

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

CRIMINAL APPEAL NO. 358 OF 2014

Kalyan S/o Deorao Sawase
Age : 40 Years, Occu.: Agril.,
R/o : Laxmipur, Taluka Wadwani,
District Beed

... Appellant
(Orig. Accused No.5)

Versus

The State of Maharashtra
Through Police Station Wadwani,
Taluka Wadwani, District Beed (M.S.)

... Respondent

....

Mr. V.R. Dhorde, Advocate for the Appellant
Mr. Rajendra V. Dasalakar, A.P.P. for Respondent / State
Mr. V.S. Undre, Advocate for Assist to A.P.P.

....

**CORAM : V. K. JADHAV AND
SHRIKANT D. KULKARNI, JJ.**

Reserved on : 30.08.2021

Pronounced on : 21.09.2021

JUDGMENT (PER SHRIKANT D. KULKARNI, J.) :-

1. This appeal is preferred by the appellant/original accused no.5 feeling aggrieved by the impugned judgment and order of conviction passed by the Additional Sessions Judge at Majalgaon in Sessions Case No.34 of 2013, whereby the appellant/original

accused no.5 alone came to be convicted for the offence punishable under Section 302 of the Indian Penal Code (for short, "IPC") and sentenced to undergo imprisonment for life and fine of Rs.2,000/- with default clause. The State seems to have not preferred the appeal against the order of acquittal in respect of accused nos.1 to 4 and 6 passed by Additional Sessions Judge at Majalgaon, whereby all of them came to be acquitted from all the charges including Section 302 read with Section 149 of IPC.

2. The facts of the prosecution case in narrow compass are as under :

a. Mr. Mohan Shrimantrao Sawase (first informant) is resident of village Laxmipur, Taluka Wadwani, Distrcit Beed. Shrimant Sheshrao Sawase (since deceased) was the father of the first informant. At the time of the incident, they were residing jointly.

b. According to the prosecution, father of the first informant and his two uncles had purchased 60 acres of land at village Laxmipur. The oral partition of the said landed property took place between his father and uncles, but there was no written partition deed. Due to which, his uncles and cousins namely Asaram/accused no.1, Gangadhar/accused no.2, Dhondiram/accused no.3 and

Dnyanoba/accused no.4 were picking up quarrels with his father. They were also threatening his father. The father of the first informant had purchased 4 acres 20 gunthas of land at village Kesapuri/Parbhani. His father sold the said land in the month of February 2013. After that transaction, uncles and cousins of the first informant raised a dispute with his father for not giving their share in the property sold out. There was one civil suit for partition and separate possession pending for adjudication. Accused no.3/Dhondiram had filed one complaint against the father of the first informant at Pimpalner Police Station in the year 2008. On that basis criminal case came to be filed in Beed Court. The said case was fixed on 14.03.2013. The first informant and his father had attended the said Court proceedings at Beed. The accused had asked the father of the first informant whether he is ready for the partition of lands, otherwise they would see him.

c. On 15.03.2013 in the morning about 8.00 a.m. the father of the first informant Shrimant had gone to his field locally named as “सिताफळीचे शेत” for grazing she-goats. The first informant and his elder brother Chandrakant were in the house and another brother Madan had gone to his job. On that day about 9.30 a.m., the she-goats returned to the house of the first informant, but his father

did not return to the house. Due to which, the first informant called his father on his cell phone, but it was not picked up. The first informant rushed to his field and found that his father was lying on the *bandh* of his field and sustained serious head injuries. There were bleeding injuries to the head of his father caused by an axe. His father was not giving any response. The first informant conveyed this scenario to his brothers and relatives on cell phone and asked them to rush to the spot. Police also rushed to the spot. The father of the first informant was taken to the hospital at Chinchwan, where the doctor after the examination, declared that the father of the first informant is dead.

d. The first informant rushed to the Police Station Wadwani and lodged a report about the incident. On that basis crime no.29 of 2013 came to be registered for the offence punishable under Sections 302, 147, 148, 149 of IPC at Wadwani Police Station and investigation was handed over to API Wadwani.

e. The Investigating Officer prepared the *panchanama* of the scene of offence and also seized blood mixed with soil from the spot and also seized one cap stained with blood. Accused nos. 1 to 6 came to be arrested. The Investigating Officer after recording

disclosure statement of accused no.5/appellant, recovered the weapon axe allegedly used in the commission of the offence. He further recorded the statements of witnesses and also seized clothes of the deceased as well as accused. The Investigating Officer found sufficient incriminating evidence against the accused. After completion of the investigation, API Wadwani filed the charge sheet against accused nos. 1 to 6 in the Court of Judicial Magistrate First Class at Wadwani. The Judicial Magistrate, First Class, Wadwani committed the case to the Sessions Division at Majalgaon in view of the offence punishable under Section 302 of IPC against the accused, which is exclusively triable by the Court of Sessions.

f. Learned Additional Sessions Judge / trial Judge has framed the charge against all the accused vide Exhibit 33 for the offence punishable under Sections 147, 148, 302 read with Section 149 of IPC. The trial was commenced. The prosecution machinery has examined in all 7 witnesses, including Investigating Officer and also produced stock of documentary evidence to prove the charge against the accused. The accused did not examine any defence witness in support of their defence.

g. Learned Additional Sessions Judge after considering the evidence on record and the argument advanced by the learned APP and the defence counsel, was pleased to hold the present appellant/original accused no.5 alone guilty for the offence punishable under Section 302 of IPC. Whereas, accused nos. 1 to 4 and 6 came to be acquitted from all the charges levelled against them.

3. In the above background, the appellant/original accused no.5 is before us who has assailed the impugned order of conviction on various grounds.

4. We have heard Mr. V.R. Dhorde, learned counsel for the appellant, Mr. Rajendra V. Dasalkar, learned APP for respondent / State assisted by Mr. V.S. Undre, learned Advocate at length. We have gone through the record and proceedings of the trial Court, evidence produced by the prosecution machinery with able assistance of both the sides.

Submissions of learned counsel for the appellant-accused

5. Mr. V.R. Dhorde, learned counsel for the appellant vehemently submitted that the order of conviction passed by the learned Additional Sessions Judge against appellant/original accused no.5 is

erroneous. The appellant came to be convicted simply on the basis of suspicion, which shall not be the basis. Learned counsel submits that the prosecution has failed to prove the guilt against the appellant/accused beyond reasonable doubt, as such, the learned Additional Sessions Judge has committed an error in convicting him by giving undue importance to the previous quarrel, which had taken place in the year 2008. He submitted that the trial court has failed to appreciate the admissions given by PW-2 and PW-5, who are the sons of the deceased that there was no dispute or quarrel amongst them since the year 2008.

6. Mr. Dhorde, further submitted that the prosecution machinery has failed to prove the memorandum statement of the appellant and discovery of a weapon and seizure thereof vide Exhibit 58 in the eyes of law. He submitted that the prosecution case rests upon the circumstantial evidence. The prosecution has failed to prove the chain of circumstances. Learned Trial Judge has convicted the appellant/accused on the basis of surmises and conjectures. He submitted that the order of conviction passed by the learned trial Judge against the appellant/accused is bad and illegal and liable to be quashed and set aside.

7. Mr. Dhorde, learned counsel for the appellant/original accused no.5 has placed his reliance on the following stock of citations in support of his argument.

(i) *Malaichamy and another Vs. State of Tamil Nadu* reported in (2019) 17 SCC 568.

(ii) *Amarjit Singh alias Babbu Vs. State of Punjab* reported in 1995 Supp. (3) SCC 277.

(iii) *Shri Abbas Nawaj Shaikh Vs. State of Maharashtra*, reported in 2019 All M R (Cri) 1316.

(iv) *Asraf Ali Vs. State of Assam* reported in (2008) 16 SCC 328.

(v) *Vikramjit Singh alias Vicky Vs. State of Punjab* reported in (2006) 12 SCC 306.

8. By taking help of the above said citations, Mr. Dhorde submitted that the alleged recovery of the weapon axe at the instance of the appellant/accused is not duly proved in the eye of law. He submitted that the weapon axe was not even properly sealed as required by law, and as such, that exercise of recovery of weapon axe under Section 27 of the Indian Evidence Act cannot be relied

upon. The learned Trial Court has committed an error in relying upon that piece of evidence. He submitted that the learned trial Court has convicted the appellant/accused by relying upon the evidence of recovery of weapon coupled with C.A. report, which is not sufficient to convict the appellant/accused.

9. Mr. Dhorde, learned counsel for the appellant submitted that every incriminating circumstance appearing against appellant/accused was not put to him specifically and separately, and as such, it has resulted in miscarriage of justice.

Submissions of learned APP

10. Per contra, Mr. Rajendra V. Dasalkar, learned APP for the respondent/State submitted that the father of the first informant met with homicidal death. There was previous enmity between the parties on account of landed property and partition thereof. One civil suit and one criminal case are pending against them in the Courts. The father of the first informant came to be eliminated on the count of partition of landed property and thus the prosecution has been successful in proving the motive.

11. Mr. Dasalkar, learned APP submitted that the learned trial Judge has properly appreciated the evidence on record coupled with documentary evidence and rightly held the appellant/accused guilty for the offence punishable under Section 302 of IPC. There is no perversity in the finding recorded by the learned trial Court. It is not a case to interfere with the impugned order of conviction passed by the learned Additional Sessions Judge against the appellant/original accused no.5 alone. He submitted that the conviction needs to be upheld against the appellant/original accused no.5.

12. Mr. Dasalkar, learned APP for the respondent/State has placed his reliance on the following stock of citations.

(i) *State of Karnatak Vs. David Rozario and another* reported in (2002) 7 SCC 728.

(ii) *Gura Singh Vs. State of Rajasthan* reported in (2001) 2 SCC 205.

(iii) *State of Rajasthan Vs. Teja Ram* reported in (1999) 3 SCC 507.

(iv) *R. Shaji Vs. State of Kerala* reported in (2013) 14 SCC 266.

(v) *Jagroop Singh Vs. State of Punjab* reported in (2012) 11 SCC 768.

13. We have considered the submissions advanced by the learned APP for the State and the learned counsel for the appellant/accused.

14. In order to prove the charge against the appellant/accused the prosecution has examined following seven witnesses:

- (i) PW-1 Trimbak Apparao Savase vide Exhibit 56.
(*Panch* witness of memorandum statement and discovery of weapon at the instance of accused no.5/appellant)
- (ii) PW-2 Mohan Shrimantrao Savase vide Exhibit 70.
(first informant/son of the deceased)
- (iii) PW-3 Gangaram Apparao Ghodke vide Exhibit 73.
(Police Constable/sample carrier)
- (iv) PW-4 Shrikrishna Apparao Varpe vide Exhibit 80.
(purchaser of land of 3 acres from the deceased Shrimant)
- (v) PW-5 Chandrakant shrimantrao Savase vide Exhibit 81.
(another son of deceased)
- (vi) PW-6 Dr. Usha Dnyandev Bangar vide Exhibit 86.
(Medical Officer, PHC Wadwani, who conducted the postmortem examination)

(vii) PW-7 Arun Suresh Jagtap vide Exhibit 94.

(Investigating Officer/API then attached to Wadwani Police Station)

15. Apart from the above set of oral evidence, the prosecution has also relied upon the following piece of documentary evidence.

(i) Spot *Panchanama* vide Exhibit 60.

(ii) Inquest Panchanama vide Exhibit 61.

(iii) Provisional cause of death certificate vide Exhibit 88.

(iv) Postmortem report/notes vide Exhibit 87

(v) Disclosure statement given by the appellant / accused no.5 and recovery of weapon vide Exhibit 57 and Exhibit 28 respectively.

(vi) Seizure *panchanama* of clothes of the appellant / accused no.5 vide Exhibit 62.

(vii) Seizure *panchanama* of clothes of another accused Dhondiram vide Exhibit 63.

(vi) Suizure *panchanama* of clothes of deceased Shrimant vide Exhibit 64.

(vii) C.A. report vide Exhibit 97

16. The defence side has admitted the following documentary evidence vide notice under Section 294 of the Code of Criminal Procedure vide Exhibit 53.

- (i) Spot *Panchanama* vide Exhibit 60.
- (ii) Inquest *Panchanama* vide Exhibit 61.
- (iii) Seizure *panchanama* of clothes of the appellant / accused no.5 vide Exhibit 62.
- (iv) Suizure *panchanama* of clothes of deceased Shrimant vide Exhibit 64.
- (v) 7/12 extract of the land in question.

17. We have gone through the above referred oral evidence and documentary evidence as well very carefully in the background of arguments advanced by both the sides.

18. In the case in hand there is no eye-witness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively 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. They should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence.

19. It is a trite proposition, judicially evolved, that circumstantial evidence if is to form the basis of conviction must be such so as to rule out every possible hypothesis of innocence of the accused and must without any element of doubt unerringly point to such culpability.

20. The five golden principles propounded by the Hon'ble Supreme Court in *Sharad Birdhichand Sarda vs. State of Maharashtra (1984) 4 SCC 116*, which still authoritatively govern the process of appreciation of the circumstantial evidence and constitute the acid test to determine the guilt or innocence of an accused person.

21. 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. it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between

‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions. They should exclude every possible hypothesis except the one to be proved.

22. Motive plays an important role in a case based on circumstantial evidence. In this case, land dispute and quarrel thereof, and conviction in a previous case is stated to be the motive in committing murder of the deceased Shrimant and accused are alleged to be the author of murder of the deceased Shrimant.

23. It is important to note that the learned trial Judge has acquitted accused nos. 1 to 4 and 6 from all the charges including murder on same set of facts and evidence. On careful scrutiny of the evidence produced by the prosecution machinery, it is noticed that PW-2 Mohan, PW-5 Chandrakant, PW-3 Gangaram, PW-6 Dr. Usha Bangar and PW-7 PI Arun Jagtap, Investigating Officer are the material witnesses.

24. The appellant has not much disputed that the death of Shrimant falls in the category of the homicidal death. In this context, it is necessary to peruse the evidence of PW-6 Dr. Usha Bangar vide Exhibit 86, who has conducted the postmortem examination and issued provisional cause of death certificate and final cause of death

certificate. Dr. Usha Bangar found the following ante-mortem injuries at the time of postmortem examination.

“ There were three chop lacerated wound over frontal region.

- 1] 2 c.m. above right supra-orbital region, of size 6.5 c.m. X 4 c.sm. X 3 c.m., grievous in nature, obliquely directed, the margins were moderately sharp and the edges shown abrasion with marked destruction of underlying tissues and organ.
- 2] Approximately 6.7 c.m. away from the above injury No.1. It was grievous in nature and obliquely directed. Size of this second injury was 6 c.m. X 4.5 c.m. X 3.5 c.m.
- 3] Over occipital region approximately 8.9 c.m. away from aforesaid injury No.5. This injury was grievous in nature, of size 6.7 c.m. X 5c.m. X 4 c.m.

All the above three injuries were caused by sharp splitting heavy weapon.

Age of the aforesaid injuries was within 12 hours.

- 4] On external examination and palpation, there was fracture of frontal and occipital region bones. These injuries were also ante-mortem.

- 5] On internal examination, injury found to the brain and its membranes were injured. These craniocerbral injuries were produced by heavy cutting weapon.

To Skull :- Vault and base fracture and irregular in shape. The frontal region had two fractures;-

- 1] 6 c.m. X 3.5 c.m. X 3 c.m.
- 2] 6 c.m. X 3.7 c.m. X 3 c.m.

There was a fracture at the occipital region, of size 6.2 c.m. X 4 c.m. X 3.5 c.m.

All these fracture wounds were obliquely directed.

- 6] There was destruction of brain.”

25. According to Dr. Usha Bangar, probable cause of death in this case is “intra-cerebral hemorrhage due to head injury” and accordingly she has given provisional cause of death vide Exhibit 88. After receiving the viscera report, Dr. Usha Bangar confirmed the same cause of death that “death due to shock due to hemorrhage” and final cause of death certificate is produced to that effect vide Exhibit 89.

26. The time of death is disputed by the defence. Dr. Usha Bangar in her examination-in-chief had stated that the age of surface

wound was within 12 hours. While facing the cross-examination, Dr. Usha Bangar admitted that the external injuries mentioned in column no.17 of the postmortem report were caused about 12 hours before the death. Dr. Usha Bangar while facing the cross-examination, went on stating that in this case, death was not caused within 12 hours before the body was received for postmortem examination. As such, certain doubt is raised from the defence side about the time of death and indirectly time of the alleged incident. The prosecution machinery seems to have not taken any pains to remove that doubt and clear the position regarding time of death of deceased Shrimant. Be that as it may, it is, however, undisputed that the death of Shrimant was homicidal and the manner in which the injuries were inflicted on the vital parts of his body shows that commission of crime of murder within the meaning of Section 300 of the IPC not falling under any of the exceptions specified therein.

27. On studying the impugned judgment, it is noticed by us that the learned trial Judge seems to have considered two incriminating circumstances to base conviction against accused no.5/appellant viz. (i) recovery of weapon i.e. an axe at the instance of accused no.5/appellant and seizure thereof, and (ii) C.A. report wherein it is opined by the Chemical Analyzer that blood stains were found on

the axe i.e. weapon recovered at the instance of accused no.5/appellant.

28. It is important to note that the learned trial Judge while appreciating the evidence of PW-2 Mohan Sawase (first informant/son of the deceased) and PW-5 Chandrakant Sawase (another son of the deceased), observed that evidence of these two important witnesses does not go hand in hand. Learned trial Judge in para nos.50, 51 and 52 of the impugned judgment arrived at conclusion that though land dispute and partition thereof was stated to be the motive in causing murder of the deceased Shrimant, there was no dispute between late Shrimant and his brothers about partition and possession of the land at Kesapur-Parbhani in view of the material admissions given by PW-2 Mohan and PW-5 Chandraknat, who are brothers *inter se* and sons of the deceased Shrimant. The learned trial Judge has concluded while recording finding on the issue of motive that the evidence of Pw-2 Mohan and his brother PW-5 Chandrakant does not appear to be worthy of credence on account of dispute of partition of landed properties and sale proceeds of land at village Kesapur-Parbhani. The learned trial Judge did not accept that accused nos. 1 to 4 and 6 caused the murder of their father Shrimant because of said dispute. Upon

Careful scrutiny of the evidence of above referred two material witnesses, the trial Judge has made such observations and arrived at finding that the motive is not proved.

29. In the above background, we have to consider about involvement of the appellant/accused no.5 in the commission of alleged offence. It is pertinent to note that accused nos. 1 and 2 are the real brothers of deceased Shrimant and accused no.3 is the son of accused no.1 and accused no.4 is the son of accused no.2. Accused no.5/appellant and accused no.6 are not the members of the family of deceased Shrimant and accused nos. 1 to 4. As such, admittedly there was no occasion for the appellant/accused no.5 to have any dispute about partition of lands or sale proceeds of the landed property sold out by the deceased.

30. It is brought on record through the testimony of PW-2 Mohan/first informant that one criminal case was lodged in the year 2008 against the accused no.5/appellant and afterwards there was no criminal case against him. It is also brought on record that accused no.5 came to be convicted in that case, but PW-5 Chandrakant has given clear admission while facing the cross-examination that after registration of the said criminal case against

accused no.5/appellant, there was dispute or quarrel against them. The land of accused no.5 is adjacent to the land of accused no.1 and his father in the same Gat number. Therefore, it is clear that present appellant is not any way concerned with the so called partition dispute, which was going on between the deceased and accused nos. 1 to 4. As such, the evidence of PW-2 Mohan and PW-5 Chandrakant is falling short to prove any other motive against the present appellant/accused no.5 for eliminating their father Shrimant.

31. In the above scenario, we have no hesitation to arrive at conclusion that the prosecution machinery has failed to prove any motive against the appellant/accused no.5 in this case.

32. Now coming to recovery of an axe at the instance of accused no.5 under Section 27 of the Indian Evidence Act and C.A. report thereof upon which the learned Trial Judge has given much importance and convicted the appellant/accused no.5 on that basis.

33. On going through the testimony of PW-1 Trimbak Savase, who is *panch* witness on the disclosure statement of the appellant/accused no.5 and discovery of weapon axe, it is revealed that this *panch* witness has turned hostile and not supported to the prosecution case. No material is brought on record through the

cross-examination of this *panch* witness to prove the exercise of recovery of the weapon axe at the instance of the appellant/accused no.5. Another *panch* witness seems to have not examined by the prosecution.

34. The prosecution has taken help of PW-7 PI Arun Jagtap, Investigating Officer to support the exercise of memorandum *panchanama* and recovery of the weapon axe at the instance of accused no.5/appellant. PW-7 PI Arun Jagtap, Investigating Officer has also stated so far during his evidence. Recovery of the weapon axe at the instance of accused no.5/appellant is stated to be an important incriminating evidence relied upon by the trial Court and convicted accused no.5/appellant coupled with C.A. report. The evidence of PW-7 PI Arun Jagta, Investigating Officer discloses that the appellant-Kalyan gave disclosure statement before him on 18.03.2013 in presence of two *panch* witnesses. After recording the disclosure statement of accused no.5/appellant they went to the field locally named as “*Pantas*” in view of instructions given by the accused-Kalyan. Accused no.5/appellant removed one axe from the grass out of that field and the said axe came to be seized under discovery *panchanama* vide Exhibit 58.

35. The defence side while conducting the cross-examination of the Investigating Officer has succeeded to bring on record one important fact, which has raised question mark about the whole exercise of recovery of weapon and sending the same for chemical analysis and report. The Investigating Officer has admitted that the seized axe was not packed (sealed) by him on the spot. He went on admitting that he did not prepare the *panchanama* about the condition of seized article while sending them to C.A. In view of such important facts brought on record through the cross-examination of Investigating Officer, the whole exercise of recording the disclosure statement of the appellant/accused and recovery of the weapon axe is seriously under cloud when concerned *panch* witness PW-1 Trimbak has turned hostile and not supported to the prosecution case. The Investigating Officer seems to have not taken due care to seal the weapon axe as soon as recovered from the spot pointed out by the appellant/accused, which was an important exercise and one of the incriminating evidence to connect the appellant/accused. Unfortunately, the Investigating Officer has not taken due care in this regard. There was scope of tampering and handling by others when the axe was allegedly stated to be stained with blood. As such, it would unsafe to rely upon the disclosure

statement of the appellant/accused and discovery of weapon axe at his instance and seizure thereof vide Exhibit 58.

36. Learned APP and the learned counsel for the appellant have referred number of citations in support of their argument on the point of recovery of weapon under Section 27 of the Indian Evidence Act and report of C.A.

37. In the case of ***Gaura Singh Vs. State of Rajasthan*** (supra) where seizure of blood stained clothes including blood stained chaddar on the basis of disclosure statement of the accused and it was found by Serologist and Chemical Examiner that clothes were stained with human blood. However, the group of blood not be determined due to lack of time. Similarly the dimension of the blood stains not mentioned. It is held by the Hon'ble Supreme Court that above material cannot be sufficient to give benefit of doubt.

38. In the case of ***R Shaji Vs. State of Kerala*** (supra), it is held by the Hon'ble supreme Court that, "it is not possible to accept the submission that in the absence of a report regarding the origin of the blood, the accused cannot be convicted, for it is only because of the lapse of time, that the blood could not be classified successfully. Therefore, no advantage can be conferred upon the accused to

enable him to claim any benefit, and the report of dis- integration of blood etc. cannot be termed as a missing link, on the basis of which the chain of circumstances may be presumed to be broken.”

39. In the case of *Jagroop Singh Vs. State of Punjab* (supra), it is held by the Hon’ble Supreme Court that, “though the blood group could not be ascertained, as the results were inconclusive, the accused had to give some explanation as to how the human blood came on this weapon. He gave none. This discovery would very positively further the prosecution case.”

40. In the case of *State of Rajasthan Vs. Teja Ram* (supra), the Hon’ble Supreme Court in para 25 has held as under :

“Failure of the Serologist to detect the origin of the blood, due to disintegration of the serum in the meanwhile, does not mean that the blood stuck on the axe would not have been human blood at all. Sometimes it happens, either because the stain is too insufficient or due to hematological changes and plasmatic coagulation that a Serologist might fail to detect the origin of the blood. Will it then mean that the blood would be of some other origin? Such a guess work that blood on the other axe would have been animal blood is unrealistic and far-fetched in the broad spectrum of this case. The effort of the criminal court should not be to prowl for

imaginative doubts. Unless the doubt is of a reasonable dimension which a judicially conscientious mind entertains with some objectivity no benefit can be claimed by the accused.”

41. We have also carefully gone through the recent citation by the Hon’ble Supreme Court in case of *Malaichamy and another Vs. State of Tamil Nadu* (supra), wherein the Hon’ble Supreme Court has considered the fact that Investigating Officer after seizure of the knives, the same were not sealed at all and he merely put them in a box and send the same to the Judicial Magistrate. The Hon’ble Supreme Court has observed that, such procedure adopted by the prosecution is highly improper and illegal, inasmuch as the box could have been opened at any stage by anybody and the weapon tampered with or replaced. Hence, the aspect of recovery is also not proved in accordance with law. Even otherwise, the circumstance of recovery from accused no.1 alone will not be sufficient to convict him for the offence punishable under Section 302 of IPC, when all the remaining evidence of the prosecution is unbelievable. Therefore, the accused is entitled for the benefit of doubt and accordingly they came to be acquitted.

42. It is also brought to our notice that though the prosecution machinery is placing reliance in respect of recovery of an axe with alleged blood stains and positive C.A. report thereof, that incriminating piece of evidence was not put to accused no.5 during his examination under Section 313 of the Code of Criminal Procedure. It is pointed out by Mr. Dhorde, learned counsel for the appellant/accused no.5 that question nos.49 and 53 are the two questions some how related to recovery of an axe and C.A. report vide Exhibit 97, but no specific question was put to the appellant/accused no.5 regarding the results of analysis of an axe allegedly recovered at the instance of the appellant/accused no.5.

43. In the background of argument advanced by Mr. Dhorde, we have carefully gone through the statement of accused no.5/appellant recorded under Section 313 of the Code of Criminal Procedure Code. We found considerable merit in the submissions of Mr. Dhorde, learned counsel for the appellant/accused no.5 that though blood stained axe was seized at his instance and sent to C.A for analysis and C.A. report vide Exhibit 97 is positive indicating blood stains thereof, no opportunity was given to the appellant/accused no.5 to offer any explanation about the results of examination of an axe through C.A. and C.A. report thereof vide

Exhibit 97. Certainly, how C.A. report Exhibit 97 can be used against the appellant/accused no.5 when important incriminating evidence was not put to him under Section 313 of the Code of Criminal Procedure.

44. In the case of *Asraf Ali Vs. State of Assam* (supra), it is held by the Hon'ble Supreme Court that, "the object of Section 313 of the Code of Criminal Procedure is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Section 313 casts a duty on the Court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specially, distinctly and separately and failure to do so amounts to a serious irregularity. Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Non-indication of inculpatory material in its relevant facets by the trial Court to the

accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise.” The Hon’ble Supreme Court was pleased to acquit the accused after noticing such defect while recording examination of accused under Section 313 of the Code of Criminal Procedure. It is held by the Hon’ble Supreme Court that, “every circumstance appearing against accused must be put to him specifically and separately. Failure to do so would vitiate the trial if accused is shown to be prejudiced thereby or it resulted in miscarriage of justice.”

45. The same view is taken by the Hon’ble Supreme Court in the case of ***Vikramjit Singh alias Vicky Vs. State of Punjab*** (supra). In the said case, the Hon’ble Supreme Court held that, “circumstances which according to the prosecution lead to proof of the guilt against the accused must be put to him in his examination under Section 313 of the Code of Criminal Procedure. If it is not done, the accused is liable to be acquitted.

46. In the case in hand the same thing is happened. Learned APP has relied upon the number of citations about importance of C.A. report. Even though in the C.A. report origin of the blood could not be detected as well as failure to give exact blood group.

47. Even though C.A. report vide Exhibit 97 some what supporting to the prosecution case pertaining to the examination of an axe cannot be used against the accused when that important piece of incriminating evidence was not specifically put to him while examination under Section 313 of the Code of Criminal Procedure.

48. Even one step ahead, the recovery of crime weapon i.e. an axe under Section 27 of the Indian Evidence Act is not sufficient to base conviction. It is useful to refer the citations in case of ***Varghese Vs. State of Kerla*** reported in ***1998 SCC (Cri.) 89*** and in case of ***Mani Vs. State of Tamil Nadu*** reported in ***AIR 2008 SC 1021***, wherein it is held by the Hon'ble Supreme Court that, “ mere recovery of a weapon/articles on the disclosure statement given by the accused under Section 27 of the Indian Evidence Act, is a weak kind of evidence and cannot be wholly relied upon and conviction in such a serious matter cannot be based upon the discovery.

49. In the instant case, the recovery of crime weapon i.e. an axe recovered in view of the disclosure statement given by the appellant/accused no.5 is accepted, the same cannot be a basis for conviction when the chain of circumstances is not complete. The evidence to prove the “circumstance of motive” is also found very shaky. Hence

considering the facts and circumstances of the case and the evidence on record, the aspect of 'motive' as put forth by the prosecution, appears to be very weak, and the same cannot be believed as a reason to commit the murder of deceased Shrimant.

50. We are of the considered view that the finding recorded by the learned trial Judge convicting the appellant/accused no.5 under Section 302 of the IPC is incorrect in view of the facts of the case and evidence on record. The learned trial Judge has committed an error in convicting the appellant/accused no.5 alone on the same set of facts and evidence and that too relying only on discovery of the weapon under Section 27 of the Indian Evidence Act coupled with C.A. report. The appellant/accused no.5 needs same treatment as like remaining accused, who have been acquitted by the trial Court.

51. The chain of circumstances is not complete in this case. The motive is not proved. Recovery of weapon and seizure thereof is found tainted exercise. C.A. report can not be used against the accused when that incriminating evidence was not specifically put to the appellant/accused and denied opportunity to offer any explanation about that incriminating evidence.

52. In view of the above, the appeal succeeds.

ORDER

- (i) The Criminal Appeal is hereby allowed.
- (ii) The impugned judgment and order of conviction passed in Sessions Case No.34 of 2013 by the Additional Sessions Judge at Majalgaon, District Beed, convicting the appellant/accused no.5 Kalyan Deorao Sawase under Section 302 of the IPC and sentenced to undergo imprisonment for life and pay fine of Rs.2,000/- with default clause, is hereby quashed and set aside.
- (iii) The Appellant/accused no.5 Kalyan Deorao Sawase is hereby acquitted from the charges punishable under Section 302 read with Section 149 of the IPC.
- (iv) The fine amount, if deposited, shall be refunded to him.
- (v) The appellant/accused no.5 Kalyan Deorao Sawase be released forthwith if not required in any other case or crime.
- (vi) The appellant/accused no.5 Kalyan Deorao Sawase shall execute P.B. of Rs.25,000/- with one or two solvent surety of the like amount in view of Section 437-A of Cr. P.C. so as to appear before the higher court as and when the notice is issued in respect

of any appeal or petition filed against the judgment of this Court. Such bail bonds shall remain in force for a period of six months from the date of its execution.

(vii) The learned Trial Judge to issue release order of appellant/accused no.5 Kalyan Deorao Sawase, forthwith as per procedure.

(viii) The Criminal appeal is accordingly disposed of.

(SHRIKANT D. KULKARNI)
JUDGE

(V. K. JADHAV)
JUDGE

S.P. Rane