

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

CRIMINAL APPEAL NO.660 OF 2019

Gopalrao Dnyanobaji Borkar
Aged about 54 years, Occ. Labour,
R/o. Strimurtinagar, Tiosa,
Tq. Tiosa, District Amravati

...APPELLANT

VERSUS

State of Maharashtra,
through P.S.O. Tiosa,
District Amravati

...RESPONDENT

Shri R.M. Patwardhan, Advocate (appointed) Advocate for the
appellant.

Shri M.K. Pathan, Additional Public Prosecutor for the
respondent/State.

CORAM : ROHIT B. DEO & URMILA JOSHI-PHALKE, JJ.

RESERVED ON : NOVEMBER 29, 2022.

PRONOUNCED ON : JANUARY 13, 2023

JUDGMENT (Per Urmila Joshi-Phalke, J.)

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

2. By this appeal, the appellant (hereinafter referred as ‘accused’) has challenged the judgment and order of sentence passed by the Additional Sessions Judge-3, Amravati on 29/04/2019 in Sessions Case No.178/2016 whereby the accused is convicted of the offence

punishable under Section 302 of the Indian Penal Code (hereinafter referred to as 'the IPC' for short) and is sentenced to suffer imprisonment for life and fine of Rs.1000/- in default, further imprisonment of one month.

3. From the material on record, case of the prosecution unfolds as under :

A] On 17/09/2016, informant – Aruna Gopal Borkar mother of the deceased has lodged report at police station Tiosa alleging that the present accused Gopalrao Dnyanobaji Borkar is her husband and she is having two sons namely Shailesh and Dhananjay respectively. They are possessing agricultural land at Shendurjana Ghat. Her husband is addicted to liquor and her son deceased Shailesh was not doing any work as well as not assisting any agricultural operations. Therefore, there used to be quarrel between her husband Gopal and her son Shailesh. On 16/09/2016 at about 8.00pm deceased Shailesh returned home under the influence of liquor after Ganpati immersion procession was over. As her husband was under the influence of liquor there was quarrel between Shailesh and accused Gopal. To avoid any further quarrel friend of Shailesh namely Umesh Dahake took Shailesh to his house and she also went along with her son Dhananjay at the house of Ashish Mehkare who is the friend of Dhananjay to spent night. On the

way, she called Umesh Dahake and enquired about Shailesh and he disclosed that Shailesh is along with him. In the morning she came at the house of Umesh Dahake, at the relevant time Umesh Dahake disclosed that Shailesh left his house in the night itself. He also disclosed that the accused Gopal had visited his house holding stick in his hand in the midnight but he had not opened the door and informed him that he will talk with him in the morning. As the informant was worried about Shailesh, she made a phone call to her brother namely Bhaskar Sarode. Her brother arrived at about 12.00pm thereafter she visited her house and saw that Shailesh was lying on the bed and covered with blanket. She removed the blanket on the person of Shailesh and saw that Shailesh has sustained injuries on his head and face and was not alive. Therefore, she approached to the police station and lodged report against the accused that he has committed the murder of Shailesh.

4. On the basis of said report, police have registered the crime. After registration of the crime, wheels of the investigation started rotating. During the investigation, Investigating Officer has visited the alleged spot of incident which is the house of the accused. At the spot he collected the blood stains, blood stained articles. He also collected blood stained soil and simple soil and drawn the spot panchnama.

During investigation, he conducted inquest panchnama and also seized the cloths of the deceased. Accused was arrested. Cloths of the accused were also seized. He forwarded all the incriminating articles to the Chemical Analyzer. The weapon of the offence was recovered at the instance of the accused which was also forwarded to Chemical Analyzer. After completion of formalities of the investigation, he submitted charge-sheet against the accused.

5. Learned Magistrate has committed the case to the court of Sessions. The learned Additional Sessions Judge has framed the charge vide Exhibit 2. The accused pleaded not guilty and claimed to be tried.

6. To substantiate the charge against the accused, prosecution examined in all six witnesses as follows :

- (i) PW-1 – Aruna Gopal Borkar (Exhibit 9) – informant.
- (ii) PW-2 – Umesh Vithobaji Dahake (Exhibit 13)
- (iii) PW-3 – Gajanan Narayan Khadse (Exhibit 21) – panch on spot.
- (iv) PW-4 – Dr. Manoj Keshavrao Barai (Exhibit 29) – Medical Officer
- (v) PW-5 – Ashish Arunrao Mehkare (Exhibit 44)
- (vi) PW-6 – Gunaji Shankar Shinde (Exhibit 36) – Investigating Officer.

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

Report lodged by PW-1 (Exhibit 10), FIR (Exhibit 11), Seizure Memo (Exhibit 15), Cloths seizure panchnama of cloths of the deceased (Exhibit 16), Medical Certificate of accused (Exhibit 18), Arrest Panchnama (Exhibit 19), Property seizure panchnama (Exhibit 20), Spot panchnama (Exhibit 23), Memorandum statement of accused (Exhibit 24), Discovery panchnama (Exhibit 25), Post mortem report (Exhibit 30), Opinion of Medical Officer (Exhibit 32), Inquest panchnama (Exhibit 37), Property seizure memo of seizure of cloths of accused (Exhibit 40), Station diary extract (Exhibits 43 and 44), Letter to Chemical Analyzer (Exhibit 41), Map (Exhibit 51), House extract (Exhibit 53), Chemical Analyzer Report (Exhibits 56 to 58).

7. The trial Court has recorded the evidence and on the basis of evidence after hearing the prosecution as well as the defence pleaded to convict and sentenced the accused as indicated above in the judgment.

8. We have heard Shri R.M. Patwardhan, learned Counsel for the accused. He submitted that the entire case is rested on circumstantial evidence and unless and until the chain of circumstances is established on record by the prosecution, the guilt of the accused cannot be said to

have been brought at home. The evidence of the witnesses is suffering from contradictions and omissions which clearly discloses that the prosecution has miserably failed to prove the charges against the accused.

9. There is ample evidence on record to show that it is not the accused but some third person has committed the crime but the accused is implicated by his wife. The evidence regarding recovery is also not reliable as it is recovered from open space. Thus, the prosecution has miserably failed to prove the charges against the accused beyond reasonable doubt. Hence, accused to be acquitted from the charges.

10. Per contra, Shri M.K. Pathan, learned Additional Public Prosecutor for the respondent supported the judgment of the learned trial Court and submitted that admittedly the prosecution case is rested on circumstantial evidence. The prosecution has proved the circumstances that there was a previous quarrel between the accused and the deceased. The evidence of PW-1 - informant Aruna Gopal Borkar corroborated by PW-2 - Umesh Dahake and PW-5 - Ashish Mehkare to show that there was quarrel between the accused and the deceased. The deceased and the accused were in the house during the night and the deceased was found dead in the morning. Spot panchnama

shows that alleged spot of incident is the house of the accused wherein deceased was found lying in the pool of blood. The evidence further discloses that the accused made a memorandum statement and at his instance the weapon of the offence i.e. axe was recovered. The scientific evidence blood stained axe, blood stains on the cloths of the accused shows blood group 'A' which is of deceased appearing on the cloths of the accused as well as on the axe. There is no explanation from the accused regarding the blood stains of blood group 'A' appearing on his cloths. As the prosecution has proved these circumstances against the accused, it is for the accused to give some explanation regarding the death of the deceased when only accused and the deceased were in the house.

11. In view of Section 106 of the Indian Evidence Act, 1872, the accused has not explained the circumstance that in which circumstances death of the deceased is caused. Moreover, no explanation from the accused regarding the blood stains of blood group 'A' found on his cloths. Thus, the prosecution has proved the charges against the accused by adducing the evidence on various circumstances and proved the guilt of the accused. Learned trial Court has rightly convicted the accused and no interference is called for.

12. In the instant case, crime is committed in secrecy with no witness to the incident in which deceased was killed. It is settled position of law that in a case where the evidence of circumstantial in nature, 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.

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

- (i) homicidal death of the deceased Shailesh.
- (ii) previous quarrel between the accused and the deceased.
- (iii) the deceased and the accused were together prior to the incident.
- (iv) the evidence of PW-1 – Aruna Gopal Borkar, wife of the accused and mother of the deceased.
- (v) the evidence of PW-2 – Umesh Vithobaji Dahake and PW-5 – Ashish Mehakare which shows that though the deceased went with Umesh Dahake but immediately returned to his home and evidence of PW-5 Ashish

Mehakare shows that PW-1 and her another son Dhananjay were at his house during the night.

- (vi) Panchnama of spot shows that alleged spot of incident is the house of the accused and deceased was found lying in the pool of blood.
- (vii) Memorandum statement of the accused and the discovery at the instance of the accused regarding the fact of concealment of knife which is proved by PW-3 – Gajanan Narayan Khadse, Panch and PW-6 – Gunaji Shankar Shinde, Investigating Officer.
- (viii) Blood stained axe, blood stains on the cloths of the accused reveal blood group 'A' is appearing that is the blood group of the deceased.
- (ix) No explanation from the accused regarding blood stains of blood group 'A' on his cloths.
- (x) Application of 106 of Indian Evidence Act, 1872.
- (xi) The injuries sustained by the accused not explained by him.

14. In order to establish homicidal death to show that manner in which the death of the deceased was caused, reliance is placed on the testimony of PW-4-Dr. Manoj Keshavrao Barai examined vide Exhibit 29. As per his evidence, he was attached to Rural Hospital, Tiosa. Dead body of the deceased Shailesh Borkar was brought to the hospital for conducting post mortem examination. The rigor mortis is well marked in whole body and post mortem lividity is present over the back, buttock, thighs except at pressure points. On examination of the body he found

multiple external injuries on the body which he has described on a separate paper. He has observed more than 14 injuries on the person of body which is described on a separate paper. The injuries noted by him are mentioned in column No. 17 which are as follows :

- 1) Lacerated wound over right frontal region 14cm x 5cm x 3cm with fracture skull vault caused due to sharp and heavy weapon.
- 2) Lacerated wound just above right ear 7cm x 2cm x 1.5 cm.
- 3) Lacerated wound 9cm x 1.5cm x 1cm from forehead to right ear.
- 4) Lacerated wound 8cm x 1.5cm x 0.5cm over right cheek.
- 5) Lacerated wound 4cm x 1cm x 0.5cm from right cheek to neck.
- 6) Cut throat injury 11cm x 9cm x 2cm just below thyroid cartilage. Trachea seen cut open. External carotid arteries and veins cut open. Hematoma present in the wound.
- 7) Lacerated wound 6cm x 1cm x 0.5cm over neck.
- 8) Lacerated wound 3 x 2 x 0.5cm pinna cut Right ear.
- 9) Underlying fracture of mandible right part.
- 10) Lacerated wound 3 x 2cm right shoulder.
- 11) Multiple small cut wounds over chest and abdomen approx. 3cm x 1cm x 0.5 cm.
- 12) Right index finger dislocation from meta-carpo-phalangeal joint attached through some skin part.

- 13) Contusion chest with underlying rib fractures heavy and blunt weapon.
- 14) Fracture left forearm lower end of radius and ulna. Open comminuted fracture.

15. He also noted the internal injuries as follows :

(i) On examination of head he found scalp vault broken at right parietal area. There was a fracture on skull vault right parietal bone with frontal bone. Brain was visible from the defect in skull vault.

16. On examination of thorax he found multiple fractures of ribs cartilages, contused area chest, trachea cut open just below thyroid cartilage. Large vessels in neck cut in lacerated wound. All the injuries were ante mortem in nature. He opined that the cause of death was due to injuries to vital organs like brain and vital structures such as large vessels in neck, trachea etc. Accordingly, he prepared the post mortem notes Exhibit 30. During his evidence he further explained that the rigor mortis starts on the muscle of eye-lid and thereafter it spreads to the whole body. The duration of spreading of rigor mortis in 2-8 hours. Likewise, the post mortem lividity starts 15 minutes after the death of the person. He further explained that for determining the time of death of a person, the presence of rigor mortis and post mortem lividity are the two essential factors. He opined that the time of death of deceased was prior to 10 hours before the examination of body.

17. His evidence further reveals that on 20/09/2016 the police had sent query, along with weapon addressed to him seeking opinion about the injuries caused to the deceased. After examining the weapons he opined that the injuries are caused to the deceased are possible by the weapons produced before him. After examining the weapons he had re-sealed the weapons and handed over to the police. His opinion about the weapon and injuries is at Exhibit 32.

18. During cross-examination it is elicited that he had not checked the length, width and weight of the weapons produced before him. The witness has explained that the weapon can be described merely by looking to it. He further admitted that such type of injuries caused to the deceased are possible by means of dragger, Gupti and Satoor. He further admits that he cannot exactly say that the injuries caused to the deceased were only due to the axe. Thus, from the cross-examination it is elicited that such type of injuries are possible by any sharp weapon that like dragger, Gupti and Satoor and medical officer cannot positively opined that these injuries are possible only by an axe.

19. Besides the medical evidence, prosecution also relied upon the inquest panchnama which is admitted by defence at Exhibit 37. The

recitals of the inquest panchnama also shows that the deceased has sustained multiple injuries on his person. PW-6 – Gunaji Shankar Shinde, Investigating Officer has narrated that he drawn the inquest panchnama and observed the injuries on the person of the deceased. Thus, the medical evidence as well as evidence in the nature of the inquest panchnama discloses that the death of the deceased is caused due to the multiple injuries which is sustained by the deceased. From the cross-examination nothing is elicited to discard opinion about cause of death. 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 lead to inevitable conclusion that deceased Shailesh died homicidal death.

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

21. 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”.

In the light of above settled legal position, we have to see whether there is evidence available which unerringly points out the guilt of the accused.

22. The prosecution relied upon various circumstances :

The first circumstance that there was no cordial relations between father and son i.e. the accused Gopal and the deceased Shailesh on the ground that Shailesh was not doing any work and was also not assisting him in agricultural operations. To prove the said circumstance, implicit reliance is placed on the evidence of PW-1-Aruna Gopal Borkar who is the wife of the accused and the mother of the deceased. The sum and substance of her evidence is that her son Shailesh was initially working in a private company but he left the job. Her husband i.e. accused was highly addicted to liquor and under the influence of liquor he used to beat her frequently. She further testified that the accused was also having grudge against Shailesh as Shailesh was not familiar with the work of agricultural operations. On 16/09/2016, Shailesh came home at about 8.00pm after the immersion of Ganesh idol and was taking his food. At the relevant time accused came back home in a drunken condition. Accused beat her son Shailesh by means of stick on his legs. She and her son Dhananjay intervened in the quarrel of accused and deceased but accused assaulted her as well as Dhananjay by

means of that stick, therefore, at about 11.00 p.m. she took Shailesh to the house of Umesh Dahake and she asked Umesh Dahake to keep Shailesh at his house and not to allow him to return to his own house. After dropping Shailesh at the house of Umesh Dahake she approached to the police station and lodged report against the accused. She again came to her house at about 11.30pm to 11.45 pm but her husband was throwing the utensils in the house and on her enquiry he came to beat her by holding axe in his hand, therefore, she called Ashish Mehkare and went at his house to sleep along with her son Dhananjay. She also made a phone call to Umesh Dahake and enquired with Shailesh and he informed that Shailesh is at his house. On the next day at about 8.00 am she went at the house of Umesh Dahake but Umesh Dahake informed her that Shailesh left the house in the night itself. He also disclosed that accused came to his house by holding stick in his hand. Thereafter she called her brother. After arrival of her brother she went at her house and saw that Shailesh was on a bed by covering bed-sheet. She removed the blanket on the person of Shailesh and saw that Shailesh had sustained injuries on head, face, throat and he was lying in the pool of blood, therefore, she approached to the police station and lodged the report. During her cross-examination it is elicited that Shailesh was also addicted to liquor but she denied that Shailesh was in habit of raising quarrels with others under the influence of liquor. The accused has

taken the defence that during the night he was not at home but he had been to his agricultural field for the protection of the crops. But PW-1 denied the suggestion that for the protection of crops her husband used to go to the agricultural field. She also denied that on the day of incident also her husband had gone during the night to agricultural field to protect the crop from wild animals. It is further elicited from her cross-examination that she had also lodged the report against her son Shailesh. She further admitted that on the day of incident Shailesh went to the house of Umesh Dahake on his motorcycle along with him. She also went at the house of Umesh Dahake to search the Shailesh. She further admitted that since the night of 16/09/2016 Shailesh went along with Umesh Dahake thereafter she could not meet him. Thus, from the cross-examination it is elicited that since the departure of the Shailesh with Umesh Dahake there was no communication between PW-1 and Shailesh. She specifically admitted that she do not exactly know as to what had happened with Shailesh and Shailesh was found dead in the house on 17/09/2018. Thus, the evidence of PW-1 shows that there was previous quarrel between the deceased and the accused. The accused assaulted the deceased therefore, deceased left the house but the dead body of the deceased was found on the next day in the house. Though defence has attempted to bring on record that the accused was not present in the house during the night hours, she denied the said

suggestion. Defence has come with a case it is not the accused but PW-1 and her son Dhananjay had committed the crime and they have committed the murder of deceased Shailesh, which she denied.

23. To corroborate the version of PW - 1, another material witness is examined by the prosecution is PW-2 - Umesh Vithobaji Dahake. His evidence reveals that on 16/09/2016 he received a phone call of Dhananjay Borkar who is younger brother of Shailesh who informed him that there is a dispute between Shailesh and his father as well as between Dhananjay. Therefore, he along with his brother Rupesh went to the house of Dhananjay. On his request, he took Shailesh to his house to sleep in the night. At the relevant time Shailesh was wearing half pant and T-shirt. His evidence further reveals that when they were proceeding he received a phone call of mother of Shailesh and she enquired whether Shailesh is with them and he answered in the affirmative. His evidence further discloses that when he reached at home Shailesh told him that he is going to his house and he left the place. But he has not followed Shailesh. On the same midnight, accused came to his house and was knocking the door. Accused was holding stick in his hand but he has not opened the door. During cross-examination of PW - 2, he admitted that Shailesh was in habit of drinking liquor occasionally. He also admitted that on the day of

incident also Shailesh had consumed liquor. It is elicited that there was quarrel between Dhananjay, deceased Shailesh and accused Gopal Borkar. He admits that he is not knowing where was Shailesh throughout the night and he is not aware what had happened with Shailesh. He denied that whenever he visited the house of Shailesh during the night father of Shailesh was not present in the house. He also denied that father of the Shailesh had been to the field to protect the crop. Thus, the defence of the accused that the accused used to be in his agricultural field to protect the crops during the night hours is denied by this witness also.

24. The defence of the accused is that it is not the accused but it is PW-1 and another son Dhananjay committed the murder of Shailesh. To rule out the possibility that PW-1 along with Dhananjay is the culprit. The prosecution has examined PW-5 - Ashish Arunrao Mehkare to prove that during the intervening night of 16/09/2016 and 17/09/2016, PW-1 along with her son Dhananjay had been to the house of PW-5 Ashish. His evidence shows that on 16/09/2016 at about 11.30pm to 11.45 pm he received a phone call of shop owner wherein he was working and he called him in front of police station accordingly he went there and saw that Dhananjay Borkar and his mother were present outside the police station. He enquired with Dhananjay and Dhananjay disclosed that his

brother Shailesh and father both are under the influence of liquor and both are quarreling. Thereafter Dhananjay and his mother came to his house to sleep. They stayed at his home for whole night and on subsequent day they left to their house and he also left to his agricultural field. Thus, the evidence of PW-5 shows that PW-1 along with her son Dhananjay was at his house during whole night. During his cross-examination attempt was made to show that he is interested witness. He admitted that he come to the Court along with Dhananjay. Except this cross-examination nothing material is elicited to discard the evidence. The defence of the accused that he was not present in the house but he was in his agricultural field is not admitted either by PW-1 or by PW-5.

25. The next circumstance on which the prosecution is relied upon to prove that the alleged incident has occurred in the house of accused and the deceased. It is an admitted position that at the relevant time i.e. at the time of incident PW-1 - Aruna, accused Gopal were residing together in their house along with deceased Shailesh and their another son Dhananjay. As per prosecution, alleged spot of incident is the house of the accused and PW-1. To prove the spot panchnama, prosecution relied upon the evidence of PW-3 - Gajanan Narayan Khadse and PW-6 Gunaji Shankar Shinde, Investigating Officer. The evidence of

PW-3 Gajanan Khadse shows that as per the direction of his superior he acted as a panch on the spot panchnama. The spot was shown by the wife of the accused. They saw that dead body was lying in a pool of blood on the diwan (bed). The police seized the bed-sheet, pillow cover, and the blood samples from the diwan in his presence. All the articles were sealed by the police in his presence. Thereafter panchnama was drawn. Said panchnama is at Exhibit 23. Regarding the spot he is cross-examined and he admitted that he cannot state the four boundaries of the said house. Except this cross-examination nothing is elicited during his cross.

26. The evidence of PW-3 is also material to prove the another circumstance of discovery of facts regarding the concealment of the axe. As per the evidence of PW-3 on 18/09/2016 again police called him to act as a panch. Another panch was also present. In their presence accused Gopal gave a statement that he is ready to produce the weapon accordingly his statement was reduced into writing which is at Exhibit 24. Thereafter accused laid them at his house. Said house was owned by one Purushottam Balkrushna Makeshwar. The accused produced one weapon from beneath of the bed which was in the porch. The weapon was an axe. Police seized the said axe by drawing the panchnama. The evidence of PW-3 is also corroborated by the evidence of PW-6 –

Investigating Officer who testified that as accused shown his willingness to give memorandum statement. He issued letters to two panchas. In presence of panchas accused had made a statement that he is ready to produce the axe concealed by him accordingly his statement was recorded. Thereafter accused laid them to his house and produced the axe. The axe was blood stained. PW-3 as well as PW-6 are cross-examined at length. The cross-examination of the PW-3 regarding the memorandum statement and discovery of the axe is only in the suggestion form. Cross-examination of PW-6 regarding the memorandum statement and the seizure of the axe is also in the nature of denial. Thus, nothing material is elicited during the cross-examination of PW-3 and PW-6 regarding the recovery of axe at the instance of the accused.

27. The another material evidence on which the prosecution relied upon is the Chemical Analyzer reports Exhibits 56 to 58. Exhibit 56 Chemical Analyzer report shows that blood group of deceased Shailesh is 'A'. As per Exhibit 57 blood group of the accused is 'B'. As per Exhibit 58 the cloths of the deceased, cloths of the accused and weapon and cotton swabs, mattress, pillow cover and red coloured scrapping were analyzed and an analysis report was submitted to the extent that article (1) full shirt, article (2) full jeans pant article (3) half

pant and article (4) underwear are stained with blood of blood group 'A' which are the cloths of the deceased article (5) full shirt article (6) full pant are the cloths of the accused and the report shows that article (5) full shirt is having blood stains of human blood whereas article (6) full pant is having blood stained of blood group 'A' which is of deceased. The report at Exhibit 58 further discloses that cotton swab by which the blood was collected from the spot, mattress seized from the spot, pillow cover seized from the spot, red coloured scrapping seized from the spot are analyzed and blood of blood group 'A' was found on mattress, pillow cover and red coloured scrapping whereas human blood was found on cotton swab. Article (7) is an axe which was seized at the instance of the accused and the blood stains of blood group 'A' was found on the blade of the said axe. Thus, the Chemical Analyzer report shows that the blood stains of blood group 'A' which is of deceased was not only found on the cloths of the deceased but also found on the pant of the accused, axe recovered from the accused and the articles seized from the spot of incident. The statement of the accused was recorded regarding the said incriminating evidence under Section 313 of the Cr.P.C. and no explanation is adduced by the accused regarding the blood stains of blood group 'A' appearing on the cloths of the accused. Only explanation given by the accused regarding the incriminating evidence of Chemical Analyzer by saying that it is false.

28. Another incriminating circumstance on which the prosecution is relied upon is the injuries sustained by the accused. PW-4 Dr. Manoj Keshavrao Barai examined on 17/09/2016. On examination he noted two injuries on his person i.e. (i) contusion 2 x 2cm over occipital region and (ii) contused abrasion 1 x 1.5cm on the base of left index finger. PW-4 admitted that the injuries found on the person of Gopal are also possible due to fall in the agricultural field. There is no explanation from the accused during his statement under Section 313 that he sustained the injuries while working in the agricultural field or due to the fall in the agricultural field.

29. After appreciation of the evidence on record, the evidence of PW-1 Aruna wife of the accused shows that there was quarrel between the deceased and the accused and the accused had assaulted the deceased on 16/09/2016. The evidence further discloses that to avoid the further quarrel she had sent deceased along with PW-2 – Umesh Dahake. She had not only sent the Shailesh with PW-2 – Umesh Dahake but she subsequently confirmed that Shailesh was with him. The evidence of PW-1 that Shailesh was taken by Umesh Dahake is corroborated by PW-2 – Umesh Dahake but his evidence shows that as soon as he reached at his house Shailesh left his house on the pretext

that he is returning to the home. The circumstance that PW-1 and Dhananjay her another son were not in the house during the intervening night is proved by the prosecution by examining PW-5 whose evidence clearly shows that he was called by his owner near the police station wherein he met Dhananjay and he came to know that there was quarrel between Shailesh, Dhananjay and accused. Thereafter PW-1 and Dhananjay came to his house to sleep and they left his house in the morning. Though these witnesses are cross-examined at length by the defence and it is attempted to bring on record that the accused was also not present in the house as usually he used to be in his agricultural field to protect the crop. But these witnesses have denied the said suggestion. It is further the defence of the accused that it is not the accused but PW-1 and Dhananjay had committed the crime but to substantiate the said defence no evidence is brought on record by the accused. Even his contention that he used to be in his agricultural field to protect the crops during the night hours is also not supported by any cogent evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of witness read as a whole inspires confidence. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general

tenor of the evidence and whether the earlier evaluation of the evidence is shaken. Material thing is to be seen is whether those inconsistencies goes to the root of the matter or pertain to insignificant aspect thereof. In the present case, some contradictions are brought on record during the cross-examination of PW-1. But these contradictions did not affect the prosecution case as their evidence consistently established that there was a quarrel between Shailesh and the accused and accused has beaten the Shailesh. Though Shailesh went along with PW-2 Umesh Dahake but he immediately returned to his house. PW-1 was not aware that Shailesh returned to the house as she was at the house of PW-5–Ashish Mehkare along with Dhananjay. She came to know about this fact in the morning when she visited the house of PW-2 – Umesh Dahake. Thereafter dead body was found in the house of the accused. Though accused stated that he was not present in the house but his contention is not supported by any other evidence. It is pertinent to note that PW-1 is the wife of the accused and mother of the deceased. There is no reason for her to speak lie and shield the real culprit. In a criminal trial normally the evidence of wife, husband, son or daughter of the deceased is given great weightage on the principle that there is no reason for them not to speak the truth and shield real culprit. According to normal human behaviour and conduct, a witness would tend to shield and protect a closely related accused. In the present case, deceased as well the accused both are

related to her. She has not exaggerated her version but her version is duly corroborated by evidence of PW-2 – Umesh Dahake and PW-5 Ashish. No reason came forward to discard their evidence as there are no material inconsistencies in the said evidence.

30. The oral evidence of PW-1, PW-2 and PW-5 is also corroborated by the other circumstantial evidence. The evidence regarding the spot panchnama is already discussed which shows that the alleged spot of incident is the house of the accused. Admittedly, presence of PW-1 and her son Dhananjay at the house of PW-5 Ashish Mehkare is established by PW-5 Ashish. Said Ashish Mehkare though cross-examined at length but nothing is elicited to discard his evidence. Admittedly, PW-1 and accused were residing together along with two sons deceased Shailesh and Dhananjay. Admittedly, at the intervening night of 16/09/2016 and 17/09/2016 Shailesh went along with Umesh Dahake and PW-1 went at the house of PW-5 Ashish along with Dhananjay. Evidence of PW-2 shows that though Shailesh came at his house but he immediately returned to his house and on the next day dead body was found in the said house. Though accused is taken the defence that he had been to his agricultural field but the defence of the accused is not supported by any other evidence or the cross-examination of PW-1, PW-2 and PW-5. All three witnesses denied the suggestion that

accused used to be at his agricultural field during the night hours to protect the crops. No independent evidence is adduced by the accused to prove the contention that he had been to his agricultural field during the night hours to protect the crops. Thus, the evidence is sufficiently shows that in the intervening night accused and deceased were only present in the house. Admittedly, there is no direct evidence to prove the charges against the accused. The circumstances on record shows that the accused and deceased were together and in the morning dead body of the deceased was found. The evidence of PW-1 - Aruna Borkar wife of the accused and mother of the deceased Shailesh and the evidence of PW-2 - Umesh Dahake shows that Shailesh went along with Umesh and subsequently Shailesh returned to the home by informing Umesh. The evidence of PW-5 - Ashish Mehkare shows that PW-1 Aruna and her another son Dhananjay were at his house during the intervening night of 16/09/2016 and 17/09/2016. Thus, it is clear that PW-1 Aruna and her son were not at home during the night hours. The evidence of PW-2 Umesh also shows that deceased Shailesh though went along with him but immediately returned to his house and in the morning his dead body was found. The oral evidence of these witnesses also corroborated by PW-3 Gajanan Narayan Khadse who acted as a panch on spot panchnama whose evidence shows that he acted as a panch and spot of incident is the house of accused and the deceased. The dead body of the

deceased was lying in the pool of blood on the diwan. Police have seized the bed sheet, pillow cover and blood samples from the diwan in his presence. Thus, not only the blood stains on the articles but pool of blood was witnessed by PW-3 Gajanan Khadse at the spot of incident. This fact is further corroborated by the Chemical Analyzer report Exhibit 58 which shows that cotton swab by which blood was collected by the police during the spot panchnama, mattress, pillow cover and red coloured scrapping seized by the police while drawing the spot panchnama are stained with blood of blood group 'A' which is of deceased. Thus, these circumstances shows that the alleged incident has occurred in the house of the accused. At the relevant time, absence of PW-1 and her son Dhananjay has positively came on record. Though the accused has taken the defence that he was in his agricultural field during the night hours but PW-1 and PW-5 denied the said suggestion. Besides the said suggestion accused has not proved the fact that he was not present in the house. In the light of above facts and circumstances, Section 106 of the Indian Evidence Act, 1872 would attract. Section 106 of the Indian Evidence Act, 1872 read as under :

“106. Burden of proving fact especially within knowledge.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.”

31. The scope of Section 106 of the Indian Evidence Act, 1872 shows that the prosecution must discharge the initial burden of establishing *prima facie* the guilt of the accused beyond all reasonable doubt. The principle underlying Section 106 of the Indian Evidence Act, 1872 is that the burden to establish those facts which are within the personal knowledge of the person, burden is cast upon that person and if he fails to establish or explain those facts, an adverse inference may be drawn against him.

32. In the present case, the offence takes place inside the privacy of the house when only accused was present along with deceased. It is held by the Hon'ble Apex Court in the case of ***Trimukh Maroti Kirkan Vs. State of Maharashtra (2006) 10 SCC 681*** that if an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. The Hon'ble Apex Court has referred the judgment of Privy Council *Stirland Vs. Director of Public Prosecution 1944 AC 315* and observed that the law does not enjoin a duty on the prosecution to lead evidence of such character which is almost

impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Indian Evidence Act, 1872 which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

33. Illustration (b) to Section 106 throws some light on the content and scope of this provision and it reads :

“(b) “A” is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him.”

Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence.

34. In view of Section 106 of the Indian Evidence Act, 1872 there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its

case lies entirely upon the prosecution and there is no duty at all on an accused to offer an explanation.

35. In the present case also admittedly PW-1 Aruna Borkar was residing in the house along with the accused and her two sons. The evidence further discloses that there was quarrel between the accused and the deceased, therefore, PW-1 sent Shailesh along with PW-2 - Umesh Dahake. But Shailesh immediately returned to the house whereas PW-1 and her son Dhananjay had been to the house of PW-5 Ashish Mehkare and they spent the night at the house of Ashish. In the above said circumstances, it is the accused who has to offer the explanation regarding the alleged incident. On the principle underlying Section 106 of the Indian Evidence Act, 1872 the burden to establish these facts is cast on the accused and if he fails to establish or explain those facts an adverse inference may arise against him.

36. The prosecution not only relied upon the circumstance that the alleged incident has occurred in the house and the inmates of the house i.e. accused had not offer any explanation. But further prosecution has adduced the evidence that incriminating article i.e. weapon is recovered at the instance of the accused. To prove the said circumstance admittedly, the prosecution relied upon the evidence of

PW-3 - Gajanan Khadse. His evidence shows that it was the accused who gave a statement that he is ready to produce the weapon. Admittedly, the evidence of panch witness nowhere shows that the accused has made a statement to the effect that he is ready to show the place where he concealed the weapon of the offence. Therefore, prosecution relied upon the evidence of PW-6 – Investigating Officer. His evidence describes in detailed that as the accused expressed his willingness to give his memorandum statement, therefore, he issued letters to two panchas. Said letter is at Exhibit 42. Thereafter accused gave his statement that he is ready to produce the axe concealed by him accordingly the said confessional statement was recorded, thereafter accused laid them and produced one axe which was kept beneath the sacs kept in front of the house. The said axe was having blood stains. The evidence of PW-6 is not shattered so far as the memorandum statement and recovery at the instance of the accused is concerned. The law regarding recovery under Section 27 of the Indian Evidence Act, 1872 is well settled. The requirement of Section 27 of the Indian Evidence Act, 1872 can be summed up as follows :

- (i) The fact of which evidence is sought to be given must be relevant to the issue.
- (ii) The fact must have been discovered.
- (iii) The discovery must have been in consequence of some information received from the accused.

- (iv) A person giving the information must be accused of any offence.
- (v) He must be in the custody of a police officer.
- (vi) The discovery of an act must be deposed to.
- (vii) Only that portion of the information which relates distinctly or strictly to the fact can be discovered.

Thus, doctrine therefore, if founded on the principle that if any fact is discovered after the search is carried out 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. Though PW-3 – Gajanan Khadse has supported the prosecution case but his evidence is not to the extent that the accused made a voluntary statement and stated about the concealment of the article by him. But the evidence of PW-6–Investigating Officer clearly shows that as the accused has shown the willingness to make a voluntary statement, therefore, he called the panchas and thereafter accused made a 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 laid them and the incriminating articles was seized. Thus, though the evidence of PW-3 is not showing the voluntariness of the accused and about the concealment but this fact is

proved by the Investigating Officer. In ***Modan Singh Vs. State of Rajasthan (1978) 4 SCC 435*** wherein it was observed that the evidence of the Investigating Officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witness did not support the prosecution version. Similar view was expressed in case of ***Mohd. Aslam Vs. State of Maharashtra (2001) 9 SCC 362*** and in ***Anter Singh Vs. State of Rajasthan (2004) 10 SCC 657*** wherein it is further held that even if panch witnesses turned hostile which happen very often in criminal cases, the evidence of the person who effected the recovery would not stand vitiated. In a recent judgment ***Subramanya Vs. State of Karnataka 2022 LiveLaw (SC) 887*** wherein Hon'ble Apex Court considered how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Indian Evidence Act, 1872. The Hon'ble Apex Court held in paragraph No.81 that the conditions necessary for the applicability of Section 27 of the Indian Evidence Act, 1872 are broadly as under :

- (i) The discovery of fact in consequence of an information received from the accused;
- (ii) The discovery of such fact to be deposed to;
- (iii) The accused must be in police custody when he gave information; and
- (iv) So much of information as relates distinctly to the fact thereby discovered is admissible.

37. The Hon'ble Apex Court has referred the judgment of the Constitution Bench 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.”

38. Thus, in the present case what emerges from the evidence of Investigating Officer 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.

39. Next circumstance that the weapon which is recovered at the instance of the accused and to show that it was connecting with the crime, prosecution relied upon the Chemical Analyzer report. The Chemical Analyzer report Exhibit 58 shows that the axe referred to the analysis was having blood stains and the blood stains of blood group 'A' i.e. of the deceased. The said incriminating circumstance is put to the accused but he has offered no explanation regarding the same. Thus, the facts that the memorandum statement of the accused and on perusal of the said memorandum statement, weapon was recovered on which blood stains of blood group 'A' i.e. of deceased are found and it is not explained by the accused.

40. The next circumstance on which the prosecution relied upon is the blood stained cloths recovered from the accused. For that purpose, the evidence of the Investigating Officer is material. His evidence shows that he arrested the accused by drawing arrest

panchnama. At the time of arrest he seized the cloths of the accused in presence of panchas which were on his person and which were blood stained. He seized one shirt and full pant stained with blood. Said cloths were seized in presence of the panchas and sealed. Said panchnama is at Exhibit 40. Though the Investigating Officer is cross-examined on this aspect but nothing incriminating came on record. Again Exhibit 58 corroborates the fact that blood stains found on the cloths of the accused especially blood stains on full pant are of blood group 'A' which is of the deceased. Blood stains found on the full shirt of the accused are of human blood. Though this incriminating evidence is put to the accused but he has not offered any explanation. As per Exhibit 56 blood group of the deceased is 'A' and as per Exhibit 57 blood group of the accused is 'B'. Thus, it is crystal clear that the blood stains which are found on the cloths of the accused especially on his pant for which he offered no explanation. If a defence of the accused is taken into consideration that he was not present in the house then question arises how the blood stains are appearing on his cloths especially pant for which no explanation is put forth by the accused.

41. Therefore, said circumstance also goes against the accused. The medical certificate Exhibit 18 shows that accused has sustained the injuries in the nature of contusion on occipital region and contused

abrasion. As per the defence, said injuries are sustained by him by fall in the agricultural field but in statement under Section 313, no such explanation is given by the accused regarding the said injuries.

42. Thus, in the present case, prosecution succeeded in establishing that the deceased died homicidal death. Said death is caused when accused and deceased were present in the house whereas other inmates i.e. PW-1 Aruna and another son Dhananjay were at the house of PW-5 - Ashish. The spot panchnama shows that alleged incident has occurred inside the house of the accused and deceased was found lying in the pool of blood. The articles which are seized during the spot panchnama bears the blood stains of blood group 'A' which is of the deceased. The axe recovered at the instance of the accused is also having blood stains of blood group 'A' i.e. of deceased. The blood stains found on the cloths of the accused are also of blood group of the deceased.

43. It is well settled that when 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 the Cr.P.C. did not offer any explanation as to how deceased received the injuries which were found on his body. The recovery of the articles is also pointing out towards the accused. It is well settled that the prosecution has to prove all the circumstances beyond reasonable doubt against the accused to prove case against him. If chain of circumstances is completed and from which only inference that the accused is guilty can be drawn, then and then only accused can be held guilty for the said offence. 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.

44. In the present case, the circumstances which are brought on record unerringly points out the guilt of the accused. The prosecution thus, by leading cogent evidence has proved that there was quarrel between the deceased and the accused. The accused and the deceased only were together in the said house during the night and in the morning Shailesh was found dead. These facts are corroborated by the recovered axe with a blood stains of blood group 'A' which is of deceased at the instance of the accused. The cloths of the accused also found with blood stains especially blood stains of blood group 'A' on the pant of the accused for which the accused had not offered any explanation. Medical officer has also opined that such type of injuries are possible by the weapon like axe, by observing the axe. As such there is sufficient evidence to connect the axe recovered at the instance of accused to be weapon of assault on deceased. The Chemical Analyzer report supports the fact by showing blood stains of blood group 'A' on the pant of the accused and on the axe which is recovered at the instance of the accused. It is tried to be impressed upon this Court that the accused was not present in the house and he had been to his agricultural field to protect the crops but this defence is not substantiated either through the cross-examination or through the independent witness. A question would always arise as to what would be the reason for the wife of the

accused to implicate the accused against whom she had no grudge in the crime thereby 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 in the impugned judgment. Hence appeal must fail. Hence we proceed to pass the following order :

- (i) The Criminal Appeal stands dismissed.
- (ii) Record and Proceedings be sent back to the trial Court.

Deleted as per
Court's order
dated 24/01/2023.

~~45. Rule is made absolute in the aforesaid terms. There will be no order as to costs.~~

46. Fees of learned Advocate (appointed) for the appellant be paid as per Rules.

(URMILA JOSHI-PHALKE, J.)

(ROHIT B. DEO, J.)

**Divya*