

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.459 OF 2017

Ganesh Mahadeo Yadav,
Age 29 yrs., Occ. Agri.,
R/o Jadid Javla, Tq. Majalgaon,
Dist. Beed.

... Appellant

... Versus ...

The State of Maharashtra

... Respondent

...

Mr. S.J. Salunke, Advocate for appellant

Mr. S.J. Salgare, APP for respondent

...

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

RESERVED ON : 16th OCTOBER, 2023

PRONOUNCED ON : 10th NOVEMBER, 2023

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

1 The original accused is challenging his conviction by learned
Additional Sessions Judge, Majalgaon, Dist. Beed on 11.04.2017 in Sessions

Case No.37/2015 by filing this appeal under Section 374 of the Code of Criminal Procedure, 1973, whereby he has been held guilty and sentenced for the offence punishable under Section 302 of the Indian Penal Code, 1860 for committing murder of his brother-in-law.

2 PW 7 Vasant Devidas Raut, r/o Kanadi Mali, Tq. Kaij, Dist. Beed is the informant. Deceased Ravikiran, aged 16 was his son. Present accused is son-in-law of PW 7 Vasant. Present accused got married to PW 9 Manjusha, whose name appears to have been given as 'Manjushri' in First Information Report, about five years prior to 13.04.2015. It is also revealed from the record that accused is the son of real sister of PW 7 Vasant. Further, it is not in dispute that on the date of First Information Report accused and PW 9 Manjusha were having daughter aged 3 and she was pregnant on the second occasion and at the time of her deposition it has come on record that the second child is also a daughter. Accused is resident of Jadid Jawla, Tq. Majalgaon, Dist. Beed.

3 With above said admitted facts it is the prosecution case that PW 7 Vasant lodged First Information Report on 13.04.2015 with Majalgaon Rural Police Station stating that he has three daughters and one son. His second daughter Swati's marriage was fixed after about three years after

marriage between Manjusha and accused. Since then the accused started saying that in fact he wanted to marry Swati. He told said fact to his wife as well as wife of PW 7 Vasant. However, nobody took it seriously and then gave advise to accused. Thereafter, Swati's marriage took place, but accused was angry with the said act. He used to tell Manjusha that his marriage has not been performed with Swati and, therefore, either he would kill Manjushri or Ravikiran and he would also commit suicide. Thereafter the engagement ceremony of third daughter of PW 7 Vasant was arranged on 09.04.2015 at Kanadi Mali and, therefore, all the near relatives were called. After the ceremony on the next day morning accused told that he wants to go to his sister's place at Mochi Pimpalgaon, Tq. Beed and, therefore, Ravikiran should be sent along with Manjusha to Jadid Jawala. He then left. Therefore, Manjushri @ Manjusha was sent along with deceased Ravikiran on 12.04.2015. Around 8.00 p.m. informant received message from Jadid Jawla that Ravikiran and Manjushri had reached there and Ravikiran would go back on the next day. On the next day i.e. on 13.04.2015 informant and his cousin brother Namdeo were in their field. Around 4.00 p.m. Namdeo received phone call from accused stating that he has murdered Ravikiran to whom they were calling as 'Bhaiyya' and after murdering him, he has thrown him on the road near field. He is proceeding to surrender before Police at Beed

and, therefore, they should not wait for Bhaiyya to come. Namdeo then made a phone call to their relative Shivaji Yadav from Jadid Jawla to confirm the fact. Shivaji confirmed the fact and then the informant went along with his relatives to the spot. They found the dead body of Ravikiran and thereafter informant lodged the First Information Report.

4 After the registration of the offence vide Crime No.49/2015 the investigation was started. The inquest panchnama was prepared and dead body was referred for postmortem. The panchnama of the spot was carried out. It is also the prosecution story that accused had gone to Shivaji Nagar Police Station, Beed around 5.30 p.m. on 13.04.2015 and surrendered himself before PW 17 ASI Mr. Ramesh Gaikwad, who was Police Station Officer on duty. PW 17 had then confirmed the information that was given by the accused which was confessional in nature and when it was confirmed that a murder has taken place within the jurisdiction of Majalgaon Rural Police Station, PW 17 Mr. Ramesh Gaikwad took accused in custody. Seizure panchnama Exh.57 of the articles found on his person has been prepared with the help of two panchas and then along with the said panchnama the custody of the accused was handed over to Majalgaon Rural Police Station.

5 Thereafter the accused came to be arrested at Majalgaon Rural

Police Station, statements of witnesses were recorded, the accused while in custody gave memorandum and discovered the big knife used in the commission of the crime under Section 27 of the Indian Evidence Act, the clothes of the deceased came to be seized, all the seized muddemal articles were sent for chemical analysis and after completion of the investigation, charge sheet was filed.

6 After the committal of the case charge was framed. Accused pleaded not guilty and, therefore, trial has been conducted. Prosecution has examined in all 17 witnesses to bring home the guilt of the accused. Taking into consideration the evidence on record and hearing both sides learned trial Judge, as aforesaid, held the accused guilty of committing offence punishable under Section 302 of the Indian Penal Code. He has been sentenced to undergo imprisonment for life and to pay fine of Rs.5,000/- (Rupees Five Thousand only), in default to suffer rigorous imprisonment for six months. Set off has been granted to the accused as contemplated under Section 428 of the Code of Criminal Procedure. The present appeal challenges this conviction.

7 Heard learned Advocate Mr. S.J. Salunke for the appellant and learned APP Mr. S.J. Salgare for the respondent.

8 It has been vehemently submitted on behalf of the appellant that the learned trial Judge has totally failed in appreciating the evidence. Most of the panchas are the relatives of deceased and his father PW 7 Vasant. Even the discovery panchnama cannot array the appellant as he was not able to differentiate between the big knife and knife. The big knife has been described as 'sura', but it is said that the chaku i.e. knife was discovered. The prosecution case rests on the alleged theory of last seen together which is a circumstantial evidence. He has relied on the decision in **Hanumant Govind Nargundkar and another vs. State of M.P.** [1953 Cri.L.J. 129], **Shailendra Rajdev Pasvan and others vs. State of Gujrat etc.** [AIR 2020 SC 180], **Indrajit Das vs. State of Tripura** [2023 (3) Mh.L.J. (Cri.) (S.C.) 412] on the point of assessment of case based on circumstantial evidence and submits that chain of circumstances have not been established in this case. The alleged extra judicial confession on phone cannot be accepted. Further, PW 9 Manjusha has been examined to state the alleged motive as well as the fact that deceased and accused left the house around 10.30 to 11.00 a.m., however, dead body has been found, that too, on a road near a field in a secluded place in the evening, therefore, the time gap between the last seen together and finding the said person dead is high. Therefore, it cannot be said that a conviction can be awarded only on the basis of last seen together. Learned

Advocate, therefore, relies on **Chandrapal vs. State of Chhatisgarh** [2022 Cri.L.J. 2401]. He has also relied on **Sawal Das vs. State of Bihar** [AIR 1974 SC 778] to buttress his submission that unless it is proved by the prosecution that the gap between the lastly the accused as well as deceased were in the company of each other and the duration between such fact being witnessed and the finding of dead body should be so narrow so that no other inference is possible. Merely because the deceased is said to have gone along with the accused, it cannot be said that any burden or onus shifts on the accused to explain anything.

9 Learned Advocate for the appellant has taken us through the entire evidence and made comments, which were in the nature that the appellant has been falsely implicated and how the cross-examination would falsify the witness. PW 4 Bajrang Bansode, who was the panch to the discovery panchnama, has not stated that the articles were sealed in proper way. Unless seized articles are not sealed after seizure no evidentiary value can be attracted. To buttress his point he relied on **Sanjay Devaji Ramteke vs. State of Maharashtra** [2020 (2) ABR (CRI) 708]. He also submits that discovery of weapon cannot be the sole criteria to connect the accused with crime. He relied on **Kalyan Deorao Sawase vs. The State of Maharashtra** [(2022) 1 ABR (Cri.) 557]. Learned Advocate for the appellant further

submits that the cross-examination of the informant and his daughter i.e. wife of the present appellant would show that there was absolutely no such motive which they wanted to convey. The said Swati's marriage had already performed and at the time of marriage the accused had not placed any obstacle. If there was any element to kill either the wife of the accused or her brother, then they would not have accompanied to the house of the accused. The mother of the accused, who is the real sister of informant PW 7 Vasant, has demanded share from property and, therefore, there is false implication. Only the relatives have been examined, who are the interested witnesses. The investigation also suffers substantially and, therefore, the conviction deserves to be set aside and the accused appellant needs to be acquitted.

10 Per contra, the learned APP strongly opposed the appeal and submitted that there was ample evidence against the appellant. Though the relationship between the accused and his wife at one point of time got strained when she says that the accused was making the demand that his marriage should be performed with the second daughter of the informant; yet, PW 9 Manjusha cohabited with him, she was pregnant at that time on the second occasion and it appears that for her safe journey Ravikiran had accompanied her. It appears to be the plan of the accused to call Ravikiran to his village and then by taking him to leave him at phata i.e. the place near

main road appellant took Ravikiran along with him and then committed murder with the help of a big knife. Prosecution has proved that death of Ravikiran is homicidal in nature. The testimony of PW 7 Vasant, PW 9 Manjusha and PW 8 Namdeo are consistent with each other. PW 8 Namdeo is the person who had received the phone call on two occasions; one was at 3.40 p.m. and another was at 3.49 p.m. when the accused had confessed that he has committed murder of Ravikiran. The testimony of PW 8 Namdeo is further supported by CDR and SDR. Though PW 12 Shivaji, who is the uncle of accused, and PW 13 Hanuman, who is the son of PW 12 Shivaji, have turned hostile in respect of extra judicial confession and testimony of PW 15 Maharudra, who is also the cousin of accused, intentionally states that the sim card which was in his name was lost on that day itself, the record with the mobile company and the CDR have been admitted by the accused. Another evidence which has been considered by the learned trial Judge is the surrender of the accused before PW 17 ASI Mr. Ramesh Gaikwad from Shivaji Nagar Police Station, Beed. The accused has not disputed that he came to be taken in custody by PW 17 Mr. Ramesh Gaikwad. It appears that intentionally the accused went ahead and surrendered himself, but the fact remains is that he had surrendered on the same day. PW 9 Manjusha has been examined not only on the point of motive but also on the point of last

seen together. Therefore, the chain of circumstances definitely points towards the accused only as the perpetrator of the crime. All these facts were taken into consideration by the learned trial Judge and, therefore, the conviction is proper and legal, which requires no interference.

11 Here, the prosecution case is based on circumstantial evidence. In other words, there is no eye witness to the incident. Under the said circumstance, apart from the above said authorities on the point of circumstantial evidence the Panchsheel that has been stated in **Sharad Birdhichand Sarda vs. State of Maharashtra [(1984) 4 SCC 116]** is required to be born in mind.

“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.”

The circumstantial evidence is in the form of 1) Last seen together, 2) Discovery Panchnama under Section 27 of the Indian Evidence Act, 3) Extra Judicial Confession on phone coupled with CDR and SDR, 4) Surrender of the accused before the police authorities, 5) C.A. report and 6) Motive. Therefore, now it is required to be re-appreciated and re-visited as to whether the prosecution was able to prove all the above said factors.

12 The testimony of PW 6 Dr. Pravin Warkari, who conducted the autopsy and gave postmortem report Exh.40, has proved that death of Ravikiran is homicidal in nature. He had noted following external injuries as stated in column No.17 of postmortem report on the dead body.

- 1) Incised wound on front of neck, left middle line at the level of thyroid cartilage running obliquely downward, tailing of wound on right side of wound, having size 2.5 c.m. x 1 c.m. x 2 c.m., clean cut margin with everted and dry blood stain in around wound and on neck, dry blood stains removed in scales.
- 2) Just half c.m. below injury No.1, oblique in direction, incised wound having size 2 c.m. x 1 c.m. x 1.5 c.m.
- 3) Contused lacerated wound above right eye, horse shoe's shaped or 'C' shaped, above 3 c.m. middle of eyebrow, convexity of injury in upward and limb of 'C' situated 3 c.m. above eyebrow. Margin irregular, dry blood stain around margin of injury, removed in scales having size 2 c.m. x 1 c.m. x bone depth.

 He has further stated that the internal injuries were corresponding to the external injuries. All the injuries were ante mortem. No doubt, he has not given the probable time of death or age of the injury, but certainly he says that the injuries were ante mortem. He has been cross-examined at length, but there is nothing which would conclude otherwise, that is, other than the homicidal death. Therefore, we conclude that

prosecution has proved the death of Ravikiran as homicidal in nature.

13 The first and the foremost witness in the chain is PW 9 Manjusha, who is the wife of the appellant. She has supported the prosecution story which is already narrated in paragraph No.10. In addition, she has stated that she was treated properly for about 2½ to 3 years by the accused. Then she went to her parents house for first delivery. At that time her sister Swati got engaged and thereafter the accused started saying her, as to why marriage of Swati has been fixed with another person. He wants to marry with her. He also told PW 9 that if his marriage is not performed with Swati, he would kill her or he would kill himself. She says that she informed the said fact to the sister of the accused and her own parents, but then after some days she had again gone to her parents' house for the purpose of attending marriage of her sister. There appears to be some improvement in her examination-in-chief to that extent, but we do not find that it is a material improvement. Though she states that herself, accused and her mother-in-law, grandmother-in-law were staying together in a house situated in the land; yet, there is no question asked on the point, as to why she had not informed what the accused told her to the mother-in-law. Under the said circumstance, we do not find that this is a got up case or reason. She has then given explanation as to why her father had given her second mobile

phone, but then she says that the accused had taken the sim card from her second mobile and had installed it in his own mobile. The cross is to the extent whether she can give the date when her father had given her second mobile. Of course, it is not expected that it should be told with precise date. Except that there is no further cross on that point. The mobile number was then relevant when it came to the conversation between the accused and PW 8 Namdeo.

14 PW 9 Manjusha has further stated that she had gone to her parents' house on 09.04.2015 for attending the engagement ceremony of her another sister i.e. Shital. It was also attended by the accused and thereafter the accused told that he would be going to meet his sister at a different place and, therefore, she should take her brother Ravikiran to go to Jadid Jawla. She has then told that though they went to Majalgaon Bus Stand the accused told them to go ahead as still he has work. Thereby PW 9 and deceased went around 4.00 p.m. to Jadid Jawla. She says that accused came around 7.00 p.m. and they had dinner. She says that at night time the husband was going out and even asked by her mother-in-law as to why he was going out. He told that he would be going to sell bullocks and, therefore, got up for giving fodder to the bullocks. On the next day morning at about 8.30 a.m. accused went outside and returned around 9.00 a.m. Then told that vehicle might

have gone and, therefore, he would leave Ravikiran at phata. They both left by taking meals around 10.30 a.m. by walk. She says that she gave one plastic carry bag containing ghee, garlic and chilli with Ravikiran. It was the point where she had lastly seen Ravikiran in the company of accused. She then says that around 4.30 p.m. the cousin brother of her husband Maharudra told her that something has happened near the agricultural land and asked her to accompany. She went along with him and then saw the dead body of Ravikiran. Maharudra has been examined as PW 15, but he has turned hostile. Important point to be noted is that learned Advocate for the appellant has relied on alleged admission, wherein it is said “on 13th, 14th, 15th, 16th and 17th of April, 2015 I was at the house of my parents”, and then it is submitted that on the day of incident PW 9 Manjusha was not in the house of accused. Therefore, there was no question of she watching Ravikiran going along with accused on 13.04.2015. We cannot accept a stray and one line alleged admission. In fact, it is part of para No.11 of her deposition and answer to first question was asked was she is residing at her parents house after death of her brother Ravikiran @ bhaiyya, and the next is the said alleged admission and the third answer to the third question is that prior to the date of incident at the occasion of Diwali festival she had been to the parents’ house. This sequence indicates that intentionally some fishing

question was asked having no sequence at all and, therefore, the said alleged admission might be the outcome of confusion. In fact, the learned trial Judge ought to have intervened and ought to have asked the learned Advocate to have a sequence or the learned trial Judge ought to be diligent in assessing as to whether the witness is getting the question properly or not. Even if we try to take the alleged admission as it is, then the question is – Where PW 9 Manjusha was till 12.04.2015 ? If she had gone to the house of her parents, then it could not have been only during this period. It is also not extracted for what purpose she was there. Another fact is that the time since 13th of April, 2015 has not been extracted. When the murder has taken place on 13.04.2015, thereafter she might have gone to her parents' house, and even in the first sentence she says that since after death of her brother she is residing with her parents. Therefore, the said sentence cannot be interpreted as the learned Advocate for the appellant wants. Then except the denial in respect of Ravikiran visited Jadid Jawla on 12.04.2015 and left on 13.04.2015 there is nothing. One more aspect was tried to be brought to our knowledge that in her cross-examination PW 9 Manjusha says that the distance between her house from the village is about 200 feet. She further admits that the tar road proceeding from Jadid Jawla to Georai road and where the dead body was of Ravikiran was lying its distance is 200 feet. We

rather wonder that whether PW 9 Manjusha has knowledge as to what is mean by feet and how much that distance comes. When she had admitted that the house is in fact in agricultural land, then the distance could not have been from her house to the village in 200 feet, when she says that the distance between the dead body and the tar road was 200 feet. In fact, it has not come on record as to what is the distance between her house and the place where the dead body was found. By taking these answers into consideration the learned Advocate appearing for the appellant wants to say that if the accused and Ravikiran had left the house at 10.30 a.m., then how the murder could have taken place after 3.00 p.m. The prosecution has not stated as to how much distance they had measured and, therefore, on this point also the theory of 'last seen together' cannot be employed. Here, we would like to say that for everything there cannot be evidence, but the circumstances can be brought on record and as regards the last seen theory is concerned, the law is well settled that the gap between the last seen together, that means, the deceased being seen alive in the company of accused and the time when his dead body is recovered or time of death is calculated, it should be as narrow as possible. Though in this case the autopsy Doctor has not given the approximate time of death; yet, it is to be noted that around 4.30 p.m. on the same day the dead body was seen by PW 9 Manjusha. At this

stage itself we would like to consider the testimony of PW 8 Namdeo. PW 8 has stated that after the alleged extra judicial confession (which will be considered later on) he had given a phone call to Hanuman Shivaji Yadav and asked him to confirm the information and after half an hour Hanuman had given the confirmation. He says that it was after the third call was given by the accused around 3.49 p.m. Unfortunately, though prosecution has examined PW 12 Shivaji and PW 13 Hanuman, they both have turned hostile. Similarly, PW 15 Maharudra, who had accompanied PW 9 Manjusha had also turned hostile. They are the near relatives of the accused. The CDR of PW 8 Namdeo and the CDR of all the four phone numbers involved in the case are on record and they all are admitted by accused. They show the conversation between one another at the relevant time. It was for the first time revealed around 3.49 p.m. that Ravikiran has been murdered. Therefore, the time gap between lastly seen together at 10.30 a.m. and then PW 9 upon receiving the information by the above said channel going to the place and confirming that her brother is dead comes to 4.30 p.m. on the same day. Therefore, we hold that the last seen theory has been proved by the prosecution.

15 Now, turning towards the second ground on which the evidence of the prosecution rests is 'extra judicial confession', and in order to prove that the prosecution has come with a case that the said extra judicial

confession was given to PW 8 Namdeo Raut, who is the brother of PW 7 Vasant. PW 8 Namdeo has stated that he is serving as a Teacher in Dnyaneshwar Vidyalaya at Kanadi Mali. His school timings were from 9.00 a.m. to 12.30 p.m. on 13.04.2015. Thereafter he went to his agricultural land along with his wife around 12.57 p.m.. At that time the accused had gave him phone call on his mobile number from his mobile and asked general questions, as to what is going on, but when PW 8 Namdeo replied that it is all right, accused told that they will have bad days to come. Then again at about 3.40 p.m. accused gave phone call from another mobile and asked Namdeo, as to where is he ? Then he told that he is in his field. Then accused asked him, what he is doing ? Namdeo told him that there is market tomorrow at Kaij and, therefore, he is collecting/plucking the vegetables. Then the accused told him that he will not be able to go to market tomorrow and then the phone was cut. Again around 3.49 p.m. he received phone call from the mobile of the accused i.e. the second number stating that he has committed the mistake and Namdeo cannot forgive him. Accused told him that he has committed murder of bhaiyya @ Ravikiran in the field. He also told that care should be taken of his daughter and the child is yet to take birth, which according to him should be sound. Namdeo asked him, as to why he is saying so and where is he ? Accused told him that he is going to Beed in

Police Station and then again cut the phone. Immediately thereafter Namdeo had informed the said fact to his brother PW 7 Vasant and uncle Devidas. Then he called PW 13 Hanuman Yadav and confirmed the said fact told by accused. After about half an hour PW 13 confirmed the said fact and told it on phone to Namdeo and, therefore, Namdeo, Vasant and other relatives went to Jadid Jawla. The important point to be noted is that PW 8 Namdeo has been cross-examined at length. Except denial there is nothing. A question might have arisen, as to whether PW 8 Namdeo would have been the proper person before whom the extra judicial confession could have been made, but here, we cannot forget the internal relationship. Accused is the son of real sister of PW 7 Vasant and cousin sister of PW 8 Namdeo. In that context Namdeo becomes maternal uncle for accused. Therefore, having his mobile number with the accused is not an objectionable fact. The testimony of PW 8 Namdeo is supported by PW 7 Vasant and also by the CDRs Exhs.92 to 96. In all the call details of five numbers have been collected i.e. 1) 9767810618, 2) 8308194060, 3) 8805184988, 4) 8888680614 and 5) 9158181082. Now, to connect the link further that the sim cards of both the numbers i.e. 9767810618 and 8308194060 was used by the accused, prosecution has examined PW 9 Manjusha Yadav, who has stated that her father had given her sim card in the second mobile, but the accused has taken

sim card and was using the mobile No.9767810618. Again except denial there is nothing in her cross-examination. Rather it has been asked to her that the mobile number of mobile broken by the accused was the same. Here, we would like to say that the mobile hand set can be broken but not the sim card and because of the destruction of the mobile hand set, the sim card cannot get destroyed. Further, PW 15 Maharudra Yadav admits that he had purchased Idea sim card bearing No.8308194060, but by turning hostile he has come up with the case that he lost the sim card on the same day. He has intentionally not given nor it can be tried to be extracted from which place the said sim card only (without the mobile hand set) got lost. Questions in the nature of cross were put to him and he has admitted that he had not lodged any complaint in respect of loss of the said sim card. In his statement under Section 161 of the Code of Criminal procedure he had stated that he had given the said sim card to the accused. Now, merely because he is now denying the said fact and coming with a case that the sim card was lost on the same day (which is a strange coincidence if at all it is to be accepted), it cannot be said that there is no connection between the crime and the accused. Interestingly, the accused has admitted his arrest panchnama Exh.101. While giving the information to the police at the time of his arrest he has given both the mobile numbers and those are exactly the

same, of which reference has been given by PW 8 Namdeo. It shows that the accused was using those mobile phones on the date of incident and arrest also. We are concerned with mobile No.8308194060 more as the confession is said to have been given from that mobile. Thus, by admitting the CDR and on the basis of arrest panchnama together with the testimony of PW 8 Namdeo, we can certainly say that the prosecution has proved the extra judicial confession. The accused has not come with a case that from his possession the said mobile phones/phone/sim cards were lost. We would like to consider the testimony of PW 12 Shivaji Yadav and PW 13 Hanuman Yadav at this stage itself. Both of them have turned hostile. PW 12 is the uncle of appellant and PW 13 Hanuman is son of Shivaji. Here, they have intentionally made wrong statement and were interested in suppressing facts because PW 13 Hanuman has even claimed ignorance about his own phone number. No doubt, prosecution had come with a case that extra judicial confession was given to PW 13 Hanuman also. But if we ignored the said part by saying that when he has turned hostile prosecution could not have proved the extra judicial confession; yet, their testimony cannot be used for anything. That means, their testimony is required to be discarded in entirety. Even it can be seen that PW 15 Maharudra Yadav has intentionally turned hostile, when he comes with a fact that he had lost the sim card on the same

day of offence. After the said confession was given PW 8 Namdeo got the fact confirmed and then PW 7 Vasant, PW 8 Namdeo and other relatives had gone to the spot. Therefore, we hold that the second segment in the chain of circumstances has also been proved by the prosecution beyond reasonable doubt.

16 Now, turning towards the point of 'motive', as aforesaid, it is stated that the accused had desire to marry second daughter of informant PW 7 Vasant and even he had given threats. No doubt, it appears that the said threat was not taken cognizance of seriously; yet, except denial there is nothing in the cross. It was also tried to be contended that said sister-in-law of accused with whom allegedly the accused intended to marry got married long back, then how it can be said that the cause of action was recurring. No action was taken against the accused by lodging a complaint. Here, it is to be noted that the accused is the husband of PW 9 Manjusha and when it comes to the relationship between husband and wife every person would try to keep himself away either to maintain the privacy of the couple or that who has to take the initiative. Therefore, inaction *per se* will not give any advantage to the accused. Some times we cannot get the reactions from the other side in order to arrive at a conclusion, as to whether the relationship has strained or not. PW 9 Manjusha was pregnant for the second time and also taking into

consideration the *inter se* relationship between them it might not have been taken seriously or might not have been taken up to police. Therefore, the motive has come on record through the testimony of PW 7, 8 and 9.

17 The further segment in the chain of circumstance is, surrender of the accused before PW 17 ASI Mr. Ramesh Gaikwad. He has deposed that accused surrendered before him at Beed around 5.30 p.m. Though it is said by him that accused confessed before him the said confession is admissible, but his surrender has to be taken into consideration as his conduct. Merely because his confession has not been reduced into writing by PW 17 Mr. Ramesh Gaikwad or he has not drawn the arrest panchnama, accused cannot take advantage of the said fact, for the simple reason that PW 17 Mr. Ramesh Gaikwad was not aware about what exactly the First Information Report that has been lodged with Majalgaon Rural Police Station. He says that he took the accused in custody even after confirming the fact. At that time i.e. taking the accused in custody he has executed panchnama Exh.57. PW 11 Shyam Rokde is the panch to panchnama Exh.57. He has stated that police has seized one mobile of Lava company in his presence, two plastic packets of insecticides, glass tube and insecticide receipt of one Rahul Krishi Seva Kendra. The testimony of PW 11 Shyam has been attacked by the appellant on the ground that in his cross-examination he has admitted that police used

to help him and, therefore, he has put his signature on the panchnama and the labels on seized articles. He is the rickshaw driver and, therefore, he has helped the police. This admission will not give any advantage to the accused. Rather it confirms that he is the signatory to the panchnama and as except denial is there, it does not take away the fact that the said panchnama was executed in Shivaji Nagar Police Station, Beed. No doubt, he has not stated the name of the accused in his examination-in-chief also, but fact remains is that it has been told by PW 17 ASI Mr. Ramesh Gaikwad. Testimony of PW 17 Mr. Gaikwad is also attacked by the appellant on the ground that he has not seized the clothes of the accused and also not marked the identity of the accused. Here, it is to be noted that PW 17 Mr. Gaikwad was playing limited role. He has accepted surrender of the accused before him and after ensuring that a murder has taken place in the jurisdiction of another Police Station, it would have been in his mind that he should have handed over custody of the accused to the Police Station which had jurisdiction over the place of offence. He says that he handed over the custody of the accused to Majalgaon Police Station around 8.00 p.m. The concerned Police Station having jurisdiction was supposed to then carry the further activities i.e. the usual understanding of the police personnel. Therefore, there is nothing in the testimony of PW 17 Mr. Ramesh Gaikwad which raises doubt over the story. In fact, receipt

Exh.98 came to be exhibited through this witness and it appears that the accused wanted to raise plea of *alibi*, however, no specific evidence was led to support the contention that accused was at a different place i.e. Talkhed at the relevant time. Though Exh.98 came to be seized in the testimony of PW 17 ASI Mr. Gaikwad as it was seized by him, the accused was not relieved of leading evidence to prove the contents of Exh.98. Receipt Exh.98 does not show presence of accused at Talkhed at a particular time which is the time when the murder of Ravikiran had taken place.

18 We would like to rely on **Aghnoo Nagesia vs. The State of Bihar** [AIR 1966 SC 119] and **Bheru Singh s/o Kalyan Singh vs. State of Rajasthan** [(1994) 2 SCC 469], wherein the fact of giving information to the police is admissible against him as evidence of his conduct under Section 8 of the Indian Evidence Act, 1872 and to that extent it is non-confessional in nature, but the confessional part of the First Information Report by the accused to the Police Officer cannot be used at all against him in view of ban of Section 25 of the Indian Evidence Act has been held. Here, whatever was stated by accused to PW 17 Mr. Gaikwad has not been reduced into writing, but his surrender before the police has to be considered as conduct under Section 8 of the Indian Evidence Act. We can consider the last conversation between PW 8 Namdeo and accused i.e. at 3.49 p.m., wherein the accused had asked

for pardon and accepted the mistake committed by him and his intention to go to Beed to surrender will have to be then connected to the testimony of PW 17 Mr. Ramesh Gaikwad. Because of the repentance the accused might have thought that he should surrender before the police. Therefore, prosecution has also proved the conduct of the accused in the form of surrender before the police authorities.

19 Objection has been raised by relying upon the decision in **Sanjay Devaji Ramteke** (supra) that the seized articles were not sealed after seizure and, therefore, it has no evidentiary value. For this, we would like to say that this may be taken note of in respect of those articles which have bearing or of that importance that without which the murder cannot be proved, e.g. weapons, clothes etc, but such strict view need not be taken in respect of certain articles like mobile phones, documents etc. In this connection we would like to assess the testimony of PW 4 Bajrang Bansode, who has been examined to prove the memorandum and discovery which is the further segment in the proof of circumstantial evidence. PW 4 Bajrang has stated that accused has given memorandum on 14.04.2015 and thereafter led the discovery. He had produced a knife from a place under the Neem tree. It is said that the knife had blood and mud. Now, much has been stated in his cross-examination about difference in the word 'sura' (big knife) and knife.

Certainly, there is difference between two weapons i.e. big knife and knife. However, at many times in common parlance it is addressed or called as 'knife'. We cannot allow to go into such minute contradiction. The fact has not been shattered in his cross that accused has led the said discovery. It is then further supported by PW 16 API Mr. Sharad Jarhad, the Investigating Officer. The said weapon was also shown to the Medical Officer, who has opined that the injuries noted by him on the person of deceased are possible by such weapon. Therefore, it has been confirmed that the knife seized through Exhs.32 and 33 is the murder weapon and it has been discovered by the accused.

20 The further evidence that has been led by the prosecution is in the form of PW 1 Navnath, who is the panch to the seizure of clothes of accused Exh.21, blood stains on shirt and pant. At the cost of repetition even if we consider that the blood stains appearing on the shirt and the jeans pant of the accused were not noticed or were tried to be seized immediately by ASI Mr. Ramesh Gaikwad; yet, the defective investigation, if at all will not put the accused in advantageous position.

21 PW 2 Harishchandra Dhavle is the panch of seizure panchnama of the clothes of deceased. PW 3 Krishna Khetre and PW 5 Vilas Shinde are

the panch to the spot panchnama Exh.25 and PW 3 Krishna is the panch to the inquest panchnama Exh.26. All of them have proved those panchnamas. The appellant attacks their testimony on the ground that PW 2 Harishchandra and PW 3 Krishna are the relatives of deceased. We do not find any substance in the same, merely because a witness is relative of either informant or accused it should not make any difference, when the citizens are bound to give true facts before the police as well as before the Courts. At the cost of repetition, we would say that these relative panchas are also the relatives of accused may be from a distant relationship, but no prejudice has been then shown as they have been engaged as panch to the panchnamas.

22 PW 10 Ram Kulkarni is the Circle Inspector, who has drawn the map. PW 14 Sayyad Hamid is the Chemical Analyzer. Thus, the chain of circumstances have been proved by the prosecution through the testimony of these panchas also.

23 Coming back to the point that PW 9 Manjusha is the person who had seen deceased alive in the company of accused, then, definitely the burden has shifted on the accused to prove as to what happened to Ravikiran @ Bhaiyya in view of Section 106 of the Indian Evidence Act. Learned APP has rightly relied on the Three Judge Bench decision in **Digambar vs. The**

State of Maharashtra [AIR 2023 SC 2827], wherein also, when prosecution established that the deceased and the accused had left the house together and soon thereafter death of the deceased had taken place, it was held that the burden to show what happened after leaving the house would shift on the accused as the same was within his/their exclusive knowledge. Here, the same factual situation existed and, therefore, decision in **Sawal Das** (supra) relied by the learned Advocate appearing for the appellant is not applicable.

24 Scrutinizing and re-appreciating the evidence on the said Panchsheel in **Sharad Sarda** (supra) we come to the conclusion that the prosecution had proved that only the accused is the perpetrator of the crime and, therefore, the learned trial Judge was correct and legal to arrive at the same conclusion. There is no merit in the present appeal. It deserves to be dismissed. Accordingly, the appeal stands dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)