

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

CRIMINAL APPEAL NO. 136 OF 2013

Shri. Haresh Narendra Gharat
Age- 36 years, Occ- Driver,
R/o. Village Popharan, Tal. Palghar,
District-Thane.
(At Present in Central Jail Thane)

...APPELLANT
[Orig. Accused]

Versus

The State of Maharashtra
(Through Tarapur Police Station)

...RESPONDENT

...

Dr. Uday P. Warunjikar, appointed for appellant.
Mr. S.S. Hulke, APP for State.

...

**CORAM : S. S. SHINDE &
N. R. BORKAR, JJ.**

DATE : 7th JANUARY, 2022.

JUDGMENT: [PER S.S. SHINDE, J.]

1. This appeal is directed against the judgment and order dated 16.10.2012 passed by Additional Sessions Judge, Palghar, thereby convicting the appellant-original accused for the offence punishable under Section 302 of the Indian Penal Code, 1860 (for short 'IPC') and sentenced to suffer imprisonment for life and to pay a fine of Rs. 5,000/- and in default to suffer further imprisonment for six months.

2. The prosecution story in nutshell can be summarized as under-
On 29.08.2010 one Shashikant Churi, resident of Dahisar,

Taluka- Palghar, District- Thane lodged a complaint in Tarapur Police Station stating that he along with his wife, mother, one sister Kamal and son Kavya reside at above address, works at Boisar and maintains his family. His younger sister Mrs. Vaishali (deceased) married with Haresh Gharat (original accused) about two years back. Said Haresh is driver by profession. Their married life was going nicely. He further stated that about 1 ½ years back said Haresh got job over a bus of Arjun Travels, and therefore, he was finding it difficult to attend his duties from Palghar, and therefore he had taken a room on rent at village Pofaran and they started residing over there. He further stated in the complaint that after initial period of their marriage his sister Vaishali (deceased) used to tell them about Haresh's having extra marital relations with one girl at Palghar and on that account he is ill treating her. About six months back said Vaishali (deceased) has been to his house and Haresh was living alone at village Pofaran. At that time he had seen said Haresh going along with one girl, and therefore, after returning home he narrated the incident to his sister Vaishali (deceased), and dropped Vaishali (deceased) at her matrimonial house at village Pofaran, and thereafter, in order to see that said Haresh should quit the relationship with said woman, he had called relatives and tried to convince him. At that time, Haresh had assured them that he will lead the matrimonial life happily and they started living married life happily. Thereafter, his sister Vaishali used to tell them that said Haresh is coming home in a drunk condition and he

constantly speaks over a mobile with a woman and he harassed her.

3. On 28.08.2010 he was having some work as to their lands and therefore he himself, his mother, his sister Vaishali and said Haresh had been to Palghar. After their work was done, they returned to their respective homes. At that time, Vaishali and Haresh, the accused, also returned to their matrimonial home and at the very time, Vaishali told him that she will bring tea powder for him and he should collect it next day while returning from his work. On 29.08.2010 at about 8.00 am when he was at home, he received a phone call from Vaishali who told him that she has brought tea powder for him and again requested him to collect the same while returning from the work. Therefore, till 2.30 pm, he worked at his work place and about 3.00 pm, he went to the house of Vaishali to collect the tea powder, at that time, he found door of her house closed and therefore, he gave calls to her by taking her name. But he did not get any reply, and therefore, he pushed the door and went inside the house. At that time, he found that T.V set in the house was on, meal was served in the plate. Again he gave call to his sister by taking her name, but he did not get any reply, and therefore thinking that she must be in a toilet, he waited for some time. After some time, he went near the toilet but in the toilet there was nobody. Rear side door of the house was opened, and therefore, he went inside the bedroom, but she was not there over the bed. However, near the wall of the bedroom

beyond the bed he found said Vaishali lying. There was blood over her face, one pillow was there over her chest and therefore, he went close to her and noticed that she had died due to pressing of her throat and said Haresh was not at home, and therefore he became sure that said Haresh due to illicit relations with another woman to which Vaishali was objecting has in anger by throttling her throat and by pressing pillow over the nose and mouth committed her murder. He started weeping loudly and thereafter, people gathered over there and he has lodged complaint accordingly.

Upon getting complaint, Tarapur Police have registered Crime at C.R. No. 29/2010 under Section 302 of the Indian Penal Code, and after completing the investigation filed chargesheet against the accused in the Court of JMFC, Palghar and JMFC Palghar in turn committed the case to the Court of Sessions being offence under Section 302 of IPC is exclusively triable by the court of Sessions.

4. The trial Court framed charge against the accused at Exhibit-3 for the offence punishable under Section 302 of IPC. The accused pleaded not guilty and claimed to be tried. After a full fledged trial, the trial Court convicted the appellant, who is presently lodged in Thane Central Prison.

5. Dr. Warunjikar, learned counsel appointed to espouse the cause of the appellant submitted that the trial court failed to look into the version of Shashikant (PW1) whereby in the cross examination vital omissions have

come on record with regards to statements made at the time of lodging the complaint before the Police about presence of blood on pillow. Further the conduct of the said witness has also admitted thereby about deliberately not informing the family members about lodging the said complaint against the present appellant. Further the evidence of PW1 spells out mere doubt and suspicion of the said witness against the present appellant about committing the said offence. The witness also admits about absence of any eye witness of the said incident. It is submitted that the evidence of the medial officer PW5 supports and/or favours the appellant-accused. The cross examination of the said witness elucidates the fact that the injuries in respect of fracture to ribs of both sides are possible by a person falling or dashing upon hard and blunt objects like permanent structure, wooden log or stone etc. PW5 further stated in cross examination that the knee joint white colour injury as stated in post-mortem report is also possible if it comes in contact of hard and blunt objects like permanent structure, wooden log or stone etc. The trial Court has deliberately not looked into these and such other vital portions of the evidence whereby absolute lacunae on behalf of the prosecution has come on record. The trial Court while appreciating the evidence has given a perverse finding in its judgment of conviction with respect to the shirt button of the accused being unfasten at the spot of incident due to resistance by the deceased to the throttling attack on her. The said finding is totally misplaced, and there is no corroborating evidence

on record to that effect, but merely based upon thoughtful presumptions drawn by the learned court. It is submitted that the learned trial Court has purposely refused to appreciate the genuine defence put forth by the appellant/accused that the appellant being falsely implicated in the present crime. The defence of the applicant that there existed a land dispute between the complainant and the deceased which is an ultimate outcome of the present offence has been deliberately negated by the trial Court. In the present situation of a circumstantial case where the settled principle of law laid down by the Hon'ble Apex Court states that unless the circumstances appearing against the accused are put to him in examination under Section 313 of Code of Criminal Procedure, 1973 (for short 'Cr.P.C.'), the same cannot be used against the accused. The learned trial Court seems to have deliberately neglected the said aspect.

6. Learned counsel appearing for the appellant further submitted that the trial Court ought not to have convicted the appellant for the alleged offence of murder whereby even though the nature of evidence might be of circumstantial type. However, the chain of circumstances is not complete and/or missing. The prosecution has miserably failed to link and establish the chain of circumstances in the present case resulting in absolute lacunae thereby. The learned trial Court seems to have misguided itself by not looking into the legal position of law laid down by the Hon'ble Apex Court

in respect of psychological tendency of the witnesses, namely relatives witnesses, of being guided by a spirit of revenge or nemesis against the accused person by stating facts which may not or could not have been stated but merely imagined unconsciously in order to see that the offender goes punished, as has happened in the present case. The appellant-accused was not given an opportunity to submit arguments and submissions upon imposing of sentence for the said offence at the instance of the learned trial Court and the same is imposed and passed thereby without any fair hearing to the appellant. The said right is one of the statutory and/or constitutional right guaranteed to accused person to which the present appellant has been deprived of by the learned trial Court. The appellant vehemently contended to adduce submissions as to the truthfulness, reliability and veracity of all the prosecution witnesses during the course of hearing of present appeal as well as submissions with respect to various contradictions and omissions in the entire evidence of the prosecution witnesses. It is submitted that the entire evidence laid down by the prosecution in the present case do not warrant conviction towards the present appellant for the said offence and that the prosecution has failed to make out a case beyond a reasonable doubt against the the present appellant. Therefore, it is submitted that appeal may be allowed.

7. On the other hand, learned APP appearing for Respondent-State invited our attention to the findings recorded by the trial Court and submitted that the findings recorded by the trial Court are in consonance with the evidence brought on record and there is no perversity as such. It is submitted that the evidence of PW1, medical officer and panch witnesses would clearly spell out the role of the appellant. It is submitted that the appellant was apprehended on very same date, and thereafter his clothes were recovered and on the said clothes blood stains of 'B' group were found. Therefore, relying upon the notes of evidence, learned APP submits that the appeal may be dismissed.

8. With the able assistance of learned counsel appearing for the appellant and learned APP appearing for State, we have carefully perused the findings recorded by the trial Court and entire notes of evidence. It appears that Shashikant Parshuram Churi (PW1) who is brother of Vaishali (deceased), lodged the complaint in the police station. In his deposition before the Court he stated that Vaishali @ Harshada was his sister. Accused is her husband. She was married to the accused 1 ½ to 2 years prior to the incident. In the beginning they were happy. Thereafter, there were quarrels between them. Accused had love affair with one girl. On that count accused assaulted and ill treated his sister. He was consuming liquor. These facts were told by his sister to him.

One day he saw accused going along with one lady at Dahisar near tamarind tree. He disclosed the said incident to his sister. He narrated the said incident to the family members, and thereafter the accused was given understanding, not to have illicit relations with said girl and accused accepted the said mistake and stated that henceforth, he will not commit such mistake. Thereafter, his sister and accused were residing properly. On 28/08/2010, the complainant, his mother, sister and accused went to Palghar tehsil office. Thereafter complainant and his mother went to their house and accused and sister went at their house. His sister asked him to collect tea powder, and accordingly while returning from his work PW1 went to the house of his sister at about 3.30 pm. From door he gave call to his sister. However, door was not opened. He waited for some time. He pushed the door. He saw TV was on and sound was high. From the house he gave call to his sister. She was not in latrine, then he went at back door. Thereafter, he went to bedroom. However, she was not found on cot. He saw her in between cot and wall of bedroom. He saw blood on her face, there was pillow on her chest. She was dead. Accused was not present in the house. He started weeping and persons residing in adjoining vicinity gathered there. He went to Police Station at 4.30 pm and lodged the complaint against the accused.

9. He was cross examined by the defence counsel. He stated that he has four sisters and one brother. He is residing at MIDC Tarapur. Vaishali was youngest sister. It appears that a suggestion was given by the defence that there were dispute with brother on land. However, said suggestion was denied by him. He stated that his father died before 5 years and land is in the name of his mother. There are 7 legal heirs who are entitled for the said land. He came to Palghar on 28.08.2010, in respect of said land. He denied the suggestion that he came at Palghar to delete the name of his sister from the revenue record of said land. He stated that on that date out of four sisters three did not come. Brother had not come to Palghar. He along with his wife and sister Vaishali went to Palghar Tehsil office at 28.08.2010 at 11.00 to 11.30 am., and they were in the Tehsil Office up to 4.00 to 4.30 pm. He himself and mother went on motorcycle to their house. On that day their work was not completed. Their statements were not recorded and amount was not deposited in Tehsil Office. He stated that the land is 1.5 Acre at Dahisar village. It appears that a suggestion was given that as share was not given in land to sisters, and therefore, they were not visiting his house. It appears that further suggestion was given that after death of his father, the land which was in the name of mother, out of that $\frac{1}{2}$ of the land was sold and the said amount was not distributed among the brother and sisters. However, the said suggestion was denied by him.

10. He admitted that he did not lodge complaint about ill treatment to Vaishali by accused earlier. Vaishali was happy with accused till 2-3 months prior to her death. He does not know whereabouts of said girl with whom the accused had love affair. He did not ask name and whereabouts of said girl. He stated that Police Station is at 3 km from his village. Vinyak Patil is police patil at village Dahisar. However, he did not inform police patil about said incident. He was afraid when he saw dead body of his sister. He stated that he again told the names of persons who gathered at the spot. He stated that he alone went to police station and did not request other to accompany him. He reached police station at 4.30 pm. He was in police station up to 5.20 pm. Before lodging the complaint he did not inform the mother, brother and sisters. The complaint was lodged as per his narration. In complaint it is not recorded that accused told him that he will not commit said mistake. In complaint it is not written that there was blood on pillow. He cannot assign any reason why it is not written in his complaint. He further stated that he had not seen who committed murder of his sister. He lodged complaint against accused. He did not make inquiry whether accused was present at house on that day. At the time of incident he was serving in shop at Bhoisar. His duty hours were from 8.00 to 4.30 pm. On permission of employer he was going out. There were heavy rain on the day of incident. On mobile, he took permission of his employer to leave shop early. It appears that a suggestion was given that on the date of incident Vaishali offered him

meal. However, he refused the said suggestion. It further appears that a suggestion was given that Vaishali demanded amount from him and he shouted and started assaulting her. He also denied a suggestion that Vaishali asked him to go out of house. It further appears that a suggestion was given that he pressed pillow on mouth of Vaishali and pushed her in the corner of bed. However, he denied the said suggestion. Further a suggestion was given that in order to save himself he went to police station and lodged a false complaint.

11. Upon careful reading of evidence of PW1, it is abundantly clear that nowhere he has stated that the appellant was seen on that date in the said vicinity or in the house or nearby the house. On the contrary, it appears that from the suggestion given to this witness by the defence that there was dispute about deletion of name of Vaishali from the revenue record of land which stood in the name of mother. A suggestion was also about not giving share to Vaishali out of consideration amount of the $\frac{1}{2}$ of the land sold by the complainant. In his cross examination he admitted that along with him other legal heirs i.e. his sisters and brother were entitled to claim share in the land standing in the name of his mother. He also admitted that he along with his mother and Vaishali went to Palghar Tehsil Office for correction in the revenue record of the said land. He also admits that he never lodged the complaint in the past about ill treatment given by the appellant to Vaishali.

He also stated that Vaishali was happy with accused till 2 to 3 months prior to her death. He also stated that he did not inquiry or knew name and whereabouts of girl to whom appellant had alleged illicit relations. He also stated that in complaint there is no mention that there was blood on pillow. He also admitted that it is not recorded in the complaint that the accused told him that he will not commit such mistake in future.

The vital admission given by PW1 in the cross examination that he did file complaint against the appellant without having any clue that the appellant was present in the house on the date of incident or at least in the nearby vicinity either soon before the death of Vaishali or after the death of Vaishali. He also stated in the cross examination that after he saw his sister in a dead condition he did not inform it to his mother and brother. It is quite unnatural conduct of PW1 that he did not inform his mother and brother and other sisters and directly he went to the police station for lodging complaint. The suspicion raised against PW1 by the defence cannot be said to be totally without any substance.

12. The prosecution examined Sudhir Kini (PW2). However, he turned hostile, and therefore, his evidence was of no use to the prosecution.

13. The prosecution examined Sunil Patil (PW3), who in his deposition stated that the complainant is his wife's brother. Deceased

Vaishali is his wife's sister. Accused is Vaishali's husband. They were residing in his village. Appellant was always quarreling with his wife. There was love affair of appellant with one girl. Therefore, there were quarrel. On 28/08/2010 complainant came to his house at 3.30 pm and informed him that Vaishali is killed. They went to house of accused. Vaishali was lying down by side of cot, he saw pillow on her mouth. There was blood on her mouth. Police recorded his statement. However, in his cross examination he admitted that he has not seen personally how Vaishali succumbed to the injuries. Police did not record his statement. He denied the suggestion that Shashikant did not come to his house.

14. In absence of statement recorded by the police directly relying upon deposition of witness before the Court is not proper. There is complete mismatch between the time stated by this witness and PW1. PW1 in his statement stated that he went to the house his sister at about 3.30 pm, and saw that his sister lying in between cot and wall of bedroom in dead condition. When PW1 was at the house of sister at 3.30 pm, how he can be at the house of PW3 at 3.30 pm. Therefore, it crates doubt about the truthfulness of the prosecution case. It appears that the PW1 had lodged the complaint in the police station on 29/08/2010 and PW3 in his deposition stated that PW1 came to his house on 28/08/2010 at 3.30 pm and informed him that he saw Vaishali in dead condition in her house. There is complete

variance about date of incident and time stated by PW1 and PW3, which creates serious doubt about truthfulness of prosecution case.

15. The prosecution has examined Manoj Shinde (PW5), medical officer, who was then working in Public Health Center, Tarapur. In his deposition before the Court he stated that on 29/08/2010 dead body of one lady was brought to Public Health Center with request to perform post mortem. He performed the post mortem. On examination he noticed that the said lady died due to asphyxia due to throttling of neck. He further found that there was abrasion on left knee joint of the lady. There was some white color around the said abrasion injury. He has also found that the skin of the neck was contused i.e. the color was reddish black. He also mentioned that there were marks of throttling by hand as there was mark of fingers over her throat. He had also noticed that ribs of the both the sides of the lady was fractured. He had also noticed that wind pipe of the lady were fractured.

16. When he further examined dead body he noticed that her eyes were closed but her mouth was opened and her tongue was between upper teeth and lower teeth. He also noticed that red fluid was oozing from both the nostrils of the lady. All the injuries were ante-mortem. He prepared post mortem report and gave his opinion below it.

In his examination-in-chief he did not tell about the age of the

injuries or probable time of the death of said Vaishali.

17. PW5 was cross examined by the defence counsel. He stated that though second doctor is available at Public Health Center, namely Umesh Ahire, he did not take help of said medical officer while performing post mortem. At the time of carrying out post mortem he prepared rough notes. He stated that, it is correct that the doctor who has performed the post mortem is supposed to preserve the said rough notes. He did not bring rough notes on the date of recording of his deposition before the Court that day. He stated that he did not feel it necessary to bring the said notes. He did not produce anything before the Court showing that he did prepare the rough notes of post mortem. He accepted the suggestion of defence that permanent structure, wooden log can be said to be hard and blunt object. Fracture of ribs is possible in the case of person forcibly comes in contact of hard and blunt object. He further stated that person came in contact repeatedly with hard and blunt object, fracture to the ribs of both the sides is possible. At the time of post mortem stomach of Vaishali was empty and he is not in a position to tell that at what time she had her meal. He has given important admission that abrasion injury mentioned in the post mortem report having white color can be caused if the knee comes in the contact of hard and blunt substance. He did not notice any swelling either over the neck, throat and the chest of the dead body. He further stated that

injuries on the leg and back are possible when the said person was trying to retaliate the throttling, it will depend upon the persons cautiousness. He further stated that in case of suffocation reddish and bluish skin is possible. He further accepted the suggestion that deceased must have died due to suffocation. However, again he said that the death is not due to suffocation but it is due to asphyxia. He further stated that it is correct that in the event of death by throttling urine, stool and tongue come out. He stated that it is correct to say that in inquest panchnama there is no mention of stool or urine noticed over the body.

18. It is crystal clear from the admission given by the PW5 in his cross examination that there can be fracture of ribs in case person forcibly come in contact of hard and blunt object. In his examination in chief he stated that he notices that eyes of Vaishali were closed and her mouth was opened and her tongue was between upper teeth and lower teeth. However, in his cross examination he stated that in the event of death by throttling urine, stool and tongue come out. However, it is not mentioned in the inquest panchnama. If the statement of PW5 in examination-in-chief, so far what he stated about tongue is concerned, he stated that tongue was between upper teeth and lower teeth and in his cross examination he stated that in the event of death by throttling urine, stool and tongue come out. Therefore, defence has created dent in the prosecution case, whether the

death of Vaishali was by throttling or otherwise. Upon careful perusal of cross examination of PW5 it is abundantly clear that he did not tell about probable time of death or age of the injuries. He has not said that the cause of the death is due to throttling, on the contrary admission given in cross-examination is that urine, stool and tongue come out in the event of death by throttling. Therefore, it can be interpreted/construed that the death can be caused otherwise by throttling.

19. It appears that the prosecution examined Nabhendra Churi (PW4) who acted as panch to the spot panchnama. He has stated in detail about his visit to the house of the accused, so also the condition in which Vaishali was lying. He stated that hair of the dead body were scattered and tongue was out of her mouth. This statement of this witness goes contrary to the deposition of medical officer and his admission that nothing is mentioned about tongue in the inquest panchnama. He stated that panchnama was prepared and his signature was taken on the said panchnama. The another panch was also present. He stated that he saw police seized pillow soaked with blood from the spot and one white color button having blood spot over it. However, in his cross examination he stated that he did not remember as to how the police have seized the pillow and button articles 1 and 2. He did not remember about the procedure followed by the police for seizing said article 1 and 2. He admitted that

there are roads to all four sides of the house. He stated that inquest panchnama at Exhibit-60 was commenced at 5.30 pm and completed at 6.30 pm, and spot panchnama was commenced after about one hour of completion of first panchnama and same was completed within one hour. In his cross examination he further stated that he did not capsize the dead body at the time of drawing the panchnama. He will not be able to tell that as to who told him about incident which took place at village Pofaran. He admitted that the complainant in the present case is his cousin. He did not remember whether the complainant had informed the incident to him telephonically. At the spot of incident crowd of about 100-150 people were gathered. During his cross examination he stated that he did not see the blood mark over the button. He further stated that it is correct that the button like article-2 are available in market. He did not remember how many signatures were obtained on the panchnama.

20. It is clear from his cross examination that Shashikant i.e. the complainant is his cousin. Secondly, 100-150 persons gathered at the spot, but no independent witness has been examined by the prosecution to prove vital circumstance that on the date of incident somebody saw the appellant in the house or nearby the house or in the vicinity of the house before happening of said incident or accused going out of house after said incident.

21. There is another panch witness i.e. Vidyadhar Churi (PW6), who was panch to seizure of clothes of accused. He has stated in detail about what was seen by him on the clothes of accused and how police seized said clothes. In his cross examination he stated that he was in the police station in between 7 to 9.30 pm. When they reached police station Shashikant was there. Shashikant told them to sign over the arrest panchnama. He did not verify the pant and shirt before signing the panchnama. He cannot tell of which make the pant and shirt was. He stated that shirt had six buttons. He did not find any special marks over the said pant and shirt Article 3 and 4 to identify the same.

22. It is clear from the evidence of this witness that merely because complainant asked them to sign on the panchnama they have signed the same. He did not verify pant and shirt before signing the panchnama. He cannot tell of which make the pant and shirt was. It is crystal clear that only his signatures were obtained to complete the procedural formalities and he did not verify the pant and shirt, which belong to accused, which were seized by the police.

23. Bhimrao Rama Chavan (PW7) was examined by the prosecution who investigated into the crime registered against the appellant. He has stated the manner in which the investigation was done by him. He stated that he prepared inquest panchnama. However, it is important to note at this

juncture that PW5, the medical officer in his deposition deposed that he noticed that her eyes were open and her tongue was between upper and lower teeth, but the same was not mentioned in the inquest panchnama. It is not clear from his evidence that the articles which were seized including clothes of the accused were kept at which place and when those were sent to CA and who was carrier of said articles. Importantly, carrier of said clothes has not been examined by the prosecution. It appears that on 29/08/2010 articles and clothes of the accused were seized and those were sent to CA by covering letter dated 28/09/2010 by PW7. The prosecution has not brought on record any explanation about where these articles were kept from 29/08/2010 till 28/09/2010. It is very important aspect inasmuch as whether those articles were kept in safe custody or otherwise and during said period of 21 days whether there was tampering with said articles or otherwise. It was incumbent upon the prosecution to bring on record evidence to show that those articles and seized clothes were in safe custody and nobody had access or opportunity to tamper with the said articles. It appears that CA report was received on 13/04/2011 which was so belatedly after six to seven months from sending the same to CA. It is not brought on record or explained about what had happened during said six to seven months.

It appears from the cross examination of PW7 that though he was working in the police station over last 32 years, prior to date of

recording evidence, he says that he did not maintain entry in the said diary while leaving to the spot of incident in the investigation of the present crime. He also stated that as per the police manual the investigating officer has to maintain the case diary and the personal diary in respect of the investigation of cognizable offence. There is entry in the case diary and personal diary as to taking investigation in his hand. He has not brought personal diary on the date of recording of evidence. He has no evidence except his oral evidence to show that he had visited the spot of incident after the investigation of crime was taken in his hand. He did not post any guard at the spot of incident. He admitted in his cross examination that there is road passing thereby house of the accused and there are residential houses in the said vicinity. He recorded the statement of some of neighbourers of said spot of incident. However, no any independent witness has been examined by the prosecution. He stated that there was no special identification mark either over the pant or the shirt which was seized from the person of the accused.

24. We have discussed the evidence of all the witnesses herein above and have made necessary comments about the weaknesses of prosecution case. None of the prosecution witness has deposed that the accused was seen within proximate time on the date of the incident in the house where incident had taken place or nearby house or in the vicinity. No

evidence is brought on record by the prosecution that some one saw the accused at the time of incident in the house or after commission of crime leaving the house. Therefore, the prosecution has utterly failed to bring on record evidence showing that the accused was present at the spot or nearby the spot or in the vicinity either at the time of incident or before incident or after the incident. PW1 admitted in his cross examination that prior to the incident two to three months the relations between his sister Vaishali and accused were cordial and they were residing happily. Importantly, PW1 did not bother to know any details about the alleged illicit relations of accused with some other girl. The natural conduct would have been to make inquiry about, who is the said girl with whom the appellant had alleged illicit relations. The prosecution case on the face of it appears to be imaginary in absence of any cogent, clinching evidence showing involvement of the accused in the commission of crime. The incident had occurred in the house of appellant in the broad day light. In our opinion Trial Court has committed error in law holding that, it was for the accused to explain in what circumstances Vaishali died. With respect to the findings recorded by the trial Court, the scheme of provisions of Section 101 to 106 of the Evidence Act, mandates that the prosecution is obliged to discharge initial burden of showing presence of the accused within the vicinity where the offence is committed and then only onus will shift on accused to explain how such death occurred in his house. As already discussed in the facts of the present

case, the prosecution has utterly failed to bring on record even single piece of evidence showing presence of accused in the house at the time of incident or soon before the incident or after the incident or at least in the vicinity where the house of the appellant is situate. In absence of such evidence, we are afraid that the conviction of the appellant can be legally sustained on the basis of shaky circumstantial evidence and in particular in absence of evidence of 'last seen together'. The prosecution was obliged to bring on record clinching and cogent evidence showing presence of accused on the relevant date at the spot of incident or in the vicinity before the incident or at the time of incident or after the incident. Merely because Vaishali (deceased) and accused were residing in the said house, the finding recorded by the trial Court that the burden lies upon the accused to explain under what circumstance Vaishali died is clearly contrary to the scheme of relevant provisions in the Indian Evidence Act. So also view taken by the Trial Court is contrary to the various ratio laid down in the various pronouncements of Hon'ble Supreme Court as well as this Court, wherein a view is taken that the prosecution is obliged to lead evidence showing presence of accused within the proximity of time in the house of alleged incident and thereafter only onus will shift upon the accused to explain, under which circumstance death occurred in the house. The Supreme Court in the case of Shambhu Nath Mehra Vs. The State of Ajmer¹ held as under:-

1 AIR 1956 SC 404

“That Section 106 of the Evidence Act does not abrogate the well-established rule of criminal law that except in very exceptional classes of cases the burden that lies on the prosecution to prove its cases never shifts and Section 106 is not intended to relieve the prosecution of that burden. On the contrary, it seeks to meet certain exceptional cases where it is impossible, or disproportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused and which can be proved by him without difficulty or inconvenience. But when knowledge of such facts is equally available to the prosecution if it chooses to exercise the diligence, they cannot be said to be especially within the knowledge of the accused and the section cannot apply.”

25. This Court (Coram:- S.S. Shinde and A.S. Gadkari, JJ.), in the case of Mr. Ulhas Sudam Gorhe Vs. The State of Maharashtra² in Para 9 held as under:-

“9. The Supreme Court in the case of Shambhu Nath Mehra v/s. State of Ajmer reported in AIR 1956 SC 404, has held that Section 106 of Indian Evidence Act is not a substitute for the burden of proof which rests on the prosecution. As noted earlier, in the present case, there is no evidence on record even to remotely suggest that the Appellant was in fact last seen in the company of the deceased Kavita either, at the time of noticing the dead body or prior thereto he was seen in the vicinity of the scene of offence within the proximity of the relevant time. In the absence of such evidence, the failure of the Appellant to offer

2 Criminal Appeal No. 512/2017

any explanation under Section 106 of the Indian Evidence Act cannot be used and termed as a circumstance against the Appellant nor can a presumption of guilt can be drawn on the failure of the Appellant. As noted earlier, there is no other material except mentioned above, available on record to connect the Appellant with the present crime. In other words, the prosecution has failed to lead any cogent and succinct evidence to base conviction of the Appellant. It appears to us that, the case of the prosecution is based on the presumption of accused was being in the said room without there being any evidence in that behalf and therefore, the only conclusion which we can draw is that the Appellant is entitled for a clean acquittal.”

26. We have carefully perused the statement of accused recorded under Section 313 of Cr.P.C. and we find that specific question that blood of group ‘B’ was found on the clothe of accused was not put to him. Merely, asking him about CA report is not important, but it was necessary to put specific question to the accused that how the blood of group ‘B’ is found on his clothes. The evidence of PW5 is not in complete conformity with the prosecution case. One panch witness to the spot and inquest panchnama appears to be in close relation with the complainant and he admitted in his cross examination that the complainant is his cousin.

27. We have carefully perused the findings of the trial Court and surprised to note that the trial Court while convicting the appellant in Para

17 observed that, on account of alleged illicit relations of the accused with another lady there is possibility that the accused himself must have throttled Vaishali and in the process of Vaishali attempting to save herself, the button Article-2 must have loosen from the shirt and there must be blood applied to his Shirt. It is very unfortunate that in the case based upon circumstantial evidence, the trial Court instead of recording definite findings observed that there is possibility that, accused must have throttled the deceased for said alleged illicit relations with said lady. The prosecution did not bring on record who was the said lady and with whom the appellant had alleged illicit relations. Secondly, PW1 brother of Vaishali (deceased) in his cross examination stated that two to three months prior to the alleged incident appellant and Vaishali were residing happily.

28. In so far as test laid down for appreciating circumstantial evidence including theory of last seen together is concerned, a useful reference could be made to the judgment of Supreme Court in the matter of Sharad Birdhichand Sarda v/s. State of Maharashtra³ the Apex Court in paragraphs 153 and 154 has observed as under :-

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be

³ (1984) 4 SCC 116

drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* where the following observations were made.

"Certainly, 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."

- (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not be explainable on any other hypothesis except that the accused is guilty,
 - (3) the circumstances should be of a conclusive nature and tendency.
 - (4) they should exclude every possible hypothesis except the one to be proved, and
 - (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.
154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

In paragraph 143 of the said Judgment, the Supreme Court observed that it is important that any circumstance adverse to the accused must be put to him in his statement under Section 313, CrPC 1973; otherwise it must be completely excluded from consideration because the appellant did not have

any chance to explain them.

29. In aforesaid Sharad Birdhichand Sarda's case (supra) in paragraphs 162 and 613 the Supreme Court has also considered the aspect as to when the benefit of doubt can be given to the accused. In the said paragraphs 162 and 163 it is observed thus :-

"162 Moreover, in M.G. Agarwal's case (supra) this Court while reiterating the principles enunciated in Hanumant's case observed thus:

If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt.

"In Shankarlal's (supra) this Court reiterated the same view thus:

"Legal principles are not magic incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment".

163. We then pass on to another important point which seems to have been completely missed by the High Court. It is well settled that where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. In Kali Ram v. State of Himachal Pradesh, this Court made the following observations.

"Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the

accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence."

In the concluding paragraph 218, the Supreme Court observed as under :-

"218 In view of the fact that this is a case of circumstantial evidence and further in view of the fact that two views are possible on the evidence on record, one pointing to the guilt of the accused and the other his innocence, the accused is entitled to have the benefit of one which is favourable to him. In that view of the matter I agree with my learned brothers that the guilt of the accused has not been proved beyond all reasonable doubt."

30. In the light of discussion in foregoing paragraphs, we are of the considered view that the impugned judgment and order passed by the trial Court cannot legally sustain, and therefore, inevitable conclusion is that the appellant/accused is entitled for benefit of doubt deserves

Before we part with the judgment, we appreciate the able assistance given by Advocate Mr. Warunjikar, who is appointed to espouse the cause of the appellant. Hence, we pass the following order-

ORDER

- a] Criminal Appeal is allowed.
- b] The impugned judgment and order dated 16.10.2012 passed by Additional Sessions Judge, Palghar in Sessions Case No. 02 of 2011 is set aside.

- c] The **appellant Haresh Narendra Gharat** is acquitted of the offence punishable under Section 302 of the Indian Penal Code, 1860.
- d] The appellant is in jail. He shall be released forthwith, if not required in any other case.
- e] The appellant shall, within three months from his release, furnish a bail in terms of Section 437-A of Code of Criminal Procedure, 1973 in the sum of Rs. 25,000/- (Rupees Twenty Five Thousand) with one surety in the like amount.
- f] The fees of appointed counsel for the appellant is quantified at Rs. 10,000/-.

(N. R. BORKAR, J.)

(S. S. SHINDE, J.)