



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

CONFIRMATION CASE NO. 1 OF 2024

The State of Maharashtra

...Appellant

Versus

Girish s/o Gangaram Kotewad,
Age : 34 years, Occupation : Labour,
R/o. Marathgalli, Mudkhed,
Tq. Mudkhed, Dist. Nanded.

...Respondent
[Accused]

.....

Mr. Govind A. Kulkarni – Assistant Public Prosecutor for the
Appellant/State

Mr. G. V. Wani – Advocate (appointed by Legal Aid) with Mr. N.V. Dhake,
Advocate - for Respondent/Accused.

Mr. Nilesh S. Ghanekar – Advocate appointed as *Amicus Curiae*

.....

AND

CRIMINAL APPEAL NO. 384 OF 2024

Girish s/o Gangaram Kotewad,
Age : 34 years, Occupation : Labour,
R/o. Marathgalli, Tq. Mudkhed, Dist. Nanded.

...Appellant
[Accused]

Versus

1. The State of Maharashtra

2. X.Y.Z.

...Respondents

.....

Mr. G. V. Wani – Advocate (appointed by Legal Aid) with Mr. N.V. Dhake,
Advocate - for Appellant/Accused.

Mr. Govind A. Kulkarni – APP for Respondent No.1/State

Mrs. Kalpana Sonpawale [Kulkarni] – Advocate [appointed by Legal
Aid] for Respondent No. 2/Victim

.....

AND

CRIMINAL APPLICATION NO. 2169 OF 2024
IN
CRIMINAL APPEAL NO. 384 OF 2024

Girish Gangaram Kotewad

...Applicant

Versus

The State of Maharashtra & Anr.

...Respondents

.....

Mr. Girish Wani – Advocate for the Applicant
Mr. Govind A. Kulkarni – APP for respondent/State

.....

**CORAM : R. G. AVACHAT
AND
NEERAJ P. DHOTE, JJ.**

RESERVED FOR JUDGMENT ON : 20TH SEPTEMBER, 2024
PRONOUNCED THE JUDGMENT ON : 7TH OCTOBER, 2024

JUDGMENT [*Per* Neeraj P. Dhote, J.] : -

1. This is the Reference for confirmation of Death sentence imposed upon the Appellant by the learned Special Judge (POCSO), Biloli, by Judgment and Order dated 17.01.2024 passed in Special Case No.12 of 2017. The Appellant has been convicted and sentenced as under : -

[i] The Appellant is sentenced to Death and pay a fine of Rs.10,000/- (Rupees Ten Thousand only) for an offence punishable under Section 302 of the Indian Penal Code. In default to pay the amount of fine, he shall suffer rigorous imprisonment for one month.

[ii] He is further sentenced to undergo rigorous imprisonment for the period of ten years and pay a fine of Rs.10,000/- (Rupees Ten Thousand only) for an offence punishable under Section 377 of the IPC. In default to pay the amount of fine, he shall suffer rigorous imprisonment for one month.

[iii] He is further sentenced to imprisonment for the remainder of his natural life and pay a fine of Rs.10,000/- (Rupees Ten Thousand) for an offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012. In default to pay the amount of fine, he shall suffer rigorous imprisonment for one month.

2. The Reference is made by the learned Trial Court pursuant to Section 366 of the Code of Criminal Procedure [for the sake of brevity "Cr.P.C."]. The Convict has also preferred Appeal against the aforesaid conviction and sentence under Section 374(2) of the Cr.P.C.

3. The prosecution's case as revealed from the police report is as under : -

3.1. The informant Shivaji Digambarrao Apatwad [PW1] was the resident of Sawarkhed, Tal. Naigaon, Dist. Nanded. He was residing there with his family comprising wife and two sons. On 05.09.2017, it was the day of immersion of Lord Ganesh. The informant and his elder

son (Victim) attended the procession for sometime and returned home around 06:00 pm. They had meals. Thereafter, Victim went outside around 06:30 pm to play. Since the Victim did not return home for quite sometime, the informant, his brothers and other known persons started searching for the Victim. During the search, dead body of Victim was noticed behind the Lord Hanuman Temple which was under construction. There were injuries on the dead body. The informant screamed due to which the villagers gathered on the spot. One of the villagers, namely, Ananda Sayabu Battinwad (PW6) told the informant that the Appellant (accused) who was working as a labourer at the ongoing construction work of Hanuman temple was dropped by him at village Ghungrala, and at that time he noticed injury on the hand of the said accused and he also appeared frightened. The police conducted the inquest and referred the body for *post mortem*. The Informant approached the Kuntoor Police Station and lodged the Report and, thereafter, Crime No.131 of 2017 for the offence punishable under Section 302 of the IPC came to be registered against the Appellant.

4. The statement of witnesses were recorded. The *post mortem* revealed the cause of death as '*Shock and haemorrhage due to injuries to vital organ (Neck Structures)*'. The blood stained shirt of Ananda Sayabu Battinwad (PW6), who dropped the Appellant on the motorcycle, came to be seized. The Appellant came to be arrested, his

clothes were seized and he was referred for medical examination. The blood stained shirt came to be seized at the instance of the Appellant pursuant to his voluntary statement. The finger prints of the Appellant were taken and sent for comparison with the finger prints lifted from the broken glass bottle seized from the spot where the dead body was found. The articles seized during the investigation were referred for chemical analysis. The Chemical Analysis (CA) Report, the Report of Finger Print Expert, *Post Mortem* Report and the relevant documents came to be collected and the Appellant came to be charge-sheeted.

5. On committal, the learned Trial Court framed the Charge against the Appellant for the offence punishable under Sections 377, 302 of the IPC and Section 6 of the POCSO Act vide Exh. 5, to which the Appellant pleaded not guilty and claimed to be tried. To prove the Charge, the prosecution examined in all 11 (eleven) witnesses and brought on record the relevant documents. On completion of the prosecution's evidence, the statement of Appellant came to be recorded by the learned Trial Court under Section 313(1)(b) of the Cr.P.C. After hearing both the sides and scrutinising the evidence on record, the learned Trial Court passed the impugned Judgment and Order convicting and sentencing the Appellant as referred to in the foregoing paragraph no. 1.

6. The presence of the Appellant was ensured and accordingly he was produced before the Court through video conferencing during the hearing of the Confirmation Case and Appeal. The Legal Services Authority appointed advocates to represent the Appellant and the Informant. Since this being the Reference for confirmation of Death sentence, this Court appointed an advocate having substantial experience on criminal side, as an *Amicus Curiae*.

7. Heard learned Advocates for the Appellant-Convict, learned APP for the State, learned Advocate for the Informant and learned *Amicus Curiae*. Perused the evidence on record.

8. It is submitted by the learned Advocates for the Appellant and learned *Amicus Curiae*, that the informant, who was the father of the Victim, lodged First Information Report [FIR] on suspicion and hearsay information. The Homicidal Death of the Informant's son was not in dispute. The evidence of the witness examined by the prosecution on the point of Victim lastly seen with the Appellant does not inspire confidence. The evidence nowhere shows that the Appellant was of such acquaintance with the said witness that, he was able to identify him in the dark. His evidence does not show as to from what distance he was able to identify the Appellant. His evidence shows that there was no source of light at the relevant time. The evidence of this

witness therefore cannot be accepted. The said witness admits that his statement was not recorded by the police and he was deposing for the first time before the learned Trial Court and it weakens the sanctity of his evidence. The evidence of the witnesses who deposed that they dropped the Appellant on the motorcycle is not reliable. There are many defects in their evidence which creates reasonable doubt about their testimony. Their evidence does not show the reason for their acquaintance with the Appellant who admittedly was not the resident of the village where these witnesses were residing and where the incident in question had taken place. The presence of one of the witnesses who claims to have dropped the Appellant gets falsified in view of his admission that he had gone to another town as his sister had a snake bite.

8.1. They further submitted that, though there is evidence regarding seizure of the articles such as blood stained shirt of the witness and the blood stained shirt of Appellant, there is no evidence of sealing of those articles and, therefore, the CA reports in respect of the articles cannot be accepted. The evidence on record shows that the Appellant was falsely implicated in the case of death of informant's son. The person who had seen the dead body for the first time, was not examined. There was delay in discovery and seizure of shirt at the instance of Appellant. There is no evidence to show the age of injury on

the person of Appellant. The medical evidence was not concrete and it gives rise to two versions. The blood group of the Appellant and that of the Victim was similar and, therefore, the CA reports are of no assistance to the prosecution. There is no report of DNA analysis of the blood. Though the prosecution has relied on the evidence relating to finger prints, the policeman before whom the specimen finger prints were taken, has not been examined. The circumstances relied upon by the prosecution to prove the Charge do not form the complete chain pointing unerringly towards the Appellant. The learned Trial Court has not appreciated the evidence on record in proper perspective and erred in convicting and sentencing the Appellant. The learned Trial Court further erred in awarding Death sentence to the Appellant against the settled principles of law. The present case cannot be said to be the rarest of rare case, warranting Death sentence and prays for allowing the Appeal.

9. It is submitted by the learned APP that the case is based on circumstantial evidence and the prosecution proved the Charge by proving the circumstances, which established the involvement of the Appellant in the Crime. The last seen circumstance is proved by examining the witness. The evidence of two witnesses shows that they knew the Appellant and after the Crime, they dropped the Appellant on the motorcycle to another village. The Homicidal Death of informant's

son was proved. There was discovery and seizure of the blood stained shirt of the Appellant pursuant to Section 27 of the Indian Evidence Act. The chance finger prints of the Appellant which were taken after his arrest, matched with the thumb print found on the broken glass bottle seized from the spot of incident. The evidence on record established the Charge and the learned trial Court has rightly convicted and sentenced the Appellant. There is no merit in the Appeal against conviction and the same be dismissed and the Judgment and Order of the learned trial Court be confirmed/upheld.

10. The learned Advocate for the informant adopted the arguments advanced by the learned APP. He submitted that the evidence on record established the Charge against the Appellant and the conviction and sentence awarded by the learned Trial Court calls for no interference.

11. Admittedly, there is no eye-witness to the incident in question and the case is entirely based on circumstantial evidence. The law in respect of the circumstantial evidence is well settled right from the Judgment in the case of Sharad Birdhichand Sarda Versus State of Maharashtra, (1984) 4 SCC 116, which is also cited by the learned Advocate for the Appellant, wherein following principles are laid down.

. A close analysis of this decision would show that the following conditions must be fulfilled before a case against

an accused can be said to be fully established:

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

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

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

- (2) *The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
- (3) *The circumstances should be of a conclusive nature and tendency,*
- (4) *They should exclude every possible hypothesis except the one to be proved, and*
- (5) *There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

12. From the evidence on record and submissions of both the sides, it is clear that, the following aspects are not in dispute : -

- [i] Victim was the son of P.W.1 – Shivaji Digambarrao Apatwad.
- [ii] Victim was below age of 18 years and thus a 'child' as defined under Section 2 [d] of the Protection of Children from

Sexual Offences Act [hereinafter referred to as 'POCSO Act'].

- [iii] The Appellant was not the resident of village Sawarkhed where the incident in question took place.

13. To prove the Charge, the prosecution relied on the following circumstances : -

- [i] Homicidal Death of informant's son.
- [ii] Unnatural intercourse on the Victim.
- [iii] Appellant lastly seen with the Victim.
- [iv] Injury on the hand of the Appellant.
- [v] Discovery of blood stained shirt.
- [vi] Blood stained clothes of the Appellant.
- [vii] Reports of Finger Print Expert.
- [viii] Motive.
- [ix] CA Reports.

HOMICIDAL DEATH OF INFORMANT'S SON : -

14. Victim was the son of PW1 – Shivaji Digambarrao Apatwad. His evidence shows that, on 05.09.2017, he and the Victim participated in the immersion procession of Lord Ganesh in their village. They both returned home when the procession reached near the school. It was about 06:00 pm. They both had dinner. Victim went out. As the Victim did not return home till late night, he along with Suresh Apatwad, Santosh Apatwad and Pandurang Sillewad started searching for the

Victim. Around 11:00 pm, while searching for the Victim, he noticed the Victim lying behind the temple of Lord Hanuman which was under construction. He noticed injuries on the body of Victim, and the pant of Victim was below thigh and stained with blood. On noticing the dead body, he screamed and the villagers gathered on the spot. The police were informed. On suspicion, he lodged Report with the Kuntoor Police Station for Murder of his son. There is no challenge to this evidence of PW1 – Shivaji Digambarao Apatwad.

15. PW2 – Maroti Datram Narwade, who was the resident of same village i.e. Sawarkhed, was called by the Police at about 01:30 am on 06.09.2017 near the Lord Hanuman Temple. The inquest at Exh.19 was prepared. On the same day, he was called at the Police Station where the clothes of the Victim were seized under the Panchanama at Exh.20. His evidence in respect of Inquest and Panchanama of seizure of clothes of the Victim remained unshaken in the cross-examination.

16. PW4 – Sudhakar Jalba Wankhede, who was also the resident of same village i.e. Sawarkhed, was called by the Police near the Hanuman Temple at about 02:45 am in September – 2017. The Spot Panchanama was carried. He noticed the dead body of a boy on the spot having injuries on neck. The articles such as one plastic and one glass bottle of liquor and blood stained mud came to be seized under the

Panchanama at Exh. 49. He identified the articles shown to him as the same which were seized at the time of Panchanama. The cross-examination fortified his evidence in respect of his visiting the spot and preparation of Spot Panchanama.

17. PW7 – Ravikiran Kumar Pore was posted at Rural Hospital at Naigaon as a Medical Officer. On 06.09.2017, the dead body of Victim was referred to him for *post mortem*. Autopsy was conducted between 08:45 am and 10:30 am., in which he noticed the following : -

- i) *Stab injury punctured wound penetrating perforating neck structure on the right side. It was on the upper 1/3rd of neck anterio laterally triangle having size of 8 x 3 x 5 cm. Deep. Increased by ½ cm. Length, margin apposed. There was no exit wound, transverse directed obliquely oriented. Depth of injuries penetrated the muscle, facquel of neck perform the internal carotid artery, jugular vain. Trachea was perforated. The entire track is filled with about 20 cc of blood and blood clots. I did not notice tissue bridging. The injury was extending from upper mid neck, lateral thyroid, to angle of mandible on the right side.*
- (ii) *There was incised lacerated wound, punctured wound, penetrating perforating on the right posterior lateral, triangle of neck, admeasuring as stated in the injury No.1. Ramus of right mandible, external occipital posteriorly, protuberance to mid occipital region posterior lateral, admeasuring 7 cm x 3 cm. x 2½ cm. Deep increased by ½*

cm. Length when margin apposed. I did not notice exist wound. Transposed and medially oriented and directed. The entire track contained 10 cc of blood. I did not notice tissue bridging. Injury in its depth. Penetrate muscle and perforate neuro vesicular bundle. Involved Palpable. Transverse process of cervical upper 3 vertebrae muscle was crushed. Temporal mandible region. Muscle was also involved.

- (iii) Incised lacerated wound just below the injury No.2, admeasuring 3 x ½ x ½ cm. Depth. Blood and Blood clots about 10 cc.*
- (iv) Incised wound transverse medially just below the injury No.3, admeasuring 1 x 1 cm.*
- (v) Incised wound on the right maxillo facial region, admeasuring 1 x 1 cm. Facia deep.*
- (vi) Incise wound on the right supra clavicular region, admeasuring 1 x 1 cm. Facia deep.*
- (vii) Avulsion tear on the right ear loss lower part. Crushed loss of lower ear palpable admeasuring 3 x 1 cm.*
- (viii) Contusion on the right axillary region, admeasuring 5 x 3 cm. Skin deep.*
- (ix) Contusion over right infra mammary region, admeasuring 2 x 1 cm. Skin deep.*

(x) *Contused abrasion on the right intra scapular region, skin deep, adm. 6 x 4 cm.*

18. After the *post mortem*, PW7 – Ravikiran Kumar Pore opined the cause of death as '*Shock and haemorrhage due to injuries to vital organ (Neck Structures)*'. He prepared the *Post Mortem* Report at Exh.60. His cross-examination shows that the performance of the *Post Mortem* and the above injuries on the dead body were not seriously disputed. It has come that the opinion expressed in the *Post Mortem* Report was the final opinion.

19. PW9 – Vivekanand Balbhim Patil was the Police Officer attached to the Kuntoor Police Station. On 05.09.2017, he received the information between 11:00 pm to 12:00 am about murder at village Sawarkhed. He accordingly made an entry in the Station Diary and proceeded to the spot. He noticed the dead body of a boy aged eleven (11) years, on the spot. He prepared the Inquest at Exh.19 and the Spot Panchanama at Exh.49 in the presence of the panchas and seized the articles from the spot. The cross-examination fortified his said evidence.

20. The above discussed evidence conclusively established that the Victim, who was the son of PW1 – Shivaji Digambarrao Apatwad, died Homicidal Death. The tenor of the cross-examination clearly shows that the Homicidal Death was not in dispute. Even during the final

hearing, the learned advocates for the Appellant did not dispute the Homicidal Death of son of PW1 – Shivaji Digambarrao Apatwad.

UNNATURAL INTERCOURSE ON THE VICTIM : -

21. The evidence of PW7 – Ravikiran Kumar Pore, the Medical Officer, who performed the *post mortem*, shows that, at the time of examination, he found two internal and two external injuries on the anus of Victim, out of which one was having the position 12 O'clock *ad measuring* 1 x 1 cm. The second was 2 O'clock position *ad measuring* 1 x ½ x ½ cm. It was skin deep. The third was abrasion having position 5 O'clock *ad measuring* ½ x ½ cm. The fourth injury was having the position 6 O'clock *ad measuring* ½ x ½ cm. and was skin deep. The tone of external anus sphincter was decreased. He expressed that the possibility of physical unnatural offence cannot be ruled out. He denied that the injuries mentioned in column no. 15 were possible if a person suffers from constipation. His opinion was sought by the Investigating Officer in respect of sexual assault and vide Exh. 62 he offered his opinion. What is seen from this evidence of Medical Officer is that, there was no definite opinion in respect of carnal intercourse. This witness only expressed the possibility of unnatural offence. His evidence is silent in respect of definite opinion on the point of unnatural offence. The medical evidence fall short of conclusive opinion in respect of anal

intercourse on the Victim. Further, there is no evidence in respect of age of the said injuries noticed by this witness.

22. The evidence of PW9 – Vivekanand Balbhim Patil, who investigated the Crime shows that he arrested the Appellant on 07.09.2017 under the panchanama at Exh. 79 and was referred for medical examination. However, there is no evidence to show injury on the private part of the Appellant. The CA report at Exh. 92, which is admissible in evidence pursuant to the provisions of Section 293 of Cr.P.C., without formal proof, shows that Exh. 5 was the anal swab of the Victim and result of analysis was – *No semen is detected on Exh.5*. Further, in the CA report, Exh. 4 was the Nail clipping of the Victim and the result of analysis was – *Neither blood nor tissue matter is detected on Exh.4*. The CA report at Exh. 93 was in respect of the articles seized from the spot of incident, the clothes of the Appellant and the clothes of Victim as can be seen from the communication by Investigating Officer to the Chemical Analyser at Exh.88. In the said CA report at Exh. 93, the result of analysis was – *No semen was detected on the said clothes which were at Exhs. 7, 8 & 9 and 11, 12 & 13*. This scientific evidence on record further weakens the prosecution case in respect of unnatural intercourse. The above discussed medical evidence on record only expresses the possibility of carnal intercourse. No semen was detected on the articles as per the Scientific Evidence in the nature of CA Reports.

The evidence on record do not conclusively prove carnal intercourse on the Victim.

LAST SEEN TOGETHER : -

23. On the point of last seen together, the star witness of prosecution is PW8 – Hanmant Chandar Dhage. He was the resident of the same village i.e. Sawarkhed where the incident had taken place. He knew the Victim. He knew the Appellant, as at the relevant time the Appellant was working as the Meson at the temple of Lord Hanuman in the village. He deposed that the incident took place in the year 2017, on the day of Anant Chaturdashi. On that day, the procession of Lord Ganesh immersion was to begin at 04:00 p.m. He and the Appellant participated in the procession. When the procession reached the Zilla Parishad School, he withdrew from the same and proceeded to the arch of the Hanuman Temple. Around 07:00 pm to 07:15 pm, he noticed the Victim with the Appellant proceeding at the back side of the Hanuman Temple. At about 07:30 pm, he saw the Appellant on the motorcycle with PW5 – Santosh Narayan Dhage and PW6 – Ananda Sayabu Battinwad. He noticed blood injury on the right hand of the Appellant.

24. His cross-examination shows that, he did not know the native place of the Appellant. He could not tell the date on which the Appellant joined construction work through Digambar Shinde, who was related to him and had engaged the services of 25 to 30 labourers for

the work at the construction site. He was certain that Digambar Shinde had maintained the register in respect of the labourers working under him.

25. Admittedly, the said person by name Digambar Shinde who had engaged the services of labourers was not examined by the prosecution. The evidence of PW9 – Vivekanand Balwant Patil, who was the Investigating Officer, admitted in his cross-examination that Digambar Shinde was the Contractor for the construction work of the temple and he did not seize the register maintained by Digambar Shinde in respect of the labourers nor he seized the register in respect of the labours from the administration of temple. The evidence of this witness i.e. PW8 - Hanmant Chandar Dhage, is silent as to how he got acquainted with the accused, who was not resident of his village. His evidence is silent as to from what distance he noticed the Victim in the company of the Appellant. His evidence shows that it was dark as there was load-shedding (no electricity) in the village from 06:00 pm to 08:00 pm. It is strange that he could notice injury on the right hand of the Appellant when there was dark and no electricity at the relevant time. Thus, the evidence of this witness in respect of identification and injury is required to be seen with serious doubt. According to him, his statement was not recorded by the Police and he disclosed about the incident for the first time before the trial Court. There is no

re-examination of this witness on the point of his previous statement, by the prosecution. Though the Investigating Officer deposed regarding the statements of witnesses, there is no substantive evidence to show that the previous statement of this witness was recorded. If that be so, the evidentiary value of his testimony diminishes.

26. It has come in the evidence of PW3 – Hanmant Madhavrao Wankhede, who was also the resident of said village, that Gulal was used in the said procession. The evidence of PW6 – Ananda Sayabu Battinwad, who was also the resident of the same village and though he denied that he participated in the said procession, his shirt MO-15 had Gulal over it, as can be seen from his cross-examination. From this evidence on record, it is clear that there was use of Gulal in the said immersion procession. Though according to PW8 - Hanmant Chandar Dhage the Appellant participated in the immersion procession of Lord Ganesh with him, there is no evidence that the clothes of Appellant had Gulal over it. This further makes us to see the evidence of PW8 – Hanmant Chandar Dhage, with serious doubt.

27. The evidence of PW8 – Hanmant Chandar Dhage shows that he was on talking terms with PW1 – Shivaji Digambarrao Apatwad who was the father of Victim. His evidence nowhere shows that he informed PW1 – Shivaji Digambarrao Apatwad that his son was lastly

seen with the Appellant, though PW1 – Shivaji Digambarrao Apatwad claims that he came to know from PW8 - Hanmant that Appellant was carrying his son i.e. the Victim, by holding hands towards temple at 06:00 pm. Therefore, it is clear that there is no *inter-se* corroboration in the evidence of this witness PW1 – Shivaji Digambarrao Apatwad and PW8 – Hanmant Chandar Dhage. In the light of the above discussion, we have no hesitation to hold that the prosecution failed to conclusively prove the circumstance that Victim was lastly seen in the company of Appellant.

INJURY ON THE HAND OF THE APPELLANT : -

28. PW5 – Santosh Narayan Dhage and PW6 – Ananda Sayabu Battinwad were the resident of same village where the incident in question took place. They knew the informant PW1 – Shivaji Digambarrao Apatwad and the Appellant. Admittedly, the Appellant is not the resident of their village i.e. Sawarkhed. Their evidence is completely silent as to how they were acquainted with the Appellant. According to PW6 – Ananda Sayabu Battinwad, the Appellant was working as the labourer at the construction site of Lord Hanuman Temple. It is already discussed while discussing the circumstance of last seen together that there was no conclusive evidence to show that the Appellant was one of the labourers working with the contractor to

whom the construction work of temple was allotted. The evidence of PW6 – Ananda Sayabu Battinwad shows that the Appellant asked him to drop at village Ghungrala. They met PW5 – Santosh Narayan Dhage ahead of Hanuman temple and the Appellant was dropped at village Ghungrala by these two witnesses on the motorcycle. According to PW5 – Santosh Narayan Dhage, when he was at the Paan Stall of Sadashiv Wankhede at about 07:00 pm on the day of incident, he saw the Appellant and PW6 – Ananda Sayabu Battinwad coming from the direction of Maruti Mandir (Hanuman Temple) and he accompanied them on the motorcycle to drop the Appellant at village Ghungrala.

29. According to PW6 – Ananda Sayabu Battinwad, the Appellant had consumed liquor when they dropped him to the said village. On the other hand, PW5 – Santosh Narayan Dhage nowhere deposed that the Appellant had consumed liquor. According to PW6 – Ananda Sayabu Battinwad, he noticed the injury on the hand of the Appellant and on asking him the reason thereof, the Appellant told him that it was caused due to iron rod. According to PW5 – Santosh Narayan Dhage, he noticed the injury on the right finger and on asking about the same, the Appellant told him that it was caused due to glass bottle. According to PW6 – Ananda Sayabu Battinwad, his shirt got the blood stains of the Appellant while he was sitting behind him on the motorcycle. He deposed that his shirt was seized by the police. Though

the evidence of PW9 – Vivekanand Balbhim Patil shows that PW6 – Ananda Sayabu Battinwad produced his shirt having blood stains and it was seized under the panchanama at Exh. 22 before the panchas, his evidence nowhere shows that the said shirt was sealed. His further evidence shows that said shirt was deposited with the Muddemal Clerk. There is no evidence of the Muddemal Clerk to show as to where and in what condition the shirt was kept. Though his evidence shows that all the seized articles were sent to the Chemical Analyser on 20.09.2017, the Carrier is not examined. Likewise, the evidence of PW3 - Hanmant Madhavrao Wankhede, who acted as the panch for the said panchanama at Exh. 22 on 06.09.2017, nowhere shows that the said shirt of PW6 – Ananda Sayabu Battinwad was sealed. This evidence on record goes to show that the shirt of PW6 – Ananda Sayabu Battinwad was sent to the chemical analysis after 14 (fourteen) days from its seizure and during that period it was lying in the police station. Under such circumstances, the possibility of tampering cannot be ruled out. Therefore, though the result of analysis of the blood stains on the shirt of PW6 – Ananda Sayabu Battinwad was that of blood group of “B”, which was the blood group of the Appellant and also that of the Victim, will be of no assistance to the prosecution.

30. As regards the injury noticed by PW5 – Santosh Narayan Dhage and PW6 – Ananda Sayabu Battinwad on the finger/hand of the

Appellant, the evidence of PW10 – Dr. Ganesh Balwantrao Jadhav shows that, on 07.09.2017, when he was attached to the Primary Healthcare Centre at Kuntoor [in short ‘PHC’] as a Medical Officer, the Appellant was brought to the PHC for medical examination and on medically examining him, he noticed ‘*contused lacerated wound on the right hand at the base of 4th finger adm. 0.5x0.5x0.1 cm*’ and according to him, it was caused within 24 hours from the time of examination and probably caused by hard and blunt object. The period when the Appellant was dropped by the aforesaid two witnesses i.e. PW5 – Santosh Narayan Dhage and PW6 – Ananda Sayabu Battinwad and the age of injury as opined by the Medical Officer cannot be said to be corroborating each other. Learned advocate for the Appellant and the *Amicus Curiae* rightly submitted that had the age of said injury was within 48 hours, the medical evidence could have corroborated the testimony of PW5 – Santosh Narayan Dhage and PW6 – Ananda Sayabu Battinwad in respect of the injury on the hand of the Appellant. Though PW10 – Medical Officer deposed that the said injury was possible while handling the piece of glass bottle, he also deposed that the probable cause of said injury was hard and blunt object, which is corroborated by the Injury Certificate at Exh. 111. If PW5 – Santosh Narayan Dhage and PW6 – Ananda Sayabu Battinwad are to be believed, the medical evidence should show two injuries i.e. one caused within 48 hours and another caused within 24 hours, however, medical evidence shows only one

injury on the right hand at the base of 4th finger of the Appellant caused within 24 hours. In the light of this medical evidence, as discussed above the testimony of PW5 – Santosh Narayan Dhage and PW6 – Ananda Sayabu Battinwad comes under the shadow of doubt.

31. In continuation of the above, PW1 – Shivaji Digambarrao Apatwad, who is the informant and father of the Victim, deposed that when the dead body of his son was found at about 11:00 pm, due to his shouts the villagers had gathered on the spot. According to him, PW6 – Ananda Sayabu Battinwad was also one of them and he was informed by PW6 – Ananda Sayabu Battinwad that he dropped the Appellant to village Ghungrala and the Appellant had suffered injury on his hand by iron rod. This evidence of PW1 – Shivaji Digambarrao Apatwad is required to be seen with serious doubt in the light of clear evidence of PW6 – Ananda Sayabu Battinwad that on 05.09.2017 i.e. on the date of incident, his sister had a snake bite for which his sister was taken to Nanded and he had also gone to Nanded after 08:00 pm.

32. To add to the above, the evidence of PW7 – Ravikiran Kumar Pore, the Medical Officer attached to the Rural Hospital, Naigaon, shows that, on 09.09.2017, the Appellant was brought for medical examination and he found the following injuries on his person.

- [i] There was contused abrasion with swelling on right hand. It was vague in size.
- [ii] Abrasion on right scapula region *admeasuring* 8x5 cm.
- [iii] Abrasion over left supra scapula region *admeasuring* 2x1 cm.
- [iv] Abrasion on left infra scapula region *admeasuring* 2x1 cm.
- [v] Abrasion on left loin region *admeasuring* 3x2 cm.
- [vi] Abrasion on left leg middle 1/3 *admeasuring* 1x1 cm.
- [vii] Abrasion on right leg middle 1/3 *administration* 1x1 cm.

32.1. His further evidence shows that, all the above injuries except injury no. [i] were simple in nature, and for injury no. [i], he advised X-ray examination to rule out internal bone injury. He deposed that, the said injury at Sr. No. [i] was possible while handling piece of sharp glass bottle. His further evidence shows that, the aforesaid injuries were fresh. He admitted that, in the Injury Certificate at Exh.104, he had not mentioned the age of injuries. It has further come in his cross-examination that the injuries mentioned in the said certificate at Exh.104 were possible by giving multiple blows by wooden log. His evidence shows that the police did not submit the report of X-ray examination of the Appellant.

33. If PW5 – Santosh Narayan Dhage and PW6 – Ananda Sayabu Battinwad are to be believed, the above referred medical evidence regarding examination of the Appellant on 09.09.2017 should show old injury on the hand or finger of the Appellant. However, the medical evidence does not speak of old injury. What the said medical evidence goes to show is that, those injuries were fresh. In the light of the above discussed medical evidence on record, the evidence of PW5 – Santosh Narayan Dhage and PW6 – Ananda Sayabu Battinwad is required to be seen with doubt. In any case, it is nobody's case that the Appellant was the resident of village Ghungrala. The Charge-sheet shows that the Appellant was the resident of village Mudkhed, Dist.Nanded. Therefore, the evidence of these witnesses that Appellant was dropped at Ghungrala is required to be seen with doubt. The evidence on record as discussed above does not conclusively establish that the Appellant had injury on his hand/finger when he was dropped on the motorcycle by the said two witnesses.

DISCOVERY OF BLOOD STAINED SHIRT : -

34. The evidence of PW4 – Sudhakar Jalba Wankhede, who was examined as the panch witness, shows that, on 11.09.2017, he was called at the Kuntoor Police Station where the Appellant was present. The Appellant stated that he was ready to produce the clothes which

were kept under the Tin behind the Lord Hanuman Temple. The memorandum to that effect came to be prepared at Exh.50. Thereafter, the Appellant led the panchas and the police to the spot from where the Article-13-Shirt came to be seized.

35. The evidence of PW9 – Vivekanand Balbhim Patil, who investigated the crime, shows that the Appellant made a statement to show the place where his shirt was hidden and the memorandum at Exh.50 was prepared. Thereafter, the Appellant led the police and the panchas to the spot behind the Lord Hanuman temple and removed the Article 13–Shirt, which was stained with blood, under the panchamama at Exh.51 and deposited the same with the Muddemal Clerk.

36. The evidence of PW4 – Sudhakar Jalba Wankhede is completely silent in respect of blood stains on the said shirt and Gulal as well. The evidence of PW9 – Vivekanand Balbhim Patil, the Investigating Officer, does not show that the said shirt was sealed, though PW4 – Sudhakar Jalba Wankhede speaks of sealing of the said shirt. Moreover, there is no evidence of Muddemal Clerk in whose custody the said shirt was given. There is no evidence as to in what condition the said shirt was kept in the police station. Secondly, the said discovery and seizure of shirt is after four (4) days from the arrest of the appellant. Thirdly, the said discovery of shirt would hardly be of any assistance to the

prosecution as the blood found on the said shirt was of Group 'B', which was the blood group of Appellant and also that of Victim. There is no DNA report in respect of the said blood stains. Thus, the prosecution failed to conclusively establish that the blood of Victim was found on the shirt discovered at the instance of the Appellant and, therefore, the discovery will not become relevant under Section 27 of the Indian Evidence Act.

BLOODSTAINED CLOTHES OF THE APPELLANT :-

37. The evidence of PW3 – Hanmant Madhavrao Wankhede, who was the panch for the panchanama at Exh. 23, under which clothes of the Appellant came to be seized at the time of his arrest on 07.09.2017, shows that, one Jeans Pant and T-Shirt of the Appellant having blood stains were seized. His evidence nowhere shows that, the said clothes were sealed after their seizure. The said evidence gets severe dent in view of his evidence in the cross-examination that the clothes were lying on the table in the Police Station.

38. The evidence of PW9 – Vivekanand Balbhim Patil, the Investigating Officer, shows that after the Appellant was arrested on 07.09.2017, the clothes which were on the person of the appellant having blood stains at the time of incident, were seized under the aforementioned panchanama at Exh. 23. The evidence of this witness

nowhere shows that the clothes were sealed. What his evidence goes to show is that the clothes were deposited with the Muddemal Clerk under the Receipt at Exh. 82. As discussed earlier, the Muddemal Clerk is not examined by the prosecution and, therefore, there is no evidence as to in what condition the said clothes were kept till they were forwarded to the Chemical Analyser after period of 14 (fourteen) days.

39. Moreover, the bloodstained clothes which were seized, as deposited above by PW9 – Vivekanand Balbhim Patil, were having the blood stains of Blood Group ‘B’, which was common Blood Group for the Appellant and the Victim. There is no DNA report to show that the bloodstains on the said clothes were only and only of the Victim. Under such circumstances, the circumstance of bloodstained clothes of the Appellant is of no assistance to the prosecution.

REPORTS OF FINGER PRINT EXPERT : -

40. It is the prosecution's case that the left thumb impression was found on the piece of glass bottle of country liquor found on the spot of incident. According to PW9 – Vivekanand Balbhim Patil, the Investigating Officer, at the time of spot panchanama, API - Mr. Pal collected the finger prints from the broken bottle which was found on the spot, however, the evidence of PW4 – Sudhakar Jalba Wankhede, who was the panch for the spot panchanama, is completely silent in respect of the collection of finger prints from the spot. Perusal of

paragraph 79 of the impugned judgment shows that the said API – Mr. Pal, who collected the finger prints from the article, could not be examined as he was no more.

41. According to PW9 – Vivekanand Balbhim Patil, I.O., he collected the specimen finger prints of the Appellant at the time of drawing the arrest panchanama which was at Exh. 79, and forwarded the same for examination to the Finger Print Expert. Prosecution examined PW11 - Narendra Mahadevrao Nakshane, who was working as the Finger Print Expert-cum-Police Inspector at the Finger Print Bureau, CID, Aurangabad. His evidence shows that the Finger Print Search Slip at Exh. 120 was forwarded by the Investigating Officer in quadruplicate. In his cross-examination, he admitted that he did not personally collect the finger prints of the appellant. The evidence of PW9 – Investigating Officer nowhere shows that the finger prints of the Appellant were taken by him. Admittedly, the prosecution did not examine the person who took the sample finger prints vide Exh. 120 [finger print search slip]. The said Exh. 120 bears the name of the Policeman who obtained the sample finger prints. It is, thus, clear that there is no substantive evidence as to who took the sample finger prints vide Exh. 120 and where. There is no substantive evidence to establish that the finger prints on the Search Slip at Exh.120 were that of the Appellant and Appellant only. Under such circumstances, the evidence in the nature of

report of Finger Print Expert would be of no avail to the prosecution. In the backdrop of above discussed evidence, we have no hesitation to hold that the prosecution failed to conclusively establish that the thumb impression on the piece of broken glass of country liquor bottle found on the spot was that of the Appellant.

MOTIVE :-

42. When the prosecution's case is based on circumstantial evidence, Motive behind the Crime assumes significance. It is equally well settled that it is not always possible for the prosecution to prove the motive behind the Crime, as the Motive is in the mind of accused. In the case in hand, there is absence of evidence to show that the Appellant had any Motive to commit the murder of Victim.

CA REPORTS :-

43. The CA reports brought on record by the prosecution showing the blood of group 'B', would not be of any assistance to establish the Charge against the Appellant as the blood group of Victim and that of the Appellant are shown to be of Group 'B' i.e. similar blood group. Admittedly, there is no report of DNA of the blood found on the articles which were seized and examined by the Chemical Analyser. The Carrier of Articles is not examined. Thus, CA reports, in absence of the other evidence on record to prove the Charge, take the case of prosecution no further.

JUDGMENTS CITED : -

44. The learned advocate for the Appellant relied upon the following judgments on the points that, (i) the circumstances from which the conclusion of guilt is to be drawn are to be fully established and they should be of conclusive nature and tendency, (ii) motive by itself is not sufficient to prove the guilt, (iii) suspicion however strong cannot take the place of proof and (iv) if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted.

1. Ramreddy Rajesh Khanna Reddy and another v. State of A.P., (2006) 10 SCC 172.
2. Bodh Raj @ Bodha @ Ors. Vs. State of Jammu & Kashmir, AIR 2002 SC 3164.
3. Sahgili alias Sanganathan v. State of Tamil Nadu represented by Inspector of Police, (2014) 10 SCC 264.
4. State of U.P. v. Ashok Kumar Srivastava, (1992) Cri.L.J. 1104.
5. State through C.B.I. Versus Mahender Singh Dahiya, 2011 AIR (SC) (Cri) 650.
6. Rajesh & Anr. Versus The State of Madhya Pradesh, 2023 AIR SC 4759.

45. The learned APP relied on the following judgments in support of his submission that Section 106 of the Indian Evidence Act shifts the burden on the accused to prove the fact which was specially within his knowledge and on the point of sentence and capital punishment.

1. Anees V. The State Govt. of NCT, Criminal Appeal No. 437 of 2015, dtd. 03.05.2024.
2. Dhananjoy Chatterjee Alias Dhana Versus State of W.B., (1994) 2 SCC 220.
3. Bachan Singh v. State of Punjab and other connected matters, AIR 1980 SC 898.
4. Khushwinder Singh V. State of Punjab, (2019) 4 SCC 415.
5. Machhi Singh and others V. State of Punjab, (1983) 3 SCC 470.

46. There can be no two views on the settled legal position enumerated in the above referred judgments. Coming to the case in hand, on re-appreciation of the evidence available on record, as discussed above the prosecution failed to conclusively establish that the Victim was lastly seen with the appellant, carnal intercourse on the Victim, the blood on the clothes of the Appellant was that of the Victim, the thumb print on the glass collected from the spot was that of the appellant, and the Appellant had the Motive to cause Homicidal Death of Victim. The circumstances relied upon by the prosecution to prove the charge against the Appellant do not form a complete chain so as to point the involvement of the Appellant in the crime, and the hypothesis of involvement of any other person in the offence in question cannot be ruled out. When the prosecution failed to conclusively establish the circumstances to show the involvement of Appellant in the Homicidal Death of Victim, Section 106 of Evidence Act will not come in picture. When the Charge is not established by conclusive evidence, the

conviction and sentence imposed by the learned trial Court is liable to be interfered with. It is needless to state that, it is the settled position in law that “*Graver the punishment, stricter the proof*”. The evaluation of the evidence on record as discussed above is neither concrete nor conclusive in nature so as to exclude every hypothesis but the one proposed to be proved. In this view of the matter, the Convict / Appellant is entitled for acquittal.

47. Before parting with the Judgment, we appreciate the efforts taken by the learned *Amicus Curiae* and learned advocates appointed to represent the parties. Their assistance was of immense help in deciding the matter.

ORDER

- [i] Criminal Appeal No.384 of 2024 is allowed.
- [ii] The impugned Judgment and Order dated 17.01.2024 passed by the learned Special Judge (POCSO), Biloli, in Special Case No.12 of 2017 stands quashed and set aside.
- [iii] The Appellant is, therefore, acquitted of the offence punishable under Sections 302 and 377 of the Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act.

- [iv] The Appellant be set at liberty, if not required in any other crime/case.
- [v] The fine amount, if paid in full or part, shall be refunded to the Appellant after the appeal period is over.
- [vi] The Criminal Confirmation Case No.1 of 2024 stands disposed off.
- [vii] In view of disposal of Criminal Appeal No. 384 of 2024, nothing survives in Criminal Application No. 2169 of 2024 for suspension of substantive sentence and same stands disposed off.

[NEERAJ P. DHOTE]
JUDGE

[R. G. AVACHAT]
JUDGE

SG Punde