

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO.41 OF 2021

Radheshyam Meghnath Kodape,
Aged 47 years,
R/o. Kohmara Toli,
Tahsil- Sadak/Arjuni, District Gondia
(Appellant is presently in
Central Jail, Nagpur)

...APPELLANT

VERSUS

State of Maharashtra,
through Police Station Officer,
Duggipar, Tah. Sadak-Arjuni,
District Gondia

...RESPONDENTS

Ms Shweta Wankhede, Advocate for the appellant.
Mr. M.K. Pathan, A.P.P. for the respondent/State.

CORAM : ROHIT B. DEO & URMILA JOSHI-PHALKE, JJ.
RESERVED ON : DECEMBER 07, 2022.
PRONOUNCED ON : FEBRUARY 24, 2023

ORAL JUDGMENT (Per Urmila Joshi-Phalke, J.)

Heard finally with the consent of learned Counsel appearing
for the parties.

2. The appellant has challenged the judgment and order of
sentence dated 03/08/2018 passed by the Sessions Judge, Gondia in

Sessions Case No.53/2016. The appellant was convicted for the commission of the offence punishable under Section 302 of the Indian Penal Code (hereinafter referred to as 'the IPC' for short) and was sentenced to suffer life imprisonment and to pay fine of Rs.5000/- in default to suffer further imprisonment for four months. The accused/appellant was also convicted of the offence punishable under Section 201 of the IPC and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.2000/- and in default to undergo further imprisonment for two months. The accused is further held guilty and convicted for the offence punishable under Section 2(1)(b) and 3(2) of the Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013 (hereinafter referred to as 'the Act of 2013' for short) and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs.5000/- in default to undergo further imprisonment for four months.

3. The benefit under Section 428 of Cr.PC is also given to the appellant/accused for the period which he had already undergone as an under trial prisoner.

4. Heard Ms Shweta Wankhede, learned Counsel for the appellant and Shri M.K. Pathan, learned Additional Public Prosecutor for the respondent-State.

5. The prosecution case in brief as follows:

A] The informant – Prabhabai Kanhaiyalal Badole who is the wife of the deceased has lodged the report at Duggipar police station, District Gondia on an allegation that the deceased Kanhaiyalal Badole is her husband. She was residing along with her husband, second wife of the deceased namely Kusum Kanhaiyalal Badole, her son Denny. They are agriculturist having their agricultural land in village Kohmara, Tahsil and District Gondia. She alleged that prior to 20 to 25 years, son of the accused namely Pawan Kodape died and he was suspecting that her husband by applying black magic killed his son, and therefore, threatened the deceased by visiting their agricultural field. She further alleged that prior to 10 to 12 days, shegoats of the accused entered in their agricultural field, at the relevant time deceased told the accused that as his shegoats entering in the agricultural field and damaging the crop, therefore there was quarrel between deceased and accused.

B] On 29/04/2016, when she was working along with her husband, son and son-in-law in the agricultural field of constructing the hut, at about 5.30 pm accused entered in their agricultural field and enquired with them regarding the construction of the hut. She alleged that on that day on 2 to 3 occasions accused came into their agricultural field. At about 6.30 pm her husband told her and others to proceed

towards house by motorcycle and he will follow them on his bicycle, therefore, she along with her son and son-in-law went at home on motorcycle and her husband was following them by bicycle. When she reached home at about 7.15 pm she came to know that near the petrol pump accused assaulted her husband by sharp weapon and ran away from the place. Her husband was removed to the civil hospital. She immediately went in the civil hospital and saw that her husband has sustained injury on his abdomen and was declared dead. Thereafter she approached to the Duggipar police station and lodged the report. On the basis of said report, Duggipar police have registered the crime. After registration of the crime wheels of the investigation started rotating. During the investigation, the Investigating Officer has visited the alleged spot of incident which was situated near the petrol pump and drawn the spot panchnama. During the spot panchnama Investigating Officer has collected the blood stained soil and simple soil. The Investigating Officer has also drawn the inquest panchnama and seized the cloths of the deceased which were blood stained. Accused was arrested. His blood stained slipper was also seized by the Investigating Officer. During the investigation, the accused made a memorandum statement that he will show the place where he burnt the blood stained cloths which were on his person at the time of incident and will also show the weapon which was concealed by him. Accordingly, his statement was reduced

into writing. As per the statement, accused led them and the places where the blood stained cloths were burnt and the knife was concealed were discovered at the instance of the accused. During investigation, the Investigating Officer has collected the post-mortem notes. The weapon of the offence was also referred to the Medical Officer for obtaining the opinion. The Medical Officer has furnished his opinion which was included in the investigation papers. The incriminating articles which were seized as well as blood samples of the deceased and accused are referred to chemical analysis. The blood samples of the accused and deceased are also collected for DNA analysis. The DNA report is collected and after completion of the investigation the charge-sheet was submitted against the accused.

6. The learned Magistrate has committed the case to the Court of Session. The learned Sessions Judge has framed the charge vide Exhibit 9. The contents of the charge are read over and explained to the accused/appellant. He pleaded not guilty and claimed to be tried.

7. To substantiate the charge against the accused, prosecution has examined in all 9 witnesses as follows :

- (i) PW-1 – Prabhabai Kanhyalal Badole (Exhibit 13) – informant.

- (ii) PW-2 – Narendra Waman Markam (Exhibit 16) – Police constable seen the accused in blood stained cloths and knife in hand – extra judicial confession
- (iii) PW-3 – Deni Kanhaiyalal Badole (Exhibit 20) – son of deceased.
- (iv) PW-4 – Pramod Vitthal Janbandhu (Exhibit 21) – Son-in-law of the deceased
- (v) PW-5 – Jitendra Bhagwandas Chandanbatwe (Exhibit 22) – Police constable carried weapon to medical officer and carrier
- (vi) PW-6 – Dinesh Bhanudas Bharinge (Exhibit 27) – Panch on spot seizure memo, inquest panchnama, memorandum statement.
- (vii) PW-7 – Dr. Trupti Shrawan Thakre (Exhibit 36) – Medical officer.
- (viii) PW-8 – Rajkumar Balaji Kendre (Exhibit 40) – Investigating officer.
- (ix) PW-9 – Rohit Uttareshwar Choudhari (Exhibit 45) – Investigating officer.
- (x) DW-1 – Dhrupatabai w/o Suindarlal Pendam (Exhibit 51)
- (xi) DW-2 – Digambar s/o Molchand Uike (Exhibit 52)

8. Besides the oral evidence Prosecution also relied upon various documents such as :

Report lodged by PW-1 (Exhibit 14), FIR (Exhibit 15), Spot Panchnama (Exhibit 28), Crime details Form (Exhibit 28), Seizure Memo (Exhibit 29), Inquest Panchnama (Exhibit 30), Seizure Memo (Exhibit

31), Seizure memo of slipper of accused (Exhibit 32), Memorandum statement (Exhibit 33), Discovery panchnama (Exhibit 33/A), Post mortem report (Exhibit 37), Query report (Exhibit 38), Chemical Analyser's Reports (Exhibits 41 to 43), Requisition to Chemical analysis (Exhibit 46) and DNA report (Exhibit 55).

9. All the incriminating evidence is put to the accused to obtain his explanation regarding the evidence against him by recording his statement under Section 313 of the Cr.PC. The defence of the accused is of total denial and of false implication. In support of the defence, the defence has examined two witnesses namely DW-1 – Dhrupatabai Sundarlal Pendam vide Exhibit 51 and DW-2 – Digambar Mulchand Uike vide Exhibit 52. The trial Court has recorded the evidence and on the basis of evidence after hearing the prosecution as well as the defence pleased to convict and sentenced the accused as indicated above in the judgment.

10. We have heard Ms Wankhede, learned Counsel for the appellant. She submitted that the entire case is rested on circumstantial evidence and unless and until the chain of circumstances is established by the prosecution the guilt of the accused cannot be said to be proved. The evidence of the witnesses is suffering from infirmities. The

prosecution also failed to prove the chain of circumstances. Merely on the basis of extra-judicial confession the accused was convicted and therefore the judgment and order of sentence deserves to be set aside as the evidence of extra judicial confession is weak type of evidence. She submitted that for all above the grounds the order of conviction and sentence deserves to be quashed and set aside.

11. Per contra, learned Additional Public Prosecutor for the State submitted that to prove the guilt of the accused prosecution has placed reliance on various circumstances including the evidence of PW-2 who had seen the accused in blood stained cloths and holding the knife in his hand. The evidence of PW-2 is also on extra judicial confession by the accused to PW-2. The evidence of PW-1 – wife of the deceased and PW-3 – son, PW-4 – son-in-law shows on the day of incident the accused visited their agricultural field repeatedly. The memorandum statement and discovery of the places where the accused had burnt his blood stained cloths and the place where the incriminating article knife was concealed or discovered at the instance of the accused. PW-6-Panch on memorandum statement and the evidence of Investigating Officer proves the memorandum statement as well as the discovery evidence.

12. Medical evidence shows that deceased was assaulted by the sharp weapon on his abdominal portion due to which he succumbed to

the death. He further submitted that though chemical analyzer report shows that the blood stains are found on the knife, slipper, burnt piece of full pant of the accused but blood group is not detected. Blood stains are also found on the cloths of the deceased. As per the Chemical analyzer report Exhibit 43 shows human blood is detected on these articles. Therefore, said articles are also examined by extracting the DNA from the blood samples of the deceased and DNA from the blood stains found on the articles. The DNA report shows that the DNA profiles obtain from cloths of the deceased, pair of slipper of the accused and knife are identical and from one and the same source of male origin that is the from blood samples of Kanhaiyalal Badole i.e. the deceased. These circumstances sufficiently proves the involvement of the accused. Accused has not given any explanation though these incriminating circumstances are put to him during his statement under Section 313 of the Cr.PC. As the accused has not explained the circumstances which are within his knowledge adverse inference can be drawn against the accused. He submitted that thus prosecution has proved all these circumstances to prove the guilt of the accused and hence no interference is called for.

13. Heard learned Counsel for the parties at the length.

14. In the instant case, admittedly though the alleged incident has occurred near the petrol pump but none has witnessed the alleged incident and the entire case is based on the circumstantial evidence. It is settled position of law that when the case is rested on circumstantial evidence, the circumstances from which the conclusion of guilt is to be drawn, should be in first instance fully established and all the facts so established should be consistent only with hypothesis of guilt of the accused and so conclusive in nature that they should exclude every 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. Keeping in mind these principles, the evidence on record is to be assessed.

15. The prosecution has relied upon the following circumstances to bring home the guilt of the accused :

- (i) homicidal death of the deceased Kanhaiyalal.
- (ii) previous dispute between the accused and the deceased as accused was suspecting that deceased has killed his son by black magic as well as the dispute between the deceased and the accused on account of she goats of the accused entered into the field of the deceased and caused damaged to the crop.
- (iii) Evidence of PW-2 who had seen the accused in blood stained cloths and knife and extra judicial confession by the accused to PW-2.

- (iv) evidence of PW-1 – wife, PW-3 – son and PW-4 – Pramod, son-in-law.
- (v) evidence of PW-6 - panch on memorandum statement and recovery of the places where the accused has burnt his blood stained cloths and the discovery of the place where where the accused has concealed the knife i.e. the weapon of the offence.
- (vi) Medical evidences
- (vii) Evidence as to chemical analyzer report which shows blood stains on the burnt cloths of the accused, the blood stains on the knife which was seized at the instance of the accused and the slipper which was seized at the time of arrest of the accused.
- (viii) the DNA evidence which shows that the blood stains of blood group of the deceased were found on these articles.

16. In order to establish homicidal death to show that the manner in which the death of the deceased is caused, reliance is placed on the testimony of the PW-7 – Dr. Trupti Shrawan Thakre who is examined vide Exhibit 36. As per her evidence she was attached to Rural Hospital, Sadak Arjuni. On 30/04/2016, the dead body of the deceased was referred to her for post-mortem. She had conducted the post-mortem examination. On her examination, she found following surface wounds on the person of the deceased :

- 1) Penetrating stab wound at interior abdominal wall of 7 x 4 cm in size.

- 2) Penetrating stab wound over left hypochondriac region around umbilicus of size 4 x 5 cm.
- 3) Incised wound at right auricle and preauricle region of size 6 x 1 cm.
- 4) Incised wound at left mastoid area of size 4 x 1 cm.
- 5) Incised wound over dorsum of right wrist of size 5 x 3 cm.
- 6) Incised wound at dorsum of left forearm of size 6 x 3 x 3 cm.
- 7) Incised wound flexor aspect left forearm of size 7 x 4 cm and another of 5 x 3 cm
- 8) Incised wound at left palm near wrist joint of size 4 x 1 cm
- 9) Incised wound at Dorsum of left hand and left wrist joint of size 6 x 6 x 1 cm.
- 10) Incised wound area between left thumb and index finger over left hand of size 7 x 3 x 1 cm.
- 11) Incised wound left lateral chest above left nipple of size 3 x 2 cm
- 12) Penetrating stab wound at left hypochondriac region of abdomen two in number of size 3 x 2 x 5 cm and 4 x 3 x 4 cm
- 13) Penetrating stab wound over left lumbar quadrant of anterior abdomen two in number of size 3 x 1 x 5 and 3 x 5 x 4 cm.
- 14) Penetrating stab wound on hypogastric region anterior abdomen of size 5 x 4 x 4 cm.
- 15) Incised wound lateral aspect left thigh two in number of size 4 x 2 x 1 cm and 2 x 1 cm
- 16) Penetrating stab wound right lumbar quadrant abdomen of size 3 x 4 x 5 cm.
- 17) Incised wound extreme lateral aspect of left thigh of size 4 x 1 cm.

17. Her evidence further discloses that on internal examination, she noticed incised wound over left preauricular area of size 4 x 2 cm and another incised wound over right preauricular area with cut right ear into two half. She opined that deceased died due to cardiorespiratory arrest due to hemorrhagic and vasovagal shock due to multiple injuries on the body. Accordingly, she issued the post-mortem notes which is at Exhibit 37. Her evidence further discloses that the weapon of the offence knife was referred to her. The knife with wooden handle having blood stains. The injuries on the body are possible by the weapon accordingly, she issued opinion as per query report Exhibit 38. She had also collected blood samples of the deceased from heart and abdominal cavity and also collected blood samples of accused Radheshyam. During her cross-examination it came on record that the injuries mentioned in the post-mortem report may be caused by different sharp weapon. She admitted the injuries may be possible by different sharp edge weapon. It further elicited during the cross-examination that when the knife was brought to her it was in a sealed condition. Thus, the cross-examination also positively shows that the injuries sustained by the deceased are by sharp weapon and when the weapon referred to her it was in a sealed condition. Thus, nothing incriminating transpired during the cross-examination of the Medical Officer.

18. Besides the oral evidence of Medical Officer and post-mortem notes, the prosecution placed reliance on the evidence of PW-6 – Dinesh Bhanudas Bharinge who testified vide Exhibit 27 that the inquest panchnama was drawn in his presence. It was drawn in the mortuary. Police also obtained the blood samples. The recitals of the inquest panchnama shows that the deceased had sustained injury on his head and his right ear was cut into the pieces. He had also sustained the injury on his left hand wrist, on his forearm, on his abdomen thus, the inquest panchnama also discloses the injuries which were found on the person of the deceased. This panch witness is not cross-examined regarding the injuries found on the person of the deceased. Thus, the evidence of Medical Officer which is not shattered during the cross-examination and the inquest panchnama shows that the death of deceased is caused as he sustained injuries and due to the blood loss due to the injuries. Thus, prosecution has proved that the death of the deceased is homicidal one. There is absolutely no material on record to hold that the deceased either died natural death or accidental death or suicidal death. All these circumstances leads to inevitable conclusion that deceased Kanhaiyalal died homicidal death.

19. As already observed that the entire prosecution case is based on circumstantial evidence. The law is settled regarding the

circumstantial evidence that :

- (i) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
- (ii) Though circumstances should be of a definite tendency, unerringly pointing towards the guilt of the accused.
- (iii) 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.
- (iv) The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of a 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.

20. According to Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in case of circumstantial evidence : (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum of probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of

direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted”.

21. In the light of above settled legal position, we have to see whether the prosecution is succeeded in establishing the guilt of the accused by proving the various circumstances and these circumstances sufficiently points out the guilt of the accused.

22. The first circumstance on which the prosecution relied upon is the previous enmity between the deceased and the accused. As per the evidence of PW-1 – wife of the deceased namely Prabhabai Badole examined vide Exhibit 13, PW-3 – Deni, son of the deceased examined vide Exhibit 20 and PW-4 – Pramod Vitthal Janbandhu, son-in-law of the deceased shows that accused was suspecting that the son of the accused died as deceased was knowing black magic and he applied the said black magic on his son. The another motive suggested by the prosecution is that the she-goats of the accused used to enter into the field of the deceased and deceased told the accused that his she-goats damaged his

crop standing in his agricultural field. As per the evidence of these three witnesses, on the day of incident when they were working on the agricultural field the accused came in their field twice and was making enquiry when they were constructing the hut. Their evidence further reveals that on that day on the say of the deceased they all three proceeded on motorcycle towards their house as the deceased told them he will follow them on his bicycle. But when they reached at home, they come to know that the deceased was killed by the accused by assaulting him by means of knife. As per their evidence as the accused was suspecting that the deceased has killed his son through black magic, and therefore, the accused has killed the husband of the PW-1. These three witnesses are cross-examined at length. PW-1 as well as PW-3 has admitted that prior to the incident no quarrel took place between the deceased and the accused. They have further admitted that they have received the information about the death of the deceased by telephonic call when they were at home. The cross-examination of the PW-4 also shows that the deceased was not knowing black magic. Thus, if the cross-examination of these three witnesses is taken into consideration the evidence is insufficient to prove the motive of the accused to commit the murder of the deceased. The evidence of these three witnesses is vague in nature to prove the motive of the accused behind the alleged crime. Therefore, the evidence of these three witnesses is not helpful to the

prosecution to prove the motive of the accused.

23. The another circumstance on which the prosecution is relied upon is the evidence of PW-2 who had seen the accused in blood stained cloths and knife. PW-2 is also the witness to whom accused has made extra judicial confession. As per the evidence of PW-2 he was attached to the Duggipar police station as Police Naik. On 24/09/2016, he was proceeding toward Sub-Divisional Police Office and reached there by 10 am. At about 6 pm he was returning to the Deori on his motorcycle when he reached near the Borkar petrol pump. He saw accused near the petrol pump proceeding in the direction of the police station. His cloths were stained with blood and he was holding knife in his hand. His evidence further discloses that he was acquainted with the accused as accused was doing the work of fetching the water in the police station and was also serving as a Home-guard. He further testified that when he enquired with the accused about what happened on the other side of the road he replied by saying “मारून टाकलो साल्याला” and he ran away. Thereafter PW-2 rushed towards the mob and found that one person resident of Kohmara was lying on the road, his intestine was came out. Deceased had also sustained the injuries on the hands. when he saw the deceased, deceased was alive. He tried to remove him in the hospital but none helped him therefore, he called Police Inspector. The

police Inspector Shri Kendre arrived at the spot and thereafter they removed the deceased in the hospital. He further deposed that they immediately proceeded to search the accused who was residing in the forest but accused was not found. They learnt that deceased was one Badole and accused killed him on the suspicion of witchcraft. During his cross-examination it came on record that in the year 2005 and 2009 the accused was serving at Duggipar police station as home guard. PW-2 denied that he enquired with the accused and accused put the knife and ran away. It has further come in the cross-examination that he informed the incident to the Police Inspector Shri Kendre. Duggipar police station is located at 500 meters from the spot of incident. PW-2 admitted that it was possible for him to give the information by approaching to the police station. Further cross-examination is regarding that being a police constable it was his duty to inform the incident to the police. He stated that he proceeded directly from the spot of incident in search of the accused, and therefore, he could not lodge the report. Thus, the cross-examination is taken to show that though PW-2 has seen the accused in a blood stained cloths he has not lodged any report immediately. He had not approached to the police station and not informed the police about the incident. The defence has further attempted to bring it on record that when accused was working at Duggipar police station, PW-2 had quarreled with him but said suggestion had denied by PW-2. If the

cross-examination of PW-2 is taken into consideration, PW-2 is not cross-examined on the aspect of extra judicial confession. Only attempt was made to bring it on record that as soon as PW-2 enquired with the accused, accused put the knife and ran away but his fact is denied by PW-2.

24. To prove the circumstance of discovery of two places where the accused has burnt his blood stained cloths and the place where accused has concealed the weapon of the offence. The prosecution has placed reliance on the evidence of PW-6 – Dinesh Bhanudas Bharinge who acted as a panch on the memorandum statement as well as the discovery panchnama. This witness has also acted as a panch on the spot panchnama, seizure of the cloths of the deceased, seizure of the slipper of the accused after his arrest and memorandum statement and discovery panchnama. The spot of incident is not disputed. As per this witness, PW-6 – son of the deceased has pointed out the spot. From the said spot police seized simple soil and soil with blood stains. Accordingly, police had collected the simple soil as well as soil with blood stains. It is pertinent to note that this PW-6 has not stated the exact place of incident where the alleged spot panchnama was drawn. The Investigating Officer who drawn the spot panchnama i.e. PW-9 has also not stated anything about the spot panchnama but PW-2 – Narendra Waman Markam has

specifically stated that the alleged spot of incident was near the Borkar petrol pump, Kohmara. It was the place opposite to the police station and he also witnessed the accused near the petrol pump. The defence has not disputed the alleged spot. As per the evidence of PW-6, police have collected blood stained soil from the said place of incident. The evidence of this witness regarding the inquest panchnama is already discussed. He also acted as a panch on the seizure of the slipper of the accused. As per his evidence, the slipper of the accused was seized by the police by drawing panchnama Exhibit 32.

25. Said slipper was seized by the police when the accused was arrested. As per the seizure panchnama, the slipper was having blood stains. Though this witness was cross-examined by the learned defence Counsel but the cross-examination was not carried out regarding the seizure of the slipper. Even the fact that the slipper was having blood stains was not denied during the cross-examination. The soil which was collected from the spot of incident and the slipper which was seized at the time of arrest of the accused were forwarded to chemical analysis along with the requisition. The chemical analyzer report Exhibit 43 shows that soil - Article 5 and slipper i.e. Article 7 stained with blood which is human blood. As the blood group on the above said articles is not determined, the said articles were forwarded for DNA examination.

The DNA extracted from blood detected on Exhibit 1 - half shirt, Exhibit 2 – pyjama, Exhibit 3 – Baniyan, Exhibit 4 – underwear, Exhibit 5 – earth, Exhibit 6 – pair of slipper, Exhibit 10 – knife and blood samples of the deceased and blood samples of the accused. The DNA report shows that DNA profiles obtained from these articles are identical and from one and the same source of male origin and matched with DNA profile obtained from blood samples of Kanhaiyalal Mangru Badole. Said DNA report is at Exhibit 55. Thus, the DNA report shows that the blood stains found on the slipper and found on the earth are identical with the DNA obtained from the blood samples of the deceased. It is pertinent to note that this incriminating circumstance was put to the accused while recording his statement under Section 313 of the Cr.PC but the accused has not given any explanation about the said blood stains.

26. PW-6 – Dinesh Bharinge is also examined to prove the disclosure statement of the accused and the discovery of the place where the accused has burnt his blood stained cloths and accused has concealed the weapon of the offence i.e. knife. As per the evidence of PW-6 Dinesh Bharinge, on 02/05/2016 the accused made a disclosure statement and disclosed that he had destroyed the cloths by burning it and he will show the place of knife. Said memorandum statement is at Exhibit 33/A. His evidence further shows that the accused pointed out the knife which was

hidden at the fencing and he also pointed out the blood stained cloths which were destroyed by him by burning it. Accordingly memorandum panchnama Exhibit 33/B was drawn. During cross-examination of this witness regarding the memorandum statement it is elicited that when he reached to the police station accused Radheshyam was present there, he was handcuff. In their presence police were asking and accused was answering. It is specifically came on record that the accused himself has made the disclosure. Thus, the cross-examination shows that the accused had made voluntary statement. PW-6 has denied that the place i.e fencing was the open space. He also denied that the panchnama by which knife was seized was drawn at police station. So far as the evidence regarding the memorandum statement and discovery of the articles is concerned prosecution also relied upon the evidence of PW-9. The evidence of PW-9 is only to the extent that on 02/05/2016 accused made a disclosure statement accordingly he recorded the memorandum and the accused produced the knife used in the crime and the cloths which were burnt by him. Thus, the evidence of PW-9 is completely silent regarding the fact that the accused has made a voluntary statement that the article was concealed and on the basis of memorandum of statement the article was recovered. However, voluntariness of the statement is revealed from the evidence of PW-6. As during the cross-examination it is specifically came on record that the accused has

made the said statement. Regarding the concealment also the evidence of PW-6 shows that the accused has pointed out the knife which was hidden at the fencing. Thus, the fact that the knife was concealed and the accused has made a memorandum statement voluntarily regarding the concealment came on record during the evidence of PW-6. Though the defence Counsel vehemently submitted that the place from which the knife was seized was an open space but it is specifically denied by the PW-6. Except the denial, no other evidence is brought on record by the defence to show that the place from which the knife was recovered was an open space. The evidence of PW-6 further shows that the accused has also shown the place where he burnt the cloths which were on his person at the time of incident. But his evidence nowhere shows that the police have seized the burnt pieces from the said place. Even the evidence of PW-9 – Investigating officer is silent regarding the fact that while drawing the panchnama he had seized the burnt pieces of the cloths. Though the discovery panchnama shows that the police have seized the burnt pieces of the cloths of the accused which were on his person but this recitals of the panchnama cannot be taken into consideration as PW-6 and PW-9 both have not stated that this burnt pieces are seized by the police while drawing the panchnama. The knife which was seized by the police on the basis of memorandum statement of the accused and it was referred to the chemical analysis. The Chemical Analyzer report Exhibit

43 shows that human blood stains are found on Article 10 - knife. As the blood group of the blood stains found on the knife was not determined, the knife was forwarded to DNA examination. The DNA report Exhibit 55 shows that DNA profiles obtain from the blood detected on the knife is identical and from one and the same source of male origin and matched with DNA profile obtain from the blood samples of Kanhaiyalal Mangaru Badole. Thus, the DNA report shows that the blood stains found on the knife are identical with the blood group of the deceased. As already observed that this incriminating evidence is put to the accused to obtain his explanation but he simply denied the same and no explanation is put-forth by the accused regarding the said circumstances.

27. The evidence of PW-5-Jitendra Chandanbatwe is only to the extent that he is serving as a police constable and carried weapon to the Medical Officer for obtaining his opinion and also carried the articles to chemical analysis. Thus, his role is to the extent that he was a carrier. PW-8 and PW-9 are the Investigating Officer. The evidence of the Investigating Officer is very cryptic in nature. They both have testified regarding the investigation carried out by them. The evidence of PW-8 is only to the extent that he recorded the supplementary statement, the statements of the witnesses and filed charge-sheet. The evidence of PW-9 is to the extent that during investigation, he drawn the spot

panchnama and arrested the accused and seized the articles and forwarded it to the chemical analysis.

28. After perusal of the evidence and after appreciating it, the material evidence on which the prosecution is relied upon are the circumstances i.e. PW-2 has witnessed the accused holding knife in his hand and he was in a blood stained cloths. His evidence is also regarding the extra judicial confession made by the accused to PW-2. So far as the evidence of PW-2 is concerned regarding the fact that he witnessed the accused holding the knife in his hand and his blood stained cloths which is not shattered during the cross-examination. During cross-examination much stress is given on the fact that though he has seen the accused holding the knife in his hand he had not lodged any report to the police station. The evidence of PW-2 shows that by telephonic call he informed Police Inspector of the Duggipar police station and within 5 minutes the Police Inspector arrived at the spot thereafter they both went in search of the accused. Therefore, mere contention of the defence that he has not lodged the report is not much important and will not affect the prosecution case.

29. Admittedly PW-2 is a police constable as soon as he seen the accused and accused disclosed to him. He immediately made a telephonic call to the police and accordingly PW-8 – Shri Kendre, Police

Inspector came at the spot. Therefore, the contention of the defence that PW-2 has not taken any action is not sustainable. The fact that PW-2 has witnessed the accused holding knife in his hand is put to the accused during his statement under Section 313. But he has not explained the above circumstances.

30. The evidence of PW-2 is further on the point of extra judicial confession. As per the evidence of PW-2, he made inquiry with the accused that what happened on the other side of the road and accused uttered “मारून टाकलो साल्याला” and he ran away. Admittedly, PW-2 was serving as a police constable at the time of incident. Whether this statement made to PW-2 i.e. extra judicial confession is hit by Section 25 and 26 of the Indian Evidence Act. Section 25 of the Evidence Act states that confession to police officer need not be proved. It states that no confession made to a Police Officer shall be proved as against a person accused of any offence. Section 26 states that no confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of the Magistrate shall be proved as against the such person. The law is settled regarding the extra judicial confession. The extra judicial confession is very weak type of evidence, requires appreciation with great caution. It must pass test of credibility. In the case of ***State of Uttar Pradesh Vs. M.K. Anthony AIR 1985 S.C. 48***

Hon'ble Apex Court has held that law does not require that the evidence of extra judicial confession should in all cases be corroborated. There is no rule of law or rule of prudence that it can be acted upon unless corroborated. If the evidence about extra judicial confession comes from the mouth of the witnesses who appeared to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have motive for attributing an untruthful statement to the accused; the words spoken to by the witnesses are clear, unambiguous and unmistakeably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to rigorous test on the touch stone of credibility, if it passes the test, the extra judicial confession can be accepted and can be basis of conviction. The same view is reiterated in ***Chattar Singh and anr. Vs. State of Haryana 2009 ALL MR (Cri) 936 (S.C.)*** wherein it is observed that deliberate and voluntary confession of guilt, if clearly proved, are among the most effectual proofs in law. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession.

31. The Indian Evidence Act does not define 'confession'. As observed by the Hon'ble Apex Court in the case of ***Aghnoo Nagesia Vs. State of Bihar 1996 AIR 119*** that for a long time, the Courts in India adopted the definition of "confession" given in Article 22 of the Stiphen's digest of the law of evidence. According to that definition, a confession is an admission made at any time by a person charged with crime, stating or suggesting the inference that he committed that crime.

32. Now only the question arises whether the statement that is extra judicial confession made to PW-2 who is police constable is hit by Section 25. The confession made to a police officer is inadmissible under Section 25 of the Indian Evidence Act and said is prohibited under Section 26 which says that if the confession is made to any other person then said confession to any other person when he is in custody then such confession is inadmissible in evidence. The statement was not made by the accused in the present case when he was in custody or during the investigation it was made by the accused immediately after the incident and it is voluntary one to a police constable.

33. Section 25 of the Indian Evidence Act reads as follows :

"25 – Confession to police officer not to be proved. – No confession made to a police officer, shall be proved as against a person accused of any offence."

A confession must either admit in terms of the offence or at any rate substantially all the facts, which constitutes the offence. The Hon'ble Apex Court in the case of Aghnoo Nagesia Vs. State of Bihar (*supra*) has held that "a confession or an admission is evidence against the maker of it, unless its admissibility is not excluded by some provision of law; that Section 25 does not exclude all statements by the accused to Police officer, but only confessions, which are on admissions in terms of the offence or at any rate substantially all facts, which constitute the offence. This Section does not stand in the way of admitting the statement of the accused to a police officer, if such statement does not amount to a confession. Section 162 of Cr.PC should be considered along with Section 25 of the Indian Evidence Act while admitting any statement other than a confession except as provided in Section 27, which provides that a statement leading to the discovery of a fact is admissible. Thus, Section 25 protects the accused in respect of a confession made by him to the police officer, whereas Section 162 protects the accused if it is made during the course of investigation. The practise of holding the memorandum preceding recovery as a confession and therefore incriminating, is deprecated by the Supreme Court in a catena of decisions."

34. In ***Pakala Narayan Swami Vs. Emperor AIR 1939 47***, the Privy Council has held that Section 25 of the Indian Evidence Act covers a

confession made to a police officer even before any investigation has started and is not confined to a confession in the course of an investigation. The principle behind the same is that as accused cannot be compelled to be a witness against himself.

Single Judge of this Court had also considered this issue in Criminal Revision Application No.117/2020 (who is part of the present Division Bench also - Justice Rohit B. Deo) and held that the expression “police officer” cannot be restricted to a police officer, who is connected with the investigation nor is the embargo on the admissibility confined to a confession made to a police officer actually discharging duty as a police officer. He referred the decision of Hon’ble Apex Court in the case of ***The State of Punjab Vs. Barkat Ram, AIR 1962 SC 276***, which reads thus :

“19. The police officer referred to in Section 25 of the Evidence Act, need not be the officer investigating into that particular offence of which a person is subsequently accused. A confession made to him need not have been made when he was actually discharging any police duty. Confession made to any member of the police of whatever rank and at whatever time, is inadmissible in evidence in view of Section 25.”

It is further observed by the Court that the decision in the *State of Punjab* (*supra*) is followed by the decision of the Full Bench of Gauhati High Court in *Bircha Kurmi Vs. State of Assam* emphasizes that

the police officer need not be the officer investigating the particular offence in which the accused is involved and the confession need not have been made to an officer actually discharging any duty, for the rigors of Section 25 of the Indian Evidence Act to come into play.

35. Admittedly, in the present case, the extra judicial confession is made by the accused to the police constable. Though it is made prior to the investigation however, in view of the Privy Council judgment under Section 25 of the Indian Evidence Act even a confession made to a police officer even before the investigation is hit by Section 25 of the Indian Evidence Act. Therefore, the extra-judicial confession cannot be acted upon.

36. The prosecution has further relied upon the circumstances regarding the recovery of the incriminating articles. At the time of arrest the slipper (chappal) of the accused was seized by the police having blood stains on it. PW-6 is examined to prove the said panchnama. As per the seizure memo - Exhibit 32, the accused was arrested and at the time of arrest, the chappal which he was wearing having blood stains was seized. Said chappal was seized on the next day of incident i.e. on 30/04/2016. The evidence of PW-6 further shows that on the basis of memorandum statement of the accused, the incriminating articles i.e.

article knife was seized. Slipper of the accused as well as the knife both articles are forwarded to chemical analysis. As per the Chemical Analyzer report Exhibit 43, human blood stains are found on slipper as well as the knife. Considering the blood group was not determined, said articles are sent for DNA examination. The DNA examination report shows that DNA profiles obtain from blood detected on the cloths of the deceased, pair of slipper and knife are identical and from one and the same source of male original matched with DNA profile obtain from blood samples of Kanhaiyalal Mangaru Badole. The process of DNA profiling starts with DNA being extracted from the crime scene and also from a sample taken from the suspect. In each case, the DNA is cut into smaller lens by specific enzymes. DNA testing has unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. Modern DNA testing can provide powerful new evidence unlike anything known before. DNA technology as a part of forensic science and scientific discipline not only provides guidance to investigation but also supplies the Court accrued investigation about the tending features of identification of criminals. Here the scientific evidence also corroborates the prosecution case confession which shows that blood stains found on the slipper of the accused are of same origin and matched with DNA profile obtained from blood samples of Kanhaiyalal i.e. deceased.

37. One more circumstance on which the prosecution relied upon is the circumstance i.e. the recovery of knife at the instance of the accused. The evidence of PW-6 shows that accused himself has made statement in their presence when police were inquiring with him. Said statement was reduced into writing. His evidence further discloses that the accused has shown the place where he hidden the article knife and produced the same from the said place. During his cross-examination it is elicited that when said memorandum statement was made, the accused was handcuff. It is attempted to bring on record that the memorandum statement was obtained when the accused was in a handcuff position. It is submitted by the defence counsel that at the relevant time accused was in handcuff position, hence recovery not acceptable. We are unable to accept the said submission for the reason that, there can be no doubt when the accused was handcuffed he may not be free from fear of the police or duress or pressure. But that itself cannot be a reason to discard the recovery of weapon. If it was otherwise found to be supported by evidence of the panch witnesses and the Investigating Officer. The Co-ordinate Bench of this Court in the case of *State of Maharashtra Vs. Vitthal Tukaram Atuagade 2017 ALL MR (Cri) 1274* held that handcuffing of accused by itself cannot be a reason to generalised the hypothesis that such a discovery cannot be reliable. That each case will have to be examined in its own peculiar

circumstances. In the present case, the accused in the presence of PW-6 - Dinesh Bhanudas Bharinge - panch witness had made the disclosure statement which has been recorded in the form of memorandum statement. Therefore, there is no substance in the submission of learned defence Counsel that said panchnama is not acceptable and to be disbelieved.

38. It is well settled that the doctrine under Section 27 is underlying on the principle that if any fact is discovered after the search is carried on the search of any information obtained from the prisoner, such a discovery is guaranteed that the information supplied by the prisoner is true. The recovery of articles at the instance of the accused admittedly has to be proved. The evidence of PW-6 - Dinesh Bhanudas Bharinge is to the extent that he was called by the police in the police station, accused was present there. He had given the statement and led to them and pointed out the place where the knife was hidden. During his cross-examination it specifically came on record that the accused himself has made a said disclosure. Thus, the evidence of PW-6 clearly shows that the accused has made a voluntary statement that he will produce the article which was concealed by him. Accordingly, his memorandum statement was reduced into writing and as per the statement accused led them and the incriminating articles was seized.

39. The Hon'ble Apex Court in the case of ***State of Uttar Pradesh Vs. Deoman Upadhyaya AIR 1960 SC 1125*** wherein paragraph No.71 explains position of law as regards the Section 27 of the Indian Evidence Act, 1872.

“71. The law has thus made a classification of accused persons into two : (1) those who have the danger brought home to them by detention on a charge; and (2) those who are yet free. In the former category are also those persons who surrender to the custody by words or action. The protection given to these two classes is different. In the case of persons belonging to the first category the law has ruled that their statements are not admissible, and in the case of the second category, only that portion of the statement is admissible as is guaranteed by the discovery of a relevant fact unknown before the statement to the investigating authority. That statement may even be confessional in nature, as when the person in custody says; “I pushed him down such and such mineshaft”, and the body of the victim is found as a result, and it can be proved that his death was due to injuries received by a fall down the mineshaft.”

40. Thus, in the present case what emerges from the evidence of PW-6 is that the accused shown his willingness to make a statement, therefore, he called two panchas and in presence of panchas accused made a memorandum statement that he will show the place where he concealed the weapon and on perusal of the said statement he led to the panchas and police and produced the article. Thus, the evidence of Investigating Officer shows that from the statement of the accused it is

crystal clear that he was the person who had concealed this. Thus, there is satisfactory compliance of Section 27 of the Indian Evidence Act, 1872.

41. Thus, the prosecution has also proved the discovery of the fact that the accused has concealed the weapon of the offence and which was discovered at the instance of the accused.

42. It is well settled that when a case is based on circumstantial evidence where no eye witness account is available, there is another principle of law is that when an incriminating circumstance is put to the accused and the accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. The appellant in his statement under Section 313 of Cr.PC did not offer any explanation as to how the blood stains of the blood group of the deceased appearing on his slipper and the articles seized at his instance. It is well settled that the prosecution has to prove all the circumstances beyond reasonable doubt against the accused to prove the guilt. If chain of circumstances are completed and form only an inference that the accused is guilty then and then only the accused can be held guilty for the said offence. However, the proof beyond reasonable doubt does not mean proof beyond any doubt. It cannot be considered as if a

mathematical formula. The phrase 'beyond reasonable doubt' has been often referred and is well understood. The learned author Glanville Williams in his book '*The Proof Of Guilt*' has said the following with respect to '*the Quantum Of Proof*'. "To say that the burden of proving a crime is generally on the prosecution does not conclude all questions. What degree or quantum of proof is needed : is it mere likelihood, or certainty, or something in between these two extremes? This question in turn raises a fundamental issue of penal policy." Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course, it is possible but not in the least probable.' The case is proved beyond reasonable doubt.

43. In the present case, the circumstances that the accused was witnessed by PW-2 in a blood stained cloths and holding knife in his hand, the blood stained slipper was seized at the time of arrest of the accused and blood stained knife was recovered at the instance of the accused. The incriminating evidence to connect the accused is further corroborated by the circumstances that the slipper of the accused and the knife forwarded to the chemical analysis. Exhibit 43 – Chemical Analyzer report shows blood stains on the slipper as well as on the knife. The

DNA report establishes that the DNA profiles obtained from blood detected on the cloths of the deceased, pair of slipper, soil collected from the spot of incident and knife are identical and from one and the same source of male origin. The accused has not offered any explanation to the said incriminating circumstances. Medical evidence shows that such injuries are possible by the weapon like knife. Thus, there is a sufficient evidence to connect the accused with the alleged offence. The another question would always arise as to what would be the reason for the wife or PW-2 to implicate the accused against whom they had no grudge by letting the real culprit to go scot-free. All the aforesaid circumstances, unless explained by the accused must be considered incriminating against him. In the facts and circumstances of the case, no perversity appears in the findings recorded by the learned trial Court so far as the charge under Section 302 and 201 of the IPC is concerned.

44. The trial Court has also held the accused guilty for the offence punishable under Section 2(1)(b) and 3(2) of the Act of 2013 and sentence to suffer rigorous imprisonment for three years. It is apparent that the trial Court has misconceived the evidence so far as the charge under the above provision is concerned. It is nowhere the case of the prosecution that the accused was doing black magic or he was involved in the witchcraft. The allegation is contrary that the accused was

suspecting that the deceased was involved in the witchcrafting. The charge under the above provision is not supported by any other evidence even there is no allegation that it was the accused who was involved in witchcraft. Therefore, the observation of the trial Court holding the accused guilty for the offence punishable under Section 2(1)(b) and 3(2) of the Act of 2013 is liable to be set aside.

45. In the facts and circumstances of the case, the appeal deserves to be allowed partly. Hence we proceed to pass the following order :

- (i) Criminal appeal is partly allowed.
- (ii) The judgment and order of sentence as regards to the offence punishable under Sections 302 and 201 of the IPC is maintained.
- (iii) The order of conviction and sentence holding the accused guilty for the offence punishable under Section 2(1)(b) and 3(2) of the Maharashtra Prevention and Eradication of Human Sacrifice and other Inhuman, Evil and Aghori Practices and Black Magic Act, 2013 is quashed and set aside and the accused is acquitted from the said charges.

(URMILA JOSHI-PHALKE, J.)

(ROHIT B. DEO, J.)