

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.123 OF 2016

Syed Wahab Sayed Mir,
Age 28 yrs., Occ. Convict No.C/10177,
R/o Tathagatnagar, Basmath,
Dist. Hingoli.

... Appellant

... Versus ...

The State of Maharashtra
Through Police Station Officer,
Police Station, Basmath,
Dist. Hingoli.

... Respondent

...

Miss. Anuradha S. Mantri, Advocate (appointed) for appellant

Mr. R.D. Sanap, APP for respondent

...

CORAM : SMT. VIBHA KANKANWADI AND
Y.G. KHOBRADE, JJ.

DATE : 28th APRIL, 2023

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 Present appeal has been filed by the original accused who has
been convicted by learned Additional Sessions Judge, Basmathnagar in

Sessions Trial No.31/2013 on 31.08.2015, wherein he has been held guilty of committing offence punishable under Section 302 of the Indian Penal Code twice for committing murder of his daughter Mariya and son Syed Kaif. He has been sentenced to suffer imprisonment for life and pay fine of Rs.1,000/-, in default to suffer rigorous imprisonment for one year, for both the offences and both the sentences have been directed to be run consecutively.

2 The prosecution story, in short, is that informant Reshma Begam is the wife of present appellant – original accused. They got married about six years prior to 03.01.2013 i.e. the date on which the First Information Report was lodged. They were having daughter Mariya aged 4 and son Syed Kaif aged 1½ on that day. Accused used to raise suspicion over her character and was of the impression that the children begotten to the wife are not from him. He used to assault and abuse the informant. Informant had told about the said ill-treatment to her father and brother as well as other relatives. They had tried to pacify accused but there was no positive response from the accused. The ill-treatment got intensified just prior to the First Information Report. Accused had come to Basmath around 7.30 a.m. on 03.01.2013 from Nanded through railway and told informant that he would leave her as well as children to the house of her father. He told that he does not require her and she should not return to his house. He quarreled with the informant.

Her father-in-law Mir and mother-in-law Abedabee had pacified the accused and then accused told informant around 11.00 a.m. that he would take children to watch circus. He took the children on his motorcycle. Thereafter around 2.40 p.m. informant was told by police that her daughter and son have been killed near railway gate which was near Sai Mandir in Basmath. Therefore, informant along with her in-laws and other relatives went to the said place. They found that Mariya and Kaif's throat was slit by some sharp weapon. Informant says that as her husband used to raise suspicion over her character and used to give threat that he would kill the children, as they have not begotten from him, her husband has committed their murder. On the basis of said First Information Report offence vide Crime No.2/2013 came to be lodged with Basmath Police Station around 3.50 p.m. on 03.01.2013, for the offence punishable under Section 302 of the Indian Penal Code and further investigation was undertaken.

3 It is also the prosecution story that PW 1 Sheshrao Lakhade with PW 19 Police Inspector Mr. Surjerao Patil had gone to Bahirji College around 1.00 p.m. They were in the college up to 1.45 p.m. and thereafter they came out of the college campus in jeep. They found one person on motorcycle bearing MH-22-A-6586. It was noticed that the clothes of that person were blood stained and, therefore, PW 19 PI Mr. Surjerao Patil stopped him and

made inquiry with him. He gave his name as Syed Wahab Syed Mir i.e. accused and also told about the incident. Thereafter, the fact was informed to the Police Station and further staff was called. Accused then took all of them to the spot i.e. by the side of railway track on Jawala Khandarban road. They saw two children on the ground, whose throats were cut. The blood had come out and those children were already dead, and the information was then sent to the house of accused to the relative and that is how PW 13 informant Reshma came to the spot.

4 During the course of the investigation the inquest panchnama of both the dead bodies was executed and it appears that prior to the lodging of First Information Report, Station Diary entry No.21 was taken around 1.45 p.m. and then the spot panchnama was executed between 3.10 to 3.50 p.m. Accused came to be arrested at 3.50 p.m. on 03.01.2013 and in presence of the panchas he had given memorandum between 9.10 to 9.50 a.m. on 04.01.2013 and discovered the knife between 10.20 to 11.00 a.m. Certain articles were seized from the spot. The inquest panchnama has been carried out between 4.00 p.m. to 5.00 p.m. on 03.01.2013 and the dead bodies were sent for postmortem. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure. The clothes of the deceased children and accused were seized and all the seized articles were sent for chemical

analysis. After the completion of the investigation charge sheet was filed before learned Judicial Magistrate First Class, Basmath.

5 Charge sheet was filed for the offence punishable under Section 302, 498-A, 323, 504, 506-II of the Indian Penal Code and under Section 3 punishable under Section 25 of the Indian Arms Act. After the committal of the case the charge was framed. Accused pleaded not guilty. Prosecution examined in all 19 witnesses to bring home the guilt of the accused. Certain documents have been admitted by the accused. Considering the evidence on record and hearing both sides the learned Trial Judge held that the accused has committed murder of his children Mariya and Kaif and accordingly convicted for the double murder i.e. twice under Section 302 of the Indian Penal Code and directed the sentences to run consecutively, however, he has been acquitted of the offence punishable under Section 498-A, 323, 504, 506-II of the Indian Penal Code and Section 3 punishable under Section 25 of the Indian Arms Act. The accused was in judicial custody since 03.01.2013 and, therefore, set off was granted under Section 428 of the Code of Criminal Procedure. This conviction is challenged in the present appeal.

6 It will not be out of place to mention here that the appeal was sent by the appellant from jail and, therefore, by order dated 03.03.2016

Advocate Miss. Ashwini S. Hoge Patil was appointed to represent the appellant. The application for suspension of sentence and releasing the appellant on bail came to be rejected by this Court by order dated 21.04.2016. As the Advocate who was appointed to represent appellant was found absent on 10.06.2016, Advocate Mr. P.N. Mule was appointed as Amicus Curiae for the appellant. The matter was then pending for the final hearing and when the matter was on board on 15.02.2023 Advocate Mr. P.N. Mule was also found absent. It was specifically stated that if he remains absent on the next date then some other Advocate would be appointed to represent the cause of appellant. Taking into consideration his absence till 13.04.2023 Advocate Miss. Anuradha S. Mantri was appointed by this Court to represent the appellant, who is from Panel of Advocates of the High Court Legal Services Sub-Committee, Aurangabad.

7 Heard learned Advocate Miss. Anuradha S. Mantri (appointed) for appellant and learned APP Mr. R.D. Sanap for the respondent. With the able assistance of both sides we have gone through the said record.

8 It has been submitted on behalf of the appellant that accused stood prosecuted for committing murder of daughter Mariya aged 4 and son Kaif aged 1½. The First Information Report is lodged by wife and she has

alleged that the accused used to raise suspicion over her character and was of the opinion that the children are not born from him. Now, except the testimony of PW 13 informant Reshma there is nobody else has been examined to support her said contention. Prosecution could have examined the parents of the accused as well as father and brother of PW 13 Reshma. One more fact to be noted is that the testimony of sole informant for the offence punishable under Section 498-A, 323, 504, 506-II of the Indian Penal Code has not been accepted by the learned Trial Judge. He could not have segregated those factors, either the informant ought to have been believed in toto or her testimony could have been discarded in toto. PW 13 Reshma is not the eye witness, but then she has stated that husband took both the children under the pretext to watch circus. The prosecution has produced a pamphlet at Exh.77 and it has been proved through PW 19 PI Mr. Surjerao Patil, which shows that Bombay Circus was organized from 05.01.2013 and the timings of the show were 2.00 p.m., 6.30 p.m. and 8.30 p.m. There was no show at 11.00 a.m. Therefore, it is unbelievable that from 11.00 a.m. itself the father would have taken the children under the said pretext. PW 11 Shaikh Mubin Shaikh Khwaja is the neighbour of the accused and he has stated that on the day of incident he had seen Mariya playing in his house. But in the cross-examination he has stated that accused had come to his house around 12.00 noon to call his children for taking to circus. If the wife

had seen husband taking both the children around 11.00 a.m., how accused could have gone to PW 11's house at 12.00 noon to call the children. Further PW 12 Jilani Khan Shabbirkhan Pathan, who is also neighbour, states that he had seen accused taking his children on his motorcycle around 12.30 p.m. Therefore, the timings do not match and the benefit of this fact should go to the accused. PW 13 Reshma says that she received information from the police around 2.40 p.m. and then went to the spot. She has also stated in her cross that she had seen the knife, which stated to be the murder weapon, in the hands of accused at the spot. This fact is not corroborated by the other police witnesses, who were present there. PW 13 Reshma has admitted that there used to be quarrels between herself and accused and, therefore, possibility of false implication of the accused cannot be ruled out.

9 PW 1 Sheshrao Lakhade and PW 19 PI Mr. Surjerao Patil are the police persons, who allegedly intercepted the accused and then after accused confessed before them, he had taken them to the spot and showed the dead bodies. However, the said confession is not admissible in view of Section 25 of the Indian Evidence Act. There are many inconsistencies in the testimony of these two witnesses. Further, PW 18 PSI Mr. Mudassirkhan Pathan has deposed that as per the directions given by PI Mr. Surjerao Patil on 03.01.2013 around 2.30 p.m. he had made inquiry with the accused about

his relatives and thereafter he brought parents and accused at the place of incident. If the interaction of the accused was at 2.30 p.m., how informant Reshma could have got the information around 2.40 p.m., is a question. PW 3 Mohd. Gaus is the father-in-law of accused i.e. father of PW 13 Reshma, but he says only about the motive of the murder and on the point of ill-treatment. His testimony is hearsay. Why the accused would have killed his children and the reason given or alleged motive appears to be concocted. PW 1 Police Naik Mr. Sheshrao Lakhade has also stated in his testimony that he had seen the knife at the place of incident, after they were taken to the spot by the accused. PW 13 Reshma says that the knife was in the hand of accused, but the prosecution examined PW 7 Mohd. Hasham Afzalkhan and PW 19 PI Mr. Surjerao Patil to prove memorandum discovery panchnama Exh.33, thereby discovering the knife from a different place. PW 8 Balbirsingh Granthi is the shop owner of the shop by name 'Hari Traders'. As per the prosecution, accused has purchased the knife "Article 12" from his shop, however, he has turned hostile. PW 10 Sanjay Rathod is the Police Constable, who had carried the samples to the Forensic Science Laboratory. However, forensic report has not been produced. Even the blood sample was taken of Reshma, accused and the children for DNA test, but as the forensic report has not been produced, it cannot be said that there was any such suspicion in the mind of the accused, that is, a concocted story. Learned Trial Judge ought not to have

believed those witnesses. The finding arrived at is perverse and, therefore, deserves to be set aside.

10 Per contra, the learned APP strongly supported the reasons given by the Trial Judge while convicting the accused. He submitted that the brutality of the accused can be seen from the fact that he has killed his own innocent children, who could not have resisted him in any manner. The daughter was four years old and the son was only 1½ years old. PW 13 Reshma is the wife and still she has not done any act to save the husband and submitted all the true facts. Her testimony is in corroboration to her First Information Report. There is no reason to disbelieve the same. Only as regards the knife is concerned, certain contrary facts have come on record, but those contrary facts even if considered as it is, will not take out the finger indicated towards accused as an author of the crime. There was no reason to disbelieve PW 1 Mr. Lakhade and PW 19 Mr. Patil as to where the accused was found. His clothes were blood stained at that time and the said interception by PW 19 PI Mr. Surjerao Patil has led to the discovery of the dead bodies. Though the alleged confession may not be admissible under Section 25 of the Indian Evidence Act; yet, the said acts done by the accused would lead to the conduct of the accused under Section 8 of the Indian Evidence Act. The difference in timings is not fatal. The witnesses are

illiterate and from a taluka place where everything is not done by watching the watch. The evidence led by the prosecution was sufficient to hold that accused has committed double murder of his own innocent children and, therefore, the learned Trial Court was justified in awarding the sentence consecutively.

11 We would like to start discussion from the testimony of PW 2 Dr. Mahendra Barge, who was the Medical Officer at Sub District Hospital, Basmath, who conducted the autopsy of both the dead bodies. The first dead body was of a female of a 4 years old and he found incised wound over anterior aspect of neck, horizontal in size measuring 9.5 c.m. x 2 c.m. x bone deep. The said injury has caused injury to trachea, esophagus, carotid vessels which were sufficient to cause death of a person in ordinary course. The internal examination showed that the organs had become pale. Accordingly, he issued the Postmortem Report Exh.14. The second dead body was of 1½ year old male. The rigor mortis was partially developed by that time. He has found incised wound over anterior aspect of the neck, horizontal in size measuring 10 c.ms. x 2 c.ms. x bone deep. It has also caused injury to trachea, esophagus and carotid vessels. Accordingly, he has given the cause of death as “due to haemorrhagic shock due to incised wound to trachea, esophagus and carotid vessels” and issued the Postmortem Report Exh.15.

He has stated that injuries to both the deceased child were ante mortem in nature. This witness has been thoroughly cross-examined on behalf of accused but nothing contradictory has been transpired. Under such circumstance, those findings were sufficient to prove that the death of Mariya as well as Kaif was homicidal in nature.

12 We would thereafter like to consider the testimony of PW 13 Reshma, who is the wife of accused. Here, it is to be noted that there is no eye witness to the incident and, therefore, the case of the prosecution was rested on the circumstantial evidence and, therefore, it was necessary for the prosecution to establish the chain of circumstances. PW 13 Reshma has been examined to establish the fact that both the children went along with their father i.e. accused around 11.00 a.m. on 03.01.2013. The children were found dead around 2.00 p.m. and, therefore, it is required to consider as to whether the testimony of PW 13 Reshma can be considered on the point of 'last seen together'. Her testimony is also important to establish the motive. It is not in dispute that she got married to accused and the deceased Mariya and Kaif are their children. On the day of incident they all were residing together. No doubt, the prosecution has not examined the parents of the accused, who were admittedly residing in the same house. Now, whether their non examination has proved to be fatal is required to be seen. Unless

we disbelieve PW 13 Reshma there was no necessity for the prosecution to examine the parents of the accused. The accused has also not examined his parents to establish his innocence.

13 In her testimony PW 13 Reshma has stated that accused used to beat her on the ground that he used to suspect her fidelity and he was under the impression that those children are not born from him. Accused gone to Nanded around 7.30 a.m. and thereafter he returned home. After his return he was saying that he would take Reshma and children to her parents house, as he does not want them to be in his house. Even at that time there was quarrel between Reshma and accused and had lasted till 11.00 a.m. Thereafter the accused asked the children to wear clothes. The son was in the house but daughter had gone to the house of a neighbour. Thereafter, accused went to call her. Thereafter, both the children sat on the motorcycle of the accused. Kaif occupied the place in front of the accused and Mariya sat as a pillion rider. It was told by the accused that he would be taking the children to see circus, which was stationed at bullock market in Basmath. Thus, she had seen the children leaving with father around 11.00 a.m. Thereafter she says that around 2.00 p.m. police persons arrived at her house and requested herself and her in-laws to accompany them. Accordingly, they went to the spot. They saw the children were killed. They saw that the

throats of the children were cut and the blood was oozing from the injury. The mother-in-law asked accused as to why he has done such act, at that time accused replied that it is done in order to give trouble to Reshma. PW 13 Reshma then states that from the place of incident she went to Police Station and lodged report Exh.49.

14 PW 13 Reshma has been cross-examined at length. It was even tried to ask, as to since when the accused was suspecting her fidelity. She was unable to give the exact time and day, but she was consistent in saying that in the past also understanding was given to the accused, when he used to raise suspicion over her character. She has admitted in cross-examination that the accused was in relation with her even prior to the marriage. Considering his behaviour and other aspects, her parents had approved the accused for marriage with her. She also admitted that her relations with the accused were good, but in the cross-examination further she has stated that accused always used to suspect her fidelity. He was not taking name of the particular person for alleged illicit relations, but she has stated that her parents as well as the parents of the accused had given him understanding. When these facts have been extracted in the cross, those cannot be thereafter refused or denied by the accused. The only aspect that appears to be the improved version is the fact that when her mother-in-law went to the place of

incident and saw that the children are killed, she asked the accused as to why he has done the act and then he has replied that it is for the harassment of the informant. Even if we keep this fact i.e. improvement aside; yet, other facts were important. In the cross-examination it has been told by her that when she went to the spot, she saw weapon in the hand of the accused. It will not be out of place to mention here that the prosecution has come with the case that the said weapon, with which murder has been caused, has then been discovered under Section 27 of the Indian Evidence Act by the accused. If it was already in the hand of accused and there were police persons including the Investigating Officer, why that weapon was not seized at the spot, would be a further question and the discovery cannot be said to be then under Section 27 of the Indian Evidence Act. But, here, we would like to make a distinction about the alleged statement in the cross by PW 13 Reshma. In her examination-in-chief she has not stated, as to where the weapon was, but then that has been extracted in the cross-examination. If that suggestion has to be accepted with the answer thereof, then it can be said that the accused is thereby admitting his presence at the said spot and the fact that the children were found murdered. No advantage can be given of the said contrary fact to the accused based on such extraction of the fact. The other cross-examination is only of denial. It is to be noted that the First Information Report has been lodged promptly. There might be quarrels

between the accused and PW 13 Reshma, but it is hard to believe that the allegations about committing murder would have been made by Reshma with an intention to implicate when her own two children were found murdered. Further, we would harp upon the age of the deceased. One is 04 years old and another is 1½ year old. Any suspicion is always fatal or it causes damage/injury, if the clouds of suspicion are not removed. At the costs of repetition we would say that when the two children were found murdered at a distant place from their house and it has been perfectly established that those children left the house along with the father, then the burden was on the father i.e. accused to prove that under which circumstance he lost the custody of the children. There is also other evidence to support the said fact, which we would be discussing at a later stage.

15 PW 3 Mohd. Gaus is the father-in-law of the accused, who has been examined to prove the motive of murder and the ill-treatment to his daughter i.e. PW 13 Reshma. He had not come to the spot after the murder. He has supported the statements by the daughter that accused used to raise suspicion over her character and, therefore, he used to persuade accused to treat her properly. He has also been cross-examined at length by the accused, however, nothing contradictory has been transpired. Many things have been rather extracted in his cross-examination by the accused. He has stated that

he used to visit the house of accused once in three months to six months and at that time Reshma used to tell him about the ill-treatment given to her by the accused. He says that he used to advise the accused to treat the daughter properly. When this has been extracted in cross, it cannot be further denied by the accused. Therefore, as regards the ill-treatment from the point of view that the accused was raising suspicion over the character of PW 13 Reshma is concerned, it has been established by the prosecution and it is said to be the motive for the accused to commit the crime.

16 PW 11 Shaikh Mubin is the neighbour of the accused. He says that the children of the accused were in his house. When accused came and told that he would be taking the children to watch circus, he had seen the accused taking both the children on his motorcycle. In his cross-examination he has stated that he has come to the house of accused around 12.00 noon and this fact has been harped upon by the learned Advocate for the appellant in saying that PW 13 Reshma says that around 11.00 a.m. accused had left with children, then how PW 11 Mubin would have seen the accused taking both the children from his house around 12.00 noon. The answer is simple. These persons are rustic persons. In her testimony PW 13 Reshma has clearly stated that she is illiterate. Under such circumstance, it is hard to believe that they would tell the exact time. Whatever time they have stated is

approximate and, therefore, it cannot give any advantage to the accused. Same is the case with PW 12 Jilani Khan, who had also seen accused along with the children around 12.30 p.m. on college road. Important point to be noted is that PW 12 Jilani Khan had earlier seen the accused proceeding with the children around 12.30 p.m. on the motorcycle and then when he was on the same road at about 1.00 p.m., a police vehicle was seen by him and then he saw blood stains on the clothes of the accused. He has also said that he had seen the dead bodies of the children, who had sustained cut injury to their throats. In his cross-examination PW 12 Jilani Khan has stated that accused is not in his relations nor he is his friend. In the cross-examination it has been extracted that for what purpose he was on the road and in order to answer the said question he has stated that since he was in search of labour work, it was assured by one Salim that he would be giving work on the construction of a house. The fact that has been extracted from him is that he was knowing the accused prior to the incident also. He had no talks with the accused on that day. He was knowing that the accused was doing a business of purchase and sale the clothes. Accused used to purchase from Nanded and used to sell in the nearby villages of Basmath. After extracting all these things in the cross, it cannot be said that the accused can thereafter deny that the witness was knowing the accused. It is true that he has made some improvements in his statement, but the fact remains is that he had seen the

accused along with his children and after a gap he saw the accused wearing a blood stained clothes. There is no reason to disbelieve PW 11 as well as PW 12 on the point that the children were along with the accused just prior to their death.

17 The testimony of PW 12 Jilani Khan stood supported by PW 1 Police Naik Mr. Sheshrao Lakhade, who is the driver of the police jeep and PW 19 PI Mr. Surjerao Patil. Both of them have stated that around 1.00 p.m. PI Mr. Surjerao Patil told Sheshrao Lakhade that he should take the official vehicle to Bahirjee College. What was told by Mr. Surjerao Patil to Sheshrao Lakhade was that he wants to meet the Principal of the said college, whereas PI Mr. Surjerao Patil says that he was called for a lecture and his lecture was over by 1.20 p.m. Around 1.45 p.m. when they came out of the campus of the college in the jeep, they found that a person on motorcycle bearing No.MH-22-A-6586 was proceeding. They found his clothes to be blood stained and, therefore, PW 19 Mr. Patil stopped him, inquiry was made with him. He gave his name as Syed Wahab Syed Mir i.e. the accused and told the incident that he has committed murder of his two sons on Jawala Khandarban road in front of Jain temple. It is then stated by both these witnesses that the further police staff was called at the said place and the accused was asked to show the place of incident. Accordingly, the jeep was

taken to the said spot, which was by the side of railway track. After the information was extracted about the name, address etc., PW 18 PSI Mr. Mudassirkhan Pathan was sent to bring PW 13 Reshma and the relatives to the place of incident. Even if it is held that the alleged confession by accused to PI Mr. Surjerao Patil and PW 1 Mr. Sheshrao Lakhade could be inadmissible under Section 25 of the Indian Evidence Act; yet, the conduct of the accused and the fact that he was wearing blood stained clothes, stopped by these two police persons near the gate of the college and then the accused leading to the place of offence where the two kids were found murdered, is definitely admissible under Section 8 of the Indian Evidence Act. Both these witnesses have been cross-examined at length on the said point, however, nothing contradictory has been transpired. It cannot be stated that PI Mr. Patil should have lodged the report first and then called the relatives of the accused and deceased. In fact, immediately the identity could have been established and accordingly, the mother of the deceased kids was called and she has immediately lodged the report. Therefore, the testimony of PW 1 Lakhade, PW 19 PI Mr. Patil and PW 18 PSI Mr. Pathan is in corroboration with each other.

18 It has been vehemently submitted that PW 1 Mr. Lakhade in his examination-in-chief itself has stated that the knife was lying there, PW 13

has stated that she had seen the knife in the hand of accused and yet it has been shown to have been discovered by the accused from a nearby Nala and, therefore, doubt is required to be raised in the prosecution story, of which benefit should be given to the accused. We have already dealt with the point about the statement in the cross by PW 13 Reshma regarding the weapon. Here, as regards PW 1 Mr. Lakhade is concerned, the said fact has come in his examination-in-chief and it appears that the learned Prosecutor, who was conducting the case, did not seek any clarification about the said statement. However, it is to be seen from the testimony of PW 1 Mr. Lakhade that initially he has stated that the accused has committed murder of two sons and then he was shown with the clothes seized under the memorandum, he corrected himself by saying that the kids, who were murdered, were the daughter and the son of the accused. Likewise this, he might have confused himself. Further, he being the driver might have witnessed many cases and, therefore, confusion would be obvious. Taking his testimony as it is, it does not give advantage to the accused. In the cross-examination that point was not touched by the learned Advocate for the accused and it was not asked him, as to whether in his presence the said knife was seized by the Police Officer or not. It is rather asked in the cross-examination that he had seen only the dead bodies at the said spot. Further, he has stated that he had not stated before the police that knife was lying at the place of incident. The fact

remains is that he was the person who witnessed the accused having blood stained clothes and then leading to the place of incident where two dead bodies were found.

19 PW 17 Dr. Mohd. Shahi Ahemed is the Medical Officer, who had examined the accused in the process of his arrest. He has stated that he found incised wound on left forearm anteriorly measuring 7 c.ms. x 1 c.m. x skin deep. The injury was simple in nature. The probable weapon would be sharp edged object. He has specifically stated that the age of the injury was between 2-4 hours. He has stated that such type of injury may be self inflicted, and even while causing injury to a child with the help of knife and if there is resistance. Even if we decide not to consider the probable answer or reason for such injury, the fact remains is that the accused had sustained injury and in his statement under Section 313 of the Code of Criminal Procedure the accused has not explained under which circumstances he received the said injury. In the cross-examination nothing contradictory has been transpired and the medical certificate issued by this Doctor has been proved at Exh.63.

20 The Medical Officer, who had conducted the autopsy i.e. PW 2 Dr. Mahendra Barge had ruled out the possibility of injuries on the person of

deceased kids, because of fall from railway and it appears that the accused intended to take advantage of the railway track nearby the dead bodies. However, the autopsy Doctor has completely denied and explained that if the kids would have been thrown from the railway, then it would have resulted in crush injury or abrasions and other injuries and not the cut injury. No doubt, he has admitted that if such person falls on a sharp objection, then the injury to the neck is possible, but it is hard to believe that both the kids would have been thrown in such a position that it will cause cut injury to their neck. In that process similar injuries are not possible. PW 7 Mohd. Hasham is the panch witness to the discovery panchnama of the knife. He has stated that after the statement was made by the accused to discover the knife, accused had taken them to the said spot. There was a cement Nala, wherein accused entered into the said Nala and brought the knife from that place. It has further come in his evidence that the said Nala was dry Nala. Though it appears that the forensic report as regards clothes and seized knife has not been produced, but the fact remains is that PW 7 Mohd. Hasham has stated that when knife was discovered, it had blood stains. In the cross-examination he has given the topography of the said spot. Though the label to the knife was not found, still affixed on the knife on the day of his deposition, we cannot give advantage of the said fact to the accused, since the panch witness has identified the said weapon to have been discovered by the accused before

him. The discovery panchnama is also proved through the Investigating Officer.

21 What we have found while considering the testimony of PW 7 Mohd. Hasham that the learned Additional Sessions Judge has given exhibit to the entire document including the confessional part of the same. Right from the decision in **Pulukuri Kottaya vs. Emperor** [AIR 1947 PRIVY COUNCIL 67] and recently in **Subramanya vs. State of Karnataka** [AIR 2022 S.C. 5110] the Hon'ble Supreme Court has stated that only that part of such statements which amounts to discovery of fact should be held to be admissible and, therefore, it was necessary for the learned Additional Sessions Judge to carve out the inadmissible portion while exhibiting the documents and should have specifically endorsed that the document would be considered only for the admissible portion. This procedural aspect has not been followed in this case; yet, that will not give any advantage to the accused. The said discovery panchnama is perfectly proved under Section 27 of the Indian Evidence Act.

22 PW 8 Balbirsingh Granthi is the shop owner of the shop called "Hari Traders", from where the accused had allegedly purchased the knife, however, he has turned hostile, but his hostility was not fatal to the prosecution.

23 PW 6 Farooqui is the panch witness to the seizure of motorcycle and clothes of victim and he has proved the said panchnama. PW 5 Shaikh Majid is the panch to the spot panchnama. He has proved the panchnama as well as the said spot has been proved through PW 1, PW 13, PW 18 and PW 19. PW 4 PHC Sk. Rahim Sk. Nanhe is the Police Officer who had received the telephonic message from PW 19 Mr. Patil and brought the motorcycle of the accused to the Police Station and also made arrangements to the photographer. PW 15 Badru Khan is the photographer, who has proved the photographs of the dead bodies and the spot. PW 14 PSI Mr. Vivek Sonwane is also the Police Officer, who went to the spot after receiving the call from PI Mr. Patil and he supports testimony of PW 1 Mr. Lakhade and PW 19 Mr. Patil.

24 Thus, it is to be noted that from the evidence that has been produced, the prosecution was able to prove the chain of circumstances, rather it was the strong chain of circumstances because the kids were 04 years and 1½ year old. They could not have gone to the said place unless would have been taken by somebody. Though PW 13 Reshma says that the accused used to quarrel with her and he used to raise suspicion over her character; yet, she would not have had reason to implicate the accused. Here, in this case, the accused has not examined his parents to prove that

everything was well in the marital life of the accused and he had no reason for any doubts. When the chain of circumstance is strongly proved, it can be said that prosecution had proved the offence beyond reasonable doubt against the accused. We do not find the Judgment of the learned Trial Judge as perverse or illegal in any manner.

25 The only fact that remains is about the sentence. As aforesaid, when we are saying that the accused had committed murder of his both children, which can be said to be independent offences punishable under Section 302 of the Indian Penal Code liable to be punished; yet, whether the sentences would run concurrently or consecutively, would have been a question. Here, in this case, the learned Trial Judge has awarded the sentences to run consecutively. Though some reasons have been given, whether those reasons for awarding such sentences were legal or not is also required to be considered, though this point was not raised on behalf of the appellant.

26 We would like to rely on the Constitution Bench decision in **Muthuramalingam and others vs State represented by Inspector of Police** reported in **(2016) 8 Supreme Court Cases 313**. A Bench comprising of five Judges of the Hon'ble Supreme Court had referred the question - "Whether

consecutive life sentences can be awarded to a convict on being found guilty of a series of murders for which he has been tried in a single trial ?” The Hon’ble Constitution Bench has explained Section 31(1), 427, 432 to 433-A of the Code of Criminal Procedure and made following observations. Several Judgments of the Hon’ble Apex Court were considered for those observations.

“7. A careful reading of the above would show that the provision is attracted only in cases where two essentials are satisfied viz. (1) a person is convicted at one trial, and (2) the trial is for two or more offences. It is only when both these conditions are satisfied that the Court can sentence the offender to several punishments prescribed for the offences committed by him provided the Court is otherwise competent to impose such punishments. What is significant is that such punishments as the Court may decide to award for several offences committed by the convict when comprising imprisonment shall commence one after the expiration of the other in such order as the Court may direct unless the Court in its discretion orders that such punishment shall run concurrently. Sub-section (2) of Section 31 on a plain reading makes it unnecessary for the Court to send the offender for trial before a higher Court only because the aggregate punishment for several offences happens to be in excess of the punishment which such Court is competent to award provided always that in no case can the person so sentenced be imprisoned for a period longer than 14 years and the aggregate punishment does not exceed twice the punishment which the court is competent to inflict for a single offence.”

Further, in paragraph No.18 it has been observed thus -

“18. The legal position is, thus, fairly well settled that imprisonment for life is a sentence for the remainder of the life of the offender unless of course the remaining sentence is commuted or remitted by the competent authority. That being so, the provisions of Section 31 under Cr.P.C. must be so interpreted as to be consistent with the basic tenet that a life sentence requires the prisoner to spend the rest of his life in prison. Any direction that requires the offender to undergo imprisonment for life twice over would be anomalous and irrational for it will disregard the fact that humans like all other living beings have but one life to live. So understood Section 31 (1) would permit consecutive running of sentences only if such sentences do not happen to be life sentences. That is, in our opinion, the only way one can avoid an obvious impossibility of a prisoner serving two consecutive life sentences.”

Further, in paragraph No.23 it is observed thus -

“23. The Parliament, it manifests from the provisions of Section 427 (2) Cr.P.C., was fully cognizant of the anomaly that would arise if a prisoner condemned to undergo life imprisonment is directed to do so twice over. It has, therefore, carved out an exception to the general rule to clearly recognise that in the case of life sentences for two distinct offences separately tried and held proved the sentences cannot be directed to run consecutively. The provisions of Section 427 (2) apart, in Ranjit Singh’s case (supra), this Court has in terms held that since life sentence implies imprisonment for the remainder of the life of the convict, consecutive life sentences cannot be awarded as humans have only one life. That logic, in our view, must extend to Section 31 of the Cr.P.C. also no matter Section 31 does not in terms make a provision analogous to Section 427 (2) of the Code.

The provision must, in our opinion, be so interpreted as to prevent any anomaly or irrationality. So interpreted Section 31 (1) Cr.PC. must mean that sentences awarded by the Court for several offences committed by the prisoner shall run consecutively (unless the Court directs otherwise) except where such sentences include imprisonment for life which can and must run concurrently. We are also inclined to hold that if more than one life sentences are awarded to the prisoner, the same would get superimposed over each other. This will imply that in case the prisoner is granted the benefit of any remission or commutation qua one such sentence, the benefit of such remission would not *ipso facto* extend to the other.”

No doubt, in the said case before the Hon’ble Supreme Court also the appellants were tried for several offences including the offence punishable under Section 302 of the Indian Penal Code for several murders allegedly committed by them for a single incident. They were found guilty. In that case also the sentence of imprisonment for life for each one of the murder was directed to run consecutively and under the said circumstance the above observations have been made. Therefore, taking into consideration those observations, here, in this case, the Judgment under challenge is passed on 31.08.2015, whereas Constitution Bench decision came on 19.07.2016. That means, it is subsequent to the impugned Judgment in this case by the Trial Court. Under such circumstance, we are required to consider the above said legal position though we are dismissing the appeal; yet, the modification

is required as regards the sentence is concerned to the extent that both the sentences to run concurrently and not consecutively. Hence, we pass following order.

ORDER

1 The Criminal Appeal stands dismissed. However, as regards the order “both the sentences shall run consecutively”, it stands quashed and modified as follows :

“3 Both the sentences shall run concurrently”.

2 It is made clear that there is no change in the other part of the order passed by the learned Trial Judge.

3 The fees of appointed Advocate is quantified at Rs.10,000/- (Rupees Ten Thousand only), to be paid by the High Court Legal Services Sub Committee, Aurangabad.

(Y.G. Khobragade, J.)

(Smt. Vibha Kankanwadi, J.)