

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

CRIMINAL APPEAL NO. 418 OF 2016

Subhash s/o Ganesh Gir,

Age : 59 years, Occu : Agri, at present nil,

R/o. Nanand, Taluka Nilanga,

Dist. Latur.

...Appellant

Versus

The State of Maharashtra

...Respondent

.....

Mr. Sunil B. Jadhav – Advocate for appellant

Mrs. Vaishali S. Choudhari – APP for respondent/State

.....

AND

CRIMINAL APPEAL NO. 419 OF 2016

The State of Maharashtra

...Appellant

Versus

Subhash s/o Ganesh Gir,

Age : 55 years, Occu : Agri.,

R/o. Nanand, Tq. Nilanga, Dist. Latur

...Respondent

.....

Mrs. Vaishali S. Choudhari – APP for appellant/State

Mr. Sunil B. Jadhav – Advocate for respondent

.....

AND

CRIMINAL APPEAL NO. 420 OF 2016

The State of Maharashtra

...Appellant

Versus

1. Nandkishor s/o Balreddy Kolyame (Koltame),
Age : 29 years, Occu. Agri.,
R/o. Sastapur, Tq. Basavkalyan, Dist. Bidar (KS).

2. Subhash s/o Virbhadrappa Kumbhar,
Age : 46 years, Occu. Teacher,

R/o. Basavkalyan, Tq. Basavkalyan,
Dist. Bidar (KS.)

...Respondents

.....

Mrs. Vaishali S. Choudhari – APP for appellant/State

Mr. Sunil B. Jadhav – Advocate for respondents

.....

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

**ARGUMENTS CONCLUDED AND RESERVED ON : 28TH AUGUST, 2023
JUDGMENT PRONOUNCED ON : 12TH SEPTEMBER, 2023**

JUDGMENT : [Per : Abhay S. Waghware, J.]: -

1. These three Criminal Appeals arise out of a common Judgment and Order dated 08.03.2016 passed by learned Additional Sessions Judge-3, Latur in Sessions Case No. 15/2012 thereby convicting Subhash Ganesh Gir for offence punishable under Sections 302, 201 r/w 34 of the Indian Penal Code and acquitting co-accused Nandkishor Balreddy Kolyame (Koltame) and Subhash Virbhadrapa Kumbhar.

2. Appellant Subhash Ganesh Gir has filed Criminal Appeal No. 418 of 2016 taking exception to the impugned Judgment and Order referred to above, whereas; State has filed two appeals viz. Criminal Appeal No. 419 of 2016 for enhancement of sentence imposed upon Subhash Gir and Criminal Appeal No. 420 of 2016 challenging acquittal of Nandkishor Kolyame and Subhash Kumbhar of the offences as stated in the impugned judgment and order.

FACTUAL MATRIX :-

3. Prosecution story, in nutshell, is that human sacrifice to appease the deities for unearthing hidden treasure was given by accused persons by committing murder of Vitthal Kamble and Surekha Gokule on 18.10.2011 and 23.10.2011, respectively. It is the case of prosecution that, after performing sorcery on the night of 18.10.2011, Vitthal was done to death by first beheading him and thereafter severing his both hands from the shoulder in the agricultural field bearing Gut No. 698 belonging to Namdeo Gambhire, situated in village Nanand. His torso was stuffed in a white sack and thrown in a well situated in the field bearing Gut No. 696 belonging to one Samadhan Panchal. Whereas; severed head and limbs were stuffed in a sack and dumped in a well situated in Gut No. 729 belonging to one Dagadu Sarwade.

3.1 It is further case of the prosecution that, on 23.10.2011, with same object, Surekha Gokule was also done to death and her severed head was dumped at the outlet of a tank of village (*chamani*) whereas; her torso stuffed inside a gunny bag was disposed of in the bushes in the vicinity of village tank.

3.2 According to prosecution, investigation revealed that both the deceased were spotted in the company of accused Subhash Ganesh Gir, Nandkishor Kolyame and Subhash Kumbhar. Statements of persons seen both of them together were recorded. At the instance of accused, belongings like personal effects and mobiles of both deceased Surekha

and Vitthal were recovered from jeweller where they were disposed of. During custody, accused gave memorandum of disclosures and after investigation, on finding sufficient evidence against them, all the three accused were duly charge-sheeted.

3.3 Case was tried by learned Additional Sessions Judge, Latur, who, after recording evidence, appreciated the same and on hearing both the sides, reached to a finding that the prosecution has established charges and held them guilty for the offences as stated in operative part of the impugned order.

3.4 It is the above order which is now questioned before us by filing distinct appeals numbered above and, therefore, we have taken up them together for decision by this common judgment.

4. Heard learned counsel appearing on behalf of all the accused and the learned APP for State.

SUBMISSIONS ON BEHALF OF APPELLANT: -

5. The common grounds raised on behalf of the accused are that, prosecution has utterly failed to establish case against the accused – Subhash Ganesh Gir, beyond reasonable doubt. Secondly, there is no evidence either direct or circumstantial. Thirdly, admittedly, though prosecution came forward with some circumstances, according to him, none of the circumstances so relied upon by the prosecution are cogently

and firmly established as required by law. He emphasized that even there is no *iota* of evidence in support of motive or last seen together theory, which according to him, are the only incriminating circumstances. As far as circumstance of recovery is concerned, it is submitted that it is of no significance for the simple reason, that even prior to alleged memorandum of discovery, police machinery was well aware and equipped with the so-called recovery and, therefore, even such circumstance was unworthy of credence. Lastly, he submitted that implication is apparently false and on suspicion. It is further submitted that, evidence of so-called star witnesses of the prosecution is full of material omissions, contradictions and improvements. The same are also overlooked by learned Trial Judge. Therefore, it is strenuously submitted on behalf of accused – Subhash Gir that though there was no case at all made out against him, learned trial Court has handed down conviction and so he prays to set aside the same.

SUBMISSIONS ON BEHALF OF THE STATE : -

6. In answer to the above, learned APP also pointed out that on the strength of evidence of 19 witnesses, story of prosecution has been established that too firmly and cogently. She pointed out to the circumstances and would submit that testimony of none of the prosecution witnesses has been shaken. The son of deceased Vitthal and sister of deceased Surekha deposed about deceased going in the

company of accused persons. Independent witness PW-13 deposed that he has also seen deceased at the Bus Stand of Nanand in the company of accused persons. Thereafter, both the deceased persons went missing. Hence, 'last seen together' theory came into play and the same has been established. There are recoveries at the instance of the accused persons and hence, she submits that learned trial Court has committed no error whatsoever in accepting the circumstances as proved. Resultantly, she submitted that there is no merit in the appeal filed by accused – Subhash Gir and prays for disallowing the same. Whereas; on account of failure to take into consideration the evidence of the prosecution as regard the remaining accused, she prays to allow Criminal Appeal Nos. 419 and 420 of 2016.

7. This being the first Appellate Court, as required by law we undertook the exercise of re-appreciating, re-examining and re-analyzing of prosecution evidence to ascertain whether there is merit in the appeals.

8. Admittedly, there being no direct evidence and case being entirely based on circumstantial evidence, it is incumbent upon the prosecution to establish all circumstances firmly, cogently and beyond reasonable doubt.

8.1 Law on appreciation of circumstantial evidence, is fairly

dealt in umpteen judgments, viz. **Hanumant Govind Nirgudkar and another v. State of M.P.**, AIR 1952 SC 343 followed by water shedding judgments in the case of **Shivaji Sahebrao Bobade v. State of Maharashtra**, AIR 1973 SC 2622; **Sharad B. Sarda v. State of Maharashtra**, AIR 1984 SC 1622; **Padala Veera Reddy v. State of Andhra Pradesh**, 1989 (Suppl.2) SCC 706; **Dhananjay Chatterjee @ Dhana v. State of West Bengal**, 1994 SCC (2) 220 and **State (NCT of Delhi) v. Navjyot Sandhu @ Afsan Guru**, 2005 (11) SCC 600, five golden principles are enunciated which are as follows:

- “(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. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved”. 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 that 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.”

9. Similarly, while conducting criminal trial, court is also expected to bear in mind the cardinal principles of criminal jurisprudence that **firstly**, fundamental burden of proving the case is always on the prosecution; **secondly**, fouler the crime, greater the degree of proof; **thirdly**, prosecution must prove its case beyond reasonable doubt; **fourthly**, accused “must be” and not merely “may be” guilty of the offence and the distance between “must be” and “may be” should not be long and divide conjectures from sure conclusion; **fifthly**, suspicion however strong, never takes place of proof; and **lastly**, court must ensure that miscarriage of justice is avoided and if facts and circumstances of the case so demand, benefit of doubt should go to the accused, provided it is fair doubt based on reasons and common sense.

10. The above principles are derivative of several landmark cases like **Bhagirath v. State of M.P.**, AIR 1976 SC 975; **Shankarlal Dixit v. State of Maharashtra**, AIR 1981 SC 765 and **Dhananjay Chatterjee @ Dhana v. State of W.B.**, (1994) 2 SCC 220.

11. In the light of above settled legal position, we proceed to scan and sift the evidence adduced by prosecution in trial court. It seems that prosecution has examined in all 19 witnesses.

STATUS, ROLE AND SUM AND SUBSTANCE OF THE PROSECUTION EVIDENCE : -

12. Before we advert to the evidence on record, we wish to introduce and spell-out the status of each of the prosecution witnesses examined by prosecution, which is as follows :

PW1 Vilas Baburao Panchal is an informant, who set the law into motion by lodging report at Exh. 39. He also acted as a panch.

PW2 Mohan Sadashiv Londhe is a panch to memorandum of disclosures at Exh. 47 to 49 at the instance of accused Subhash Kumbhar and Nandkishor Kolyame and Exh. 50 to 56.

PW3 Shivaji Digambar Patil is a photographer, who had taken snaps of the dead bodies found in the well as well as in the tank.

PW4 Keshav Yeshwantrao Suryawanshi is a panch to seizure of mobiles at the instance of accused Subhash Gir.

PW5 Limbraj Kalappa Belkunde is a panch to memorandum of recovery and discovery of spot, seizure of knife, one printed saree of red colour, under garmets, gunny bag containing head of a woman and pendant of shivling.

PW6 Uttam Narsing Shetake is a panch to seizure of memorandum

of disclosure/seizure of clothes of accused Subhash Kumbhar and Nandkishor Kolyame.

PW7 Kamalabai Gurunath Tukanna is the sister of deceased Surekha, who claims to have met deceased Surekha at Goundgaon and informed her about she suffering from jaundice and leaving for village. She met her sister at Goundgaon and she left saying that she was leaving for village and thereafter she went missing.

PW8 Udhav Keshav Giri and **PW9** Balasaheb Bhimrao Kadam are the carrier of muddemal.

PW10 Digambar Rangrao Jadhav is the panch to seizure of gold chain and earrings vide Seizure Panchanama at Exh. 152.

PW11 Santosh Digambarrao Birajdar is an employee of a jewellery shop owned by Gopan Babruwan Pawar. He gave evidence about accused Subhash Gir and Vandana Kashigir Giri visiting the shop for selling ornaments i.e. Bormal and earrings.

PW12 Dr. Sagir Pathan conducted autopsy on the dead body of Vitthal Kamble and issued probable cause of death and the post-mortem report.

PW13 Pratap Raghunath Sonwane is the relative of deceased Vithal Kamble. According to him, he met Vitthal at the bus stand of

Nilanga and they both had tea together and Vitthal introduced persons with him who are the accused persons.

PW14 Bhaskar Vithalrao Kamble is the son of deceased Vithal. According to him, the sum and substance of his evidence is that his father left the house on 18.10.2011 saying that he was accompanying deceased Surekha to collect medicine for her ailment from Subhash Gir. His father went informing that he would stay at the house of Subhash Gir. There was last telephonic call between them in the evening of 18.10.2011 and later on there was no contact and directly dead body and its parts were detected and identified by him.

PW15 Dr. Sandip Venkatrao Pendharkar has conducted post-mortem on the dead body of deceased Surekha and issued opinion of probable cause of death and post-mortem report.

PW16 Ashok Abasaheb Anantre, API, was attached to the Killari Police Station at the relevant time. He being an Investigating Officer carried out investigation and narrated about all the steps having been taken by him during the investigation.

PW17 Kishor Venkat Alane and **PW18** Ramesh Shyamrao Mehtre collected the Call Detail Records.

PW19 Chetan Shivdas Patil, the Nodal Officer of Airtel, Pune Branch, handed over details of calls between accused and the deceased.

13. Hence, it is seen that the following circumstances in trial court which are relied upon by the prosecution, are as follows : -

First – Both the deceased Vitthal and Surekha leaving house on 18.10.2011 to go to the house of accused Subhash Gir at Nanand for arranging medicine.

Second– Both the deceased spotted in the company of accused at the bus stand of Nilanga on 18.10.2011.

Third – Recovery of heads and limbs of both Vitthal and Surekha at the instance of accused.

Fourth – Sale of ornaments of Surekha by accused Subhash to a jeweller.

Fifth – Recovery of mobiles of Surekha and Vitthal at the instance of accused Subhash.

FIRST CIRCUMSTANCE

14. According to prosecution, on 18.10.2011, Vitthal left the house informing his son Bhaskar (PW14) that he was taking deceased Surekha to Nanand to arrange medicine for her as she was allegedly suffering from jaundice. Similarly, PW7 Kamalabai also claims to have met her deceased sister Surekha and during their conversation, she

claims deceased Surekha to have told her about she suffering from jaundice and she leaving for village.

15. PW14 – Bhaskar s/o Vithalrao Kamble, informant and son of deceased Vitthal, in his evidence at Exh. 166 deposed that on 18.10.2011 at around 8:30 p.m. his father told him that he will go to Nilanga to bring medicine of jaundice for Surekha. He further deposed that his father told him that Surekha Gokule was suffering from jaundice and as there was nobody with her, he was accompanying her to bring medicine for her. He further deposed that his father told him in the afternoon that Nandkishor Reddy of Sastapur and his friend Subhash Master were also going to Nanand to meet Subhash Gir and that his father and deceased Surekha were accompanying them to Nanand. According to him, his father also further told him that as the daughter of Nandkishor Reddy was ill, they were going to Subhash Gir. He further told him that he may stay in the house of Subhash Gir that night and saying so, his father left on TVS two wheeler. In the evening, PW14-Bhaskar made a telephonic call to his father and that time his father told him that he had come to Nilanga and his two wheeler had failed but thereafter, till 22.10.2011 there was no contact with his father.

15.1 PW7 – Kamalabai Gurunath Tukanna, who is sister of deceased Surekha, has given evidence at Exh. 143 to the effect that, she had visited her sister two and half years back and on one Tuesday i.e. on

18.10.2011, they had met each other at Goundgaon. At that time, deceased Surekha told her that she was suffering from jaundice and that she was going to village. Then this witness is found to have given description of clothes and the ornaments on the person of deceased Surekha and stated that her sister deceased Surekha told her that she was going to Nilanga and thereafter she went missing.

16. Taking into account the depositions of PW14 and PW7 on the point of this circumstance, it has come on record that on 18.10.2011 deceased Vitthal left his house informing his son Bhaskar (PW14) about alleged disease suffered by deceased Surekha and he accompanying her to Nanand to meet appellant - Subhash Gir. But, thereafter his father did not return and rather his dead body was traced directly. Evidence of PW14 shows that, in the same evening there was telephonic talk between deceased Vitthal and him but thereafter there was no contact between them.

16.1 According to PW7-Kamalabai, she met her sister at Goundgaon and she left for village informing about her ailment.

17. On close scrutiny of testimonies of PW14-Bhaskar and PW7-Kamalabai, it is emerging that deceased Vitthal left house on the morning of 18.10.2011 on his motorcycle. There is no evidence to show that, he went further and met deceased Surekha, where he went and

picked her up and where they further proceeded. Even motorcycle of deceased Vitthal is not traced out by the Investigating Machinery. Similarly, PW7 sister of deceased Surekha claims about she and her sister meeting at Goundgaon and her sister deceased left saying that she is going to her village. PW7 does not speak about her sister informing that she was going with deceased Vitthal to Nanand to the accused persons to collect medicine. Resultantly, there is no evidence on the point of both Vitthal and Surekha to be together on 18.10.2011. No witness or neighbour of accused is examined to verify whether both deceased had come there together. There is no evidence to show that both the deceased reached the house of appellant Subhash Gir, together. Therefore, evidence of PW14 and PW7 on the point of both deceased planning together to visit accused is either unclear or ambiguous. This circumstance is not completely or conclusively getting proved about both the deceased meeting on 18.10.2011. Hence, this circumstance fails.

SECOND CIRCUMSTANCE

18. Precise case of the prosecution is that both deceased were in the company of accused, and PW13 – Pratap Sonwane, a relative of deceased Vitthal had met accused as well as both the deceased at Nilanga bus stand. Hence, so-called theory of last seen together. He is the star witness for prosecution on above theory.

18.1 Before advertng to the evidence of this witness, it would be fruitful to give brief account of the settled legal position as regards the evidentiary value of last seen together and how and when this circumstance can be proved and accepted.

18.2 When theory of last seen together is relied, then it is expected of prosecution to even establish time since death at least by approximation. Before re-appreciating the evidence on this count, it is desirable to briefly discuss the law on the point of theory of last seen together propounded by Hon'ble Apex Court time and again. It is time and again held that "last seen theory comes into play, only where the time gap between the point of time when accused and deceased were seen last alive and when deceased is found dead is so small that possibility of anyone other than accused being the author of crime becomes impossible". In absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to the conclusion in those cases. Such observations are spelt out in the case of **State of U.P. v. Satish**, (2005) 3 SCC 114 and **Shyamlal Ghosh v. State of West Bengal**, (2012) 7 SCC 646.

19. Similarly, law is also squarely settled that while invoking circumstance of last seen together, it is equally necessary for prosecution to establish, time since death. Such proposition is propounded in

landmark case of **Niranjan Panja v. State of West Bengal**, (2010 6 SCC 525) and Shyamlal Ghosh (supra).

20. In the backdrop of the above, if we visit the evidence of PW13 at Exh. 161, we find it deposing that he knew the deceased Vitthal who was father of mother-in-law of his brother Gopal. According to him, he met Vitthal Kamble on 18.10.2011 at Nilanga bus stand at around 07:00 p.m. According to him, he asked deceased Vitthal to come to his village, however, he allegedly replied that there were 3 to 4 persons with him and they were going to Nanand. He further deposed that, he had tea with these persons including a lady, namely, deceased Surekha and thereafter deceased Vitthal introduced the companions with him. This witness further deposed that deceased Vitthal had told him the names of these persons as Nandkishor Kolthame R/o. Sastapur, Subhash Kumar Master R/o. Basavkalyan, Subhash Gir Maharaj R/o. Nanand and one lady Surekha Gokule. According to this witness, after taking tea, deceased Vitthal Kamble along with his companions went out of the bus stand saying that they were going to Subhash Gir at Nanand.

20.1 While under cross, this witness (PW13) has stated about informing police that after taking tea Vitthal and his companions went out of the bus stand saying that they were going to Subhash Gir at Nanand, however, on confronting his statement, he is unable to assign

any reason as to why such a fact is not mentioned in his statement. In fact, there is material omission to this extent.

20.2 It is further emerging that, in spite of claiming to be distant relative of deceased Vitthal and in spite of claiming to have met him on 18.10.2011, he has not immediately reported the same either to the family members of Vitthal or police about so-called meeting with deceased Vitthal in the company of accused. His statement seems to have been recorded on 09.11.2011, even when he claims to have learnt about death of Vitthal Kamble on 29.10.2011. Even otherwise, in view of above discussed law, the last seen theory comes into play only when the time gap between the point of time when accused and deceased were seen last alive and when deceased is found dead is so small that possibility of anyone other than accused being the author of crime becomes impossible. Here, apparently there is immense time gap between so-called accused and deceased seen alive together on 18.10.2011 till the dead bodies of Surekha and Vitthal were traced out in the tank on 28.10.2011 and 05.11.2011, respectively. Resultantly, even this circumstance of 'last seen together' inspires no confidence and consequently fails as not proved.

THIRD CIRCUMSTANCE

21. It seems that the case of the prosecution in the trial court was that, torso of Vitthal and Surekha were found in a well and tank, respectively. However, heads of both Vitthal and Surekha were recovered

from distinct places at the instance of accused persons. The panchas to the so-called recovery and discovery have also been examined by prosecution.

21.1 In the light of above, we have examined the evidence of so-called panchas. According to PW2 – Mohan, on 05.11.2011 i.e. almost about three weeks of the incident, there is disclosure by accused Subhash Gir regarding his readiness to show the place where he threw sacks. His disclosure memorandum Exh. 47 was recorded. Witness further stated that accused Subhash Kumbhar also made a statement and it was scribed at Exh. 48. Likewise, accused Nandkishor also gave memorandum of disclosure at Exh. 49 and thereafter all three accused took police and panchas to field of Dagadu Sarwade and there accused Subhash Gir told that the sack was thrown in a well and it was taken out and it was found to have contained a head of male and two hands, one dhoti, shirt, cap, pyjama, baniyan and gamchcha. Son of deceased Vitthal identified the clothes of deceased Vitthal and panchanama Exh.50 was drawn. Witness further stated that accused took them to the field of Namdeo Gambhir and pointed to the spot where blood was lying and police collected samples of soil mixed blood along with stone and chappal vide panchanama Exh. 51.

21.2 In cross at the hands of learned counsel for accused no. 1, there is entire denial but, while under cross at the hands of learned counsel for accused nos. 2 and 3, panch witness admitted that the spot

pointed out by him to police was already known to the villagers.

21.3 Therefore, what is emerging is that there is said to be a disclosure by all three accused on 05.11.2011, after almost two weeks of their arrest. When police were already aware of the spot, the so-called disclosure cannot be taken aid of by prosecution by applying Section 27 of the Indian Evidence Act as, there was nothing new which was discovered and was exclusively to the knowledge of the accused. Therefore, even said circumstance cannot be said to be proved.

FOURTH CIRCUMSTANCE

22. According to prosecution, accused Subhash Gir and one Vandana Kashigir Giri after committing the offence, removed the ornaments on the person of deceased Surekha and sold it to a jeweller, namely, Gopal Babruwan Pawar. According to prosecution, there is evidence about accused Subhash Gir disposing of the ornaments on the person of deceased Surekha and resultantly accused persons are responsible.

22.1 Witness PW11 Santosh Digambarrao Birajdar has been examined in support of above story, however, it is revealed that in fact PW11 is not the owner rather he is an employee of the shop owned by said Gopal Babruwan Pawar. Consequently, so-called sale transaction at the instance of Subhash Gir was with a staff of a jewellery shop and not the owner. Therefore, even though PW11 has been examined by prosecution, his evidence at Exh. 153 shows that police visited him on

08.11.2011 to make inquiry and he allegedly told them that he purchased gold from accused Subhash Gir. He further deposed that prior to 8.11.2011, accused Subhash Gir and Vandana had come to the shop for selling one Bormal and two earrings. He purchased it because he knew them. According to him, he purchased those articles for Rs.23,700/-. He further stated, on 08.11.2011, he was asked by police to come to Killari Police Station on 09.11.2011 along with those articles and accordingly, he, Gopal Pawar and others went to Killari and handed over the articles which were seized.

22.2 In cross at the hands of learned counsel for accused no.1, there is total denial. However, while under cross at the hands of counsel for accused nos. 2 and 3, he answered that they pay income tax and keep record of purchase and sale of gold. They give receipt on sale or purchase of ornaments. He answered that he had handed over office copy of receipt to the police and police prepared panchanama. He answered and admitted that on 08.11.2011, he did not hand over the ornaments to the police as according to him, police did not ask him to handover. He admitted that, article 'T' and 'U' are new.

22.3 Above material shows that, by examining PW11, attempt has been made by prosecution to connect appellant on the basis of sale of some ornaments by him to the jeweller. However, in spite of visiting jewellery shop on 08.11.2011, it is evident from evidence of PW11 that there was no seizure of any ornaments on that day and mere inquiry

was made. Why sold ornaments were not seized on the very same day is in dispute. On the next day, PW11 seems to have visited police station and handed over articles 'T' and 'U', but he admits in cross that they are new. For the said reason, even said circumstance of alleged sale of ornaments by accused Subhash and Vandana, is not free from doubt for above discussed reasons. It is also pertinent to note that at the threshold, there is no distinct evidence about ornaments to be belonging to deceased Surekha only. Though her sister is shown to have identified the same, there is no missing complaint by her sister Kamalabai and she seems to have identified the ornaments which were already with the police. Resultantly, above evidence of witness is not sufficient to hold this circumstance as cogently proved.

FIFTH CIRCUMSTANCE

23. Prosecution has claimed that there is seizure of mobiles of both the deceased Vitthal and Surekha at the instance of accused Subhash Gir. Evidence shows that accused Subhash Gir was arrested on 03.11.2011, however, PW4 at Exh. 124 claims that he was called by police directly to the house of accused Subhash Gir on 02.11.2011 i.e. one day prior to alleged arrest of accused – appellant on 03.11.2011. This witness claims that appellant accused gave memorandum of disclosure regarding handing over of mobile and produced it from his house and it was a black Nokia company make mobile, which according to accused-appellant, belonged to Surekha. Again witness stated that on

07.11.2011, he was called at the home of accused and on that day accused produced another black mobile informing it to be belonged to Vitthal and both the mobiles were seized.

23.1 While under cross at the hands of learned counsel for accused nos. 2 and 3, this witness has admitted that prior to 02.11.2011, police had already visited their village many a times for meeting Subhash Gir and his family. He admitted that both mobiles were not having sim cards at the time of seizure.

23.2 What is emerging from above evidence is that, accused Subhash Gir is arrested on 03.11.2011, however, recovery of two mobiles from same place is attributed to him on 02.11.2011 i.e. one day prior to his arrest and subsequently after five days of first recovery/discovery. Why recoveries were not caused on one and the same day i.e. on 02.11.2011 itself has not been explained by the prosecution. Witness has admitted that, police had visited house of accused even prior to 02.11.2011 but there was no disclosure or recovery. Even otherwise, according to this witness, the mobiles were without sim cards. To connect the mobiles to the deceased, distinct evidence ought to have been produced i.e. purchase receipt of mobile and customer application form. Unless it is shown that the mobiles belonged to only and only deceased, the same cannot be connected to the deceased. Further, Investigating Officer seems to have admitted that the mobiles were standing in the name of one Shivkumar and one

Basavraj. Without any further material about mobiles owned by such persons to be used by both the deceased, it is unsafe to hold this circumstance also as established and proved.

SUMMATION

24. Therefore, none of the above circumstances pressed into service by prosecution are firmly and cogently proved and the chain of circumstance is also not shown to be established as completed. Hence, case of prosecution cannot be said to be proved beyond reasonable doubt.

25. We have gone through the judgment and order passed by the learned Additional Sessions Judge. When learned trial Judge has found circumstances of last seen together and circumstance of discovery under Section 27 of the Indian Evidence Act as not proved, still only on the basis of recovery of heads of deceased Surekha and Vitthal after two weeks of arrest and recovery of ornaments and mobiles, learned trial Judge seems to have accepted the case of the prosecution proved. It is evident, as stated above that unless the circumstances form a complete chain pointing out only to the guilt of the accused and ruling out his innocence, case based on circumstantial evidence cannot be said to be proved. Here, as stated above, chain is found to be getting snapped on two crucial aspects i.e. last seen and recovery/discovery, hence the impugned judgment, being not legally maintainable and sustainable

deserves to be set aside by interfering and allowing the appeal filed by the appellant. Hence, we pass the following order.

ORDER

1. Criminal Appeal No. 418 of 2016 stands allowed. Criminal Appeals No. 419 of 2016 and 420 of 2016 fail and stand dismissed.
2. The Judgment and Order dated 08.03.2016 passed by learned Additional Sessions Judge – 3, Latur in Sessions Case No. 15/2012 convicting the appellant – Subhash Ganesh Gir for the offence punishable under Section 302 and 201 of Indian Penal Code, stands set aside.
3. The appellants, namely, Subhash Ganesh Gir, stands acquitted of the offence punishable under Sections 302 and 201 r/w 34 of the Indian Penal Code.
4. Accused – Subhash Ganesh Gir be set at liberty, if not required in any other case.
5. Fine amount, if deposited, be refunded to him after the statutory period is over.
6. We clarify that there is no change in respect of order of disposal of Muddemal property.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE