

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

919 CRIMINAL APPEAL NO.354 OF 2017

Shyam Vishnu Yadav,
Age 24 yrs., Occ. Labour,
R/o Near Hande Floor Mill,
Mitra Nagar, Shelgi, Tq. & Dist. Solapur.

... Appellant

... **Versus** ...

The State of Maharashtra
Through Tamalwadi Police Station,
Tq. Tuljapur, Dist. Osmanabad.

... Respondent

...

Mr. A.S. Shelke, Advocate for appellant

Mr. S.J. Salgare, APP for respondent

...

**CORAM : SMT. VIBHA KANKANWADI
ABHAY S. WAGHWASE, JJ.**

DATE : 17th OCTOBER, 2023

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

1 Present appeal has been filed by the original accused challenging his conviction for the offence punishable under Section 302 of the Indian Penal Code, 1860 in Sessions Case No.191/2014 by learned Additional

Sessions Judge, Osmanabad on 06.01.2017, whereby he was convicted for murdering his brother Namdeo on 13.08.2014. It will not be out of place to mention here itself that the appellant was prosecuted for the offence punishable under Section 201 of the Indian Penal Code also, however, he has been acquitted from that offence.

2 The prosecution has come with a case that PW 1 API Mr. Rahul Deshpande was attached to Tamalwadi Police Station. A complaint was lodged by one Sahebrao Limbaji Shinde, ASI attached to Tamalwadi Police Station in respect of murder of an unknown person. That First Information Report was lodged on 13.08.2014 vide Crime No.51/2014. PW 1 Rahul Deshpande had published the photograph of the deceased to all the Police Stations for establishing the identity. Such publication was also made at Navi Ves Police Chowky, Solapur and it was realized that the said photograph resemblance with a missing person by name Namdeo given by one Shyam Yadav. Therefore, said Shyam Yadav, wife of deceased and other relatives were called to Osmanabad Civil Hospital, where the dead body was kept in mortuary. They identified the dead body and then the custody of the dead body was handed over to them for last rites. Prior to that ASI Mr. Sahebrao Shinde had reported that accidental death was reported by one Engineer Mohan Kale when he was coming at about 9.30 a.m. on 13.08.2014 from

Ganjewadi to National Highway No.211 from a cart road. He found dead body of an unknown person in a ditch on the southern side and he found blood stains. The report given by said Engineer Mohan Kale came to be registered under Section 174 of the Code of Criminal Procedure and thereafter the inquest panchnama was carried out and dead body was sent for postmortem. It was opined by the autopsy Doctor that the death is due to sharp weapon due to injury caused near the neck and because of heavy loss of blood. Considering the death to be homicidal the said First Information Report was lodged.

3 PW 2 PSI Mr. Suresh Shinde has carried out the investigation after the identity of the deceased was established. Statements of the wife, mother-in-law and neighbour of the deceased have been recorded on 21.08.2014 and then it was found out that accused Shyam was involved in the incident and, therefore, accused came to be arrested on 23.08.2014. Accused made disclosure and discovered knife allegedly used in the commission of the offence as well as the clothes on his person on 26.08.2014 and the memorandum panchnama came to be executed in presence of two panchas. The seized articles were sent for chemical analysis. After the investigation was over charge sheet was filed.

4 After the committal of the case, accused pleaded not guilty and prosecution has examined in all 14 witnesses to bring home the guilt of the accused. After considering the evidence on record, as aforesaid, the accused has been held guilty of committing offence punishable under Section 302 of the Indian Penal Code. He has been sentenced to suffer imprisonment for life and to pay fine of Rs.5,000/- (Rupees Five Thousand only), in default to suffer rigorous imprisonment for six months. Hence, this appeal.

5 Heard learned Advocate Mr. A.S. Shelke for the appellant and learned APP Mr. S.J. Salgare for the respondent. Perused the record.

6 It has been vehemently submitted on behalf of the learned Advocate for the appellant that the learned trial Judge has not appreciated the evidence properly. Case is based on circumstantial evidence and, therefore, it ought to have been considered by the learned trial Judge. Each and every circumstance in the chain of circumstances should unerringly point towards accused as the perpetrator of the crime. Unnecessary weightage has been given to the testimony of PW 8 Mahananda – widow of Namdeo, PW 9 Ruksana – friend of PW 8 Mahananda and alleged to be the neighbour on the point of last seen together, PW 13 Pravin Jagtap – neighbour, PW 12 Sindhu Jagtap, PW 2 PSI Mr. Suresh Shinde – Investigating Officer for memorandum

panchnama and PW 11 Kantabai Sonawane, to whom alleged extra judicial confession was given. PW 12 Sindhu Jagtap says about quarrels between deceased and accused and PW 13 Pravin Jagtap was on the point of stay of accused in his house on 13.08.2014. In fact, PW 5 Appa Ransure is panch to the spot panchnama Exh.42, inquest panchnama Exh.43, seizure of motor cycle panchnama Exh.21 and memorandum panchnama Exh.23, however, he did not support the prosecution and was declared hostile. Therefore, the discovery of knife which is said to be the murder weapon has not been proved by the prosecution beyond reasonable doubt. The incident had taken place i.e. accused allegedly went missing in the intervening night of 12.08.2014 after 11.00 p.m. to 9.30 a.m. of 13.08.2014. Testimony of PW 6 Engineer Mohan Kale that he found the dead body around 9.30 a.m. on 13.08.2014 but ultimate identification of the dead body is on 21.08.2014. That means, till then the relatives of deceased Namdeo were not even aware that Namdeo is dead. Merely because the wife Mahananda and neighbour Ruksana are saying that the deceased had gone along with accused on 12.08.2014, when their statements were allegedly taken on 21.08.2014 the learned trial Judge ought not to have invoked the theory of last seen together. The proximity between the death and lastly seen the deceased in the company of accused should be narrowed. Even if we take the timing given

by PW 6 Engineer Mohan Kale as correct; yet, the gap from 11.00 p.m. of 12.08.2014 to 9.30 a.m. of 13.08.2014 is large and, therefore, it cannot prove the guilt of the accused. The accused is not disputing the death of Namdeo as homicidal in nature, however, what is disputed is that accused is the perpetrator of the crime. Further, the prosecution has not even proved the motive. The testimony of PW 12 Sindhu Jagtap would show that she has information that there was a house belonging to Shyam and Namdeo which was sold for about Rs.1,70,000/-, but thereafter dispute was raised by Namdeo that he should get the amount of his share. The entire amount was with Shyam i.e. accused. If we consider the testimony of PW 8 Mahananda, then, it can be seen that she was totally unaware about such transaction. She has clearly stated in her examination-in-chief itself that after it was informed by police that deceased has been murdered, then, she started pondering upon who would have committed murder of her husband. She got suspicious about accused and then she says that the house which was in the name of Namdeo was sold by accused Shyam about six months prior to the incident and he had not given money to Namdeo. She admits that Namdeo was asking for money but accused got annoyed and gave threat to kill the Namdeo. This appears to be an afterthought concocted story. There was no such evidence beyond reasonable doubt which could have led to the

conclusion that prosecution has proved the offence beyond reasonable doubt. The judgment passed by the learned trial Judge being perverse, based on wrong appreciation of evidence, interference is required.

7 Per contra, the learned APP strongly opposed the appeal and submitted that PW 8 Mahananda and PW 9 Ruksana had seen the deceased alive and in the company of the accused around 11.00 p.m. on 12.08.2014. Accused had come to fetch him on the motorcycle in possession of the accused. Accused had taken deceased since both of them were having habit to drink liquor. It was thought by the widow that they were going for drinking liquor. The prosecution proved that the death of Namdeo is homicidal in nature by examining the autopsy Doctor. The further chain in the circumstances is that there was motive for accused to commit the crime. The accused had sold the house which was in the name of Namdeo, but accused has not given him amount of his share and, therefore, the Namdeo was demanding share from the said amount. It appears that the deceased resisted and, therefore, murder has been committed with the knife which has been discovered by the accused. All the witnesses have supported the prosecution and there is no perversity in arriving at the said conclusion by the learned trial Judge. The appeal deserves to be dismissed.

8 The prosecution story rests on – 1) last seen theory, 2) extra judicial confession, 3) handkerchief belonging to the accused found at the spot, and 4) discovery of knife. Thus, the prosecution story rests on circumstantial evidence and for that purpose prosecution will have to prove the golden principles laid down in **Sharad Birdhichand Sarda vs. State of Maharashtra** reported in (1984) 4 SCC 116 :

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

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade vs. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri. L.J. 1783] where the observations were made : [SCC para 19, p.807 : SCC (Cri) p. 1047]

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say. they should not

be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”

Therefore, it is required to be seen, as to whether the said five golden principles i.e. panchsheel have been fulfilled by the prosecution in this case.

8.1 We will take note of recent judgment in **Rajesh and another vs. State of Madhya Pradesh** [2023 SCC OnLine SC 1202], wherein following are the observations :

“In a case resting on circumstantial evidence, the prosecution must establish a chain of unbroken events unerringly pointing to the guilt of the accused and none other [**C. Chenga Reddy and others vs. State of A.P.** [(1996) 10 SCC 193], **Ramreddy Rajesh Khanna Reddy and another**

vs. State of A.P [(2006) 10 SCC 172], **Majenderan Langeswaran vs. State (NCT of Delhi) and another** [(2013) 7 SCC 192] and **Sharad Birdhichand Sarda vs. State of Maharashtra** [(1984) 4 SCC 116]. As long back as in the year 1952, in **Hanumant vs. State of Madhya Pradesh**, a Three Judge Bench of this Court observed as under :

‘It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.’

Again, in **Padala Veera Reddy vs. State of Andhra Pradesh** [1989 Supp (2) SCC 706], this Court affirmed that when a case rests solely upon circumstantial evidence, such evidence must satisfy the following tests :

- ‘1 The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
- 2 Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- 3 The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
- 4 The circumstantial evidence in order to sustain conviction must be

complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.'

Last seen theory :

9 On the said point the prosecution is relying on the testimony of PW 8 Mahananda and PW 9 Ruksana. PW 8 Mahananda has deposed that she got married to Namdeo about seven years prior to the incident. It was her second marriage. She has daughter from her first marriage and son from Namdeo. Namdeo was selling Bisleri water bottles at S.T. Stand, Solapur with biscuits and other snacks. Namdeo was addicted to liquor. She herself used to go for labour work on building construction sites. They all were residing in a rented room, which was adjacent to room of her mother. On the day of incident she herself, her mother Laxmi and neighbour Ruksana had gone for labour work. Namdeo was sick and, therefore, he was in the house. He was watching television. She returned at about 6.00 p.m. Around 10.00 p.m. Namdeo was sitting on handcart near her house. Then her mother Laxmi called him for dinner, but he told that he is having loose motion and, therefore, he asked her to take the dinner. Mahananda, her mother and Ruksana had dinner in the house of her mother and thereafter when they were returning to house accused came on motorcycle and took Namdeo on

motorcycle along with him. She felt that both the brothers were going for drinking liquor and, therefore, she went to house and slept. She got up around 7.00 a.m. and prepared food. Her mother came and asked, where is Namdeo ? She told that Namdeo is not in house and might have gone for his work. At that time, PW 9 Ruksana told her that at the mid night accused had come in front of house and was calling Mahananda as 'Vahini' (sister-in-law). But then Ruksana told accused that Namdeo had gone along with him and how he has come back. Thereafter Mahananda, her mother and Ruksana went for the work. Accused had thereafter given phone call to Laxmi and asked, where Namdeo is ? Mahananda returned at 7.30 p.m. Accused had also come. Then her mother told accused that he should file missing complaint in respect of Namdeo to Police, but he told that they should search for him for three days and then they should file missing report. Accused then asked Namdeo's photograph, which was provided by Laxmi. They searched for Namdeo for about two days, but on the next day around 3.00 to 4.00 p.m. accused told to Laxmibai to come to Police Chowky. They lodged the missing report and came back. Here, it is to be noted that PW 9 Ruksana has also tried to say the same thing, but the more clarity was tried to be given by her by saying that around 11.00 to 11.15 p.m. they saw accused taking Namdeo with him. PW 9 Ruksana has not given as to who are the members of her

family. But, then she says that even she felt that both the brothers were proceeding for drinking liquor and, therefore, they had not obstructed them. Feeling is a different thing and actual asking would have been a different thing. This would rather given an impression that even they had not suspected that the accused would commit murder of his brother. PW 9 Ruksana further says that at mid night accused went in front of the house of Namdeo and called for Mahananda. But she, that means Ruksana, asked accused that - when Namdeo had gone along with him and still not returned ? She does not say that it raised suspicion in her mind and she felt that she should ask as to why the accused is calling for Mahananda and where Namdeo has been left. It is rather surprising that when accused was allegedly calling Mahananda, the neighbour would come and they will not call Mahananda outside the house nor Ruksana says that she asked accused as to why he is calling Mahananda. She has not given the time when accused had come. Another aspect i.e. required to be seen is – both of them are not explaining where the accused used to reside and who are his family members. This information was necessary in view of the fact that prosecution has also examined PW 12 Sindhu Jagtap, who has stated that a day prior to finding of dead body of Namdeo, accused had gone to her house between 1.00 to 1.30 a.m. Accused slept in her house, woke up around 7.30

a.m. and went away. She is not giving reason as to why she had given shelter to accused at odd hours. She does not claim that she is the relative of deceased and accused. It has come in the cross-examination of this witness that one Vandana is her daughter-in-law and accused as well as deceased are the cousin brothers of Vandana. PW 12 Sindhu has not stated that her daughter-in-law had allowed accused to sleep at night time on that day. The distance between her house and the house of accused and deceased has also not been stated. Therefore, her statement that accused had come to stay on the intervening night of 12.08.2014 and 13.08.2014 appearing to be unbelievable. Prosecution has examined PW 13 Pravin Jagtap, who is the son of PW 12 Sindhu Jagtap. He has also stated that around 1.30 a.m. on 13.08.2014 accused went to their house. He opened the door and smelled alcohol from accused. He made inquiry to accused, as to whether he had come after consuming liquor. Accused told 'Yes'. Accused entered his house and slept in his house and went on the next day morning around 7.30 a.m. Even if for the sake of argument it is accepted that the accused had come to stay or sleep at the night time to his house; yet, this fact *per se* will not prove that the accused has committed the crime. It appears that this witness did not find it abnormal that the accused had come at such an odd hours and then slept in his house. Coming back to the testimony of PW 8 Mahananda,

it can be seen that she had absolutely no knowledge as to why the accused would have committed murder of her husband. She has expressed only the suspicion which according to her came in her mind after police told her that Namdeo has been murdered. She says that she suspected accused as accused had sold house of Namdeo six months prior to the incident and had not paid money to Namdeo. Namdeo was demanding that money to accused. After the money was demanded, accused has threatened Namdeo saying that he would kill him. Thus, it can be seen that this kind of explanation is coming much after the date of incident and for that purpose the quick consideration of the dates would be relevant. Deceased went on missing rather allegedly went along with accused around 11.00 to 11.15 p.m. on 12.08.2014. His dead body was found around 9.30 a.m. on 13.08.2014, but the identity is stated to have been established on 21.08.2014. That means, in between 12.08.2014 to 21.08.2014; though she says that the accused was meeting her and they were talking to each other, still she did not suspect accused to be the culprit.

10 The schedule above said would show that there is much gap between the deceased seen alive by PW 8 Mahananda and PW 9 Ruksana and they had seen the dead body of Namdeo i.e. from the intervening night of 12.08.2014 to 13.08.2014 till 21.08.2014. Even if we take that the dead

body was found on 13.08.2014; yet, there was gap of about 10 to 11 hours between deceased seen alive allegedly with accused and the murder. Here itself, we would like to consider the testimony of the autopsy Doctor. There is no much dispute about the cause of death given by PW 3 Dr. Swapnil More. Column No.17 and corresponding internal injuries would clarify that the death was homicidal in nature. He has stated that after considering the internal examination of stomach he found that death occurred within 08 to 10 hours from last meet. Again going back to testimony of PW 8 Mahananda we can get the whole day of 12.08.2014. She was outside the house for work, she returned around 6.00 p.m., her mother had called Namdeo for dinner around 10.00 p.m. but he had not taken by stating that he is suffering from loose motion. The question, therefore, arises – when Namdeo had taken meals ? Therefore, in absence of these details we cannot come to the conclusion that the death and the last seen incident had proximity with each other. We would like to rely on the decision in **R. Sreenivasa vs. State of Karnataka** [2023 SCC OnLine SC 1132], wherein following are the observations :

15-a) **Kanhaiya Lal vs. State of Rajasthan**, (2014) 4 SCC 715, where it was noted :

‘12 The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed

the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.’ (emphasis supplied)

(b) **Nizam vs. State of Rajasthan**, (2016) 1 SCC 550, the relevant discussion contained at Paragraphs 16-18, after noticing Kashi Ram (supra) :

'16. In the light of the above, it is to be seen whether in the facts and circumstances of this case, the courts below were right in invoking the “last seen theory”. From the evidence discussed above, deceased Manoj allegedly left in the truck DL 1 GA 5943 on 23-1-2001. The body of deceased Manoj was recovered on 26-1-2001. The prosecution has contended that the accused persons were last seen with the deceased but the accused have not offered any plausible, cogent explanation as to what has happened to Manoj. Be it noted, that only if the prosecution has succeeded in proving the facts by definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and then only onus can be shifted on the accused under Section 106 of the Evidence Act.

17 During their questioning under Section 313 Cr.PC., the appellant-accused denied Manoj having travelled in their Truck No. DL 1 GA 5943. As noticed earlier, the body of Manoj was recovered only on 26-1-2001 after three days. The gap between the time when Manoj is alleged to have left in Truck No. DL 1 GA 5943 and the recovery of the body is not so small, to draw an inference against the appellants. At this juncture, yet another aspect emerging from the evidence needs to be noted. From the statement made by Shahzad Khan (PW 4) the internal organ (penis) of the deceased was tied with rope and blood was oozing out from his nostrils. Maniya Village, the place where the body of Manoj was recovered is alleged to be a notable place for prostitution where people

from different areas come for enjoyment.

18 In view of the time gap between Manoj being left in the truck and the recovery of the body and also the place and circumstances in which the body was recovered, possibility of others intervening cannot be ruled out. In the absence of definite evidence that the appellants and the deceased were last seen together and when the time gap is long, it would be dangerous to come to the conclusion that the appellants are responsible for the murder of Manoj and are guilty of committing murder of Manoj. Where time gap is long it would be unsafe to base the conviction on the “last seen theory”; it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. From the facts and evidence, we find no other corroborative piece of evidence corroborating the last seen theory.’ (emphasis supplied)

16 The cautionary note sounded in Nizam (supra) is important. The ‘last seen’ theory can be invoked only when the same stands proved beyond reasonable doubt. A 3-Judge Bench in Chotkau vs. State of Uttar Pradesh, (2023) 6 SCC 742 opined as under :

15 It is needless to point out that for the prosecution to successfully invoke Section 106 of the Evidence Act, they must first establish that there was “any fact especially within the knowledge of the” appellant. ...’ (emphasis supplied)

To buttress our findings that in order to employ the theory of last seen together it should be proved by prosecution that the gap between deceased lastly seen together in the company of accused and the death was so narrow that it should then infer that accused is only the perpetrator of the crime. Therefore, we hold that prosecution has failed to bring home the

theory of last seen together.

11 Before we proceed to the next point, we would also like to consider the point of motive. Since the case of the prosecution is based on circumstantial evidence it is inevitable for the prosecution to prove the motive. Here, the motive is stated to be the fact that accused had sold house which was in the name of Namdeo, got the money but did not share it with Namdeo. Namdeo was demanding the money, but accused threatened him with dire consequences. The first and the foremost fact is that the alleged sale is six months prior to the incident. How much amount is received and whether the deceased was having share in the said property or not has not been conclusively proved. If it is a fact that the house was standing in the name of deceased, then the question arises – As to how accused would have sold the same to anybody ? Only deceased was then competent person to execute the sale deed. The said sale deed has not been produced on record and got exhibited. On the same point there is evidence of PW 12 Sindhu. She has stated that deceased as well as accused were having one house property. It was sold for Rs.1,70,000/- and since then both were quarreling with each other. The money of the sale proceeds was with accused. Deceased was demanding money of his share from accused. Accused was assaulting Namdeo and giving threat to kill. First and the foremost fact is

that this witness does not claim herself to be the purchaser or relative of a purchaser who was present at the time of execution of alleged document. Secondly, she says that the house belong to both, accused as well as deceased, which is not the case stated by PW 8 Mahananda. When the alleged incident of giving threat has taken place has also not been seen. Prosecution has not taken pains to examine the person to whom the house is allegedly sold. He would have been the best person to say to whom he handed over the consideration amount. Therefore, the testimony of PW 12 Sindhu is hearsay on this point and cannot be considered. Thus, the prosecution has not established the motive also.

Extra Judicial Confession and handkerchief belonging to the accused found at the spot :

12 The prosecution has come with a case that the accused had given extra judicial confession to PW 10 Devidas Sonawane and PW 11 Kantabai Devidas Sonawane, the husband and wife. However, both of them appears to have supported the prosecution story to certain extent only. They have stated that accused had gone to their house on 23.08.2014 and on that day there was newspaper coverage to the news item about murder of Namdeo and photograph was also published. PW 11 Kantabai after witnessing the

photograph asked to accused - what is near the dead body ? He told that - it is handkerchief belonging to him. Then, she asked accused - as to how his handkerchief is near the dead body ? Then the accused told that - he had given the said handkerchief to deceased. This much fact is supported by both of them, but the other alleged confessional part has not been supported. Questions in the nature of cross were put by the prosecution by taking permission, however, nothing favourable has been transpired. Here, to the supported part also we would like to say that both these witnesses do not claim that the accused was having relationship with both of them and to whatever extent they have supported does not amount to confession, rather there is explanation in the same to the fact of handkerchief found near the dead body. According to them, the accused told them that he had given the said handkerchief to deceased. Therefore, on the said count also the prosecution has failed.

Discovery :

13 The prosecution has also then relied on the discovery under Section 27 of the Indian Evidence Act. It is alleged that the accused discovered the knife used in the commission of offence in presence of panchas and the Investigating Officer. Testimony of PW 2 Mr. Suresh Shinde

would show that such statement was given on 26.08.2014 and in presence of two panchas the knife was recovered from a room/house owned by Narsayya Komul. Even PW 2 PSI Mr. Suresh Shinde says that after the accused had allegedly taken them to the said place, he asked his owner to give the key of his house and after the key was supplied the lock was opened and they entered the house. Now, this Narsayya Komul has not been examined. Prosecution has examined PW 5 Appa Ransure, who acted as panch to the said discovery panchnama, but he has turned hostile. The questions in the nature of cross have not yielded any admission. Under the said circumstance, the discovery of knife cannot be said to have been proved legally. The reliance placed by the learned trial Judge only on the testimony of PW 2 Mr. Suresh Shinde is wrong.

14 Other witnesses examined by the prosecution are formal in nature.

15 Thus, taking into consideration the re-assessment and re-appreciation of evidence above said it can be certainly said that the prosecution had failed to bring a complete chain of circumstances of which every single circumstance was pointing out the accused to be the only perpetrator of the crime. The findings arrived at by the learned trial Judge

are based on wrong appreciation of evidence and, therefore, they deserve to be set aside. Appeal deserves to be allowed. Hence, following order.

ORDER

- 1 Criminal Appeal stands allowed.
- 2 The conviction awarded to the appellant – Shyam Vishnu Yadav in Sessions Case No.191 of 2014 by the learned Additional Sessions Judge, Osmanabad for the offence punishable under Section 302 of the Indian Penal Code, stands quashed and set aside.
- 3 The appellant stands acquitted of the offence punishable under Section 302 of the Indian Penal Code.
- 4 The appellant be set at liberty, if not required in any other case.
- 5 The fine amount deposited, if any, be refunded to the appellant after the statutory period.
- 6 We clarify that there is no change as regards the order in respect of disposal of muddemal.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)