



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

CRIMINAL APPEAL NO.560 OF 2019

Javed Khan Wasi Khan
Age : 33 years, occu : Labour,
R/o. Lane No.10, Sadat Nagar,
Near Railway Station,
Aurangabad, Tal. & Dist. Aurangabad.

.. Appellant
(Orig. Accused)

Versus

State of Maharashtra

.. Respondent

.....

Shri. Naseem R. Shaikh, Advocate for the Appellant
Smt. U. S. Bhosle, APP for the Respondent / State.

.....

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

RESERVED ON : 14.03.2024
PRONOUNCED ON : 06.05.2024

JUDGMENT [Per NEERAJ P. DHOTE, J.]

Impugned in the present Appeal, filed under Section 374 (2) of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') is the Judgment and order dated 16.05.2019 delivered by the Additional Session Judge-6, Aurangabad in Sessions Case No.132 of 2017 convicting the Appellant for the offence punishable under Section 302 and 201 of the Indian Penal Code, 1860 (hereinafter referred to as the 'I.P.C.') and sentencing him to suffer Imprisonment for Life and to pay fine of Rs.10,000/- (Rs. Ten Thousand), in default to pay fine, suffer Simple Imprisonment for Two (02) Month for the offence punishable

under Section 302 of the I.P.C. and to suffer Rigorous Imprisonment for Three (03) Years and to pay fine of Rs.5000/- (Rs. Five Thousand), in default to pay fine, suffer Simple Imprisonment for One (01) Month for the offence punishable under Section 201 of the I.P.C.

2. The Prosecution's case as revealed from the Police Report is as under:

2.1. Akshay Dnyaneshwar Gulaskar (hereinafter referred to as the 'Deceased') was the son of the Informant PW5 - Dnyaneshwar Sonaji Gulaskar, R/o. Kotala Colony, Aurangabad. On 08.12.2016 at about 17:45 Hrs., the Informant returned home from his work. At that time, Deceased was at home. Deceased left the house around 18:30 Hrs. on the Jupiter moped (two wheeler). He did not return home till late night. The Informant gave call on the phone of Deceased, however there was no response. The Informant and his family members thought that Deceased must be with his friends, therefore, they went to sleep. On 09.12.2016 around 09:15 a.m. the Informant received phone from his younger son informing him that Deceased was found lying in front of Saroj High School. The Informant went to the spot which was in front of Saroj High School, situated on Kasambari Durgah Road. He found his son Akshay lying dead with cut injury on his neck and injuries over the body. One cigarette was found near the body. At some distance burnt papers were noticed. Two wheeler of Deceased was found at the

distance of one to one and half (1 ½) kilometer from the spot where the body was lying. Dead body was taken to the hospital.

2.2. The informant lodged the Report with the Police Station Chawani, Aurangabad against unknown person and Crime No.482 of 2016 came to be registered for the offence punishable under Sections 302 and 201 of I.P.C. at 13:55 Hrs. During the course of investigation, the clothes of Deceased came to be seized, the Inquest and Post-mortem were done, the Spot Panchanama was carried, the statement of friends of Deceased came to be recorded. It was revealed that lastly the Appellant was in the company of Deceased. The Appellant came to be arrested, one Knife came to be seized at the instance of the Appellant, clothes of the Appellant came to be seized from his house, the blood samples of the Appellant were drawn, the Forensic experts lifted the prints from the two wheeler and the Finger prints of the Appellant were taken. The seized Articles were sent for Chemical Analysis. The Finger Print Expert opined that the Finger prints of the Appellant matched with the prints lifted from the two wheeler. The Chemical Analyst opined that the DNA extracted from the cigarette butt found near the dead body and DNA extracted from the blood of the Appellant matched. The Test Identification Parade was conducted in which PW7 - Balbhim Rajabhau Admane and PW8 - Yogesh @ Banni Chandrakant Ahire who were the friends of Deceased and were in the company of the Deceased before his

death, identified the Appellant as the person who left with the Deceased. Investigation revealed that quarrel took place between the Appellant and Deceased on account of Rs.1,300/-. In that quarrel, the Appellant inflicted severe injuries on the neck and other parts of the body and killed Deceased and left the spot on the two wheeler of Deceased after destroying the documents of the two wheeler. The cause of death as per the Post-mortem was **“Cut throat injury to neck”**.

2.3. On completion of the investigation, the Appellant came to be charge-sheeted. On committal, the learned Additional Sessions Judge, Aurangabad framed Charge against the Appellant for the offence punishable under Sections 302 and 201 of the I.P.C. *vide* Exh.6, to which the Appellant pleaded not guilty and claimed to be tried. To prove the Charge, Prosecution examined in all twenty two (22) witnesses and brought on record relevant documents while recording the testimony of witnesses. After the Prosecution closed their evidence, the learned Trial Court recorded the statement of Appellant under Section 313 (1)(b) of the Cr.P.C. The Appellant denied the Prosecution's case. The Appellant also submitted his written-statement under Section 313 of Cr.P.C. at Exh.183 contending that he was falsely implicated. The Appellant examined two defence witnesses who were the Journalist and Executive Editor of the daily newspaper. After the defence evidence was over, the

learned Trial Court delivered the impugned Judgment and Order after appreciating the evidence available on record.

3. Heard the learned Advocate for the Appellant and the learned APP for the Prosecution. Scrutinized the evidence available on record.

4. The Prosecution's case is based on circumstantial evidence. As per settled position under the law in the case based on circumstantial evidence, (a) the chain of circumstances from which the conclusion of guilt is to be drawn should be fully established (b) the facts so established should be consistent only with the hypothesis of the guilt of the accused (c) the circumstances should be of a conclusive nature (d) the circumstances should exclude every possible hypothesis except the one sought to be proved and (e) there must be a chain of evidence so complete so 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.

5. In the case in hand, the Prosecution relied on the following circumstances to prove the Charge :-

- (i) Homicidal Death of Akshay Gulaskar.
- (ii) Deceased lastly seen with the Appellant.

- (iii) Seizure of Knife and blood stained clothes at the instance of the Appellant.
- (iv) Matching of DNA extracted from the cigarette butt found near the dead body and DNA extracted from the Appellant's blood.
- (v) Matching of prints found on the two wheeler and Finger prints of the Appellant.
- (vi) Motive.

(i) Homicidal Death of Akshay Gulaskar :-

6. It is submitted by the learned Advocate for the Appellant that the Homicidal Death of the Informant's son is not in dispute. It is submitted by the learned APP that there is sufficient evidence on record to establish that the Informant's son Akshay died Homicidal Death.

7. The evidence of PW1 – Shaikh Ismail Shaikh Mohammad show that at 05:45 a.m. on 09.12.2016 while he was going for Namaz to Noor Saroj Masjid, he saw one body lying behind the school in pool of blood. One sweeper (PW2 – Ravindra Kishan Salve) of Municipal Corporation came there and made phone call to the police by dialing the number 100. One and half (1½) hours later police came. The cross-examination show that the said evidence of this witness of noticing the dead body while going to Namaz is not disputed.

8. The evidence of PW2 – Ravindra Kishan Salve show that he was working as the Sweeper in the Aurangabad Municipal Corporation. At

06:30 a.m. on 09.12.2016 as he was doing his work in the area of Saroj Urdu School, he saw the dead body in pool of blood. He made phone call to the police by dialing the number 100. The police reached the spot. This evidence is not disputed.

9. The evidence of PW3 – Mirza Ajaj Baig show that he was the teacher in Saroj Urdu School. On 09.12.2016 the Head-master of the school was requested by the concerned police to provide two panchas. On instructions, he went on the spot where the body was lying. The Inquest at Exh.14 was conducted. The Inquest (Exh.14) is admitted by the Appellant. Thus, there remains no question of disputing the Inquest. His further evidence show that he was also the Panch for the Spot Panchanama at Exh.22. In his presence certain articles were seized from the Spot. One two wheeler was also seized which was at the distance of two kilometers from the place of incident. The cross-examination could not create any dent in his evidence in respect of Spot Panchanama.

10. The evidence of PW5 - Dnyaneshwar Sonaji Gulaskar show that in the morning of 09.12.2016 he received phone call from his younger son that Akshay was lying dead near Saroj High School on Kasambari Durgah Road. He immediately reached the said spot and found his son Akshay lying dead in pool of blood with injuries on his throat. The dead

body was lying on stomach. On this point, there is no cross-examination.

11. The evidence of PW20 - Indal Mohan Bahure show that from May-2016 to December-2017 he was attached to Cantonment Police Station. On 09.12.2016 he was the Police Station In-charge. He was assigned the investigation of this crime. He received telephonic call that one dead body was lying near Saroj School, so he reached the spot. He saw one male dead body in pool of blood. He noticed some papers in burnt condition near the body. He deposed of performing the Inquest at Exh.14 and of conducting the Spot Panchanama at Exh.22. His evidence further show that plain soil, blood mixed soil, partially burnt papers, one burnt cigarette piece, one pen, one *jutti* pair, one partially burnt passbook of State Bank of Hyderabad were found. On checking pant pocket, one list of mobile numbers, one broken belt of wrist watch, one cigarette pocket smeared with blood having black colour were found. All the said articles were seized under the panchanama with the help of Forensic team. He also deposed of seizure of two wheeler which was at some distance. On the aspect of performing Inquest and Spot Panchanama, the cross-examination could not create any dent in his evidence.

12. The evidence of PW10 – Dr. Manoj Bhimrao Patekar show that from the year-2013 to June-2018 he was the Medical Officer at

Government Medical College and Hospital, Aurangabad. On 09.12.2016 when he was posted in the Forensic Department, the dead body of Akshay Dnyaneshwar Gulaskar was received from the Cantonment Police Station along with Inquest, for Post-mortem. He along with Dr. Arif Shaikh and Dr. Ashok Jiwane performed Post-mortem from 02:20 p.m. to 04:20 p.m. On examination he found the following external injuries :

“1. Cut throat injury in the form of incised wound of size 19 cm. X 7 cm. X vertebral column deep, horizontal, over the front of the neck, extending from just below right ear up left anterolateral part of neck with tailing on left side. All the underlined muscles, blood vessels, larynx and upper part of thyroid cartilage are clean cut. Margins are clean cut, reddish and blood stained. This injury is individually sufficient to death in ordinary course of nature.

2. Multiple incised injuries were present on the left side of the neck, on left lower lip, on the left cheek, on the right submandibula region. All these injuries were clean cut, reddish and blood stained. Also there were incised injuries present over dorsal aspect of left hand. Interdigital space between right thumb and index Finger. On distal phalynx of left middle Finger. On proximal phalynx of left middle Finger, medial aspect of proximal phalynx of left thumb. All these injuries are suggestive of defence injuries. There are multiple linear abrasions over left shoulder and multiple superficial incised wounds over left shoulder. There is superficial incised wound on upper part of nose. There are multiple linear abrasions on the lower part of back. Abrasions present over posterior right elbow and anterior left knee.”

13. He deposed that on further internal examination the injury corresponding to Injury No.1 was found. All the injuries mentioned in Column No.17 were antemortem and fresh, caused by sharp cutting weapon up to injury no.13. Injury Nos.13 and 14 were caused by hard and blunt object. He gave the cause of death “**Cut throat injury to neck**

(homicidal)". The Post-mortem is at Exh.101 which corroborate his testimony. Though this witness was cross-examined, his testimony given in the examination-in-chief remained unshaken.

14. Through the above discussed evidence the Prosecution has successfully proved that Informant's son Akshay Dnyaneshwar Gulaskar died Homicidal Death and hence, the circumstance no.(i) is proved.

(ii) Deceased lastly seen with the Appellant :-

15. It is submitted by the learned Advocate for the Appellant that PW6 - Akash @ Samadhan Janardhan Lahane and PW9 - Shoaib Iqbal Sayyed who were having their egg omelet center at Balaji Nagar and Sillekhanra at Aurangabad, respectively, where according to the Prosecution the Appellant and Deceased had gone, did not support the Prosecution. He submitted that the evidence of PW7 – Balbhim Rajabhau Admane and PW8 – Yogesh @ Banni Chandrakant Ahire on the point of last seen cannot be believed. He further submitted that though these witnesses claimed that they identified the Appellant in the Test Identification Parade (T.I.P), the T.I.P. was conducted belatedly after a period of three months from the date of the arrest and that too in violation of relevant guidelines. He submitted that the evidence in respect of last seen, is not trustworthy and be discarded.

16. It is submitted by the learned APP that the evidence of the said two witnesses i.e. PW7 – Balbhim Rajabhau Admane and PW8 – Yogesh @ Banni Chandrakant Ahire remained unshaken in the cross-examination and they identified the Appellant as the same person who was lastly in the company of Deceased in the court while recording the deposition. She submitted that the identification of the Appellant by these two witnesses is corroborated by the previous T.I.P

17. The evidence of PW6 – Akash @ Samadhan Janardhan Lahane and PW9 – Shoaib Iqbal Sayyed is of no assistance to the Prosecution as the said witnesses did not support the Prosecution. Though they were cross-examined on behalf of the Prosecution, nothing has come in their evidence which would further the case of Prosecution.

18. PW7 – Balbhim Rajabhau Admane is the resident of Beed. He knew one Sagar Shete of Aurangabad whose grandmother was residing in the same colony where he was residing. On 08.12.2016 he came to Aurangabad at 06:00 p.m. There was marriage of his maternal uncle's daughter. On arrival at CIDCO Bus Stand, he made phone call to Sagar Shete. Sagar Shete came and they both went to Kotla colony as there was opening ceremony of one Gym center known to Sagar Shete. From Kotla colony, he, Sagar and one Vaibhav went to the house of his maternal uncle which was near the MIT College where he kept his bag

and thereafter they three i.e. he, Sagar and Vaibhav went towards Jabinda ground which was on Beed Bypass Road and purchased liquor from one wine shop.

19. His further evidence show that Sagar Shete received phone call from Amol and Sagar told Amol the place where they were present i.e. Jabinda ground. Amol and Yogesh @ Banni Ahire (PW8) reached Jabinda ground. They all, except Vaibhav, consumed liquor. At that time Amol received phone call from Deceased. Within ten (10) to fifteen (15) minutes Deceased came to Jabinda ground. Deceased removed the liquor unit (bottle) from his two wheeler and they all consumed liquor. Thereafter they all left for taking meals. As one of them was omitting due to excess consumption of liquor, they purchased water bottle from the office of Musafir Travels and thereafter went to Kotla Colony. Sagar, Vaibhav and one friend returned home due to excess consumption. Deceased told him that good quality *anda bhurji* was available at railway station. Therefore, he, Yogesh and Deceased went to railway station. He and Yogesh were on Honda Passion two wheeler and Deceased was on Jupiter Scooty. When they reached *anda bhurji* center, one friend met Deceased and said friend hugged each other. The said friend of Deceased told *anda bhurji* vendor to prepare good quality *anda bhurji* as they were his relatives. The said friend of Deceased was wearing red jacket and black pant.

20. His further evidence show that while *anda Bhurji* was served, Deceased and his said friend left on the scooty of Deceased. The time was between 12:00 p.m. and 01:00 a.m. Deceased and his friend returned. They all had *anda bhurji*. Deceased made the payment for *anda bhurji* and he went to pan stall. At that time Yogesh told Deceased that he will drop Balbhim to the house of his maternal uncle. Thereafter, he and Yogesh left the place. When they reached near Lalaji Hotel near railway station, Yogesh told him that they will take Deceased with them as he had consumed excess liquor and therefore, they took “U” turn and when they reached near the *anda bhurji* center, Deceased and his friend were not there. He deposed that they cancelled going to the flat of his maternal uncle and went to the room of his friend Yogesh (PW8). On the next day morning at 09:00 a.m. he gave call to Sagar, who asked him to come at Kotla colony, so that he will drop him to his maternal uncle’s flat. At that time Sagar informed him that his friend who was with them in the night was involved in an accident. Thereafter Sagar left him to the house of his maternal uncle. His evidence show that police recorded his statement as per his say.

21. His further evidence show that he identified the Appellant as the same person with whom he met firstly at the *anda bhurji* center and thereafter while going with Deceased. His evidence show that he

identified the Article-8 (black pant) and Article-9 (red jacket) as the same clothes which were on the person of the Appellant while he saw him at the *anda bhurji* center. His evidence show that on 03.12.2016 he was called for T.I.P in the Harsool Jail. In the T.I.P he identified the Appellant as the same person with whom he met for the first time at the *anda bhurji cart* and thereafter saw him with Deceased. He identified the T.I.P Memorandums at Exhs.86 and 87 as the same which bears his signature.

22. This witness was cross-examined by the defence. It is tried to be brought in his cross-examination that he read about the death of Akshay in the newspaper. As he is not the eye witness to the incident, not knowing the cause of death is not expected from him. He gave admission that on the day of the incident they all consumed excess liquor and therefore, they were not able to control themselves and not able to understand. He did not inform the police the facial features, age and description of the person who was lastly seen with the Deceased. He denied that Yogesh (PW8) provided information to him about the identification parade and on that basis he identified the Appellant, as Yogesh (PW8) had first participated in the TIP. He noted down the dates on which he was called for recording statement and called for identification parade. He accepted that he was instructed to tell those dates while recording the evidence in the Court. The omission which is

brought in para-17 of his evidence is not of much significance. He denied all the other suggestions.

23. PW8 - Yogesh @ Banni Chandrakant Ahire was residing in Kotla Colony, Auranabad as he was taking education of Engineering. Deceased was known to him being the resident of Kotla colony. In the evening of 08.12.2016 after coming back from college, he was roaming on the ground of Kotla colony. While he and Amol More were sitting, he received phone call from Sagar Shete who called them at Durgah on Beed Bypass road. Sagar Shete, Balbhim Admane (PW7) and Vaibhav Borade were present there. Thereafter they went to Jabinda ground for party where they had liquor. After some time Amol More received phone call between 10:30 and 11:00 p.m. Deceased and Pappu Narwade came there on Jupiter vehicle. Deceased removed liquor bottle from two wheeler. They all i.e. Vaibhav Bansold, Deceased Akshay, Pappu Narwade, Sagar Shete, Amol More and Balbhim Admane (PW7) consumed liquor. Thereafter they returned towards Kotla colony. Sagar Shete went to the house of in-laws in Kotla colony and he handed over the passion motorcycle to him for dropping Balbim Admane (PW7) to his home. Sagar Shete and Amol went to their respective houses. He, Deceased, Balbim Admane (PW7) and Pappu Narwade went towards Railway Station, Aurangabad. In the meanwhile, Pappu Narwade left for his home. Deceased told them that they would go to railway station

for having *anda burji*. Accordingly, they reached the railway station and went to *anda bhuri* cart and between 12:00 a.m. and 12:15 a.m. While they were having *anda bhurji*, one person came there wearing red jacket and black pant. Deceased and that person talked at some distance. The said person told the *anda bhurji* vendor to provide good *anda bhurji* as they were his relatives. After having *anda bhurji* Deceased paid the bill.

24. His further evidence show that, the Deceased and the said person informed that they will return in two minutes. Deceased and that person left on the Jupiter vehicle. Deceased was driving two wheeler. While he (PW8 - Yogesh) and Balbhim were about to leave the said place, Deceased and that person came there. He told Deceased that he will come soon by dropping Balbhim (PW7) and they proceeded. When they were at Lalji Hotel, they decided that as it was too late they would take Deceased with them and drop him at home. So, they returned towards *Anda bhurji* stall from opposite side of the road. They did not find Akash and that person at that place. The time was between 12:30 p.m. and 01:00 a.m. They thought that Deceased might have returned home. They returned and went to room of their friend.

25. His further evidence show that in the morning when they came to Kotla colony they saw one Duster four wheeler in front of the Deceased house. One person came out from the said four wheeler and told them to give support / courage to Ameya. The said four wheeler

proceeded. They followed it towards the Cantonment Police Station. They learnt that Akshay was Murdered by someone. His statement came to be recorded.

26. His further evidence show that on 09.03.2017 he was called for T.I.P in the Harsool Jail where he identified the Appellant as the same person who was seen at the *anda bhurji* center and thereafter while going on Jupiter two wheeler along with Deceased. In his evidence he identified the Appellant as the same person who was lastly seen with Deceased and to whom he identified in the T.I.P. The T.I.P. Memorandum at Exhs. 91 & 92 is brought on record and he identified his signature thereon.

27. He was cross-examined by the defence. His cross-examination show that his evidence *'Akshay and that person returned on Jupiter and told them that they will return within two minutes'* was an omission in his previous statement. It has further come that firstly they consumed liquor in Jabinda park from the bottle purchased by Balbhim Admane (PW7) and thereafter they, except him, consumed the liquor from second bottle, which was brought by Deceased. The process of T.I.P. was completed within five to ten minutes. He visited the police station in respect of this crime two to three times.

28. It is clear from the above discussed evidence of PW7 – Balbhim Rajabhau Admane and PW8 – Yogesh @ Banni Chandrakant Ahire that the Accused or the person whom they saw in the company of Deceased at the *anda bhurji* center was not known to them. The Accused or the said person was a stranger to them. Their evidence shows that they had consumed excess liquor. The evidence of PW7 - Balbhim Rajabhau Admane shows that the extent of consumption of liquor by them was to such an extent that they were not able to control themselves and were not able to understand. This clearly shows that they were inebriated and not in their senses. It is further clear from their evidence that the said excess consumption of liquor was prior to their reaching the *anda bhurji* center. It is also clear from their evidence that the said person was not in their company prior to their consumption of liquor or during consumption of liquor. Their evidence goes to show that after becoming inebriated they went to the egg center at the instance of Deceased. It is thus clear that when the said unknown person came at the egg center and met the Deceased, these witnesses were in an inebriated state. After having the *egg bhurji*, they dispersed. Therefore, it is clear that only for a short span of time the said unknown person was present there. Admittedly, the time was midnight. Evidence of PW7 – Balbhim Rajabhau Admane makes it clear that he did not give the description (facial features, age) of that unknown person to the police. Under such circumstances, it is highly doubtful that these

witnesses were able to register the personality and features of the said unknown person in their minds.

29. Further, though their evidence show that they visited the prison where the T.I.P was carried out and they identified the Appellant as the said unknown person. The Prosecution examined PW13 – Milind Bhaulal Dhakane who was the Panch for T.I.P and PW16 – Mrs. Meena Bhalchandra Warade, Naib Tahsildar, who conducted the T.I.P. The said T.I.P was admittedly conducted close to three (3) months after arrest of the Appellant. (The Appellant was arrested on 10.12.2016 and T.I.P was conducted on 09.03.2017). It is needless to state that the T.I.P is required to be conducted at the earliest. In the cross-examination of PW16 - Mrs. Meena Bhalchandra Warade the defence sought the explanation for delayed T.I.P and she deposed that she did not explain the delay in writing to the Investigating Officer though she volunteered that the T.I.P was extended at the request of Investigating Officer. Even the evidence of PW20 - Indal Mohan Bahure, Investigating Officer is silent on the aspect of delay in T.I.P. It is settled position under the law that the T.I.P is for investigation purpose.

30. The evidence of PW16 - Mrs. Meena Bhalchandra Warade merely show that six (06) dummies were of similar height as that of the Suspect. The evidence in respect of T.I.P is completely silent on the

aspect that the dummies were of more or less the same physical appearance and approximately of same age as that of the Suspect. This show that there was deviation from the guidelines framed for the purpose of T.I.P. Under such circumstances, the T.I.P. will not be of any assistance to the Prosecution for the purpose of corroborating their case for establishing identity of the Appellant as the assailant.

31. The authorities relied upon by the learned Advocate for the Appellant on the aspect of last seen and T.I.P. which are (i) **Sachin and Ors vs. The State of Maharashtra, 2021 (3) AIR Bom. R. (Cri.) 87**, (ii) **Somasundaram Alias Somu vs. State, AIR 2020 SC 3327**, (iii) **Md. Sajjad alias Raju alias Salim vs. State of West Bengal, AIR 2017 SC 642**, and (iv) **Musheer Khan @ Badshah Khan and Anr vs. State of M.P, AIR 2010 SC 762** reiterates the settled principles.

32. In the light of the above discussed evidence, the identification of the Appellant by PW7 – Balbhim Rajabhau Admane and PW8 – Yogesh @ Banni Chandrakant Ahire as the same person who had come at the *anda bhurji* center and thereafter accompanied the Deceased is required to be seen with doubt and cannot be relied. Thus, the circumstance no.(ii) is not proved by the Prosecution.

(iii) Seizure of Knife and blood stained clothes at the instance of the Appellant :

33. It is submitted by the learned Advocate for the Appellant that the evidence in respect of discovery of Knife pursuant to the Section 27 of the Indian Evidence Act cannot be relied because the evidence on record show that the Spot Panchanama was done in detail and no weapon was found during the Spot Panchanama and subsequently the discovery of the Knife is shown from the same spot. He further submitted that the evidence in respect of seizure of blood stained clothes does not inspire confidence. In support of his submission, reliance is placed on the judgments in the case of **(i) Mani vs. State of T.N., AIR 2008 SC 1021**, and **(ii) Ishwarbhai Narayan Makwana vs. State of Maharashtra, 2013 (1) BOM. C. R. (CRI) 10**. In these Judgments, the discovery of relevant articles were made from open ground after more than ten days of the incident and about 300 feet away from the dead body and the discovery was not accepted and seizure of blood stained clothes from the house of the Accused was not construed as a proved circumstance.

34. It is submitted by the learned APP that the Prosecution have led the evidence to show that the Knife and blood stained clothes were discovered and seized at the instance of the Appellant. It is submitted that the said discovery becomes relevant under Section 27 of the Indian Evidence Act.

35. For this circumstance of Discovery and Seizure, the relevant evidence is that of PW12 – Santoshkumar Kisanlal Bansile. He was in the Government service. On 12.12.2016 he and another witness Milind Dhakane were directed by their superior to go to the Cantonment Police Station to act as Panchas. Accordingly, they went to the police station around 11:20 a.m. The Police Officer told them that the Accused was likely to come and ask him to hear what he says. Police Constable brought Appellant in the cabin of the Officer. The Appellant disclosed his name as Javedkhan Wasikhan. The Appellant stated that he was ready to show the place where he committed the Murder and further stated that he was ready to produce the Knife which was used for commission of the Murder (partly inadmissible). He further deposed that the Appellant stated that water bottle was used for cleaning the Knife and he threw the Knife and he was ready to produce it. Memorandum of the said statement was prepared, upon which both the panchas signed. He identified Exh.109 as the said Memorandum. Thereafter by government vehicle the policemen, the panchas, one photographer and the Appellant went towards the direction given by the Appellant. The vehicle was stopped ahead of Saroj English School at the instance of the Appellant. They all alighted from the jeep and walked at the distance of ten (10) meters. The Appellant searched in the grass which was standing there and produced the Knife (Article-10). The

blade of Knife was around 3.5 cms in width and its wooden handle was around 11 cms. The Panchanama at Exh.110 was prepared in that regard. Thereafter they returned to the police station.

36. The evidence of PW20 – Indal Mohan Bahure, Investigating Officer show that during Police Custody Remand (PCR) the Appellant was taken in confidence and enquiry was made with him. Initially he avoided to give rational answers, but thereafter he showed willingness to produce the Knife. He prepared the Memorandum at Exh.109. The Appellant made the said statement in presence of two panchas and before him. He called the photographer and they all with Accused proceeded in the government vehicle towards the direction given by the Appellant. The vehicle was stopped at the instance of the Appellant ahead of Saroj School. The Appellant led them to one *kaccha* road and removed the Knife from bushes which was seized in the presence of panchas and Panchanama at Exh.110 was accordingly drawn.

37. The cross-examination of PW12 - Santoshkumar Kisanlal Bansile show that the seizure panchanama at Exh.110 was silent on the aspect that the accused searched Knife from the bushes of congress grass. This shows that the evidence of this panch witness that the accused took search in the congress grass and produced the Knife has no corroboration from the said panchanama. As seen from the evidence, there is no dispute that the spot of incident i.e. where the dead body

was found lying, was near Saroj School. In the cross-examination of PW12 - Santoshkumar Kisanlal Bansile it has come that the place from where the Knife was produced was not closed. From this evidence available on record, it is clear that the discovery and seizure of Article-10 (Knife) was from the vicinity of the place where the dead body was found lying. The evidence of PW3 – Mirza Ajaj Baig who acted as the Spot Panch show that several articles were seized at the time of the Spot Panchanama. Thus, it is strange that the said Article-10 (Knife) was not found at the time of conducting the Spot Panchanama which was conducted in detail. Under such circumstances, the Prosecution's case in respect of the discovery and seizure of Article-10 (Knife) at the instance of the Appellant is required to be seen with doubt.

38. The evidence of PW12 - Santoshkumar Kisanlal Bansile further show that on the same day i.e. 12.12.2016 in the afternoon both the panchas were again called by the Investigating Officer in the police station where the Appellant stated that he was ready to produce the clothes which were on his person at the time of the incident and the amount which he took from Deceased and memorandum at Exh.111 was prepared. His further evidence show that they all proceeded in the government vehicle which was taken in the directions shown by the Appellant. The vehicle was stopped near the corporation school and Appellant took them in front of his house and gave call by name Samina. The door of the house was closed and it was opened by one child and

the Appellant entered the said house and they followed. The Appellant removed one carry bag wherein one red colour full jacket having chain, steel button and black and red dots, one black T-shirt, one black pant and 13 currency notes of Rs.100/- denomination were kept. All the said Articles were seized under the Panchanama at Exh.112. He deposed that the Articles-8, 9 and 11 were the same clothes.

39. On the point of seizure of the clothes at the instance of the Appellant, the evidence of PW20 - Indal Mohan Bahure show that after the said statement of the Appellant that he was ready to produce the clothes and cash, the Appellant took them to one house in the government vehicle. The door of that house was closed and upon knocking the door was opened. They went inside the house and accused removed one bag in which the aforesaid clothes and cash were kept and they all were seized.

40. From the above discussed evidence the Prosecution wants to establish discovery and seizure of clothes and cash at the instance of Appellant. However, in his evidence of PW20 - Indal Mohan Bahure, Investigating Officer deposed that during enquiry, the Appellant stated that chappals which he was wearing at the time of the commission of the offence (partly inadmissible) were in his house and so he took search of the Appellant's house and seized the chappals. However on the contrary, the evidence of PW15 – Vikram Birbhan Bahot show that

the chappals were seized in the police station. Even if the Investigating Officer is to be believed, there is no evidence as to whom the said house belong or in whose possession it was. If the said house was that of the Appellant, it is really strange that when the Investigating Officer took search of the Appellant's house and seized the chappals, the said clothes and cash were not found. As seen from the evidence discussed above, the said house was not the vacant place and it was occupied. Thus, in the light of above discussed evidence available on record, the evidence in respect of discovery and seizure of the clothes and cash at the instance of the Appellant is required to be seen with doubt.

41. From the above discussed evidence of Prosecution witnesses, the circumstance no.(iii) cannot be said to be proved and is thus discarded.

(iv) Matching of DNA extracted from the cigarette butt found near the dead body and DNA extracted from the Appellant's blood :-

42. It is submitted by the learned Advocate for the Appellant that the evidence in respect of DNA to connect the Appellant cannot be accepted. It is submitted that the seizure of cigarette butt from the place of offence was not proper and therefore the result of analysis cannot be relied. In support of his submission, he relied on the Judgments in the case of **Jitendra s/o. Suresh Gabhane vs. The State of Maharashtra, 2017 (4) Bom. C. R. (Cri.) 289** and **Rahul vs. State of Delhi, 2022 (4) R.C.R.**

(Criminal) 993 wherein the quality assurance in the process of collection of samples and their analysis have been emphasized. He further relied on the Judgment in the case of **Madathil Narayanan and Ors vs. State of Kerala and Anr, AIR 2016 SC (Supp) 254** wherein DNA analysis of the blood stains could not be done and **Prakash Nishad @ Kewat Zinak Nishad vs. State of Maharashtra, 2023 (3) Bom. C. R. (Cri.) 592** wherein there was unexplained delay in sending the samples for analysis and the evidence was found to be not reliable.

43. It is submitted by the learned APP that the evidence on record show that the DNA extracted from the cigarette butt which was found on the spot of incident and the DNA extracted from the blood of the Appellant was found matching and the said scientific evidence is trustworthy.

44. There can be no dispute in respect of the principles laid down in the aforementioned Judgments cited by the learned Advocate for the Appellant. In the case in hand, the relevant evidence for this circumstance is that of PW3 - Mirza Ajaj Baig who was the Panch for the Spot Panchanama. In his evidence he deposed that the passbook, broken wrist watch, shirt, pant, one chit, one pen of Ranault Company having blood stains were lying on the spot and all the said articles were collected in one carry bag. Herein he nowhere refers to cigarette butt. However, his further evidence show that when Articles were shown to

him at the time of the recording his testimony, one plastic pouch containing two pieces of cigarette (one small and one big size) was opened and shown to him and at that point of time, he deposed that it was collected from the spot. Be that as it may. Even if we accept that the cigarette / cigarette butt was found on the spot of incident, there is no evidence that after its collection it was sealed. The evidence of PW3 – Mirza Ajaj Baig is completely silent on the aspect of sealing of the Articles. It is true that PW20 – Indal Mohar Bahure, Investigating Officer deposed that all the Articles which were collected from the spot were sealed in the presence of panchas, however, there is no substantive evidence of Panch witness to corroborate his evidence on that aspect.

45. There is further reason which requires the said evidence to be viewed with doubt. The PW3 - Mirza Ajaj Baig in his evidence deposed that they reached the spot at around 08:30 a.m. and left the spot around 12:00 noon. However, the said timings are not corroborated from the spot panchanama (Exh.22) which records the time between 12:30 and 13:30 Hrs. Thus, there is complete mismatch in the time deposed by the Panch Witness for the Spot Panchanama and the timings mentioned in the Spot Panchanama. This further renders the evidence of collection of cigarette / cigarette butt to be seen with doubt.

46. There is further reason to discard the evidence in respect of DNA. There is evidence of PW17 - Mrs. Madhuri Patil, who was the

Assistant Scientific Analyst working in the Forensic Science Lab, Mumbai. She compared the DNA extracted from the cigarette butt and DNA extracted from the blood samples of the Appellant and found them to be matching. In her cross-examination, she deposed that, it was difficult to interpret the Article, if that Article touches the earth. If the Prosecution evidence for seizure of cigarette butt from the spot of incident is accepted, the said piece of cigarette / butt was collected from the earth. When there is clear evidence of an expert that, if the Article touches the earth its interpretation becomes difficult, the result of analysis of the DNA extracted from the piece of cigarette / butt which was lifted from the earth / ground cannot be accepted. Thus, the circumstance no. (iv) is not proved by the Prosecution and is discarded.

(v) Matching of prints found on the two wheeler with the Finger prints of the Appellant :

47. It is submitted by the learned Advocate for the Appellant that the evidence in the nature of Finger prints cannot be accepted for the reason that before taking the Finger prints of the Appellant, no permission of the concerned Magistrate was taken as mandated from the provisions of the Identification of Prisoners Act. He relied on the judgments in the case of **Nagaraja vs. State of Karnataka, 2020 AIR (SC) 288** and **Mohd. Aman and another vs. State of Rajasthan, AIR 1997 SC 2960**.

48. On the contrary, it is submitted by the learned APP that the Finger prints were developed from the two wheeler used by the Deceased at the time of the incident, matched with the Finger prints of the Appellant. She further submitted that the provisions of the said act permits the Investigating Officer to take the Finger prints of the accused during the course of investigation.

49. On this point, the relevant evidence is that of PW14 - Gopinath Baburao Lokhande. His evidence show that he was the Finger Print Expert and on 09.12.2016 he went to the spot of incident with the requisite material on the directions received from the concerned police station for collecting Finger prints. On reaching the spot the Investigating Officer informed him that they found one scooter (two wheeler) at an unknown place. He with the help of material, examined the said scooter and found two prints, out of which one print was developed / lifted from the speedometer and second print was lifted from the D.P scooter. The said two prints were developed with the required chemicals. On 28.12.2016 they received the Finger prints of the Suspect which were taken by the police and on comparison, he found that the prints lifted from the speedometer of the scooter matched with the left hand palm print of the Suspect, which was received from the police station. The relevant communications and the report of

comparison along with the statement of reasoning are brought on record from Exhs.126 to 131.

50. The provisions of Sections 4 and 5 of the Identification of Prisoners Act are in respect of Taking of measurements or photograph of unconvicted persons, and Power of Magistrate to order a person to be measured or photographed. However, in the backdrop of the evidence available on record, which is considered in the subsequent paragraph, we need not ponder upon the said provisions.

51. In the case in hand, there is absolutely no evidence that the prints i.e. palm / Finger prints which were received by PW14 - Gopinath Baburao Lokhande from the concerned Police Station for comparison were that of the Appellant. It is only on the basis of the letters at Exhs.127 and 128, which refer that during the course of investigation the Finger prints of the Appellant taken were being sent for examination the Prosecution is advocating that the prints of Fingers were that of the Appellant. The impugned Judgment show that the said Exhibits weighed heavily in the mind of Trial Court in accepting the evidence of Finger prints. In any event, the said letter cannot form the basis to establish that the Finger prints which were sent for comparison by the concerned police station to the expert i.e. PW14 – Gopinath Lokhande were that of the Appellant. There is absolutely no substantive evidence

with corroboration in the nature of Panchanama / Memorandum drawn at the time of taking the Finger prints to establish that the Finger prints sent for comparison were that of the Appellant. Unless it is proved by the Prosecution that the Finger prints which were sent to PW14 - Gopinath Baburao Lokhande for comparison with the prints lifted from the scooter were that of the Appellant, the said evidence in respect of the Finger print becomes valueless and is discarded. Thus, the circumstance no.(v) is not proved by the Prosecution and is discarded.

(vi) Motive :

52. The evidence available on record do not establish that the Appellant had any motive to commit the crime. Even if for the sake of argument it is accepted that robbing the Deceased was the motive behind the crime, the failure to prove the circumstances brought on record renders the Prosecution's Motive to fall down. Even if for a moment the seizure of cash amounting to Rs.1,300/- at the instance of Appellant is accepted, there is nothing to establish that the said cash belonged to Deceased.

53. Consequent upon failure of the Prosecution to prove the discovery / recovery of the Knife and clothes at the instance of the Appellant, the C.A. Report at Exh.141 showing human blood on the Knife and blood of 'O' group, which was also that of Deceased, will not by itself sufficient to

maintain the conviction and sentence recorded by the learned Trial Court against the Appellant. The evidence brought on record by the Prosecution in respect of pointing the egg stall where the witnesses had the *anda bhurji*, the place where the dead body was found by the Appellant during the course of investigation would not be relevant under Section 27 of the Indian Evidence Act for the reason that the said places were known to the witnesses and cannot be termed as within the exclusive knowledge of the Appellant. Though the Appellant examined two Defence Witnesses, we need not deal with it, as the Prosecution's evidence has failed to establish the Charge.

54. As discussed above, the Prosecution has utterly failed to establish / prove the circumstances, much less, the chain of circumstances to unerringly establish that it was the Appellant who caused the Homicidal Death of informant's son Akshay. The evidence available on record do not satisfy the requirement of law on circumstantial evidence settled right from the case of **Sharad Birdhi Chand Sarda vs. State of Maharashtra** reported in (1984) 4 SCC 116 till date. On re-appreciation of the evidence available on record, the Charge fails and the Appeal is liable to be allowed. Hence, the following order.

ORDER

- (i) The Criminal Appeal is allowed.
- (ii) The Judgment and Order dated 16.05.2019 passed by the learned Additional Session Judge-6, Aurangabad in Sessions Case No.132 of

2017 convicting and sentencing the Appellant namely Javed Khan Wasi Khan is hereby quashed and set aside.

(iii) The Appellant namely Javed Khan Wasi Khan is acquitted of the offence punishable under Sections 302 and 201 of the I.P.C.

(iv) The Appellant be released forthwith, if not required in any other crime.

(v) Record & Proceedings be sent back to the learned Trial Court.

(NEERAJ P. DHOTE, J.)

(R. G. AVACHAT, J.)

GGP