated on the highest parameter but preponderance of the probability is the criteria applicable to the explanation of the accused.

42. In the light of guiding principles and the facts of this case, the evidence before the Trial Court which has been analysed hereinabove, we are of the opinion that the prosecution has failed to establish all the links to prove the guilt of the appellant. Hence, the conviction of the appellant deserves to be set aside.

43. Hence, we pass following order:

ORDER

1. The appeal is allowed. The judgment and order dated 8th March, 2011, in Sessions Case No. 58 of 2010, whereby the sentence and conviction was awarded by the learned 1st Ad-Hoc Additional Sessions Judge, Sessions Court for Gr.

Bombay at Fort, Mumbai, is quashed and set-aside. The appellant be set at liberty forthwith, if not needed in any other case.

2. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

(PRAKASH D. NAIK, J.)

(PRASANNA B. VARALE, J.)