

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

**CRIMINAL APPEAL NO.579 OF 2019**

Balasaheb S/o Babasaheb Bhagat  
Age-25 years, Occu – Agril,  
R/o Bhagat Vasti, Devgaon,  
Tq. Newasa, Dist. Ahmednagar

..APPELLANT  
(Orig. Accused No.1)

-VERSUS-

The State of Maharashtra  
Through Police Inspector  
Sonai Police Station, Tq. Newasa,  
Dist. Ahmednagar

..RESPONDENT

WITH

**CRIMINAL APPEAL NO. 611 OF 2019**

Bhanudas S/o Ganpat Dhedge @ Bhagat  
Age : 70 years, Occ : Agri.,  
R/o Bhagat Wasti, Devgaon,  
Tq. Newasa, Dist. Ahmednagar

..APPELLANT  
(Ori. Complainant)

-VERSUS-

1. The State of Maharashtra  
Through Police Inspector,  
Sonaee Police Station,  
Ta. Newasa, Dist. Ahmednagar.
2. Sangita Shankar Dhedge @ Bhagat  
Age : 29 years, Occ : Agri.,  
R/o Bhagat Vasti, Deogaon,  
Ta. Newasa, Dist. Ahmednagar  
Now at present :  
C/o Bhaurao Ashok Waje  
At post. Vambori, Tq. Rahuri,  
Dist. Ahmednagar.

..RESPONDENTS  
(Resp. No.2 is Ori. Accused No.2)

WITH  
CRIMINAL APPEAL NO. 612 OF 2019

Bhanudas S/o Ganpat Dhedge @ Bhagat  
Age : 70 years, Occ : Agri.,  
R/o Bhagat Wasti, Devgaon,  
Tq. Newasa, Dist. Ahmednagar

..APPELLANT  
(Ori. Complainant)

-VERSUS-

1. The State of Maharashtra  
Through Police Inspector,  
Sonaee Police Station,  
Ta. Newasa, Dist. Ahmednagar.

2. Balasaheb Babasaheb Bhagat  
Age : 23 years, Occ : Agril.,  
R/o Bhagat Vasti, Deogaon,  
Ta. Newasa, Dist. Ahmednagar

..RESPONDENTS  
(Resp. No.2 is Ori. Accused No.2)  
WITH

APPLICATION FOR LEAVE TO APPEAL BY STATE NO. 183 OF 2019

The State of Maharashtra  
Through :  
Police Inspector,  
Sanaee Police Station,  
Taluka Newasa,  
Dist. Ahmednagar

..APPLICANT/APPELLANT  
(Ori. Complainant)

-VERSUS-

1. Balasaheb Babasaheb Bhagat  
Age : 23 years, Occ : Agril.,

2. Sangita Shankar Dhedge @ Bhagat  
Age : 27 years, Occ : Agri.,

Both R/o Bhagat Vasti, Deogaon,  
Tq. Newasa, Dist. Ahmednagar.

..RESPONDENTS  
(Orig. Accused Nos.1 & 2)

....

Mr. K.N. Shermale, Advocate for appellant in Appeal No.579/2019.

Mr. V.B. Jagtap, Advocate for appellant in Appeal Nos.611/2019 and 612/2019.

Mr. S.D. Ghayal, APP for respondent in Appeal Nos.579/2019, 611/2019 & 612/2019 and applicant in ALS No.183/2019.

Respondent No.2 in Criminal Appeal No.611/2019 and ALS No.183/2019 is absent.

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**CORAM : R.G. AVACHAT AND  
SANJAY A. DESHMUKH, JJ**

**RESERVED ON : 13<sup>th</sup> JUNE, 2023  
PRONOUNCED ON : 12<sup>th</sup> SEPTEMBER, 2023**

**JUDGMENT (Sanjay A. Deshmukh, J.):**

1. A Criminal Appeal No.579 of 2019 is preferred by the accused no.1 against the judgment dated 17.05.2019 passed by the learned Additional Sessions Judge, Newasa, Dist. Ahmednagar, in Sessions Case No.27 of 2017. He was convicted for life imprisonment under section 302 of the Indian Penal Code, 1860 (for short the IPC).

2. A Criminal Appeal No.611 of 2019 is preferred by the informant against the impugned judgment of acquittal of the appellant-accused no.2 from offences punishable under sections 302, 201 r/w 109 of the IPC. Respondent no.1/Accused no.2 though duly served with the notice of this appeal remained absent.

3. A Criminal Appeal No.612 of 2019 is preferred by the informant Bhanudas against the impugned judgment for awarding the death sentence to

accused no.1.

4. An application No.183 of 2019 is preferred by the State Government seeking leave to challenge the impugned judgment against accused no.1 for the offences punishable under sections 120-B and 201 of the IPC and against accused no.2 for all the charged sections from which they were acquitted.

**PROSECUTION'S CASE :-**

5. Informant Bhanudas Ganpat Dhedge is father of victim Shankar and uncle of accused no.1. Shankar is husband of accused no.2. They have two children. Informant and his four brothers are residing separately in the village Deogaon, Tq. Newasa, Dist. Ahmednagar. Their houses are situated adjacent to each other near to their agricultural lands. The illicit relationship was developed between accused no.1 and 2 before six months of the incident. They were found while talking with each other. A doubt about their illicit relationship was created in the mind of Shankar, and informant. Therefore, quarrel used to take place between Shankar and accused no.2 frequently. Accused nos.1 and 2 were planning to eliminate Shankar as he was an obstacle in their illicit relationship.

6. In the afternoon of 31.03.2017 a quarrel took place between accused no.2 and Shankar on account of her illicit relationship with accused no.1. She made phone call to accused no.1 secretly and they hatched conspiracy to eliminate Shankar. She instigated accused no.1 to commit

murder of Shankar. She informed him that Shankar has planned to water the corn's crop on that night. She told him to give the live current of electricity on to an electric motor pump of that water well, so that Shankar would suffer electrocution and die.

7. The informant and Shankar went to their farm for watering the corn crop on 01.04.2017 at about 2.30 a.m.. They reached near to their water well. The informant proceeded ahead and Shankar went to start the electric motor pump of the water well. No sooner informant reach 80-90 feet, he heard hue and cry of Shankar. He turned back immediately and rushed towards Shankar. In the light of his torch, he saw that accused no.1 was assaulting Shankar by iron rod. Shankar fell down. He was crying and moaning. That time, informant enraged and shouted on accused no.1. He asked him as to why he assaulted Shankar ? That time accused no.1 told him that he is having illicit relationship with accused no.2 and Shankar is frequently beating her, therefore, she directed to eliminate him, therefore, he assaulted him. Thereafter accused no.1 ran away with that iron rod. Informant made hue and cry. Hearing that his nephews Sanjay (PW-1) and Laxman came there. He told them that accused no.1 assaulted Shankar by iron rod. Some other persons came there. Sanjay and other persons took Shankar to the Civil Hospital at Ahmednagar. There doctor examined him and declared that he is dead.

8. Incident of murder of Shankar was informed to Police Station

Newasa, Dist.Ahmednagar. In the morning of 01.04.2017. API S.S. Patil immediately went there. Shri Patil got phone numbers of both accused from informant. He sent requisition letter to the Superintendent of Police, Ahmednagar for calling call details etc., of mobile phone calls of both accused bearing nos. 7741856201 and 7720989694 respectively. He called the dogs squad but nothing was revealed by it. Informant told him that accused no.1 confessed before him that he committed murder of Shankar.

9. The A.D. was registered in Topkhana Police Station, Ahmednagar, Dist. Ahmednagar. Inquest was drawn up. The postmortem was conducted on 01.04.2017 at Aurangabad. The funeral was conducted at late hours of 01.04.2017. Thereafter on 02.04.2017 at about 1.14 am a report was lodged in the Police Station, Newasa, Dist. Ahmednagar by Bhanudas father of Shankar. A crime bearing C.R. No.89/2017 under sections 302, 201, 120-B r/w 109 of the IPC was registered against both the accused.

#### **INVESTIGATION :-**

10. Investigation of the crime was assigned to Investigating Officer (for short, I.O.) Shri S.S. Patil, API, Police Station, Newasa, Dist.Ahmednagar on 02.04.2007. On the same day, he arrested the accused. He drew a spot panchanama of scene of occurrence and seized soil mixed with human blood etc. He recorded statements of the witnesses.

11. I.O. Shri Patil received papers of A.D. from Topkhana Police Station, Ahmednagar, Dist. Ahmednagar. He seized the blood stained clothes

on the person of Shankar, which he wore at the time of incident.

12. Accused no.1 made voluntary disclosure on 04.04.2017 before I.O. Shri Patil and panchas that he is ready to produce the iron rod used for assaulting Shankar and his blood stained clothes, which he wore at the time of incident as well as mobile hand set used for calling accused no.2. The memorandum panchanama of that disclosure was drawn up. Accordingly accused no.1 in the presence of panchas took out and handed over those articles. The seizure panchanama of these articles was drawn up.

13. Accused no.2 also made voluntary disclosure on 04.04.2017 before I.O. Shri Patil and panchas that she is ready to hand over the mobile hand set which she used for calling accused no.1. Accordingly, memorandum panchanama of it was drawn up. She in the presence of panchas took out and handed over that mobile hand set from bathroom of courtyard of her house. It's seizure panchanama was drawn up.

14. I.O. Shri Patil sent iron rod, shirt of accused no.1 and clothes of Shankar as well as his viscera and blood samples etc., to the Forensic Laboratory for analysis and report.

15. I.O. Shri Patil collected postmortem report. He sent letter for recording statement of informant (PW-1) and Sagar Bhausahab Kale (PW- 5) under section 164 of the Criminal Procedure Code, 1973 (for short, the Cr.P.C.) to the learned Judicial Magistrate, First Class, Newasa (for short, the JMFC). Those were recorded. He filed charge-sheet in the Court of JMFC,

Newasa. The case was committed to the Additional Sessions Court, Newasa, Dist. Ahmednagar. The C.A. reports were received and submitted on the record in the sessions case later on.

**CHARGE:-**

16. The charge (Exhibit -16) was framed against accused no.1 for the offences punishable under sections 302 and 201 of the IPC for commission of murder and causing disappearance of evidence of murder of Shankar, as well as against both accused for hatching conspiracy for commission of his murder for the offence punishable under section 120-B of IPC. An alternative charge was also framed against accused no.2, that she abetted accused no.1 for the commission of murder of Shankar for the offence punishable under section 109 of the IPC.

**DEFENCE :-**

17. The defences of the accused are that of the denial and falsely implication of accused no.1 due to earlier enmity with the father of accused no.1, that some thieves might have murdered Shankar and that there was enmity between Shankar and some members of brotherhood; and therefore, they might have committed his murder.

18. We have perused the impugned judgment, entire matter before us and grounds of objections raised in all the appeals and application for leave to file appeal. The parties are referred to their original status in the trial.

19. To rebut the presumption of innocence of the accused, prosecution

recorded oral evidence of eight witnesses. The trial Court came to the conclusion that accused no.1 has committed murder of Shankar. He was held liable under section 302 of the IPC and he was sentenced for life imprisonment. He was acquitted from rest of the charges. Accused no.2 was acquitted from all the charge.

**ADMITTED FACTS :-**

20. Admitted material facts are that, the occurrence of incident of Murder of Shankar, spot of occurrence of incident is 300 feet away from the houses of informant and accused, A.P.I. S.S. Patil reached on the spot of occurrence of incident in the morning of 01.04.2017, a dog squad was called but it failed to trace and point out any doubtful person or thing, the accused no.2 was accompanied with Sanjay (PW-2) when Shankar was taken to the hospital after the incident at Newasa, the postmortem was conducted at Aurangabad, last rites were performed in the late night of 01.04.2017, accused no.2 was present for last rites of Shankar, the report was lodged at 1.14 a.m. on 02.04.2017, accused no.1 is son of paternal aunt of Sagar Kale (PW-5), the phone number of accused no.1 is 7741856201, phone number of Sagar (PW-5) is 8600910447 and connection of phone number 7720989694 was in the name of Shankar.

**HOMICIDAL DEATH OF SHANKAR :-**

21. Learned Advocate for accused no.1 conceded that there is material and sufficient evidence of homicidal death of deceased Shankar, which is

proved by clear and convincing oral evidence of Dr. Manoj Patekar (PW-4) who conducted postmortem on the body of Shankar. The postmortem report is at Exhibit-30. This oral and documentary evidence is not disputed by the defence. Therefore, it is not necessary to discuss these evidences here in detail. The homicidal death of deceased Shankar is proved by the prosecution beyond reasonable doubt. The reasons of the trial Court in this regard are legal and correct. But there is no clear cut finding that homicidal death is proved. However, first four incised wounds caused by iron rod to the head of Shankar are disputed by defence. Dr. Patekar (PW-4) also admitted that those injuries are not possible by iron rod. We will consider those incised wounds in the relevant part of the reasons of this judgment.

**EYE WITNESSES AND OVERT ACT OF ACCUSED NO.1 :-**

22. The evidence of informant (PW-1) is adduced by the prosecution to prove three important facts in issue i.e. (i) motive for commission of murder of Shankar, (ii) he was an eye witness to the incident of murder, and (iii) alleged extra judicial confession made by the accused no.1 before him as soon as he assaulted Shankar.

23. Informant (PW-1) deposed mostly as per the prosecution story that we noticed that, illicit relationship was developed between accused nos.1 and 2, therefore, the quarrel used to take place between Shankar and accused no.2 frequently. On that day he went along with Shankar for watering the corn crop, he proceeded ahead and Shankar proceeded towards the water

well to start electric motor pump. No sooner informant reached upto 80 to 90 feet from that water well, he heard hue and cry of Shankar. He immediately rushed back to him. He saw in the light of his torch that accused no.1 is assaulting Shankar with an iron rod. He shouted on him and asked him as to why he assaulted Shankar ? That time, accused no.1 said that “he is having illicit relationship with accused no.2. Shankar was causing obstacles in their relationship. Accused no.2 told him to eliminate him. Therefore, he assaulted him.” Thereafter he ran away with that iron rod. Shankar was unable to speak and he was profusely bleeding and moaning with pain. After hearing hue and cry of informant, his nephews Sanjay Dhedge (PW-2) and Laxman Dhedge came there. They and other persons took Shankar from that place to the hospital at Newasa. There he was declared dead. He lodged the report (Exhibit-25) on 02.04.2017 after funeral of Shankar was over. His statement (Exh.26) was recorded under section 164 of the Cr.P.C.

24. Sanjay Dhedge (PW-2) deposed that he heard hue and cry of informant (PW-1), he was saying that accused no.1 Balu assaulted Shankar, he immediately went there on the spot of occurrence of incident, suspicion was developed about illicit relationship between these accused and he noticed that illicit relationship.

25. I.O. Shri Patil (PW-7) deposed that in the morning of 01.04.2017, he went to the place of occurrence of incident. He called dog squad there. He got phone numbers of accused no.1 and Shankar. He sent letter Exhibit-51 for

getting details of their phone calls. He came to know from informant that accused no.1 assaulted Shankar. He proved Exhibit-52 to 57 the documentary formal evidence of receipt of articles and correspondence made by him etc. He further deposed manner in which he carried out and completed investigation of this crime.

**DELAY FOR LODGING REPORT :-**

26. It is well settled that the delay for lodging report itself does not diminish its evidential value automatically. The Court has to see whether there were chances of false implication and whether there is actual false implication of the accused or not. The facts of each case are decisive for it. The report was lodged after 21 hours of the incident of Murder, which reveals from admitted facts. The explanation/reasons given by prosecution for delay caused for lodging the report are that informant was under the grief of murder of his son and funeral was not over till late night of 01.04.2023.

27. The learned advocate for accused no.1 pointed out the grounds of objection of the appeal filed by him. He submitted that the trial Court erred in appreciating evidences of informant (PW-1) and Sanjay (PW-2) in its proper perspective. He pointed out the conducts of these witnesses. Unreasonable delay caused for lodging the report is not satisfactorily explained by prosecution. It was not considered as reasonable doubt for which accused no.1 is entitled. He prayed to allow the appeal of accused no.1.

28. The learned APP for the State and learned advocate for informant

pointed out the grounds of objections in their appeals as well as Application for Leave to file appeal filed by State Government. They strongly opposed to the appeal filed by accused no.1 by contending that reasons and finding for his conviction are legal and correct in respect of eye witnesses informant (PW-1) and Sanjay (PW-2). Their evidences are sufficient evidences to hold both accused guilty for murder. There is no such unreasonable delay caused for lodging report. They prayed to dismiss the appeal of the accused and allow their appeals and application.

29. It has come on record in the cross-examination of informant (PW-1) that he told to I.O. Patil (PW-7) that he saw that accused no.1 assaulted Shankar. But I.O. told him to come to the Police Station, Newasa, Dist.Ahmednagar to lodge report. I.O. Patil (PW-7) called dog squad and also immediately sent letter (Exhibit-51) for getting phone call details of accused no.1 and Shankar instead of promptly lodging of the report against accused when he got that information of cognizable offence of murder of Shankar subsequent conducts of informant and I.O. Patil are not natural but reasonably doubtful. When the informant perceived the fact that accused no.1 had assaulted Shankar and he told that to I.O. (PW-7), there was no any obstacle for him to proceed to lodge the report immediately against both accused.

30. There are two more important circumstances, one is that if informant was knowing the fact that illicit relationship of accused was reason

of murder of Shankar and on instigation of accused no.2, accused no.1 committed murder of Shankar then how informant or his other family members did not object her to go with Shankar to the hospital and to attend his funeral. This subsequent conduct of informant and his family members is not natural and those create reasonable doubt about his presence there when Shankar was assaulted. Another important doubtful is that as per P.M. report (Exhibit-30) four incised wounds were found on the head of Shankar as deposed by Dr. Manoj Patekar (PW-4) but no such sharp edged weapon is seized by the I.O..

31. Dr. Patekar admits that incised wounds are not possible by iron rod. This creates a reasonable doubt about the perceiving of the assault on Shankar by informant (PW-1) by the iron rod. The material corroborative evidence of sharp edged weapon is not brought on record by the prosecution. It is also reasonable doubtful circumstance. Therefore, reasonable inference can be drawn that informant was not present at the time of incident of murder of Shankar. It is well settled that extra judicial confession must be promptly brought to the notice of Police or I.O. and it must be recorded immediately to ensure its credibility. It is because it is easy to allege and fabricate. It is not acceptable that informant or anybody did not insist for lodging of the report against the accused for entire day, even when accused no.1 was known to them as assaulter of Shankar. These subsequent conducts of informant (PW-1) and I.O. Patil (PW-7) as per section 8 of the Indian

Evidence Act are not natural but reasonably doubtful. Therefore reasonable inference can be safely drawn from their conducts that informant was not present there at the time of alleged assault and he did not perceive alleged assault made by accused no.1 on Shankar and no extra judicial confession was made to him by accused no.1. Therefore, explanation given by prosecution for 21 hours delay caused for lodging the report, is not natural, probable and acceptable. Accused came with defence of earlier enmity. There were chances of false implication of the accused, which can be safely inferred from the conduct of informant that delayed report was lodged after deliberation. For the reasons discussed above, evidence of informant (PW-2) as an eye witness of the incident of commission of murder of Shankar by accused no.1 is not found natural, probable and acceptable. The trial Court erred and failed to appreciate evidences of informant (Pw-1), Sanjay (PW-2) and I.O. Patil (PW-7) in its proper perspective and come to the wrong and illegal conclusion in this regard. Therefore, argument of learned APP and learned advocate for informant are not acceptable in this regard. We hold that there was unreasonable and unexplained delay caused for lodging of report and it is reasonably doubtful circumstance against the prosecution.

**MOTIVE AND OVERT ACT OF ACCUSED NO.1 :-**

32. It is well settled that it is not necessary to prove motive in each and every case. But if the case is based on circumstantial evidence then motive must be proved. However, facts of each case are decisive. The Court

has to exercise judicious discretion and decide whether proving of motive is necessary or not.

33. The learned advocate for accused pointed out the improvements in the evidences of informant (PW-1) and Sanjay (PW-2). Informant (PW-1) admits in his cross-examination, that he had not stated while lodging the report that he noticed that there was illicit relationship between these accused. Sanjay (PW-2) admits that he did not state while recording of his statement that he noticed illicit relationship between these accused. The motive is not proved. There is no eye witness to the alleged incident, however, the learned trial Court grossly erred in appreciating the evidence of PW 2 and believed him and informant (PW-1) as reliable witnesses. Accused no.1 is entitled for benefit of doubt. The reasons and findings given by the learned trial Court are not sustainable in the eye of law. He lastly prayed to acquit the accused no.1.

34. The learned A.P.P. for the State and learned advocate for the informant submitted that informant has specifically deposed that quarrel took place between accused no.2 and Shankar in the afternoon of 31.03.2017 is sufficient evidence of motive, and that reasons and findings of the trial court are convincing and correct. No interference is warranted in it. They prayed to hold accused no.2 guilty and sentence accused no.1 to death penalty.

35. In the report Exhibit -25 and statement Exhibit-26 of informant recorded u/s 164 of the Cr.P.C. he stated that he noticed that accused no.1

was frequently talking with Sangita, therefore, there was doubt about their illicit relationship and his son Shankar was doubting her character and quarrel used to take place between them. On 31.03.2017 in the afternoon the quarrel took place between them. But there was doubt about it, which means it was only guess work or inference of informant (PW-1). It is not perceived evidence. The guess or inference is no evidence in the eye of law. There was doubt in his mind about the alleged illicit relationship between accused. It means he was not firm about it. Except the incident dated 31.03.2017, no independent and specific evidence of any such earlier incident of alleged quarrel on account of illicit relationship between Shankar and accused no.2 is brought on record to corroborate the evidence of informant on the point of motive for commission of murder of Shankar. The improvements in the evidences of informant (PW-1) and Sanjay (PW-2) as discussed above creates reasonable doubt that they have never noticed alleged illicit relationship between these accused. They improved and stated these facts in their evidences. If doubt about illicit relationship was in the mind of informant and accused no.1 has confessed to him that he committed murder of Shankar on the instigation of accused no.2, how can informant and other family members allow her to accompany Shankar to the hospital and to attend his funeral is a serious and reasonable doubt. This conduct of informant is not natural but reasonably doubtful. Therefore, presumption of genuineness as per section 80 of the Indian Evidence Act will not come to aid to the statement (Exh.26) of

informant (PW-1) which was recorded under section 164 of the Cr.P.C. to presume that it is genuine. This presumption is rebutted by the defence in the cross-examinations of informant (PW-1), Sanjay (PW-2) and I.O. Patil (PW-7) as well as by pointing out the conducts of informant and I.O. (PW-7) that they remained silent for about 21 hours after the incident and did not lodge the report promptly. However, trial Court did not discuss evidence of informant (PW-1) with reference to the presumption under section 80 of the Indian Evidence Act as to whether it is applicable or not or it is rebutted or not by the defence side. Therefore, evidence of informant (PW-1) without any corroboration that there was quarrel between Shankar and accused no.2 on account of illicit relationship is not probable and acceptable. It is because there was unreasonable delay caused for lodging report and best possible evidence of any family member or neighbourer was not brought on record to corroborate the evidence of informant (PW-1) about the alleged quarrel between Shankar and accused no.2.

36. The evidence of Sanjay (PW-2) is that first he heard shouts and then he went there. But his evidence is vague and not acceptable that he heard shouts of informant (PW-1) and that time he was saying that accused was beating Shankar is not probable. Such listening from 300 feet is not probable. The trial Court believed this piece of evidence as corroborative evidence to the evidence of informant (PW-1). For that, the reason given by the trial Court is that defence did not deny his evidence. But advocate's

mistake is not proof. It is well settled that advocate is not appointed to give admission or waive rights of accused. When informant's evidence is not found reliable and the trial Court held in para nos.35 and 36 that conviction cannot be based on his evidence, how evidence of Sanjay (PW-2) can be used as corroborative piece of evidence to believe evidence of informant (PW-1) is a serious question ? Trial Court erred in holding in para no.38 of the impugned judgment that evidence of informant (PW-1) is corroborated by the evidence of Sanjay (PW-2). The informant's evidence was once held not reliable and thereafter it was held reliable with corroboration of evidence of Sanjay (PW-2). It is not permissible in law to disbelieve the evidence of witness first and also believe him again. Law and Courts are for certainty. The reasons and findings of trial Court in this regard are self contradictory and not sustainable in the eye of law. The trial Court erred in believing the hearsay evidence of Sanjay (PW-2) that he heard from informant (PW-1) that accused was beating Shankar, is a reliable piece of evidence as per principle of *res gestae* under section 6 of the Indian Evidence Act. It is not even hearsay evidence as the evidence of informant (PW-1) is not found reliable about alleged perceiving of incident of assault made by accused no.1 on shankar and also about making of extra judicial confession to him at that relevant time as discussed above as those were doubtful subsequent conducts of informant (PW-1) and that of I.O. Patil (PW-7).

37. The principle of *res gestae* under section 6 of the Indian Evidence

Act was wrongly applied by the trial Court to the hearsay evidence of Sanjay (PW-2). The trial Court erred and failed to comprehend that there is distinction between the substantive and corroborative evidences. The “corroborating evidence” as per Black’s Law Dictionary means “the evidence that differs from but strengthens or confirms what other evidence shows” and the “substantive evidence” means “the evidence that a reasonable mind could accept as adequate to support a conclusion or evidence beyond scintilla”. Thus substantive evidence means an evidence to which no corroboration or support is required to hold that fact is proved. The corroborative evidence means weaker or partially reliable evidence to which support of other evidence is necessary to hold that fact in issue is sufficiently or fully proved. It is well settled that corroboration is rule of law (e.g. illustration (b) of section 114 of the Indian Evidence Act) as well as rule of prudence. The prudence means judicial discretion of the Court to decide whether corroboration is required or not. The Court cannot finally decide or conclude on the basis of only corroborative evidence that fact in issue is proved particularly while deciding criminal liability of the accused in criminal case where strict proof is required. The conviction cannot be based only on corroborative evidence. Only exception to it is that if the case is based on circumstantial evidences and if complete chain of the circumstances through corroborative evidences is proved beyond all reasonable doubts to draw irresistible inference and conclusion of existence of fact in issue and that particular accused is only

author of the crime and no one else. Thus trial Court failed to comprehend distinction between the concepts of substantive evidence (mostly perceived by the senses and reliable) and corroborative evidence (generally weaker or partly reliable) in its proper perspective and erred in law and facts by believing evidence of informant (PW-1) and Sanjay (PW-2).

38. The trial Court also erred in relying upon precedential law of *Omsing Vs State* reported in *1997 Cr.L.J. 2419 (Rajasthan)* in which law is laid down that, when an eye witnesses spontaneously told the person reaching that place, immediately after occurrence about the incident and the culprits, their evidence is held to be relevant.

39. We noticed in para no.36 of the impugned judgment that though two more case laws were cited by the defence ratio's in it were not carved out and discussed in it. Further, how and why those are applicable or inapplicable is not clearly mentioned in the judgment by the trial Court with its material facts with convincing reasons. The Court has to marshal case law with its ratio or principle in the judgments. Further separate reasons must be given in the judgment as to its applicability or inapplicability and why it is relied upon or why not with its peculiar set of facts and argument of other side. Further it is well settled that criminal cases cannot be decided on the basis of case laws and matter before Court is always decisive. The trial court erred while considering these precedential laws.

40. The prosecution's evidence about alleged illicit relationship

particularly evidence of informant (PW-1) is not only vague but untrustworthy as there was unreasonable and doubtful delay caused for lodging the report, which cannot be safely relied. The part of evidence is guess or inference, which is not evidence and it cannot be relied upon. There is no corroboration to the incident of quarrel between Shankar and accused no.2 on account of the alleged illicit relationship as deposed and stated by informant in his report (Exhibit-25) and statement (Exhibit-26), which is reasonably expected.

41. We noticed that during the cross examination of the informant (PW-1) totally irrelevant questions that too one full page in respect of doubtful death of his wife and her funeral etc were allowed to be asked and recorded in the deposition. To test the veracity of the informant (PW-1) such questions and evidence is not relevant at all in the facts and circumstances of this case. The suspicious death of wife of informant that too took place before 20 years back was not fact in issue in this case. However, these questions were allowed to be asked which were totally irrelevant and inadmissible in the facts of this case. Learned APP in the trial Court also did not object it. Not only this, such totally irrelevant and inadmissible evidence is discussed by the trial Court in para no.22 of the impugned judgment of remote evidence. The trial Court erred and failed to perform its role as master of his Court to curtail such inadmissible evidence as per section 136 of the Indian Evidence Act. The object of Indian Evidence Act is to save time of the Court for speedy disposal

of the cases and speedy justice to the parties. The trial Court erred and failed to control the cross-examination of defence and to exercise discretion as per procedural powers vested in it under section 136 of the Indian Evidence Act to decide relevance and admissibility of the questions put to informant (PW-1) which were totally irrelevant about the suspicious death of his wife. The relevant evidence is not always admissible as per the Indian Evidence Act. But only because the trial Court erred as discussed above, it is not ground to acquit the accused. In order to have active participation of the trial court in the trial, the Hon'ble Supreme Court guided in the case of ***Ram Chander Vs. The State of Haryana, AIR 1981 SC 1036***, as under :-

“The adversary system of trial being what is is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth.”

42. The trial Court has not given reasons and finding about proof of existence or non-existence of motive that either it is proved or not or proving of it is necessary or not in the facts and circumstances of this case as per

definition of “Proved” as defined in the section 3 of the Indian Evidence Act.

43. As discussed above, the evidence of informant (PW-1) is not found trustworthy. It is not reliable evidence of overt act of accused no.1. The defence disproved evidence of informant (PW-1), Sanjay (PW-2) and I.O. Patil (PW-7) on the basis of principle of preponderance of probability. We hold that the prosecution failed to prove its case based on the oral evidences of an eye witness informant (PW-1), Sanjay (PW-2) and documentary evidence of report (Exhibit-25) and statement (Exhibit-30), as discussed above beyond reasonable doubt. Hence both accused are entitled for benefits of reasonable doubts. The findings of trial court regarding accused no.1 are not legal and correct. Therefore, the arguments of learned A.P.P. for the State and learned advocate for the informant are not accepted in this regard.

#### **CIRCUMSTANTIAL EVIDENCES :-**

##### **(I) SEIZURE OF PHONES AND CALL DETAILS :-**

44. To prove seizure of mobile phones, Talathi Sham (PW-3) and I. O. Patil (PW-7) deposed that both accused made disclosure before them and handed over those and in his presence it's memorandum and seizure panchanamas Exhibit-44 and 45 were drawn up. As per recovery and seizure panchanama at the instance of accused nos.1 and 2, they handed over the mobile hand sets Articles G and H as per section 27 of the Indian Evidence Act and accordingly disclosure as well as recovery and seizure panchanamas Exhibit-47 to Exhibit-49 were drawn up. Same facts are deposed by I.O. Patil

(PW-7). Therefore, it is not necessary to discuss his same evidence here.

45. To prove ownership and the call details of these mobile phones, Sachin (PW-6) Nodal Officer of Idea Cellular Company deposed that as per the letter received from I.O., he sent phone call details and copies of the applications for getting those phone connections etc. at Exhibits- 38 to 41. He also proved tower location certificate of these phone numbers at Exhibit-42 and certificate under section 65B of the Indian Evidence Act at Exhibit-43.

46. Learned advocate for accused submitted that evidence of alleged phone calls made by both accused to each other is not sufficient evidence to hold them liable. The recoveries of those two phones made from the open places, which were known to others does not prove the “fact discovered” which is essential requirement of Section 27 of the Indian Evidence Act. There is no specific evidence that accused no.2 was using mobile hand set of Shankar. The recovery of mobile phone of accused no.1 at his instance is not sufficient to hold him guilty, when there is no positive evidence of actual using of mobile hand set by accused no.2. It is also not evidence of causing disappearance of evidence. Trial Court rightly disbelieved this evidence. He submitted that it is reasonably doubtful evidence and cannot be believed and relied upon against both accused.

47. Learned APP and learned advocate for the informant submitted that the evidence of Sachin (PW-6) is clinching and independent. His evidence is not shaken in the cross-examination. It is reliable and sufficient

evidence to infer that there was actual abetment by instigation on the part of accused no.2 to the accused no.1 and they conspired to commit murder of Shankar. They pointed out admissions in the evidence of Sagar (PW-5) that he admitted that accused no.1 made phone call to him and told him about the murder of Shankar. They submitted that trial Court failed to appreciate this independent evidence against accused in its proper perspective and acquitted accused no.2 illegally.

48. There is unexplained delay of three days for recovery of those handsets of mobile phones at the instance of these accused. The evidences of seizure of both mobile handsets which were seized from open places visible to the members of their family which is proved from the evidence of Talathi Sham (PW-3) itself from his examination-in-chief. Thus essential requirement of section 27 of the Indian Evidence Act that fact discovered is not proved by the seizure panchanama Exhibit-44 and 45 by the prosecution beyond reasonable doubt. Therefore, argument of learned APP and learned advocate for informant are not acceptable in this regard.

49. Sachin (PW-6) deposed and proved that, sim card of mobile hand set (Art.H) having mobile No.7720989694 was granted and allotted in the name of Shankar. None of the witness have stated that accused no.2 was using that mobile hand set. She denied that she was using that mobile hand set in her statement recorded under section 313 of the Cr.P.C. Evidence of Sham (PW-3) and Sachin (PW-6) is not sufficient and useful to hold that

hand set of mobile phone (Article - H) was in the custody of accused no.2 and that she was using it though it was in the name of Shankar at the time of incident. It is not proved and brought on record that Shankar was using another mobile phone and accused no.2 was using this mobile phone.

50. The call details Exhibit-41 shows that phone calls were made by accused no.1 by his phone no.7741856201 to Sagar on the night of 01.04.2017 and to the phone no. 7720989694 which is in the name of deceased Shankar on 25.03.2017 to 31.03.2017. The call details (Exhibit-41) are proved by Sachin (PW-6), which shows that accused no.1 made one phone call to the mobile phone of Sagar Kale (PW-5) bearing No.8600910447 after the incident, which he had admitted in his cross-examination taken by APP. This independent evidence of Sachin (PW-6) with call details at Exhibit-41 is not shaken in his cross examination which is independent technical evidence. It is proved that phone calls were made to the phone in the name of Shankar and Sagar (PW-5) by accused no.1 on 25.03.2017, 31.03.2017 and 01.04.2017, which is clearly proved by the evidence of Sachin (PW-6) as discussed above. This is evidence of conduct of accused no.1 as per section 8 of Evidence Act. The accused have only denied this evidence in their statement u/s 313 of the Cr.P.C. There is no reason to disbelieve this evidence. This is technical, independent and natural evidence and it is not disproved by the defence. The argument of learned advocate for accused no.1 is partly not acceptable in this regard. The trial Court did not give clear

reasons and finding about this evidence. We cannot conclude effect of this evidence here unless other circumstantial evidence is discussed along with it.

II) **EXTRA JUDICIAL CONFESSION OF ACCUSED NO.1 AND CONDUCTS OF ACCUSED :-**

51. The prosecution is relying upon the circumstantial evidences to prove the conducts of both the accused, extra judicial confession made by accused no.1, the motive, inference of the overt act of commission of murder of Shankar by accused no.1 in conspiracy with accused no.2 and her instigation for it. For proving these facts in issue, the prosecution examined Sagar (PW-5) to whom alleged extra judicial confession (Exhibit-35) was made by accused no.1 immediately after the alleged incident by making phone call. He deposed that accused no.1 is son of his real paternal aunt. He was 17 years old at the time of incident. While deposing before trial Court, he was below the age of 18 years. It is duty of the trial Court to ascertain as to whether child witness understands importance of oath or not. Thereafter trial Court has to decide as to whether to administer oath to him or not. This must be done and noted at the beginning of deposition of child witness and thereafter his evidence shall be recorded. The defence may not object such non-compliance of procedural formalities. It is duty of the trial Court to follow the said procedure before recording of evidence of child witness as per section 4 of The Oaths Act, 1969. It is procedural lapse on the part of the trial Court. It may cause prejudice to the accused. However that was not objected

before trial Court. However, accused are not entitled for acquittal on this lapse.

52. Sagar (PW-5) did not support prosecution and resiled from his previous statements recorded by I.O. and J.M.F.C. Court. His statement was recorded by I.O. on 02.04.2017. Sum and substance of prosecution's another story as spelled out from his statement (Exhibit-35) recorded under section 164 of the Cr.P.C. before J.M.F.C. Court, is that, accused no.1 met him on 25.03.2017, while he was talking on the mobile phone with a girl. Sagar (PW-5) asked him as to with whom he was talking ? That time, he said that he spoke with accused no.2 wife of Shankar and he is having illicit relationship with her. On 2<sup>nd</sup> occasion in his presence on 31.03.2017 at about 7 p.m. accused no.1 said to him that he perceived missed phone call of accused no.2 from his phone. He then made phone call to her. That time speaker of his phone was on. She said to him that "her husband Shankar is beating her on account of their illicit relationship, Shankar has planned to go to water the corn crop on that night, she directed him to switch on and give the electric current to the starter of electric motor pump of that water well. So that her husband would sustain/suffer by electric shock and die by the electrocution." Accused no.1 said "Yes". He also told her that he had put the iron rod there under the Neem tree. Thereafter, she told that her husband has just come in the house and thereafter, she switched off her mobile phone. Thereafter, Sagar (PW-5) came to his house and slept. At about 3-30 a.m. on 01.04.2017,

he received phone call made by accused no.1. He said that he switched on and gave the electric current to the button of that electric motor pump. Shankar went to start that pump. He sustained electrocution. Thereafter, he assaulted him by an iron rod and he threw that iron rod in the drum kept near his house. Again accused no.1 made a phone call to him and requested him to come to meet him, but he refused to go there. That time, accused no.1 threatened him that if he tells that fact to anybody, he will also kill him like Shankar.

53. In his cross-examination taken on behalf of the prosecution Sagar (PW-5) denied almost all facts in his statement Exh.35. He admitted that his statement was recorded before J.M.F.C. Court on 01.04.2017 and at about 3.00 to 3.30 a.m., he received the phone call of accused no.1 and he told him about the death of deceased Shankar. He further admits that he had stated number of his mobile phone while recording of his statement (Exhibit-35) before the J.M.F.C. Court. He also admits that J.M.F.C. Court asked him that, is there any pressure by police or others for recording his statement. But he replied 'no'. He cannot tell reason as to why he did not tell that fact of pressure of police to that J.M.F.C. Court. He denied that he stated the number of mobile phone of accused no.1, which is appearing in his statement at Exhibit-35. He emphasised that prior to recording of his statement by the J.M.F.C. Court he was pressurized by the Police in the uniform to give such statement as per his statement recorded by I.O.. Therefore, he gave such

statement (Exh.35) accordingly.

54. In his cross-examination taken on behalf of accused Sagar (PW-5) admits that one month before the incident he was not on talking terms with accused no.1 as there was quarrel between them. He further admits that before recording of his statement (Exh.35), police slapped him and also memorized him as to what and how to give statement before the J.M.F.C. Court and that his mobile phone was not with him from 30.03.2017 to 02.04.2017.

55. Learned advocate for the accused no.1 submitted that evidence of Sagar (PW-5) is totally shaken in the cross-examination. He was pressurized by the Police prior to recording of his statement (Exhibit-35) is not reliable evidence. Further his subsequent conduct shows that he was silent even after extra judicial confession was made to him by accused no.1 immediately after the incident. He lastly submitted that this evidence is not reliable and acceptable.

56. Learned APP for the State and learned advocate for the informant submitted that evidence of Sagar (PW-5) is not totally unbelievable though he resiled from his previous statement. His part of evidence and statement Exhibit 35 ought to have relied upon by the trial Court to infer involvement of both the accused in this crime.

57. There is no material corroboration by medical evidence which is reasonably expected to be in existence to statement of Sagar (PW-5) Exhibit-

35. The spot panchanama Exhibit - 45 is also not corroborating about the factual position of tampering with wiring that switch of electric motor pump for giving of live electric current to it. It is naturally expected that Sagar (PW-5) would have stated that serious fact of making of extra judicial confession made to him by accused no.1 at least to the relatives of Shankar immediately in the morning of 01.04.2017. He did not disclose it to anybody all those serious facts known to him. The statement of Sagar (PW-5) was recorded by the Police on 02.04.2017. One day's delay for recording his statement creates reasonable doubt about its veracity. Thus keeping mum for one day shows that his subsequent conduct is not natural to believe his evidence as per section 8 of the Indian Evidence Act. To fabricate such evidence of extra judicial confession is easy. Therefore, it is expected that it must be recorded earliest in time as soon as it was made by accused No.1 to Sagar (PW-5).

58. In Exhibit-35, it is mentioned that Shankar sustained electrocution but P.M. report (Exhibit - 30) does not show such injuries. In the statement Exhibit-35, it is mentioned that accused no.1 assaulted Shankar by an iron rod, but there are four incised wounds and Dr.Manoj (PW-4) deposed that those are not possible by the iron rod. Therefore, presumption of genuineness of statement Exhibit-35 as per section 80 of the Indian Evidence Act is not helpful to dispense with partial burden of proof on the part of prosecution. Thus, Exhibit-35, the statement under section 164 of the Cr.P.C. is reasonably doubtful and it cannot be safely relied upon for drawing inference about

involvement of accused no.1 on the basis of above admissions given by Sagar (PW-5). His evidence is not discussed by the trial Court with reference to the presumption under section 80 of the Indian Evidence Act as to whether there is foundational evidence of presumption or not and that presumption is applicable or not or it is rebutted or not by the defence.

59. As per section 31 of the Indian Evidence Act an admission is not conclusive proof. As per proviso of section 58 of the Indian Evidence Act, Court may require further proof even though any fact is admitted by the witness or party. It is well settled that principle viz FALSUS IN UNO FALSUS IN OMNIBUS is not accepted as rational principle of law in India which means that if witness deposes partly false and partly true his rest of evidence is also false.

60. Sagar (PW-5) admits in his cross examination taken on behalf of prosecution that he received phone call of accused no.1 at 3.00 to 3.30 a.m. on 01.04.2017. The call details (Exhibit - 41) are proved by Sachin (PW-6) which are partly corroborating to his part of evidence that he received phone call of the accused. Thus, his part of evidence along with the evidence of Sachin (PW-6) undoubtedly proves that phone call were made by accused no.1 to him on the phone of Shankar which is proved from CDR report Exhibit - 41. It is corroborative evidence and it only establishes making of phone calls to each other. From it inference of involvement of both accused cannot be safely drawn as Sagar (PW-5) did not disclose those serious and

material facts to the investigating officer or any relatives of Shankar at least in the morning of 01.04.2017 or within reasonable time thereafter. His subsequent conduct under section 8 of the Indian Evidence Act is not natural and probable to believe his part of statement at Exh.35. Thus, his part of oral evidence and statement at Exh. 35 are reasonably doubtful and it would not be safe to rely upon it.

61. Sagar (PW-5) admits two contrary facts in his cross-examination taken by APP. One is that he received phone call of the accused No.1 after the incident of murder and that he was not in talking term with him for about one month. The call details etc at Exh. 41 proved by Sachin (PW-6) shows that there were phone calls between him and accused no.1 during 25.03.2017 to 01.04.2017. Thus he deposed false that he is not in talking terms with accused no.1 though he attended phone call. Giving false evidence is criminal mischiefs as defined under section 191 of IPC, which is punishable as per section 193 of the IPC.

62. It is observed by the trial court in the impugned judgment that an application was submitted by the learned APP for taking criminal action for giving false evidence against Sagar (PW-5). Trial Court observed in last para 49 of the impugned judgment that proceeding is dropped against Sagar (PW-5) as he is minor. The trial Court did not conclude whether Sagar (PW-5) gave false evidence or not. This shows he gave false evidence. We found that he gave false evidence intentionally and knowingly regarding receiving of

phone call of accused no.1 to him on that night of incident.

63. The trial Court erred and did not follow the mandatory procedure as per section 344 or 340 of the Cr.P.C. for taking action by summary or by regular case against Sagar (PW-5). For the trial Court has to come to an independent conclusion by giving convincing reasons while delivering judgment that witness has knowingly or willfully given false evidence.

64. The trial Court has not followed the mandatory procedure as discussed above as per section 340 or 344 of the Cr.P.C. The reasons and finding as to whether Sagar (PW-5) has given false evidence or not are not given in the impugned judgment in detail. In the last para of the impugned judgment, the trial Court erred and held that the proceeding is dropped against Sagar (PW-5). In fact there was no such proceeding to drop but only an application was filed by prosecution in that Sessions case for taking action against Sagar (PW-5) for giving false evidence. But it is not ground for acquittal of the accused. It is matter between witness and Court.

65. When any legal action is regulated by law, that procedure must be followed by the Court strictly particularly when it is criminal action. No doubt, these are legal formalities. But legal formalities are generally mandatory and particularly in criminal cases those cannot be moulded and excluded.

66. We noticed in the first sentence of cross-examination of the Sagar (PW-5) taken by APP for State, which shows that he was threatened by the

APP Tambe that “you know that if you resile from your statement given before Magistrate, it is a crime ?”. This offensive question was asked to him. As per Section 152 of the Indian Evidence Act, the trial Court erred and did not prohibit such threatening to the witness when he is in the witness box. It is unfairness on the part of the prosecution. It may cause serious prejudice to the accused, if under that fear he deposes and his evidence is to be believed. Considering age of Sagar (PW-5) that he was below the age of 18 years at the time of recording of his evidence, and fact that he was threatened by the APP in trial Court as well as in the facts and circumstances of the case and time consumed for trial and these appeals etc., we do not find it expedient to proceed against him for giving false evidence as per section 340 or 344 of the Cr.P.C.

67. We hold that the evidence of Sagar (PW-5) with his statement Exhibit – 35 is not reliable to infer conclusively that there was conspiracy and abetment as well as extra judicial confession made to him by accused no.1. His evidence cannot be safely relied upon as it is not coherent but reasonably doubtful. But as held above his part of evidence, which is corroborated by the material evidence of Sachin (PW-6) alongwith call details (Exhibit-41) is proved by the prosecution and even though he has resiled from his previous statement. This evidence is corroborated independent and material evidence by call details (Exhibit-41). However, there is no any material, independent and sufficient evidence to corroborate his evidence of receiving phone calls

made by accused no.1 to accused no.2. We will discuss this evidence with other circumstantial evidences. However, argument of learned APP and learned advocate for informant are partly not acceptable in this regard.

(III) **FINDINGS OF BLOOD ON THE IRON ROD AND SHIRT OF THE ACCUSED NO.1 :-**

68. To rely upon the C.A. reports, first of all legal seizing of the incriminating articles, its packing, sealing and sending as well as reaching those to the C.A. office must be proved by the prosecution.

69. To prove the spot of incident and seizure panchanamas of the articles found there, the prosecution is relying upon the evidence of panch witness Talathi Sham (PW-3). He deposed that earth mixed with blood and blood stuck to the stone found at the spot of incident were seized under spot and seizure panchanama Exhibit-44 in his presence. He further deposed that the clothes of deceased Shankar were produced by the police constable. Those were seized under seizure panchanama at Exhibit-45 on 02.04.2017 in his presence. He identified those clothes marked as Articles "B" to "E".

70. Sham (PW-3) further deposed that he was called by I.O. on 04.04.2017. That time accused no.1 expressed his willingness to produce the iron rod and a shirt which he worn at the time of occurrence of alleged incident. Accordingly, it's memorandum panchanama Exhibit-46 was drawn up. He took them to his house. Near to his house, there was one plastic drum. Accused no.1 took out an iron rod out of it. Thereafter he took out and

handed over a shirt from the back side of his house. Those articles were seized as per seizure panchanama Exhibit-47. He identified these articles “A”, “F” and “G”. Same facts are deposed by I.O. Patil (PW-7). Therefore, it is not necessary to discuss his same evidence again here.

71. To prove reaching of all the incriminating articles to C.A. office for analysis and report, Police Constable Chandrakant (PW-8) deposed that he reached all those articles to the C.A. office, Nashik as per letter Exhibit-57. His formal evidence is not opposed and disproved by the defence. We are surprised that, the trial Court did not consider and discuss oral evidence of Chandrakant (PW-8) in the impugned judgment. In the list of witnesses in para no.14 of the impugned judgment names and roles of only seven witnesses are mentioned. But name of Chandrakant (PW-8) is not even listed. No doubt court has discretion and may not discuss the evidence of a particular witness or any other evidence but it has to give reason that it is not material evidence or that there is another decisive evidence. But trial Court did give reason as to why it has not considered and discussed it in the impugned judgment. It is duty of the trial Court to consider entire evidence which is part of the “matter before it”, as per the definition of “proved” in section 3 of the Indian Evidence Act. Needless to mention that matter before it means prosecution’s story, defence of accused, charge, oral and documentary evidences, articles, arguments, statements of accused under section 313 of the Cr.P.C., pursis, remand report etc but not only evidences.

Such inaction of the trial Court gives technical benefit to the accused to exonerate them from the criminal liability.

72. The learned trial Court discussed evidences of C.A. reports, which were neither admitted by the defence nor exhibited. Trial Court erred and failed to follow legal course of action as is provided in to prove section 293 of the Cr.P.C. The trial Court has to play active role during conducting trial. The word “may” used in section 293 of the Cr.P.C. confers discretion in the trial Court that it Court may rely upon such evidence without calling C.A. official as an expert witness in the Court. The trial Court may permit defence side if prayed for to call such expert witness to cross-examine him. Trial Court did not follow this legal course of action to exhibit C.A. reports prior to relying upon it. If prosecution is not proving the fact in issue trial Court is empowered by section 311 of the Cr.P.C. to examine such expert witness as a Court witness or may exhibit document in its discretion as per Section 293 of the Cr.P.C. for making it eligible to read it in evidence. If any evidence is to be considered against accused then trial Court is duty bound to confront it to the accused as per section 313 of Cr.P.C. in order to give an opportunity to explain it. This mandatory procedure is not followed by the trial Court. It is unfair trial against the accused. The trial Court erred and failed to conduct trial as per procedure prescribed by law. Some times accused are getting technical benefits of such lapses. It failed to follow that it is fact finding Court. In this regard, it would be beneficial to consider the important recent

precedential law of the Hon'ble Supreme Court in the case of ***Munna Pandey V/s State of Bihar*** reported in ***2023 SCC Online SC 1103***, in which following guidelines are given :-

“64. All fair trials are necessarily legally valid, but is the reverse necessarily true? What then is the genesis of the concept of a fair trial? The concept of a fair trial has a very impressive ancestry, is rooted in history, enshrined in the Constitution, sanctified by religious philosophy and juristic doctrines and embodied in the statute intended to regulate the course of a criminal trial. Its broad features and ingredients have, in course of time, been concretised into well recognised principles, even though there are grey areas, which call for further legal thought and research.

70. This Court has condemned the passive role played by the Judges and emphasized the importance and legal duty of a Judge to take an active role in the proceedings in order to administer justice and to prevent the truth from becoming a casualty. A Judge is also duty bound to act with impartiality and before he gives an opinion or sits to decide the issues between the parties, he should be sure that there is no bias against or for either of the parties to the lis. For a judge to properly discharge this duty the concept of independence of judiciary is in existence and it includes ability and duty of a Judge to decide each case according to an objective evaluation and application of the law, without the influence of outside factors.

71. If the Courts are to impart justice in a free, fair and effective manner, then the presiding judge cannot afford to remain a mute spectator totally oblivious to the various happenings taking place around him, more particularly, concerning a particular case being tried by him. The fair trial is possible only when the court takes active interest and elicit all relevant information and material necessary so as to find out the truth for achieving the ultimate goal of dispensing justice with all fairness and impartiality to both the parties.

74. If anyone would ask us the question, “What is the ratio of this Judgment?” The answer to the same would be very simple and plain, in the words of Clarence Darrow;

“Justice has nothing to do with what goes on in the courtroom; Justice is what comes out of a courtroom.”

73. Many such mandatory directions and guidelines are given by the Constitutional Courts of India time and again by way of various precedents, which are binding on the Courts as per Article 141 of the Constitution of India. Therefore, we do not propose to give such directions again. The learned Judges of the Trial Court are expected to follow those directions and guidelines and activate themselves to avoid such serious illegalities, lapses and inactions.

74. Learned advocate for the accused no.1 submitted that accused no.1 accompanied Shankar when he was taken to the hospital after the incident. Therefore, blood might have stuck to his shirt, there is delay of three days to recover and seize an iron rod and shirt. An iron rod and shirt were seized from open places which is proved by the defence. There is no conclusive finding of exact blood group over all the articles except shirt of accused no.1. He prayed that considering these reasonably doubtful circumstances, evidence of seized articles cannot be safely relied upon as it is not coming within the purview of fact discovered as per requirement of section 27 of the Indian Evidence Act.

75. Learned advocate for accused no.1 further submitted that accused no.1 is in jail since last six years. If the case is sent back for proving these C.A. reports then it will take a long time. He therefore submitted that even if C.A. reports are taken as proved, those do not disclose the exact blood group of Shankar which must be found on an iron or on a shirt of accused. The blood group 'A' is determined from the shirt of accused no.1 must match with the blood group of Shankar which is not determined. It is not matching. Hence, accused No.1 is entitled for benefit of reasonable doubt.

76. Learned APP for the State and learned advocate for the informant submitted that the C.A. reports are independent evidences showing involvement of accused no.1. The human blood is found on his shirt and iron rod for which he had no explanation. Blood group 'A' is found on the shirt of accused no.1 is sufficient to infer the involvement of accused no.1 in this crime. It is independent and clinching evidence. On the basis of it conviction of accused can be safely based.

77. Considering peculiar set of facts and circumstances of this case and in view of submission of the learned advocates for both sides and as per discretion vested under section 393 of the Cr.P.C., we are evaluating evidences of C.A. reports even though those are not exhibited. As per C.A. report, the blood group of Shankar is not determined. The C.A. report shows that human blood was found on seized shirt, iron rod and on the seized clothes of Shankar. The blood group 'A' is determined on the alleged shirt

(Article F) of accused no.1. But in respect of other articles blood groups are inconclusive. It is defence of accused no.1 that he also took injured Shankar from that place of occurrence to hospital and blood was stuck to his shirt. In the suggestion of defence put to the witnesses informant (PW-1) and Sanjay (PW-2) they have denied that accused no.1 was accompanying when Shankar was being taken to the hospital after the incident. Thus, there is no reliable evidence of defence of accused that blood might have stuck to his shirt.

78. The iron rod and shirt were seized from open places must have seen by the family members of accused no.1 and others. It does not establish ingredients of Section 27 of the Evidence Act which requires that “fact discovered” at the instance of the accused may be proved. It means facts which were not known to any one except accused. Therefore, evidence of Sham (PW-2) is not useful to the prosecution to connect accused no.1 with this crime. Further, blood group of Shankar is not determined. Therefore, ‘A’ group of human blood found on the shirt of accused No.1 cannot be used firmly to connect him with this crime to infer his overt act of alleged murder of Shankar. This evidence is disproved in view of reasonably doubtful recovery of those articles from open places. It is not reliable evidence. Therefore, evidences of C.A. reports is not helpful to the prosecution. The circumstantial evidences of iron rod, clothes of deceased Shankar and shirt of accused no.1 along with C.A. report can not be safely relied upon to connect him with this crime to infer his overt act. The trial Court also disbelieved

these evidences of articles and C.A. reports and legal seizure of these articles. For the reasons discussed above, the argument of learned APP and learned advocate for informant is not acceptable in this regard.

79. It is well settled that the complete chain of circumstantial evidences must be established by the prosecution as per the law laid down by the Hon'ble Supreme Court recently in the case of *Dinesh Kumar Vs. State of Haryana in Criminal Appeal No.530 of 2022 decided on 4<sup>th</sup> May, 2023*. In this case, the Hon'ble Supreme Court held as under :-

“14.....

The factors which have to be taken into consideration by the Court in a case of circumstantial evidence, are too well settled to be stated but nevertheless these factors which are being reproduced from Anjan Kumar Sarma (supra) are as under :

- (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned “must” or “should” and not “may be” established;
- (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.”

80. We have to consider these three material circumstantial evidences together and decide whether these are complying the above requisites of law as per the ratio and principles laid down in the case of *Dinesh Kumar (supra)*. There is independent technical evidence of making of phone call by accused no.1 to Sagar (PW-5) and also on the phone number in the name of Shankar. This is evidence of previous and subsequent conducts of accused no.1 as per section 8 of the Indian Evidence Act. It is corroborative in nature and not substantive. It requires material and independent corroboration to infer the guilt of any of the accused. Rest of the circumstantial evidences are not proved by the prosecution as held above. The motive of the accused is not proved by the prosecution, which must be proved when the case is based on the circumstantial evidences. Thus circumstantial evidences discussed under three different heads above together with admitted facts particularly homicidal death of Shankar and spot of incident are not sufficient to complete the chain of the circumstances to draw the inference of involvement of any of the accused in this crime. The reasons and findings of the trial Court are correct in respect of the circumstantial evidences. Therefore, no interference is warranted in it. Therefore, argument of learned APP for State and learned advocate for informant is not acceptable in this regard.

**FINAL CONCLUSION :-**

81. We have in our correctional jurisdiction and as the last fact finding Court considered entire matter before us, and grounds of objections in the appeals of both sides and in the application for leave to file appeal along with impugned judgment. We have meticulously re-appreciated entire evidences particularly an evidence of the eye witness informant (PW-1) and all circumstantial evidences together. Rest of the documentary evidences are not discussed as it is formal and not disputed by the defence.

82 Though informant told that he saw accused no.1 while assaulting Shankar, the I.O. Patil (PW-7) did not lodge the report promptly, he did not seize sharp edged weapon to prove incised wounds sustained on the head of Shankar at sr. no.1 to 4 as noted in the postmortem report, which is the cause of death of Shankar. How those were caused and who caused it are not proved by the prosecution. This best possible evidence is not brought on record by the prosecution. This is doubtful circumstance, which creates reasonable doubts about the prosecution's case for which accused are entitled.

83. From our all above reasons and findings on all the facts in issues discussed hereinbefore, we found that trial Court erred and misapplied section 6 of the Indian Evidence Act, to the evidence of Sanjay (PW-2), it did not give conclusive finding on delay caused for lodging the report and motive for commission of murder, it did not discuss the evidence of Chandrakant

(PW-8), and did not conclude that best possible evidence of seizure of weapon having sharp edge to prove four incised wounds found on the head of Shankar is lacking. Thus, trial Court failed to consider the basic rule of evidence that best possible evidence of sharp edged weapon is not brought on record. It failed to consider the conducts of informant (PW-1) and Sagar (PW-5) as well as accused no.1 that they did not disclose to anybody about extra judicial confession made by accused no.1 to them on that night after the incident which was naturally expected from them. Their conducts are not natural but reasonably doubtful. The above discussed proved evidences are only corroborative pieces of evidences and those are not sufficient to establish complete chain of the circumstance to infer the guilt of any of the accused. Thus, the trial Court erred and failed to act as prudent man while evaluating the matter before it in its proper perspective as contemplated in the definition of “proved” and “not proved” in the Indian Evidence Act, which is most rational part of it. Here prudent man does not mean an intelligent man. The Court has to evaluate the matter before it only as if it is ordinary prudent man by considering background and conducts etc. of the witnesses and parties with defences of the accused and draw reasonable inference or form opinions and give findings with convincing reasons that the existence of facts in issue or its non existence are proved or not or its existence is probable or not. The evidences must be reasonably and meticulously scrutinized in criminal cases. But too much scrutiny of evidences is not expected as well as

sterling quality evidence without any mistake cannot be expected.

84. The trial Court gave benefit of doubts to both the accused about these circumstantial evidences only. But trial Court failed to give benefit of doubts to accused no.1 in respect of reasonably doubtful evidences of informant (PW-1) and Sanjay (PW-2) and partly proved medical evidence about four incised wound of Shankar. Needless to mention that every doubt or suspicious circumstance cannot become reasonable doubts. A reasonable doubt means, such a doubt or doubts which basically unearths the prosecution's case to persuade the mind of a Court to hold that facts in issues are not proved by the prosecution. The trial Court erred to consider this important and basic principle of benefit of reasonable doubt that when there is no clear and convincing proof, the prosecution must prove its case at least beyond reasonable doubt.

85. The prosecution failed to prove any criminal mischiefs allegedly committed by any of the accused beyond all reasonable doubts to fasten criminal liability as per charges levelled against them. The essential ingredients of charged sections of the IPC are not proved by the prosecution against any of the accused by adducing sufficient and reliable evidence. The prosecution failed to prove its case based on the evidence of eye witness (PW-1) as well as on circumstantial evidences. The defence did not prove their defences but evidences of the prosecution witnesses are disproved to disbelieve the prosecution's story. It was not considered by the trial Court and

it erred in law and fact as discussed above.

86. The prosecution undoubtedly proved homicidal death of Shankar and spot of incident of his murder. The prosecution also proved the call details at Exhibit – 41, which shows previous and subsequent conducts of accused no.1 that he made phone calls on the phone in the names of Shankar and also to Sagar (PW-5) at the relevant time of incident of murder of Shankar. However, all these are corroborative pieces of evidences. There is no material and independent corroboration to these evidences. Those are not sufficient evidences to infer the overt act of accused no.1 as well as involvement of accused no.2 in this crime as alleged by the prosecution.

87. We hold that the prosecution failed to rebut the presumption of innocence of both the accused by adducing cogent and reliable evidence, which is cardinal principle of criminal jurisprudence. As per international human rights covenant accused must be presumed to be innocent until his guilt is proved. It is procedural, natural/inherent as well as human right of the accused. The right of the accused that he is presumed to be innocent is golden rule that runs through the web of criminal jurisprudence and it is also principle of fair trial as per Article 21 of the Constitution of India. The Court has to balance the rights and liabilities of the accused and victim of the crime and to see that there shall be justice to the parties before it. Every murder is serious like this one. However, in the absence of sufficient, cogent and acceptable legal evidence, accused shall not be held liable for it on the

reasonably doubtful evidences as discussed above.

88. We found no substances in the grounds of objections of the appeals filed against accused no.1 and 2 by the informant and in the application of the State Government filed for leave to file appeal for enhancing punishment and awarding of death penalty to the accused no.1.

89. The impugned judgment is partly illegal and not sustainable in the eye of law. The reasons and findings in the impugned judgment require interference partly and it deserves to be partly set aside to the extent of conviction of accused no.1. The appeals filed against both accused and the application for leave to file appeal filed by the State deserves to be dismissed. For the reasons discussed above, arguments of learned APP for State and learned advocate for informant are not accepted. Accused no.1 deserves to be acquitted from the charged sections 302, 201 and 109 of the Indian Penal Code. There is substance in the grounds of objections of his appeal. His appeal deserves to be allowed. Hence the following order :-

#### **ORDER**

1. Criminal Appeal No.579 of 2019 is allowed. The order of conviction and sentence dated 17.05.2019 passed by the learned Additional Sessions Judge, Newasa, Dist. Ahmednagar is quashed and set aside.
2. Appellant – accused no.1 Balasaheb S/o Babasaheb Bhagat stands acquitted.

3. Fine, if any, paid by the appellant – accused no.1 be refunded to him.
4. Since the appellant is in jail, he be released forthwith, if not required in any other case.
5. Criminal Appeal No.611 of 2019 and Criminal Appeal No.612 of 2019 preferred by the original complainant are dismissed.
6. Application for leave to Appeal by State No.183 of 2019 is dismissed.

( SANJAY A. DESHMUKH, J. )

( R.G. AVACHAT, J. )

sga