

VISHWANATH
SATYANARAYANA
SHERLA
Digitally signed by
VISHWANATH
SATYANARAYANA
SHERLA
Date: 2022.01.04
14:50:25 +0530

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

CRIMINAL APPEAL NO.745 OF 2013

Shri Gunvant Rohidas Bansode
At Bodka, Post: Rameshwar
Tal. & Dist. Latur
(presently at Nashik Road Central Jail)

... Appellant
(org. accused)

Vs.

State of Maharashtra
(Through Rasayani police station)

... Respondent

Ms.Ameeta Kuttikrishnan, Advocate appointed for the Appellant

Mr.S.S. Hulke, APP, for Respondent – State

**CORAM: S.S. SHINDE &
SURENDRA P. TAVADE, JJ.**

**JUDGEMENT RESERVED ON: DECEMBER 8, 2021
JUDGEMENT DELIVERED ON: JANUARY 4, 2022**

JUDGEMENT (PER S.S. SHINDE, J.):

1. This appeal challenges the judgment and order passed by the learned Sessions Judge, Raigad Alibag dated 14th March, 2011 in Sessions Case No.137 of 2009 thereby convicting the appellant – accused for the charge under section 302 of the Indian Penal Code and sentencing him to rigorous imprisonment for life and to pay Rs.1,000/- as fine and in default thereof, to suffer simple imprisonment for six months.

2. The prosecution case in brief is as under:

The deceased Sunita and her husband Vinayak were staying together at Mohopada, Taluka Khalapur, District Raigad. Complainant Mohan was staying in front of their house in the same locality. On 19.7.2009 at about 7am, Mohan had gone to bring newspaper when his daughter had informed him on phone that many people had assembled in front of the house of Vinayak. Mohan immediately came and went to the house of Vinayak and saw the dead body of Sunita in a pool of blood between the kitchen and bedroom. There were bleeding injuries on her neck, cheek and arm. The cupboards were open and articles in cupboards were scattered. On enquiry, he came to know that day before the date of the incident i.e., 18.7.2009 at about 8.30 pm, the accused had visited the house of the deceased and demanded money from her. Thereafter, Mohan lodged a complaint with Rasayani Police Station and on that basis, the offence was registered at C.R. No.36 of 2009 against the accused for the offences punishable under sections 457, 460 and 302 of the Indian Penal Code.

Investigation commenced. Inquest panchanama and spot panchanama were prepared. Two pillow covers, bedsheet, carpet stained with blood were seized from the spot. The dead body of Sunita was sent to hospital for postmortem. The accused was arrested on 22.7.2009 at Balegaon, District Solapur. Chargesheet was submitted against the accused for the offences punishable under sections 302, 460 and 382 of the Indian Penal Code before the learned JMFC, Khalapur, who later on, committed the case to the Court of Sessions, Raigad Alibag.

The Sessions Court framed the charge. Thereafter, subsequently, charge under section 460 of the Indian Penal Code came to be deleted. The defence of the accused was that of total denial and false implication and he claimed to be tried.

After completion of trial, the accused was held guilty and accordingly, came to be convicted for the offences punishable under sections 302 and 382 of the Indian Penal Code as already mentioned herein above. Hence, this Appeal.

3. The learned Counsel appearing for the appellant – accused has assailed the impugned judgment and order on many grounds.

She submitted that the prosecution evidence was mainly of circumstantial nature. The recovery of weapon (knife) at Lonavala after a considerable period is not at all acceptable as the prosecution had failed to establish that the appellant had gone to Lonavala after committing the alleged crime. She submitted that the statements of PW8 (Ayesha) and PW9 (Zarina) were not trustworthy as they themselves were guilty of misappropriation of stolen articles. There was no explanation by the prosecution as to the condition of the said knife. She submitted that the evidence in respect of C.A. report regarding blood sample of the appellant was prepared without following proper procedure. There is no details about the date and time when the blood sample of the accused was taken which vitiates the reliability of the said evidence. The learned Counsel submitted that the trial Judge failed to appreciate the existence of foot print which was found in the blood, spilled over the floor, of unknown person at the place of incident. This was clearly indicative of the presence of a third person at the relevant time. She also submitted that the motive being the alleged crime was not properly established and still, the statement of PW3 (Anandsing) was accepted at its face value. She further submitted that the objection of the appellant to the conclusion

regarding the postmortem report of the deceased that the absence of state of rigor mortis clearly indicated that the time of the death of the deceased, as given by the prosecution, was in clear doubt. She submitted that mere presence of the appellant at the spot of the incident on earlier day could not have been sufficient to prove the alleged involvement of the appellant in the crime. There were contradictions in respect of seizure of camera of Canon make and the same vitiated the version of recovery of stolen articles. In the aforesaid background, the learned Counsel for the appellant submitted that the present Appeal deserves to be allowed and the impugned judgement and order needs to be quashed and set aside.

4. On the other hand, the learned APP appearing for the Respondent – State has relied on the reasoning given by the trial Court in the impugned judgment and order and while supporting the same, submitted that the impugned judgment and order challenged in Appeal needs no interference and the same may be dismissed.

5. The prosecution has in all examined 20 witnesses in support of its case.

PW1 Mohan Krishnaji Soman, nephew of the deceased, is the first informant; PW2 Anandsing Gangasing Rawat was the servant of the deceased; PW3 Vinayak Yashwant Modak – Milkman; PW4 Manish Vinayak Soman is the son of the deceased, PW5 Amol Ramesh Tol had purchased camera (article 22) from the accused; PW6 Amita Kisan Patil was the Computer Operator at Internet Cafe at Mohapada; PW7 Navnath Pandharinath Shenkar was the owner of mobile shop at Mohapada; PW8 Ayesha Shaikh Rahemutla Shaikh was the rag picker; PW9 Zarina Rahemutla Shaikh was also a rag picker and daughter of PW8 Ayesha; PW10 Rajashri Shrikant Koli Shaikh was known to accused and in July 2009, accused had paid her Rs.2,000/-; PW11 Hemant Ramchandra Chalke, PW12 Ravindra Mahadeo Chitale, PW13 Dileep Bhaskar, PW14 Pravin Mishrimal Soni and PW15 Baban Ram Patil were the panch witnesses; PW16 Raju Chandsaheb Mulani was known to accused and the accused had worked with him for one month; PW17 Ramesh Narayan Deshmukh was the Circle Officer at Chowk, Taluka Karjat; PW18 Ganesh @ Swami Chandrashekar Awasekar in whose house the accused had kept the stolen articles; PW19 Dr.Ghanashya Hari

Nazirkar was the Medical Officer who had conducted the postmortem and PW20 Sanjay Dattu Hajare was the Investigating Officer.

6. In order to prove its case, the prosecution had relied upon the following circumstances:

- 1) Sunita died homicidal death;
- 2) Visit of accused to Mohopada and the house of deceased
- 3) Monitory need of accused
- 4) Demand of money by accused from deceased
- 5) Existence of blood stains on the clothes of accused
- 6) Recovery of knife and ornaments of deceased
- 7) Recovery of stolen articles at the instance of accused
- 8) Accused was working as servant in the house of the deceased.

7. The main charge levelled against the accused is that of committing murder of Sunita. So, the question that requires determination is whether the death of Sunita was homicidal. There is no controversy about the cause of death of Sunita on account of

injuries sustained by her.

PW19 Dr.Nazirkar, who was serving as Medical Officer at Rural Hospital, Chowk Tal.Khalapur, had conducted autopsy on the dead body of Sunita. He has described 23 injuries in the postmortem report. As per his opinion, the cause of death was 'hemorrhagic shock due to multiple injuries'. The injuries which are mentioned in a separate sheet of the postmortem report are as follows:

On face: right side face

- 1) Base of Nostril oblique extending on right side
CLW 2" x 1/2" bone deep
- 2) CLW on right side cheek 2"x 3/4" x 1/2"
- 3) CLW sub-mandibular area 2" x 1/2" x 1/2"
- 4) CLW on cheek 1" x 1/4" x 1/4"
- 5) CLW on chin 2" x 1/4" frm mid line to right side

Neck and ant. chest wall

- 6) 1.1/2" x 1/4" x 4" approx. at the junction of neck and chest oblique. On right side.
- 7) CLW 1" x 1/2" x 1/2" oblique 2" below lower most portion of neck above sternum
- 8) 2" x 1/2" x 1/2" CLW at the base of neck oblique like figure
"/-"
- 9) CLW 2" x 1/2" x 1/2" on anterior aspect of front of neck.
- 10) Near left nipple 1" meial and oblique CLW 2" x 1" x 1/2"

Left Upper limb and axilla

- 11) CLW 2" x 1/2" x 1/2" on anterior aspect of shoulder oblique

- 12) CLW 3" x 1/2" x 1" lateral aspect of left upper limb.
- 13) CLW 2.1/2" x 1/2" x 1/2" on lateral aspect upper limb oblique
- 14) CLW 3" x 1/2" x 1" on lateral aspect oblique.
- 15) CLW 3" x 3/4" x 1/2" on lateral aspect oblique
- 16) Left side chest wall – 2" x 1" x approx. 3" depth with fracture of 3rd and 4th rib.

Left Side of Face

- 17) Full length through and through cut on left ear 1" upward from left ear lobe
- 18) CLW 3" x 1/2" x 2" on left side sub mandibular region oblique
- 19) CLW 2" x 1/2" x 2" on left side of neck, oblique in supra-clavicular region
- 20) CLW 1" x 1/4" x 1/4" on medial aspect of Patella left knee
- 21) Linear abrasion on shin of tibia.

Right wrist

- 22) On lateral aspect, oblique 1.1/2" x 1/2" x 1" like 'V' extending on both palmar and dorsal aspect
- 23) CLW 2" x 1/4" x 1/4" - 2" above olecranon process on left right upper limb lateral aspect."

The injuries mentioned at serial Nos.4, 6 and 16 are shown as fatal injuries. As per the opinion of the Medical Officer, the injuries at serial Nos.1 to 4, 6 to 8, 11 to 19, 22 and 23 are possible by knife. In the cross-examination, the medical officer had stated that he did not notice rigor mortis and there were no signs of decomposition.

8. It appears that the advocate appearing for the accused before the trial Court submitted that when the autopsy of the dead

body was conducted on 19th July, 2009 at about 3pm, PW19 Dr.Ghanashyam Hari Nazirkar did not notice rigor mortis on the dead body. Also, there were no signs of decomposition. Therefore, it was submitted before the trial Court that it can be stated that the death was caused within two hours of beginning of postmortem i.e., between 1pm to 2pm and consequently, the prosecution story that the deceased died during the intervening night between 18th July and 19th July, 2009 is falsified.

It needs to be noted here that the trial Court had accepted the evidence of PW2 Anandsingh who was with the deceased upto 11.30pm on 18th July and thereafter, in the morning at 8am on 19th July. PW2 Anandsingh and PW3 Vinayak had seen the dead body and suggested that the death had occurred at 11.30 to 8am in the intervening night of 18th July to 19th July.

9. In order to find out the correctness of the deposition of the Medical Officer that no rigor mortis was found on the dead body and the body was not decomposed, we have seen the postmortem report where to the question in column 11, i.e., 'Regar Mortis – Well-marked, slight or absent, whether present in the whole body or part only.' the reply given was "rigor mortis – absent. Not on

any limb". Further, in column 12, as to the question - 'Extent, and signs of decomposition, presence post-mortem lividity of buttocks, loins, back and thighs or any other part. Whether bullae present and the nature of their contained fluid. Condition of the cuticle.', the reply given was "No evidence of decomposition or post mortem lividity".

Therefore, considering the deposition of PW2 Anandsing which is contrary to the deposition of the medical officer PW19 Dr.Nazirkar, though it can be concluded that the death was homicidal, nevertheless, the defence is able to cause doubt in the prosecution case about the time of death of the deceased.

10. The prosecution in order to prove the visit of accused to Mohopada and the house of the deceased, examined PW1 Mohan, PW2 Anandsing and PW4 Manish.

PW1 Mohan in his deposition before the Court stated that PW3 Vinayak Soman is his real uncle and the deceased Sunita was the wife of his uncle. His uncle was residing in front of his house. PW2 Anandsing was the servant working in the house of his uncle and aunt. His relations with his uncle are very good. His

uncle has two sons i.e., Mangesh and Manish. Manish (PW4) was doing business at Mumbai and Mangesh resides in America. His uncle Vinayak and aunt Sunita were residing in their house. Their servant Anandsing was residing in the servants' quarter. PW4 Manish had informed the police about the stolen articles i.e., gold ornaments, laptop, camera.

On 19th July, 2009, in the morning as usual, PW1 went to bring newspaper when he received a call on his mobile from his daughter Seema that something wrong had taken place in the house of his uncle. Therefore, he immediately started to proceed to his house. On the way, he noticed that the servant Anandsing was coming towards him. Anandsing informed him that his aunt was lying in the house and he should come to see her. Then, he went to the house of his uncle and noticed that his aunt was lying in a pool of blood between kitchen and bedroom. She had bleeding injuries on her neck; there were injuries on her hands and her right earlobe was torn. The household articles were scattered in the bedroom and he found her aunt in a dead condition. At about 9.30am, he went to Rasayani Police Station and lodged a police complaint. He was shown a copy of the said complaint and

he stated that the contents in the said complaint are correct.

He further deposed that prior to engaging Anandsing as servant, one Gunwant was working as servant in the house of his uncle. He identified the said Gunwant i.e., the accused, in the Court. He made enquiry with Anandsing about the incident and Anandsing told him that on the previous night, the said Gunwant had come to the house. After PW1 lodged the complaint, police came to the spot; prepared spot panchanama and the dead body was taken to the hospital at Chowk and after postmortem, the dead body was handed over to them and the last rites were performed after two days.

11. The defence cross-examined this witness. It appears that the defence was successful in extracting information from him that the house of the uncle is in a locality where there are other bungalows adjoining it and people are residing. He also admitted that there is one temple of Lord Ram near his house. It appears that a suggestion was given to him that the priest of the said temple was always present in the temple, however, the said suggestion was denied by him. He stated that the distance between the servant's quarter and the house of his uncle is at 20'.

There was traffic on the road in front of his house for 24 hours. On 19th July, 2009 in the night, he was in the house. He was not visiting his uncle's house daily. He stated that he was unable to tell as to the usual places of different articles kept in the house of his uncle. He further stated that his aunt Sunita was physically stout. Looking to the spot of incident, he was suspecting that the crime was committed by more than two persons.

12. Upon a careful perusal of the evidence of PW1, it appears that his evidence is hearsay inasmuch as PW3 Anandsing narrated him about the death of his aunt and thereafter, he went to the house of the aunt. He has given a very vital admission in the cross-examination that he was suspecting that the crime was committed by more than two persons. However, it appears that the prosecution has tried only the present appellant. This witness has nowhere in his examination in chief stated about the presence of the accused in the intervening night between 11.30pm to 8am 18th July and 19th July. His evidence at the highest can be considered as hearsay evidence and that he noticed that his aunt was lying in an injured condition on the relevant date. In his cross-examination, he has stated that the house of his uncle is situated

in an area wherein other people are residing and his house is just a few feet distance from the house of his uncle. There is a road and the traffic on the said road is present for 24 hours.

13. The prosecution did examine PW2 Anandsing. He stated that his native place is Uttaranchal. He was doing the household work including cooking in the house of the deceased and her husband Vinayak. He was staying in the servants' room of their house. He used to call Mr.Soman as Dada and Mrs.Soman (deceased Sunita) as Mummy. He stated that before the incident, Dada and Mummy were only residing in the house. One Sakubai was a sweeper in the house of Mr. & Mrs.Soman. Sakubai used to attend the work in between 9am to 6pm.

On 18th July, 2009, at about 9am, he prepared breakfast for Dada and Mummy. After the breakfast, Dada went to the village Gulsunde telling this witness that he will return on the next day. He further deposed that he and the deceased took lunch. On the same day, at about 7.30pm, he was in the bungalow. At that time, one boy knocked the door of the gate and so, he opened the gate and enquired about his name to which he (said boy) told him that his name is Gunwant (accused) and he expressed a desire to

meet mummy (deceased). He asked the said boy Gunwant to stay there and he went inside the bungalow and informed mummy (deceased) that a person by name Gunwant had come. The deceased told him that Gunwant was an old servant and instructed him to allow him to come inside the bungalow. Thereafter, Gunwant entered inside the premises of the bungalow; went towards the dog in the bungalow and then, entered into the bungalow and went into the bedroom. Gunwant went inside the bedroom. Anandsingh also went inside the bedroom. The deceased was in kitchen. Gunwant told Mummy (the deceased) that he had brought some medicine for Dada. The said medicine was like tea powder. The deceased had asked PW2 to prepare tea for Gunwant. After tea, Gunwant asked the deceased to give him some money whereupon the deceased informed him that Dada was out of station and he will be returning home on the next day and so, he may come on the next day. He stated that Gunwant was talking with Mummy in anger and thereafter, Gunwant went outside the house in anger. PW2 followed him upto the gate and closed the gate. While going, Gunwant also touched the dog. It was a female dog and her name was Diana. Gunwant went outside at about 7.50pm or 8pm. After about 15 to 20

minutes, the deceased had informed PW2 that she had seen something hiding in the glass inside the bungalow. Then, he took a torch and took search there but did not notice anything. At about 10pm, he and Mummy had dinner. They were watching television till 11.30pm and then PW2 went to his quarter and slept and Mummy slept in her bedroom.

He further deposed that on 19th July, 2009, at about 7.30am, he went to the bungalow of the deceased and knocked the door but there was no response. At about 8am, the milkman (PW3 Vinayak Modak) came. He also knocked the door but it was not opened. Then, they went towards the backdoor and found that the said door was half open and so the milkman and PW2 went inside the bungalow. They noticed that the deceased was lying near the door of bungalow in a pool of blood. There were bleeding injuries over her person and she was in a dead condition. Then, he called PW1 Mohan and other neighbourers. Mohan informed the police about the incident. The police came to the spot. Then they referred the dead body to the hospital for postmortem. He identified Gunwant in the Court. The police enquired with him about the incident and he narrated the incident in Hindi and the

police reduced the same into writing in Marathi.

14. It appears that this witness was cross-examined by the defence Counsel. During his cross-examination, he stated that Gunwant came to the bungalow. He enquired with the deceased as to how she was. He also enquired about the health of Dada. He stated that it is not true to suggest that the accused was demanding his money as he was in need. He further stated that it is true to suggest that after taking tea, the accused went away. There are 3 doors to the bungalow. The door from which he always used to go into the house was closed.

15. Upon a careful perusal of his evidence, nowhere it is suggested that the accused again came into the said house within the proximate time of the alleged offence or that he was seen somewhere near the bungalow or inside the bungalow or near the bedroom. He had given admission in the cross-examination that after having tea, the accused left the house of the deceased. Importantly, when the Sunita suspected after 15 to 20 minutes of the accused leaving the house that, she saw something hidden in the glass inside the bungalow, in respect of same PW2 in his deposition stated that, pursuant to doubt expressed by Sunita he

took search but he did not notice anything hidden or suspicious. The question arises when the deceased saw something hidden in the glass inside the bungalow, the possibility of any other person present at the relevant time in the bungalow cannot be completely ruled out. It was for the prosecution to clear all doubts by bringing on record cogent evidence. According to PW2, the accused had asked for money from the deceased, however, reply given by Sunita (deceased) is important inasmuch as she did not tell the accused that, she will not give him the money but she stated that, her husband is out of station and he will come on the next day. Therefore, the reasonable inference that can be drawn is that she was willing to consider the request of the accused to give him money after her husband returns home on the next day. It is also relevant to note from his evidence that there are 3 doors to the house of the deceased. Mere visit of Gunwant i.e., the accused, on the earlier day to the house of the deceased could not lead to any definite conclusion showing his involvement in the alleged commission of offence. It is an admitted position that PW2 Anandsing is residing in the servants' quarter in the same bungalow which is 20' away from the bungalow. It has come in his evidence that till 11.30pm on the earlier night, they were

watching television. It is also strange to note that, he went at 7.30am to see Sunita (deceased) and found the door of bedroom was closed and without taking any efforts to awaken her he went back to the servants quarter, and returned only after the milkman came at 8.30am, that too, when the milkman told him that the door was not being opened. If the test of a reasonable man is applied that, what he/she would think in case the door was not opened by 7.30am as usual, in that case, PW2 ought to have made sincere efforts to open the door or at least shout loudly and call somebody so as to open the door. The conduct of PW2 appeared to be unnatural inasmuch as he knew everything about the daily routine of the deceased and even then did not make efforts to awaken her. As already observed, it has come in the cross-examination of PW1 Mohan Soman that, he suspected the crime might have been committed by more than two persons. There appears to be substance in the said contention in the cross-examination by keeping in view the injuries sustained by the deceased on his person.

16. The prosecution examined PW3 Vinayak Yashwant Modak,

the milkman. He deposed that he was doing the milk business and supplying milk door to door. He was supplying milk to Vinayak Soman since last 1½ years prior to the said incident. On 19.7.2009, he went to the house of Mr.Soman at about 8am to give milk. The gate of the compound was opened by PW2 Anandsing. At that time, the female dog Diana came forward, so, he instructed PW2 Anandsing to remove her. Then, he went inside the bungalow through the main door and saw that the body was lying covered with a blanket. After seeing so, he got frightened. Then, he called people residing in the vicinity and then, he went away.

17. The aforesaid evidence of PW3 clearly shows that, when he went inside the bungalow through the main door, he saw the body was lying covered with a blanket. Therefore, the contention of PW2 that the door was not opened at 7.30am and it is only after PW3 came at about 8am, when he knocked the door but there was no response, is falsified by the evidence of PW3 discussed herein above. As already observed, PW3 in his evidence stated that when he went inside the bungalow through the main door, he saw that the body was lying covered with a blanket. He did not say that the door was locked, but said it was not open and then he went

towards the backdoor, and said door was found half opened, and then PW3 went inside the bungalow. So, there is total inconsistency and confusion created by the prosecution witnesses i.e. PW2 and PW3 as to whether the door was closed or open in the morning and, whether both of them went backside and then, they found half of the said door was open.

In his cross-examination, PW3 had stated that he entered into the bungalow from the main door of the bungalow. He was the first person to reach the spot amongst the other persons. When he reached the bungalow, at that time, Anandsing was in the servants' quarter. As per version of prosecution witnesses usually, the milkman (PW3) used to go to the bungalow in between 8am to 8.30am to deliver the milk. Anandsing always used to accept the milk from the gate and main door. His timing of arrival was known to Anandsing. When he knocked the door of compound gate, at that time, Anandsing came from the servants' quarter and pushed the main door of the bungalow.

18. From the joint reading of evidence of PW1, PW2 and PW3, it is abundantly clear that there is no whisper in their evidence that in between 11.30pm and 8am in the intervening night of 18th July

and 19th July, they saw the accused somewhere near the bungalow or inside the bungalow or nearby the spot of the incident. Therefore, it can safely be concluded that there is no evidence brought on record by the prosecution to suggest that in between 11.30pm and 8am in the intervening night between 18th and 19th July, somebody saw the accused present near the vicinity of the bungalow or inside the bungalow. In fact, the police ought to have thoroughly enquired about the role of PW2 in the entire episode.

19. Though one of the circumstances considered by the trial Court is monetary need of the accused, except bare words of PW2 that he asked for money from the Sunita and, she replied that she will consider the request of the accused after her husband returns home the next day. Merely because the accused was in need of money, in absence of any refusal by the deceased for giving money or there was any hot exchange of words between them, it is difficult to conclude that the said monetary need of the accused can be considered as incriminating circumstance in the chain of circumstances considered by the trial Court especially keeping in view the deposition of PW2 Anandsing. Merely stating that he saw

the accused in anger is not sufficient to hold that the accused was in monetary need.

20. The prosecution relied upon the circumstance of recovery of stolen articles at the instance of accused. In order to prove the said circumstance, the evidence of PW12 Ravindra and PW18 Ganesh was considered. Accordingly, the trial Court considered the circumstances of recovery of stolen articles at the instance of the accused and existence of blood stains on the clothes of the accused.

PW12 Ravindra is the panch witness to memorandum and recovery panchanama. He had stated that, he was called to the police station where the accused was present and accused had stated that he is ready and willing to produce one bag and clothes which he had kept in the house of his friend at village Bale. Accordingly, the accused took the police alongwith PW12 and one more panch witness to village Bale. In the said village, near a temple, they stopped and the accused told one of his friends, PW18 Ganesh, to produce the bag and clothes and accordingly, Ganesh produced a rexin bag wherein a pant, half shirt, laptop, camera box containing CDS and mobile handset were found in it.

The pant was stained with blood. Accordingly, panchanama was prepared.

21. PW5 Amol Ramesh Tol was another panch witness who had stated that the accused had given a camera of Canon make to him and he had produced the said camera before the police and it was seized. However, the evidence of PW18 Ganesh, PW20 Sanjay, who was the Investigating Officer and PW12 Ravindra Chitale, panch witness, shows that camera of Canon make was found in a rexin bag. The Investigating Officer PW20 Sanjay had in his cross-examination denied the suggestion that PW5 Amol Tol produced one camera before him. Due to this discrepancy, the trial Court has disbelieved the theory of recovery of rexin bag at the instance of the accused.

Though the trial Court has recorded the finding, relying upon the evidence of the panch witnesses PW18 Ganesh and PW12 Ravindra, that the seizure of rexin bag containing laptop, clothes, etc; he has no hesitation to rely on the said evidence, the evidence on record suggests contrary inasmuch as the witness PW5 Amol Tol had stated that the accused had given camera of Canon make

to him and he had paid Rs.1,000/- to the accused. Further, he had stated that he had produced the said camera of Canon make from the witness Amol Tol. However, the panch witness Ravindra had stated that the camera of Canon make was found in the rexin bag and, therefore, in the background of the aforesaid contradictory evidence, the findings recorded by the trial Court that the said evidence is acceptable, is not in consistence with the evidence on record.

Thus, the finding recorded by the trial Court insofar as the recovery of stolen articles at the instance of the accused is concerned, same is contradictory and inconsistent and therefore Trial Court ought to have discarded the said evidence.

22. The next circumstance relates to the recovery of knife and gold ornaments of the deceased. In this context, the prosecution has examined PW8 Ayesha, PW9 Zarina, PW11 Hemant, PW12 Ravindra, PW13 Dileep, PW14 Pravin and PW15 Baban. The case of the prosecution is that the accused after committing the crime, went to Lonavala and threw away the plastic bag containing ornaments and knife in a garbage box and during

investigation, the same were seized. PW12 Ravindra stated that the accused had made a statement that, he had thrown away knife and ornaments in a garbage box near ST stand at Lonavala and showed his willingness to show the place. Accordingly, when they went to Lonavala and searched for the same in the garbage box, nothing was found in it. Thus, since there was no recovery of any article at Lonavala at the instance of the accused, the trial Court held that the statement alleged to have been made by the accused had no evidentiary value. In fact, the trial Court has also held that the prosecution had not adduced any evidence to show that the accused had thrown away the plastic bag containing knife and gold ornaments in a garbage box at Lonavala. It also held that the circumstance with regard to seizure of knife and ornaments is of no avail to the prosecution to connect the accused with the alleged offence.

23. As already discussed, insofar as the circumstance i.e., existence of blood stained clothes of the accused and another circumstance of recovery of knife and gold ornaments is concerned, the trial Court has recorded a categorical finding that both the recoveries were not at the instance of the accused.

24. It appears that the trial Court recorded a finding that the blood group of the deceased was 'A'. The pant (article 15) which was found in the rexin bag was stained with blood group 'A' whereas the blood group of the accused is 'O'. It held that the existence of blood stains of the deceased on the pant of the accused shows involvement of the accused in the commission of the offence of murder of the deceased Sunita.

Admittedly, the person who had collected blood sample from the body of the accused and the deceased was not examined. It was incumbent upon the prosecution to examine the said person so as to prove that the blood sample was collected from the accused and the body of the deceased.

25. The prosecution had examined PW12 Ravindra who stated that he was called by police to the police station on 27.7.2009 where another panch Vinayak Gaikwad was also there. He was asked to listen to the accused as to what he was saying. Accused made a statement before them that he threw away the knife and gold ornaments in a garbage box near ST stand at Lonavala so as to avoid the involvement in the crime. The said statement of the

accused was reduced into writing. Then the contents of the memorandum was read over to him and his signature was obtained. Then, the panchas, the accused and the police personnel proceeded towards Lonavala. When they reached near the ST stand at Lonavala, the accused asked them to stop the vehicle at a place where the garbage box was kept. Then they alighted from the vehicle. All of them followed the accused upto the garbage box. Then the accused pointed the garbage box in which he had thrown the knife and the gold ornaments. They searched the garbage box, however, could not find anything. Panchanama was prepared accordingly and the contents of the same were read over to the panchas and their signatures were obtained on it. As already observed, recovery of the aforesaid articles at the instance of the accused has not been believed by the trial Court.

It appears that the said witness PW12 Ravindra also stated that on 28.7.2009, he was called to Rasayani Police Station at about 7am. The accused was present there. He made a statement before them that he will produce one bag and clothes which he was wearing at the time of the incident which was kept in

the house of his friend in village Bale. His memorandum statement was recorded accordingly and the same was read out and signatures of the panchas obtained on it.

Then, the accused, panchas and the police personnel went towards Solapur. 5 kms before Solapur, the accused asked to stop the vehicle near village Bale where the panchas and police alighted from the vehicle. The accused went upto one house and then, the accused Gunwant called his friend by name Ganesh. Then, one boy came out from the house. Then, the accused Gunwant instructed his friend Ganesh to produce the bag and clothes. Accordingly, his friend Ganesh produced the same before the police. Police opened the rexin bag and in the said bag, there was one pant, half shirt, laptop, camera and box containing CDS and mobile hand set. The pant was found stained with blood. Then the police prepared the panchanama, seized the articles and then the panchas signed on the panchanama. This panch had accordingly identified the said articles.

26. We have already discussed the evidence of PW18 Ganesh and PW5 Amol Tol wherein it is stated that the camera was purchased from the accused. PW5 had stated that he produced

the same before the Investigating Officer. However, the present witness (PW12) and other witnesses had stated that the said camera was found in the bag which was recovered at the instance of PW18 Ganesh. Therefore, there is a complete mismatch of deposition of PW12 with the deposition of PW5 Amol Tol. Therefore, it is difficult to believe the evidence of this panch witness in view of the deposition by PW5 Amol Tol that the camera was purchased by him from the accused and the same was produced before the police officer.

27. It appears from the admissions given by this witness in the cross-examination that he was a habitual panch witness inasmuch as on 27.7.2009, he received a phone call from the police and then, he went to the police station. It appears that the alleged incident had taken place, as per the prosecution case, in the intervening night between 18th and 19th July, 2009, however, the alleged memorandum statement and the recovery is belatedly made in between 27th July and 28th July, 2009. The said time gap also assumes importance in a case based upon circumstantial evidence.

28. It appears from the evidence on record that the seized articles and, in particular, the clothes were sent to the Forensic Laboratory on 6th August, 2009 and analysis of the same was completed on 8th October, 2009 (exhibit 75). The same were taken back in custody by the police on 23rd October, 2009.

It follows from the evidence on record that the person, who had taken the blood samples from the accused and the deceased was not examined. There was a belated recovery of the articles on 27th July and 28th July, 2009. The alleged circumstance of blood stains being found on the pant of the accused and other 2 – 3 articles found in the rexin bag is the only evidence relied upon by the trial Court while convicting the appellant. We have discussed at length that, why such alleged recovery cannot be believed in view of the contradictory evidence given by the prosecution witnesses.

29. Since the case in hand is based upon circumstantial evidence, it would be apt to refer to the landmark judgment of the Hon'ble Supreme Court in the case of **Sharad Birdhi Chand**

Sarda vs. State of Maharashtra¹ has held as under:

"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 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 & Anr. v. State of Maharashtra (AIR 1973 SC 2622) 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.

These five golden principles, if we may say so, constitute the

1 AIR 1984 SC 1622

panchsheel of the proof of a case based on circumstantial evidence.”

30. If the case in hand is considered in the light of the observations made by the Supreme Court in the case of **Sharad Birdhi Chand Sarda (supra)**, the circumstances from which the conclusion of guilt is to be drawn is to be fully established, in the facts of the present case. We have made a reference to the circumstances relied upon by the prosecution in paragraph 6 above. We have in detail discussed that the prosecution has utterly failed to establish the circumstances from which the conclusion of guilt can be drawn or that they are consistent only with the hypothesis of the guilt of the accused or that the circumstances are of a conclusive nature and tendency or they exclude every possible hypothesis except the one to be proved and that there is a chain of evidence so complete that it does not leave any reasonable ground for the conclusion consistent with the innocence of the accused and shows that in all human probability, the act must have been done by the accused. Even the remaining circumstances which are relied upon by the prosecution suffers from cogent and convincing evidence. It was incumbent upon the prosecution to prove each circumstance independently and the

chain of circumstances so as to exclude every possible hypothesis except the one to be proved that the appellant has committed the alleged crime and none else. In the first place, some of the circumstances relied upon by the trial Court are not incriminating circumstances at all. Secondly, 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. In the present case, hardly any circumstance is proved by the prosecution.

31. In that view of the matter, we are of the considered view that the finding of conviction recorded by the trial Court deserves to be interfered with. The prosecution has utterly failed to prove each circumstance independently and the chain of circumstances so complete that, it leads to only hypothesis of guilt of accused and none else. Therefore, the appellant is entitled to benefit of doubt. Accordingly, the following order is passed:

ORDER

- (i) Appeal is allowed.

(ii) The impugned judgement and order passed by the learned Sessions Judge, Raigad Alibag dated 14th March, 2011 in Sessions Case No.137 of 2009 is quashed and set aside.

(iii) The accused be set at liberty and released forthwith unless required in any other case;

(iv) The accused shall be released forthwith initially on furnishing personal bond of Rs.5,000/-, on his undertaking that within two months from the date of his release, he would furnish one solvent surety in the like amount;

iv) The accused shall comply with the mandate of section 437A of Code of Criminal Procedure upon his release on furnishing bond of Rs.5,000/-, within two months.

v) Fine amount, if any, paid by the appellant - accused be refunded to him.

32. We appreciate the able and quality assistance rendered by the appointed advocate Ms.Ameeta Kuttikrishnan and we quantify her fees and expenses at Rs.10,000/- to be paid by the High Court

Legal Services Committee within a period of four weeks from today.

33. Criminal appeal stands disposed of accordingly.

(SURENDRA P. TAVADE, J.)

(S.S. SHINDE, J.)