

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.77 OF 2017
WITH
INTERIM APPLICATION NO.3427 OF 2022**

Barkya @ Vishwas Ananda Patil
R/o Bilashi Tal. Shirala
District Sangli

.. Appellant

Vs.

The State of Maharashtra
(At the instance of *Kokrud* Police Station,
District Sangli)

.. Respondent

Dr. Yug Mohit Chaudhry with Anush Shetty Advocate for the Appellant.
Mr. Shreekant V. Gavand A.PP for the Respondent-State.

**CORAM : A. S. GADKARI AND
SHYAM C. CHANDAK, JJ.**

RESERVED ON : 17th JANUARY 2024

PRONOUNCE ON : 20th MARCH 2024

JUDGMENT: [PER- SHYAM C. CHANDAK, J.]

1) Present Appeal is seeking an exception to the Judgment and Order dated 3rd December 2016, passed by the Additional Sessions Judge *at Islampur*, District Sangli, in Sessions Case No.17 of 2014, whereby the Appellant has been convicted for the offences punishable under Sections 363 and 302 of the I.P.C. and sentenced under Section 302 of the I.P.C. to suffer imprisonment for life and to pay a fine of Rs.2,000/- and in default, to suffer simple imprisonment for one month. No separate sentence has been awarded for the offence punishable under Section 363 of I.P.C. The

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Appellant has been acquitted of the offence punishable under Section 377 of I.P.C. and under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (*for short "POCSO Act"*)

2) Facts giving rise to this Appeal are as under:-

2.1) That, the first informant-Dadasaheb Baburao More (PW3), his wife Manisha (PW8) and two sons namely Kuldeep (*hereinafter referred to as 'deceased'*) and Rohit were residing at village *Bilashi*, Taluka *Shirala*, District Sangli.

2.2) On 25th January 2014, at about 7.00 p.m., the deceased had gone to *Maruti* temple for *Darshan*, however, he did not return home. Therefore, Dadasaheb (PW3), his friends, Manisha (PW8) and their neighbour enquired in the village about the deceased but he was not found. They also enquired with friends of the deceased but in vain. Therefore, at about 11.00 p.m., Dadasaheb lodged a missing report (Exh.34) of the deceased, without raising suspicion or complaint against anybody.

2.3) On 26th January 2014, at about 7.00 a.m., Dattatraya Shipekar (PW2) resident of *Bilashi* went to his field. At that time he found that, the deceased was lying dead in the adjacent field of Tanaji Gurav. Immediately, Dattatraya Shipekar informed the said fact to Dadasaheb (PW3) and others in the village and then filed a report (Exh.32). In turn, S.M.Pardhi, A.P.I. visited the spot, held an Inquest Panchnama (Exh.29) and referred the body

for post-mortem examination. S.M.Pardhi, A.P.I. took a separate samples of blood-smeared earth and neutral earth from the spot and recorded the Spot Panchnama (Exh.51). After a post-mortem examination, clothes and pair of sandals of the deceased were seized under a Seizure Panchnama (Exh.41). The post-mortem examination revealed that, the deceased died due to acute asphyxia due to strangulation. Hence, Dadasaheb (PW3) lodged the First Information Report (Exh.35) under which this Crime No.3 of 2014 was registered under Sections 302 of I.P.C. against an unknown person.

2.4) On 27th January 2014, Investigation Officer A.P.I. Mr.Bhimrao Waghmare (PW19) arrested the Appellant under an Arrest Panchnama and seized one mobile handset found from his person (Exh.53). The Appellant had injuries to his left-hand ring finger and little finger, hence Police referred him for medical examination and obtained certificate (Exh.74).

2.5) A.P.I. Waghmare (PW19) recorded the statement of witnesses. It revealed that, the deceased was going to a village gymnasium. Since last three months of the incident, the deceased had stopped going to the gymnasium because Appellant was asking him to massage his body and thus was harassing him. On 25th January 2014, at about 7.00 p.m, after visiting the temple, the deceased had been to Sankalp Lohar (PW5) and met him at his residence. On the same day, in the evening (at about 7:30 p.m.), the Appellant had taken a motorcycle bearing registration no. MH-

10/R-0245 from Ajit Parit (PW15). After meeting Sankalp Lohar (PW5), when the deceased left for home, the Appellant was present there. The Appellant called and took the deceased with him on the motorcycle. However, the deceased did not return home thereafter. Therefore, Dadasaheb (PW3) and Manisha (PW8) enquired with Sankalp Lohar. He disclosed that, the Appellant had taken the deceased with him. Therefore, Dadasaheb and Manisha enquired with the Appellant but he denied having taken the deceased with him. Hence, again search was made but in vain.

2.6) On 29th January 2014, Appellant made a disclosure statement (Exh.84) and recovered the motorcycle from the house of Ajit Parit (PW15), on which the Appellant had driven the deceased to the spot of offence. On 29th January 2014 itself, Appellant made another disclosure statement (Exh.57) and showed the spot from where he had taken the deceased with him; the route by which he had taken the deceased with him; where he collected the rope (to strangulate the deceased); where he had parked the motorcycle; where the murder was committed and where he abandoned the the body of the deceased. Accordingly, A.P.I. Waghmare (PW19) recorded the Panchnama (Exh.57-A).

2.7) On 30th January 2014, the Appellant again gave a disclosure statement (Exh.37) and led the police and panchas to his house and recovered his clothes, the rope used in the offence and one orange bag

which the deceased was carrying with him at the time of incident (Exh.38).

2.8) The Appellant gave one more disclosure statement (Exh.55) on 2nd February 2014 and showed the field of sugar cane where he had thrown the torch which the deceased was carrying at the time of offence. However, said torch, was not found there. A.P.I. Waghmare (PW19) recorded the Panchnama (Exh.55-A), accordingly. Meantime, A.P.I. Waghmare recorded the statement/supplementary statement of the witnesses. On 17th February 2014, A.P.I. Waghmare referred the *muddemal* articles for Chemical Analysis (Exh.71).

2.9) On completion of investigation, it revealed that, the Appellant used to have unnatural sex with the deceased. The Appellant had fear that, the deceased would disclose the illicit act to his family members and others. Therefore, the Appellant kidnapped the deceased and committed his murder by strangulation. A.P.I. S.S. Shevale accordingly submitted charge-sheet in the Court of the Judicial Magistrate First Class, at *Shirala*, District Sangli. After complying with Section 207 of the Code of Criminal Procedure (for short “the Code”), the learned Magistrate committed the said case to the Court of Sessions.

3) On committal of the case, the learned Judge of the trial Court framed the charge at Exh.24. The charge was read over and explained to Appellant in Marathi vernacular. The Appellant pleaded not guilty to the

charge and claimed to be tried. His plea was recorded below Exh.25. The defence of the Appellant was of denial and false implication.

4) In the course of the trial, the prosecution examined 19 witnesses in support of its case and placed reliance on various documents in evidence. Besides, the seized material objects were also produced. The Appellant in his defence, denied his involvement in entirety. After the prosecution closed its evidence, the statement of the Appellant under section 313 of the Code was recorded (Exh.91). The Appellant did not examine himself nor examine any witness in his defence.

4.1) The learned Judge of the trial Court after considering the evidence in the light of rival arguments, held that the chain of all the circumstances has been proved. It leads to a safe and only one hypothesis that, the Appellant kidnapped the deceased and committed his murder, therefore, the learned Judge convicted and sentenced him as noted above.

5) Dr.Chaudhry, learned counsel for the Appellant submitted that, admittedly, the prosecution case was based on circumstantial evidence. However, the trial Court, while convicting the Appellant for the offences punishable under Sections 363 and 302 of I.P.C. has not followed the parameters laid down by the Hon'ble Supreme Court and this Court in its various judgments, that are to be followed for conviction in a case based on circumstantial evidence. First of all the motive for the crime is not proved.

Secondly, the prosecution failed to prove that, the deceased was last seen in the company of Appellant. The alleged discovery and recovery at the instance of the Appellant is not proved nor there was any corroborative evidence of an independent witness in that regard as material panch witnesses turned hostile. There are material discrepancies that go to the root of the case. However, the trial Court simply brushed them aside, without giving any satisfactory explanation for not considering the same in proper perspective. Therefore, the impugned conviction and sentence is not only erroneous but also illegal. Hence, the Appeal may be allowed.

6) On the contrary, Mr. Gavand, learned A.P.P. appearing on behalf of Respondent-State has opposed the appeal, contending that the prosecution had fully met the standard of proof required to convict a person in a case of circumstantial evidence. The circumstances relied upon by the trial Court fully established the involvement of the Appellant and the chain of evidence furnished by the circumstances is also complete. The appeal thus lacks merit and is liable to be rejected.

7) We have considered the submissions made by learned counsel for the Appellant and the learned A.P.P. A question that surfaces first from the rival submissions is, whether the death of deceased is culpable homicide amounting to murder.

8) From the evidence of Prakash Koli (PW1), Dattatray Shipekar

(PW2), Dadasaheb (PW3) and Manisha (PW8), it has been established that, on 25th January 2014, at about 7:00 p.m., the deceased had gone to the temple. However, the deceased did not return home. Therefore, Dadasaheb, Manisha and others enquired with relatives and friends of the deceased and also searched for him. The deceased, however, was not found. Therefore, the missing report (Exh.34) was lodged by Dadasaheb (PW3). Further, it has been established that, on 26th January 2014, at about 7.00 a.m., when Dattatray Shipekar (PW2) went to his agricultural land, he saw that, the deceased was lying dead in the adjacent field of Tanaji Gurav. He informed said fact to Dadasaheb (PW3) and then lodged the report (Exh.32).

8.1) Cumulatively, the testimonies of Prakash Koli-Inquest Panch (PW1), Dattatray (PW2), Dadasaheb (PW3) and Vishwas Patil-Spot Panch (PW10) have proved that, on getting the report (Exh.32), the police arrived at the spot, recorded the Inquest Panchnama (Exh.29), Spot Panchnama (Exh.51) and referred the body for post-mortem examination.

9) Testimony of Dr. Kishor Patki (PW18) reveals that, on 26th January 2014, between 11.45 am to 1.30 p.m., at Rural Hospital *Shirala*, he held the post-mortem examination and noted the following external injuries on the body of deceased:-

“Observations in column No.16:- Ligature marks were present at the level of thyroid cartilage oblique in direction. Multiple marks were present there *i.e.* two on the left half and two on the

right half of the frontal side of the neck. Ligature marks on right side admeasuring 5 X 1.25 c.m. and 6 X 1.25 c.m. Ligature marks on left side admeasuring 5 X 1.125 c.m. and 7 X 1.1/2 c.m.

1. Ligature marks were also present on the lateral sides of the neck and partially present on the posterior lateral sides, suggestive of strangulation. There were no obvious signs suggestive of hanging. The neck was not stretched. Ligature marks were more prominent on the frontal sides.
2. Bruise present over left cheek, admeasuring 4 X 3 c.m.
3. Bruise over right cheek, admeasuring 2 X 3 c.m. lateral to left angle of mouth with evidence of soft tissue swelling.
4. Generalized abrasion present over umbilical and peri-umbilical region in the form of tearing of superficial skin admeasuring 8 X 3 c.m. patchy in distribution.
5. Bruise over left shoulder 2 X 1 c.m. laterally.
6. Bruise over right shoulder admeasuring 1 X 1.1/2 c.m. over the posterior aspect.
7. Bruise over face.

9.1) Dr. Kishor Patki opined that, all the above abrasions and bruises were antemortem as its appearance was reddish brown and margins were blurred due to vital reaction. They were not dark brown or not even black.

9.2) Dr. Kishor Patki deposed that, brain coverings were congested and brain parenchyma showed evidence of minute petechia.

There were signs of compression of the cervical vasculature. Both lungs were congested. Subcutaneous areolar tissue under the ligature marks were echymosed. Laryngeal and tracheal cartilage, Thyroid bone, Hyoid bone and Thyroid cartilage were fractured. Posteriorly, probable evidence of a knot was seen there. The cut section of both lungs showed evidence of blood tinged frothing. Right side of the heart was full of blood. Dr. Kishor Patki informed that ligature marks are possible by the pressure of rope. Other injuries are possible by fist blows.

9.3) Dr. Kishor Patki opined that, the cause of death was due to acute asphyxia due to strangulation. Accordingly, he has given the PM. Report. Before that, he gave the advance certificate as to the cause of death (Exh.79).

10) The evidence of Dr. Kishor Patki is very consistent with his PM. Report. Said oral and documentary evidence clearly shows that, the deceased was intentionally strangled with a rope-like object. Said evidence virtually went unchallenged in the cross-examination of Dr.Kishor Patki. In other words, nothing has emerged in the cross-examination to disbelieve that evidence. Accordingly, we hold that the death of the deceased was culpable homicide amounting to murder.

11) Now we advert to the question *i.e.* whether the prosecution has

proved that the Appellant kidnapped and murdered the deceased. And the answer to this question is purely based on circumstantial evidence.

12) As held in the case of *Shri. Sujit Biswas vs. State Of Assam*, AIR 2013 SC 3817, “..... In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take the place of proof. This is for the reason that the mental distance between ‘may be’ and ‘must be’ is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the Court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between ‘may be’ true and ‘must be’ true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between ‘may be’ true and ‘must be’ true, the Court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The Court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a

merely probable doubt, but a fair doubt that is based upon reason and common sense. (*Vide: Hanumant Govind Nargundkar & Anr. vs. State of M.P.*, AIR 1952 SC 343; *State through CBI vs. Mahender Singh Dahiya*, AIR 2011 SC 1017; and *Ramesh Harijan vs. State of U.P.*, AIR 2012 SC 1979”).

12.1) In the case of *Shri. Sujit Biswas (supra)*, it is also laid down that, in a case of circumstantial evidence, the Judgment remains essentially inferential. Inferences are drawn from established facts, as the circumstances lead to particular inferences. The Court must draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion, that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused.

12.2) In the case of *Sharad Birdhichand Sarda vs. State of Maharashtra*, AIR 1984 SC 1622, the Hon’ble Supreme Court held that, “Graver the crime, greater should be the standard of proof”. In *Kali Ram vs. State of Himachal Pradesh*, AIR 1973 SC 2773, the Hon’ble Supreme Court enunciated that, “A golden thread which runs through the web of the administration of justice in criminal cases is that, if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused

and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases wherein the guilt of the accused is sought to be established by circumstantial evidence”.

13) Keeping in mind the aforesaid settled legal propositions, we have considered the prosecution evidence in the case in hand. There are various circumstances on the strength of which the prosecution has claimed to have proved the charge.

14) The first circumstance was that, the Appellant was asking the deceased to massage his body and having unnatural sex with him. The Appellant had feared that, the deceased would disclose his said illicit act to others. This provided the Appellant a motive to kidnap the deceased and commit his murder.

14.1) In this regard, Dadasaheb (PW3) and Manisha (PW8) have deposed that, the deceased was going to the gymnasium for exercise. Sankalp Lohar (PW5) deposed that, he and the deceased were classmates and they both were going for exercise. Evidence of Dadasaheb (PW3) and Manisha (PW8) shows that, Appellant was asking the deceased to massage his body and thus harassing him, therefore the deceased discontinued the exercise. Sankalp Lohar deposed that, from Diwali festival, the deceased did not come for exercise. Dadasaheb and Manisha have deposed that, the

Appellant was having unnatural sex with the deceased. Appellant had feared that, the deceased would disclose his said illicit act to others, therefore he committed the murder of deceased.

14.2) Unarguably, the aforesaid facts suggest a strong motive for the murder. They were not general and simple facts. Therefore, a father would not miss to state it to police at the very first encounter. If it is converse, then having regard to Section 114 of the Evidence Act, it is abnormal and therefore, would be enough to draw an adverse inference, particularly when the charge is serious and its proof is dependent on circumstantial evidence only. However, in the cross-examination, Dadasaheb (PW3) has admitted that, he did not mention in the missing report (Exh.34) that, the deceased was going for exercise in the gymnasium, at that time the Appellant was asking the deceased to massage his body and due to said harassment the deceased was avoiding the exercise. Dadasaheb (PW3) has also candidly admitted that, at the time of lodging the missing report (Exh.34) and F.I.R. (Exh.35), he has not mentioned that, the Appellant was having unnatural sex with the deceased, the Appellant had fear that the deceased would disclose said illicit act of the Appellant to others, therefore the Appellant committed the murder of deceased. Instead, in the missing report (Exh.34) Dadasaheb (PW3) has specifically stated that, he has no suspicion or complaint against anyone about the deceased going missing

nor he has whispered anything against the Appellant in the F.I.R. (Exh.35). It is equally surprising that, even though Dadasaheb (PW3) was present at the time and place of Inquest Panchnama (Exh.29) and as he admitted, his mental state was normal at that time, he did not inform to the police that, Appellant was asking the deceased to massage his body and having unnatural sex with him. No plausible explanation has been offered by Dadasaheb (PW3) or the prosecution for omitting the aforementioned important facts in the missing report (Exh.34) and F.I.R. (Exh.35).

14.3) It is not the case that, the deceased himself had informed his parents that the Appellant was having unnatural sex with him. In the cross-examination, Dadasaheb (PW3) admitted that he came to know about the said unnatural sex and murder of the deceased from rumour spread in local people. However, he has not named anyone from them. The time and place of said illicit act is also not informed by the witnesses. It is not the case that, the Appellant had unnatural sex with the deceased after he stopped to exercise in the gymnasium. There is a considerable time gap between the stopping of the exercise by the deceased and his gone missing. During the said time gap, the deceased and Appellant were not seen together in the gymnasium.

14.4) In view thereof, we are of the considered opinion that, the claim of Dadasaheb (PW3) and Manisha (PW8) that, the Appellant was

asking the deceased to massage his body; due to said harassment the deceased stopped to exercise; Appellant was having unnatural sex with the deceased and the Appellant committed murder of deceased due to the fear that, the deceased would disclose the said illicit act to others, thus imputing a strong motive to Appellant to kidnap and commit the murder, is nothing but a significant improvement. Therefore, their said assertion is not free from a reasonable doubt and thus cannot be safely relied upon.

15) The second circumstance was that, on 25th January 2014, in the evening, the Appellant had borrowed the motorcycle no. MH-10/R-0245, which belongs to Ajit Parit (PW15). This witness has proved that, at the time of incident he owned the said motorcycle. However, he deposed that, the Appellant had not taken the motorcycle from him on the day of incident in the evening. In fact, this witness turned hostile to the prosecution and nothing material could be elicited in his cross-examination by the A.P.P. As such, it is not proved that, on 25th January 2014, in the evening, the Appellant had taken the motorcycle from Ajit Parit (PW15).

16) The third circumstance the prosecution has heavily relied on is that, on 25th January 2014, at about 7:30 p.m., the Appellant had taken the deceased with him on the said motorcycle. Said fact was witnessed by Sankalp Lohar (PW5). Thus, the deceased and Appellant were last seen together.

16.1) In this regard Sankalp Lohar (PW5) deposed that, on 25th January 2014, at about 7.00 p.m., the deceased met him at his residence. On enquiry, the deceased said that, he had been to the temple, therefore he casually came to see him (PW5). After meeting him, the deceased left for home. However, Sankalp Lohar deposed that, at that time the deceased had not gone with the Appellant on his motorcycle. Thus, Sankalp Lohar did not support the prosecution on the aspect that 'the deceased and Appellant were last seen together'. The A.P.P. cross-examined him but could not derive any concrete evidence on the point of 'last seen together', except the fact that, the deceased was carrying one bag and a torch with him at that time.

16.2) On the same point, Dadasaheb (PW3) and Manisha (PW8) have deposed that, while searching for the deceased on the evening of 25th January 2014, they enquired with Sankalp Lohar (PW5) who was at his grandfather's house. Sankalp Lohar told them that, the deceased had visited him casually, while the deceased had gone to the temple. At that time the Appellant was standing near the house of Ajit Parit (PW15) and then the Appellant took the deceased with him on the motorcycle. This evidence, however, is completely hearsay because Sankalp Lohar has not testified so. Moreover, both Dadasaheb and Manisha did not inform the time when they had been to Sankalp Lohar and enquired with him about the deceased.

16.3) Dadasaheb (PW3) and Manisha (PW8) have deposed that,

when Sankalp Lohar (PW5) told them that, the Appellant took the deceased with him on the motorcycle, they visited at Appellant and enquired about the deceased but he denied to have taken the deceased with him. However, Dadasaheb and Manisha have not informed the time when they had been to the Appellant and enquired with him *i.e.* before or after the lodging of the missing report (Exh.34).

16.4) It is significant to note that, the circumstances suggesting the motive for murder and the facts helpful to prove that, the Appellant and deceased were 'last seen together' by Sankalp Lohar (PW5), both were of equal importance. It is admitted by Sankalp Lohar (PW5) that, he was also searching for the deceased along with the parents of deceased and others. Nevertheless, Dadasaheb (PW3) did not state the said facts in the missing report (Exh.34) even though it was lodged promptly on 25th January 2014, at 23:26 hours. Said facts are also missing in the F.I.R. (Exh.35). On the contrary, in the missing report (Exh.34) Dadasaheb specifically stated that, they did not get any clue about the deceased when they enquired with his friends about his missing. Besides, Dadasaheb (PW3) has not raised any doubt against the Appellant in the missing report (Exh.34) even though according to his knowledge, the deceased was last seen in the company of Appellant. The same is the case with the F.I.R. (Exh.35). This is very uncommon to natural human behaviour and conduct. Moreover, it is not

proven that the Appellant had borrowed the motorcycle of Ajit Parit (PW15). Therefore, the testimony of Dadasaheb (PW3) and Manisha (PW8) that, they enquired with Sankalp Lohar (PW5); he told them that, the Appellant took the deceased with him on the motorcycle; therefore, they enquired with the Appellant and he denied that fact, is also not free from legitimate doubt. As such, mere recovery of the motorcycle at the instance of Appellant is of no avail to the prosecution.

17) The prosecution has claimed that, the recovery of Appellant's mud-stained clothes, rope (used in the offence) and the bag of deceased, at the instance of Appellant is duly proved. The Appellant's conduct of showing the spot where he had thrown the torch of deceased, the route by which he had taken the deceased to the spot of incident and the spot of the murder, is also proved. These circumstances, according to learned A.P.P., safely lead to a logical conclusion that, the deceased was last seen in the company of Appellant and after committing the murder of deceased, the Appellant disposed of the torch in the sugar cane field and concealed his clothes, rope and the bag of deceased at his house.

18) In this regard the evidence that falls for our consideration is of Anil Chavan (PW4), Sankalp Lohar (PW5), Manisha (PW8) and API Waghmare (PW19). Evidence of Manisha (PW8) is that, the deceased was carrying a bag, an oil bottle and a torch when he went to the temple.

Sankalp Lohar (PW5) deposed that, the deceased was carrying a bag and a torch. Anil Chavan (PW 4) deposed that, on 30th January 2014 he had gone to the Police Station. The evidence of Anil Chavan and A.P.I. Waghmare cumulatively shows that, on 30th January 2014 the Appellant made a disclosure statement that, he is ready to point out his clothes, rope used at the time of the offence and the bag which was with the deceased; A.P.I. Waghmare prepared the memorandum thereof in the presence of panchas (Exh.37); thereafter, Appellant led the panchas and A.P.I. Waghmare (PW19) to his house, at *Bilashi* and recovered the said clothes *i.e.* Track Pants, T-Shirt, rope and one orange bag (Article-‘A’ to ‘D’) from a wooden box-bed; accordingly, A.P.I. Waghmare prepared the Recovery Panchnama (Exh.38). Manisha (PW8) and A.P.I. Waghmare have identified the said bag. Similarly, A.P.I. Waghmare has identified the other articles.

18.1) A.P.I. Waghmare (PW19) deposed that, on 2nd February 2014, the Appellant made a disclosure statement (Exh.55) in presence of him and panchas that, he would point out the field where the torch was thrown, however, the torch was not recovered. Accordingly, he recorded the Panchnama (Exh.55-A). Ravindra Dhas (PW12), panch witness to the above turned hostile. Nothing helpful has been elicited in his cross-examination by the APP.

18.2) However, the aforesaid disclosure statements and recovery at

the instance of the Appellant is reasonably doubtful because, when the Appellant could easily dispose of the torch of the deceased in a sugar cane crop, he had no reason to carry the bag and the rope at his house, conceal it there at the risk of its recovery at his behest and let it used as evidence against himself. On the contrary, as the Appellant was alone during that night, he could have easily disposed of the bag and the rope as he allegedly disposed off the torch looking to serious consequences of the offence. Thus, very unnatural conduct has been attributed to the Appellant. In other words, at the same time, wise and unwise doings have been ascribed to the Appellant. Thus, the disclosure statement and recovery of the Track Pants, T-Shirt, rope and orange bag is not free from a reasonable doubt.

18.3) That apart, as admitted by Anil Chavan, police had told him that the Appellant wanted to point out the clothes, rope etc. This fact indicates that, the disclosure statement was already made by the Appellant before the arrival of the panchas. Moreover, Anil Chavan is resident of village *Chikarde*, District Solapur. He is a relative of Dadasaheb (PW3). On 30th January 2014, Anil Chavan had no reason to go to the Police Station. On the contrary, his evidence shows that, on that day he was at *Bilashi* alongwith Dadasaheb (PW3). As noted in the printed F.I.R, the distance between *Kokrud* Police Station and village *Bilashi* is about 4 Kms. However, A.P.I. Waghmare (PW19) did not call any other local person as panch in

place of Anil Chavan. These circumstances indicate that, Anil Chavan had been to the Police Station just on the say of Dadasaheb (PW3), therefore, he is an interested witness. As such, in the absence of corroborative evidence from an independent witness, it would not be safe to rely upon the disclosure statement of the Track Pants, T-Shirt, rope and orange bag (Article- 'A' to 'D').

18.4) No doubt, the C.A. Report (Exh.87) shows that, the rope (Article-'C') was stained with human blood, but its group was inconclusive. As such, it will be not of much help to the prosecution. As alleged, the Track Pants and the rope (Article- 'A' and 'C') had stains of mud. However, the C.A. was not requested to compare the neutral earth sample taken from the spot of offence with the mud on the Track Pants and the rope to give his opinion as to whether all the earth, tallies or not.

18.5) There is no mention in the missing report (Exh.34) and F.I.R. (Exh.35) that, the deceased had carried the bag and the torch with him when he went to the temple. Manisha (PW8) did not inform as to why the deceased needed to carry the torch. It was not the case of prosecution that, the temple was located at a remote and dark place or that there was no provision of any lamp. For these reasons, it is doubtful that, the deceased was carrying the torch.

18.6) Moreover, Anil Chavan (PPW4) and A.P.I. Waghmare (PW19)

both have not specifically deposed that, the Appellant disclosed that he concealed his clothes, rope and bag at his house and he only threw the torch in the field. Therefore, and considering the evidence as to 'motive' and 'last seen together' is doubtful, even if it is accepted that, the Appellant recovered the Track Pants, T-Shirt, rope and the orange bag (Article- 'A' to 'D') and showed the field where the torch was thrown, it will not be sufficient to conclude that the Appellant himself had removed the bag and the torch from the possession of deceased and concealed/ thrown it, as the case may be.

19) The next circumstance the prosecution relied on was that, the Appellant made the disclosure statement (Exh.57) and showed to the police and panchas the spot from where he had kidnapped the deceased on the motorcycle, the route by which he had taken the deceased with him, the spot where he stopped to collect the rope, the spot where he got down from the motorcycle and the spot where murder was committed. Accordingly, A.P.I. Waghmare (PW19) recorded the Panchnama (Exh.57-A).

19.1) However, the concerned panch witness Shivaji Dhas (PW13) has turned hostile. His cross-examination by the A.P.P. was ineffective. Therefore, the prosecution was left with no alternative except to depend upon the evidence of A.P.I. Waghmare (PW19) but he has only testified that the Appellant had stated that he would point out the route by which he

went towards the place of incident and where the deceased was murdered. Accordingly, he recorded the memorandum of the statement at Exh.57. A.P.I. Waghmare deposed that, then the Appellant led the police and panchas *via panand* road to the field of Mr.Gurav, where the body of deceased was found and accordingly, he recorded the Panchnama at Exh.57A. However, in the absence of trustworthy and corroborative evidence in respect of the other circumstances discussed above, the aforesaid testimony of A.P.I. Waghmare (PW19) is not sufficient to hold that, the Appellant kidnapped the deceased and committed his murder in that field.

20) With the help of the evidence of A.P.I. Waghmare (PW19), Arrest Panchanama (Exh.53), evidence of Dr. Namdev Patil (PW17) and injury certificate (Exh.74), the prosecution has proved that, when the Appellant was arrested, there was C.L.W on his left ring finger, on second phalange flexor aspect, 1 cm in size; abrasion on left hand little finger-lateral side and abrasion on left hand little finger-medial side. Dr. Namdev Patil examined the Appellant and gave the injury certificate (Exh.74), accordingly. Dr. Namdev Patil testified that, the said injuries were more than 24 hours old, simple and can be caused by hard and blunt object.

20.1) However, Dr. Namdev Patil (PW17) admitted that, the age of injury can be determined based on colour and healing condition of the

injury. He has not mentioned the colour of the injuries in the certificate (Exh.74). Therefore, the existence of the injuries is least enough to derive any definite conclusion therefrom.

21) Upshot of the aforesaid discussion is that, on careful scrutiny and re-appreciation of the evidence on record in the light of the settled principle of law, we are of the considered view that the prosecution has failed to prove the complete chain of all the circumstances more particularly the 'motive' for the crime and the 'last seen together' theory leading to the only hypothesis that, except the Appellant, no other person has kidnapped the deceased and committed his murder. A reasonable doubt lingers with respect to the probability or conclusiveness of the circumstance relied on by the prosecution, forming a link in the chain of circumstances pointing to the guilt of the Appellant. In short, there is reasonable doubt about the truthfulness of the prosecution version to the extent that, on the relevant date, at time and place, the Appellant kidnapped the deceased and committed his murder. The benefit of said doubt, therefore, would go to the Appellant. As a result, the Appeal deserves to be allowed.

21.1) Hence, the following Order :-

21.2) The impugned Judgment and Order of conviction and sentence dated 3rd December 2016, passed by the Additional Sessions Judge at *Islampur*, District Sangli, in Sessions Case No.17 of 2014, is quashed and

set aside.

21.3) The Appellant-Barkya @ Vishwas Ananda Patil is acquitted of the offences punishable under Sections 363 and 302 of the I.P.C.

21.4) Record indicates that, presently Appellant-Barkya @ Vishwas Ananda Patil is lodged in Kalamba Central Prison, Kolhapur, hence, the Appellant be released from the prison forthwith, if not required to be detained in any other crime/case.

21.5) Criminal Appeal No.77 of 2017 is allowed in the aforesaid terms. Consequently, the Interim Application is also disposed off.

(SHYAM C. CHANDAK,J.)

(A. S. GADKARI, J.)