



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

CRIMINAL APPEAL NO. 216 OF 2020

Sunil Jankiram Dundyar,
aged about 27 years, Occ. : Labour
Work,
R/o Pimpalgaon Lendi, Tq. Sindkhed
Raja, District Buldana
At present Pundalik Nagar, Lane No.4,
Aurangabad

...Appellant

// VERSUS //

The State of Maharashtra,
through Police Station Officer,
Police Station Chikhli,
Tah and District Buldana

... Respondent

WITH

CRIMINAL APPEAL NO. 476 OF 2024

Sangita Wd/o Sanjay Devhare (Kewat)
Aged – 30 years, Occ. Labour,
R/o Sambhaji Nagar, Chikhali, Tah. Chikhali,
District Buldhana (Original Accused No.2)

...Appellant

// VERSUS //

The State of Maharashtra,
through Police Station Officer, Police Station
Chikhali, Ta. Chikhali, District Buldhana

... Respondent

Shri R.M.Daga, Advocate for the appellant in Criminal Appeal No. 216
of 2020

Shri P.R.Agrawal, Advocate for the appellant in Criminal Appeal No. 476
of 2024

Shri Ganesh Umale APP for the respondent/State in both appeals.

**CORAM : NITIN B. SURYAWANSHI &
PRAVIN S. PATIL, JJ.**

**Reserved on : 29th January, 2025
Pronounced on : 2nd May, 2025**

JUDGMENT : (PER : NITIN B. SURYAWANSHI, J.)

Both the appellants are convicted under Section 302 read with Section 34 of Indian Penal Code by the learned Principal Sessions Judge, Buldhana in Session Case No. 26 of 2018 vide judgment and order dated 31st January, 2020 and sentenced to suffer life imprisonment and to a pay fine of Rs.5000/- each with a default clause.

2. The case of prosecution in short is that Shankar Maniram Devhare (Kewat) lodged a report at Chikhli Police Station, on 17th January, 2018 at 12.50 hours stating that his son Sanjay along with Sangita (Accused no.2) was residing in a rented room in Shambaji Nagar, Chikhli. Sanjay used to visit parent's house. On 17th January, 2018 at about 8 am his nephew Akash Kewat received a telephone call from Sangita (accused no.2) that Sanjay was dragging his legs and hands. Akash informed this fact to his father Rameshwar (brother of informant). Rameshwar informed the said fact to Shankar (P.W.1). Shankar (P.W.1)

and his family members then went to the house of Sanjay and found the dead body of Sanjay lying on the bed. Accused no.2 was present there. Since exact cause of Sanjay's death was not known at that time, he lodged a report (Exhibit 23), on the basis of this report accidental death (MERG No. 5/2018) was registered. During inquiry of AD, spot panchanama and inquest panchanama were prepared. During inquest panchanama two strangulation marks one of 7 and other 11 inches were noticed around the neck of deceased. After the funeral, when P.W.1 and others made inquiry, he came to know from Auto driver Shubham (P.W.5) that last night deceased Sanjay and Sunil (accused no.1) were dropped at the house of Sanjay. Thereafter inquiries were made with accused no.2. She gave extra judicial confession stating that Sanjay was given sleeping pills mixed in the liquor and thereafter with the help of accused no.1, he was strangled in sleep. Thereafter, Shankar (P.W.1) lodged (Exhibit 93) report of murder of Sanjay by both the accused. Accordingly, Crime No. 0026 of 2018 was registered with Police Station Chikhli, District Buldhana for the offence punishable under Section 302 read with Section 34 of Indian Penal Code. On completion of investigation, charge-sheet was filed.

3. Charge under Section 302 read with Section 34 of Indian Penal Code was framed against both the accused. Prosecution examined 13 witnesses in support of the charge and trial Court found both the accused guilty and convicted them as above. Hence, this appeal.

4. Learned Advocate Shri R.M.Daga, representing accused no.1 submitted that the trial Court has erred in placing the reliance of extra judicial confession of accused no.2 and taking into consideration the inconsistency in the evidence of prosecution witnesses, the said extra judicial confession is not reliable. He submitted that chain of circumstance is not complete and vital links in the chain of circumstance are missing. The involvement of accused no.1 cannot be inferred on the basis of extra judicial confession of accused no.2. According to him, the confession of accused no.2 is involuntarily and therefore it should not be relied upon. It is submitted that motive to kill deceased Sanjay was with Retiwala Pawar whose name appeared in the evidence of prosecution witness Suresh Dewahare (P.W.6). It is further submitted that there is no cogent and reliable evidence of last seen together. Shubham (P.W.5) has turned hostile therefore his evidence is of no help to the prosecution. Taking into consideration, the spot panchanama it is clear that landlord

Kiran More (P.W.9) cannot see front door of house of deceased. If the omissions in his evidence are considered, he is not a reliable witness. He submitted that recovery of rope from the bathroom is belatedly done as the spot panchanama is prepared on 17th January, 2018 whereas recovery of rope from bathroom of the house of deceased is shown on 22nd January, 2018 and therefore it is doubtful. It is submitted that doctor who conducted postmortem has not given final opinion as the cause of death though in the postmortem, it is mentioned that death is due to ashpexia due to strangulation. According to him, the prosecution has not brought on record nylon wire with which the deceased was strangled, seizure panchnama does not mention that nylon wire was seized, therefore, it is doubtful as to by which object the death is caused. According to him, the evidence of mobile location is also not trustworthy as the location of accused no.1 was found missing in between, the incident has taken place at Sambaji Nagar Chikhli, whereas mobile location shows that accused no.1 was at Chinchparishar, Chikhli. By relying on Subramanya Vs. State of Karnataka reported in 2022 Livelaw SC 887, Dinesh Kumar Vs. State of Haryana reported in 2023 SCC Online SC 564, Ishwar S/o Pandurang Masram Vs. State of Maharashtra reported in 2013 ALL MR Cri. 2750,

he submits that prosecution has failed to prove the charge against the accused no. 1 beyond reasonable doubt and therefore appellant is entitled for acquittal.

5. Shri P.R.Agrawal, learned advocate representing accused no.2 submitted that the prosecution has failed to prove the offence against the accused beyond reasonable doubt. He submitted that in spite of alleged extra judicial confession by accused no.2 to Shankar Devhare (P.W.1), he has not referred it in the AD report. Even the reference of confession is not there in the spot panchanama. FIR is belatedly lodged after 48 hours of the incident and the column of delay is kept blank in it. The delay in lodging the First Information Report is not explained by the prosecution which gives fatal blow to the prosecution case. It is submitted that in view of omissions in the evidence of P.W.9, his evidence is unreliable. He further submitted that cell phone number (Chitaman Patil) 7378993583 is registered in the name of Nimba Chitaman Patil, therefore, the evidence of Narendra Kharve (P.W.13) that location of that cell phone was of Chikhli cannot be held adverse to the interest of accused no.2. By relying on Adina Wd/o Subhash Rathod and another Vs. State of Maharashtra reported in 2024(5) Cri, 181, Nanasaheb Changdeo Nikam

Vs. The State of Maharashtra reported in 2024 ALL MR (Cri) 2411, he submits that chain of circumstance in the present case is not complete and hence accused no.2 may be acquitted.

6. Shri Umale, learned Additional Public Prosecution has supported the judgment of trial Court. He submitted that prosecution has proved last seen theory by examining Shubham Jadhav (P.W.5) and Kiran More (P.W.9). Mobile locations of both the accused were found at the house of deceased at the time of incident. Narendra Kharve (P.W.13) has proved the CDR reports which show that accused no.1 and 2 were in constant touch with each other. Motive of accused is proved by Mangala Kewat (P.W.4). Rope is recovered at the instance of accused no.1. Extra Judicial Confession given by accused no.2 is rightly relied upon by the trial Court while convicting the accused persons. Therefore, according to him there is sufficient evidence on record to sustain the conviction of both the accused persons. He, therefore, submits that both the appeals being devoid of merit may be dismissed.

7. Heard learned advocate for the appellants and learned Additional Public Prosecutor for the State. With the assistance of learned

advocate for the appellant and learned Additional Public Prosecutor, we have perused the record.

8. Admittedly, this is a case of circumstantial evidence, prosecution has relied upon following circumstances (i) last seen theory (ii) both the accused had opportunity to commit murder (iii) false explanation given by accused no.2 about the death of Sanjay (iv) extra judicial confession and prompt lodging of the FIR (v) medical evidence (vi) electronic evidence showing presence of accused at the place of incident at the relevant time, (vii) recovery of incriminating articles authenticity of the disclosure statement and recovery panchanama. (viii) motive (ix) no explanation given by the accused no.2 as to the cause of death of her husband Sanjay.

9. Homicidal death of Sanjay is proved by the prosecution by examining Medical Officer Dr. Meena Kasare (P.W.8). During postmortem, she found following external injuries on the dead body:

“(i) Two ligature marks seen on neck anterior brownish in colour, one above thyroid cartilage and one at the level of thyroid cartilage of size 7 inch in length and ¼ Inch in width, running upward and backward upto behind and below both

ears. On dissection of ligature marks, it shows ecchymosis under subcutaneous tissue.

(ii) Old injury abrasion on left foot in between 4th and 5th toe, blackish in colour of size 3 cm x 1 cm.

(iii) Old injury abrasion on right foot medial aspect, blackish in colour of size 2 cm x 1 cm.”

10. On internal examination, she found that organs were congested, both lungs were congested. She opined that deceased died within 4 to 6 hours of last meal. Viscera was preserved for chemical analysis and it was handed over to the police. The cause of death is “*Asphyxia due to strangulation*”. Along with query letter (Exhibit 62) one yellow colour wire of 12 feet x 4 inches was forwarded for opinion. She opined that death by strangulation can be caused by that wire. The two packets of pills Alprazolam and Becalm 0.5 mg which were seized from the accused no.1 at the time of his arrest were sent for opinion to her. She opined that it was a pill of sleep and drowsiness.

11. In cross-examination, she admitted that in viscera report Exhibit 66 it is mentioned that 104 milligrams of ethyl alcohol per 100 grams was found. She further admitted that there is no findings about the

contents of medicine of sleep and drowsiness. She also stated that ligature marks which are found on the dead body was because of nylon string. Thus, from her evidence it is clear that death of Sanjay was homicidal.

12. To prove last seen theory, prosecution has relied upon the evidence of Shubham Raju Jadhav, (P.W.5) auto rickshaw Driver and Kiran Tukaram More (P.W.9) landlord of deceased.

13. Shubham (P.W.5) has testified that he is auto-rickshaw driver and resides in the same locality of the deceased. He further stated that incident took place on 16th January, 2018 in night hours, at that time he was returning from bus stand after his trip. At that time, deceased and accused no.1 met him. Both were under the influence of liquor. They asked him to reach them to the house. Accordingly, he reached them to the bus stop of Sambaji Nagar, near Gopal Kirana. Thereafter, what happened he did not know. After leaving deceased and accused no.1 at the spot, he went home and thereafter nothing happened.

He was declared hostile and cross-examined by the learned Public Prosecutor. In cross-examination, he admitted that Sunil and Sanjay came and Sunil had parcel of liquor. In auto rickshaw, he and Sanjay consumed

one peg from parcel. Thereafter at 8.30 pm he left both of them at the house of Sanjay. On the next day morning, there was noise of crying in front of the house of Sanjay. He went there and came to know that Sanjay was dead. His parents came there. Dead body of Sanjay was lying in the front room on bed, there were marks on his neck. His parents inquired with him and he told them all the incidents from first meeting of deceased and Sunil with him, till he left them at the house of deceased.

14. In cross-examination conducted by accused he deposed that, he was not knowing the name of deceased prior to his death. He did not know accused no.1 Sunil. Sanjay had been to the liquor shop alone and thereafter he returned home. He admitted that he had not stated name of Sunil in his statement. He stated that it is correct that there was a talk that Sanjay had been to the liquor shop with one Pawar. Omissions to the effect that *“Sanjay and Sunil had come to my house” “I left Sanjay and Sunil at the liquor shop, at that time they told me that to stop there, thereafter they brought one parcel after that they consumed one peg each”, “I left them to the house of Sanjay”* were brought on record in his cross-examination. He admitted that police did not call him to identify the accused. Again at the request of learned Public Prosecutor he was

permitted to be cross-examined by the State but nothing material is brought on record in his cross-examination by the State.

15. Kiran More (P.W.9) is landlord of deceased Sanjay. He deposed that incident occurred on 16th January, 2018 in night hours. He was present in his house. In the night hours Sunil and Sanjay came under the intoxication of liquor. There was quarrel between husband and wife. He asked why they were quarreling. He convinced Sanjay not to quarrel and asked Sangita who was the guest. She told him that he was her cousin (son of paternal aunt) and tomorrow morning he would go away. Sanjay had brought non-veg at home. He asked Sangita to prepare non-veg and said that they would come after sometime. At 6.30 pm Sanjay and Sunil left the house. Thereafter he closed his door and slept. He was not aware when they returned Sunil halted at the house of deceased. When he woke up in the next day morning, he saw Sangita crying. He asked her as to why she was crying. She told that her husband was slept and he was not waking up. Neighbour gathered there. He along with his wife went to their house to see what happened. They saw Sanjay in front of room and there were two ligature marks on his neck. His parents and relatives were gathered there. They informed to the police. After funeral Sanjay's

parents told them there were illicit relations of Sangita with Sunil, therefore they both killed Sanjay. Shubham (P.W.5) resides adjacent to his house and he knows him.

16. In cross-examination he deposed that three rooms were given to Sanjay on rent. He admitted that front door room of Sanjay was not seen from his house. He voluntarily stated that back side door is seen. He admitted that after Sanjay and Sunil left the house to drink, he did not know whether Sanjay came alone or along with Sunil. There were usual quarrels between husband and wife and they have not paid much attentions to those quarrel. He denied the suggestion that wife Sangita was not in the house at night. Omissions to the effect that *"I had been to the house of Sanjay."* *"I convinced them not to quarrel"*. *"I asked Sangeeta who was the guest, she said that he was cousin (son of paternal aunt), he would go tomorrow morning"*, *"Sunil halted in the house of Sanjay in the night, Shubham resides besides my house"* were brought on record in his cross. He could not assign any reason as to why these statements were not mentioned in his police statement.

17. It appears that, PW-5 Shubham was won over by the accused after his evidence was recorded on 12th March, 2019. On that day, an

application was filed by the accused for adjournment and thereafter the matter was adjourned to 10th April, 2010 and on that day he was cross-examined by the defence.. It is well settled that testimony of hostile witness cannot be ignored totally and the Court can scrutinize his testimony and accept that portion of the same which receives corroboration from other evidence on record. The testimony of a hostile witness is not liable to be rejected without even scrutinizing it, although great care and caution is required to analyse the same before accepting any part of it as is otherwise found reliable and consistent with the prosecution case. (See : *Dhananjay Chatterjee Alias Dhana V/s State of W. B.* (1994) 2 SCC 220). From the evidence of PW-5 it is clear that he has seen the deceased and accused no.1 under the influence of liquor and they asked him to reach them to the house and accordingly in his rickshaw he reached them to the stop of Sambhaji Nagar. He has categorically stated in the cross-examination by the learned Prosecutor that at 8.30 pm he left both of them at the house of Sanjay. He has disclosed these facts to the parents of Sanjay on the next day. Therefore, it is clear that this witness has last seen of deceased and accused no.1 together on the date and time in the night of incident.

18. Kiran More (P.W.9) and Shubham Jadhav (P.W.5) are residents of same locality and they both have seen deceased and accused no.1 Sunil together in the night of incident. Omissions in the evidence of Kiran More (P.W.9) are not material so as to discard his entire evidence.

19. It has come in the evidence of Shubham Jadhav (P.W.5) that he dropped Sanjay and accused no.1 at their house. Kiran More (P.W.9) had seen deceased, accused no.1 and accused no.2 in the house of deceased in the night of incident. Therefore, prosecution, by leading evidence of PW-5 Shubham, PW-9 Kiran More, has established last seen theory that the deceased was lastly seen in the company of Accused Nos.1 and 2 in the night of the incident. Therefore, Accused Nos. 1 and 2 had opportunity to commit murder of deceased Sanjay.

20. By examining Narendra (P.W.13), Noddell Officer, prosecution has proved CDR of mobile of the accused persons. He stated that idea mobile numbers 7350908205 and 9112330149 are in the name of accused Sunil. Vodaphone mobile no. 7378993583 is in the name of Sangita (accused no.2). He gave certificate of call details report which are system generated. Hence, this report cannot be changed IMEI numbers of these mobiles are automatically generated. He has issued certificate

under Section 65-B of the Indian Evidence Act (Exhibit 125). He has also proved documents of card of accused (Exhibits 126, 127, 129). He stated that tower location of all the SIM cards in the mobile recovered from the possession of Sunil (accused No.1) are of Chinchparisar, Chikhli, Buldhana, Shivaji Chowk, Chikhli, Buldhana and Mira, Chikhli, Buldhana, Chikhli, Buldhana, Mehkar Fhata, Chikhli, Buldhana. He further deposed that tower location of all sim cards are at Chikhli where the dead body was found. Thereafter tower locations were traced two places through which accused no.1 after leaving the house of deceased and accused no.2 in the morning hours went to Aurangabad. He has categorically stated that tower location of accused no.1 clearly shows that he was present in Chikhli on 16th January, 2018 in the night and on 17th Morning in morning hours and thereafter route by which he travelled from Chikhli to Aurangabad.

21. It is pertinent to note here that cell phone of Sangita (accused no.2) is recovered from accused no.1 Sunil. The evidence of this witness and the mobile location of accused persons supports the last seen theory of the prosecution. It also confirms the fact that accused no.1 was at the

house of deceased in the night of incident and after commission of murder he left the house in the morning on 17th January, 2018.

22. Presence of accused nos. 1 and 2 in the night of incident at the house of deceased is proved by the prosecution in the evidence of PW-5 and PW-9, as well as in the evidence of PW-13. These circumstances prove the involvement of accused nos. 1 and 2 in the crime.

23. To prove extra judicial confession, prosecution has examined Mangala Kewat (P.W.4), mother of deceased Sanjay, and PW-6 uncle of deceased. PW-4 has deposed that accused no.2 gave extra judicial confession in her presence stating that sleeping pills were administered to Sanjay, then she tied his hands and legs and accused no.2 strangled him by wire. However, in cross-examination she has admitted that on seeing dead body of Sanjay she fell unconscious, therefore, it is not possible to believe that she heard the extra judicial confession given by accused no.2.

24. Suresh (P.W.6) uncle of deceased Sanjay has deposed that incident occurred on 17th January, 2018 in the morning hours when he

was at his house, he received a call of his nephew informing the death of Sanjay. Thereafter, he went to Sanjay's house. Persons gathered there suggested him that it was a murder, he should not touch the body. Dead body was lying in the front room. Hands and legs of Sanjay were tied and there were marks on neck and throat. He asked accused no.2 as to what happened but she gave evasive replies. After postmortem and after funeral he and his nephew Akash asked accused no.2 to narrate true facts as to what happened. She narrated that Sunil (accused no.1) was her cousin (son of paternal aunt). Both of them administered sleeping pills in Sanjay's liquor and made him unconscious. His hands and legs were tied by pieces of saree and Sunil (accused no.1) strangled deceased by wire. Thereafter, they called police and told that Sangita (accused no.2) confessed the guilt in their presence. He was also called to act as a panch on next day of incident and in his presence police seized mobiles from Sunil's mother.

In cross-examination he admitted that he met the deceased one and half months before incident. During that period accused no.2 was not residing with him. He admitted that prior to the incident accused no.2 used to go to the house of her parents. He voluntarily stated that it was a

pre-planned murder, as accused no.2 was having illicit relation with Retiwala Pawar, Sangita (accused no.2) and Sunil committed the murder. He admitted that illicit relations of Sangita (accused no.2) with Retiwala Pawar was known to deceased Sanjay. Retiwala Pawar had threatened deceased Sanjay to see him. He admitted that on 17th January, 2018, Sangita (accused no.2) did not talk with him. He further stated that she stated the incident after they came back from funeral. Omission that *“hands and legs of dead body tied”* was brought on record in his cross-examination.

25. Rameshwar (P.W.7) is uncle of deceased Sanjay. He deposed that on the day of incident phone call was received from Sangita (accused no.2) on the mobile of his son. It was informed by accused no.2 that Sanjay was restless. This fact was informed to his elder brother Shankar (P.W.1). He told him to go there and thereafter he along with brother and family members went there. They inquired with daughter-in-law as to what has happened. She said that Sanjay deceased was restless since last night. They saw deceased lying in front room, there were marks of strangulation on his neck. On repeated asking Sangita did not disclose anything except above.

In cross-examination he admitted that he was not on frequent visiting terms to the house of Sanjay. There was dispute between husband and wife, accused no.2 used to go her parents house. There was a talk that accused no.2 was illicit relation with Pawar contractor and therefore, there was a dispute between husband and wife. People gathered there were talking that Pawar is behind the incident.

26. Learned Public Prosecutor conducted his re-examination. He admitted the contents of his statement recorded under Section 164 of the Code of Criminal Procedure (Exhibit 56).

27. Shankar Kewate (P.W.1) is father of deceased who has lodged the oral report (Exhibit 23) to the police station. Exhibit 23 was registered as AD No. 5 of 2018. On the basis of the same, spot panchanama and inquest panchanama were prepared. Though after hearing extra judicial confession of Sangita (Accused No.2), he lodged report (Exhibit-93) and FIR (Exhibit-94) was registered on that basis, he has not supported the prosecution case in that behalf. Report Exhibit-93 and FIR Exhibit-94 are proved in the evidence of Sudhakar Gawargure (PW-12), Investigating Officer.

28. It is to be noted here that PW-1 has admitted to have lodged oral report (Exhibit-23). He has further stated that again another report on typing was written down and his signature was obtained. As he was frightened because of death of his son, he does not know what was written in the report, . In his cross-examination by APP, he has stated that, *“It is not correct that my son told me that there was love affair between accused Nos.1 &2: and they were feeling that my son was the hurdle in their love affair. I do not know that on 16-01-2018 accused No.1 had been to the house of accused No.2. I do not know that on that day in the evening accused No.1 – Sunil caused my son to consume liquor. It is not correct that in order to save my daughter in law, I am deposing falsely”*. He volunteered *“Let the accused No.2 be punished”*. When asked whether police recorded your statement? He answered, *“Police read over me the above facts and obtained my signature.”* Thus, he has admitted that the above statements mentioned in the FIR were read over to him and then he signed it. Thus, it is clear that whatever stated by him in the FIR was written down and same was read over to him and then he signed it, after understanding the contents. FIR (Exhibit-94) is lodged after funeral was over and immediately after extra judicial confession was made

by Accused No.2 and when accused No.2 was asked about cause of death of Sanjay. Vivid details of extra judicial confession made by Accused No.2 and the disclosure made by PW-5 are given in the FIR. FIR is proved by PW-12, investigating Officer, who has recorded it as per say of PW-1. PW-12 was doing his public duty and he cannot be said to have any knowledge about facts as to in what manner Sanjay's murder was committed. We therefore, find it hard to believe that police have recorded FIR on their own within short period of occurrence of the incident, by falsely implicating Accused Nos.1 and 2. Since the facts narrated by PW-1 are recorded PW-12 in the FIR (Exhibit-94), we hold that FIR corroborates prosecution case and extra judicial confession made by Accused No.2 giving details as to how Sanjay was killed with the help of Accused No.2.

29. Considering evidence of PW-6, we are inclined to believe that Accused No.2 Sangita made extra judicial confession and disclosed the manner in which she and Accused No.1 Sunil mixed sleeping pills in the liquor of the deceased, which made him unconscious and thereafter his hands were tied with pieces of saree and Accused No.1 Sunil strangled the deceased by wire. Though informant (PW-1) has turned hostile,

Report (Exhibit-93) lodged by him as the basis of extra judicial confession of Accused No.2, is proved in the evidence of PW-12 Sudhakar Gawarguru, the Investigating Officer. FIR (Exhibit-94) is registered on the basis of the said report.

30. On careful appreciation of evidence on the point of extra judicial confession, we are of the view that the prosecution has proved extra judicial confession in the evidence of PW-6. A stray admission of PW-6 that on 17th Sangita did not talk to him, cannot be read in isolation to disbelieve his version that extra judicial confession was made by Sangita. At the time of arrest of Accused No.1 Sunil, packet of sleeping pills was recovered from his pocket, which corroborates prosecution case and the extra judicial confession made by Accused No.2 Sangita. Fact remains that after hearing extra judicial confession of Accused No.2, PW-1 lodged report Exhibit-93 and FIR (Exhibit-94) is registered on the basis of said report. It is a matter of record that in the FIR it is stated that Accused No.2 had illicit relations with Rameshwar Pawar, resident of Sambhani Nagar, Chikhli. Since those relations were known to deceased Sanjay, there used to be quarrels between Sanjay and Accused No.2. Since last 4 months, Accused No.2 had illicit relations with her cousin Sunil Dundyar

(Accused No.1). In the report Exhibit-93, it is stated that auto driver Shubham (PW-5) disclosed him that on previous night he dropped deceased Sanjay and Accused No.1 at about 7.00 p.m. in his auto at the house of the deceased. At that time, they both were drunk. Thereafter, when he enquired with Accused No.2, she disclosed that after her cousin Sunil Accused No.1 and deceased Sanjay returned home, Accused No.1 mixed sleeping pills in Sanjay's liquor and made him drink it. After having dinner at about 10.30 p.m. when the deceased was sleeping, by giving her threat of life, he made her to hold hands of deceased Sanjay and thereafter gagged Sanjay's mouth and nose with piece of saree and thereafter strangled him with string. Then he took her mobile and left home at 5.30 a.m. It is further stated that since Sangita (Accused No.2) had illicit relations with her cousin Sunil (Accused No.1) and since deceased was problem in these relations, they both, in collusion, have killed Sanjay in the night of 16th January, 2018. Fact of illicit relations between Accused No.1 and 2 is also stated by PW-6 by voluntary statement made during corss-examination. Thus, the lodging of FIR referring to extra judicial confession made by Accused No.2 further corroborates prosecution case.

We are aware of the legal position that extra judicial confession is a weak type of evidence and no conviction can be awarded only by relying on it. However, in the case in hand, we are considering it as one of the additional circumstance in the chain of circumstances proved by the prosecution to bring home guilt of the accused.

31. Fact remains that after the extra judicial confession given by accused no.2, Shankar (P.W.1) has immediately lodged report (Exhibit 93), though he has turned hostile, this report is exhibited through Investigating Officer (P.W.12). It is thus clear that initially P.W.1 lodged report it was registered at A.D. No. 5/2018. After Shubham (P.W.5) disclosed that accused no.1 was with the deceased in the night of incident and they both were under the influence of liquor and he dropped them at the house of deceased and after hearing the extra judicial confession of accused no.2, P.W.1 has lodged the report (Exhibit 93). The disclosure in extra judicial confession is corroborated by finding of packet of sleeping pills in the pocket of accused no.1 at the time of his arrest. Prompt lodging of report (Exhibit 93) also rules out afterthought implication of accused in the crime. We are therefore of the view that extra judicial confession mentioned in the report (Exhibit 93) corroborates the

prosecution case and reveals the involvement of accused in the present crime and this is one of the strong circumstance proved by the prosecution against accused.

32. This Court in the case of Ishwar S/o Pandurang Masram Vs. the State of Maharashtra reported in 2013 ALL MR 2750, has held as under:

(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law.

“12..... It can be seen from the evidence of this witness that according to him when he was making inquiry, at that time, the present appellant is said to have told him that he had opened the fire and killed Thakare. It can further be seen that he had asked Ishwar, when he told the said witness that he was teasing him as an impotent and hence he killed Thakare. As held by the apex court that the

disclosure of confession has to be voluntarily. From the evidence of this witness, it can be seen that alleged extra-judicial confession was not voluntarily, but all answers given in reply to the query made by his superior in an inquiry....”

33. It is also held in this judgment that extra judicial confession made by the accused during the inquiry made by Superior Officer into death of deceased, who was allegedly murdered by the accused was involuntary.

34. These observations strongly relied upon by the appellants to contend that the extra judicial confession of accused no.2 was involuntarily and hence it should not be relied upon. The said argument cannot be accepted for the simple reason that extra judicial confession made by the accused no.2 in the present case was on asking by the prosecution witnesses and relatives of deceased, as to what caused death of Sanjay. Merely because, she gave extra judicial confession on asking by the relatives of the deceased, it cannot be said that extra judicial confession was involuntarily.

35. Gajanan (P.W.3) and Investigating Officer P.W.12 have proved the recovery of articles from accused no.1. In presence of P.W.3 and another panch, clothes of the deceased including jeans, shirt, baniyan,

knicker and shoes were seized vide seizure panchanama (Exhibit 34). On 18th January, 2018 vide seizure panchanama (Exhibit 35) two samsung mobiles of accused no.1 Sunil and Intel made mobile of accused no.2 were seized. On 19th January, 2018 vide panchanama (Exhibit 36) two samples of blood bottles were seized.

36. Gajanan Chavan (PW-3) has proved seizure of clothes and shoes of deceased and two sealed bottles vide seizure Panchanama Exhibit-34. He was again called on 18th in the Police Station and in his presence 3 mobiles (Two samsung make and one itel make) and one packet of medicine pills were seized from Accused No.1 Sunil. Another Pancha was Manoj Sadar. He identified Samsung Mobiles (Article F and Article G) seized from Accused No.1 Sunil and Itel mobile (Article H) of Sangita and the packet of medicine pills (Article-I). All these articles were seized under Panchanama Exhibit-35.

On 19th in his and Manoj Sadar's presence, two samples of blood bottles brought by the police employee from the Rural Hospital, Chikhli were seized vide Panchanama Exhibit-36.

On 22nd, in his and Manoj's presence, Accused No.1 Sunil, who, at that time was in police custody, was brought out and he gave a statement that he would show the place of incident and some objects i.e. one white colour string, piece of saree and saree. His memorandum statement (Exhibit-37) was recorded. Thereafter, Accused No.1 Sunil led them to the spot of the incident in police van. They went to Sambhaji Nagar as per directions of the Accused. At the instance of the Accused, the van was stopped in front of Saubhagya Sadan Building. Then the Accused proceeded to the said building. Accused Sunil showed the spot of the incident, that house was closed. Key was obtained from house owner (PW-9) and lock was opened by the key. Articles, which were used in the commission of the offence, were hidden in the bathroom. At the instance of Accused Sunil the Articles i.e. white colour string, piece of saree and saree were recovered. The recovered articles were sealed in a packet (Article J). White colour string (Article L), one piece of saree (Article M) and saree (Article N) were seized vide seizure Panchanama (Exhibit-42).

On 23rd, in the presence of PW-3 and Manoj, Accused No.1 Sunil made a statement that he wants to show the place, where he had thrown

the wire used in the commission of offence and he would recover the same. His memorandum statement (Exhibit-43) was recorded and thereafter they proceeded to place as per directions of Accused No.1 Sunil. He took them to Deulgaon Mahi near one bridge prior to Datta Temple and showed the place where he had thrown the wire. Thereafter, he produced yellow colour wire from the field (Article O). The same was seized by seizure Panchanama (Exhibit-44). All these Panchanamas were video graphed and two CDs of said videography were seized in the presence of these Panchas from videographer vide Panchanama Exhibit-45. Two CDs are marked as Article Q-1 and Article Q-2.

37. In cross-examination, this witness has stated that 22 to 25 minutes were required for searching the wire and accused as well as panchas and police searched for the wire. He admitted that place from where the wire was recovered is accessible to everybody. Bathroom from where saree etc. were seized was open to sky. He stated that yellow colour wire was also recovered and paper label was affixed in the police station. Recovery memorandum statement of the accused and seizure of the articles are also referred to in the deposition of Investigating Officer

(P.W.12). These, recoveries provide a vital link in the chain of circumstances against the accused persons.

38. In this case, the prosecution has proved motive of the accused to commit the crime. It has come in the evidence of Mangala (P.W.4) that Accused No.2 was having extra marital affair with Accused No.1 and, therefore, her son had started consuming liquor. Motive is also reflected in Report Exhibit-93 and FIR Exhibit-94.

“As regards relevancy of motive in a case based on circumstantial evidence, the weight of authorities is on principles that if motive is proved, that would supply another link in the chain of circumstantial evidence but, absence of motive cannot be a ground to reject the prosecution case, though such an absence of motive is a factor that weighs in favour of the accused.” (Vide “Prem Singh V/s State of NCT of Delhi” 2023 LiveLaw (SC) 2).

39. In “State of U.P. V/s Kishanpal” (2010) 9 SCC 189, the Supreme Court has held “

“38 ... the motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually promoted or excited them to commit the particular crime.

39. The motive may be considered as a circumstance which is relevant for assessing the evidence but if the evidence is clear and unambiguous and the circumstances prove the guilt of the accused, the same is not weakened even if the motive is not a very strong one....”

40. In view of aforesaid reasons, the Prosecution has established, beyond reasonable doubt, that Sanjay was murdered in the night between 16th and 17th January, 2018. Both the accused were present at the house of the deceased in the fateful night. Accused No.1 left house of the deceased at 5.30 a.m. in the morning, of 17th January, 2018, carrying cell phone of Accused No.2. Location of cell phones of both the accused establish their presence at the spot of incident in the fateful night. Accused No.2, in the morning of 17th January, 2018, raised a false alarm about restlessness of Sanjay, though she was aware that Sanjay had expired. Under section 106 of the Evidence Act, it was incumbent on the part of Accused No.2 to explain circumstances as to how Sanjay met homicidal death. Accused

No.2 has failed to give any explanation, on the contrary she raised a false alarm, which is an additional circumstance against her.

41. Even accused no.1 has failed to explain various phone calls between him and accused no.2, recovery of cell phone of accused no.2 from him and his mobile location at the spot of the incident in the fateful night and that he left the house of deceased by taking cell phone of Accused No.2, at 5.30 am on 17th January, 2018. Failure of both the accused to give plausible explanation of the above circumstances indicates that both the accused have failed to discharge the burden under section 106 of the Evidence Act and it has to be taken as an additional circumstance proving their guilt.

42. In Trimukh Maroti Kirkan Vs. State of Maharashtra reported in 2006(10) SCC 681, the accused was charged of the murder of his wife; there had been allegations of ill-treatment of the deceased-wife by the accused -husband; and though the victim had been killed by strangulation, the information given to her parents as also to all in the village was that she had died on account of snakebite. After taking note of the facts of the case, this Court explicated on the principles governing the

assessment of circumstantial evidence, the operation of section 106 of the Evidence Act and the effect of want of necessary explanation or giving of false explanation by the accused, inter alia, in the following passages :-

*14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstance of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties (See *Stirland V Director of Public Prosecutions* 1944 AC 315) – quoted with approval by Arijit Pasayat, J. In *State of Punjab V. Karmail Singh* (2003) 11 SCC 271. The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that where any*

fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

21. In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it

complete. This view has been taken in a catena of decisions of this Court.”

43. Applying aforesaid ratio to the facts of present case, it needs to be held that since the accused have failed to explain facts within their special knowledge and accused No.2 gave explanation which is found to be untrue, the same needs to be taken as an additional link in the chain of circumstances against the accused, to make it complete.

44. The Prosecution has further proved the recovery of incriminating articles from Accused No.1, including cell phone of Accused No.2. This circumstance further connects Accused persons to the present crime. The extra judicial confession made by Accused No.2 corroborates prosecution case so also prompt lodging of the FIR on the basis of said extra judicial confession. Recovery of packet of sleeping pills from Accused No.1, at the time of his arrest further corroborates the prosecution case and the extra judicial confession. Thus, all the circumstances proved by prosecution taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and these circumstances are incapable of

explanation on any hypothesis other than guilt of the accused and they are inconsistent with their innocence. The prosecution evidence establishing the chain of circumstances against the accused is cogent and reliable. According to us, prosecution evidence establishes involvement of both the accused in the crime and prosecution has proved its case beyond reasonable doubt.

45. In Subramanya Vs. State of Karnataka (supra), the Apex Court was considering the case of recording confession under TADA Act, it is held that, confession of co-accused can only be considered but cannot be relied on as substantive evidence, it is also held that memorandum statement of the accused did not indicate or suggest that he indicated anything about the involvement in concealment of the weapon.

46. In Dinesh Kumar Vs. State of Haryana (supra), it is observed:

“25. The evidence of last seen becomes an extremely important piece of evidence in a case of circumstantial evidence, particularly when there is a close proximity of time between when the accused was last seen with the deceased and the discovery of the body of the deceased, or in this case the time of the death of the deceased. This does not mean that in cases

where there is a long gap between the time of last seen and the death of the deceased the last seen evidence loses its value. It would not, but then a very heavy burden is placed upon the prosecution to prove that during this period of last seen the discovery of the body of the deceased or the time of death of the deceased, no other person but the accused could have had an access to the deceased. The circumstances of last seen together in the present case by itself cannot form the basis of guilt (See Anjan Kumar Sarma V. State of Assam).

26. The circumstances of last seen together does not by itself lead to an irrevocable conclusion that it is the accused who had committed the crime. The prosecution must come out with something more to establish this connectivity with the accused and the crime committed. Particularly, in the present case when there is no close proximity between circumstances of last seen together and the approximate time of death, the evidence of last seen becomes weak (see Malleshappa V. State of Karnataka)”

We have already observed in the foregoing paragraphs that there is sufficient material on record to connect the accused persons to the crime in question and there is close proximity between circumstance of last seen together and the approximate time of death. Therefore, this ruling is of no help to the accused persons.

47. In Adina Wd/o Subhash Rathod and another Vs. State of Maharashtra (supra), this Court has held that in cases governed by circumstantial evidence, if chain of circumstance is not established, failure of accused to discharge the burden under Section 106 of the Act. is not relevant at all. When chain is not complete. even falsity of defence is no ground to base conviction.

48. We have already observed supra that the prosecution has led evidence establishing chain of circumstances against the accused and, therefore, presumption under section 106 of the Evidence Act is attracted and the Accused have failed to discharge their burden, by offering reasonable explanation in discharge of said burden. Therefore, this provides an additional link in the chain of circumstances proved against the accused.

49. The trial Court has properly appreciated the evidence and has convicted the accused by giving cogent reasons. In this case, the prosecution has proved beyond reasonable doubt that both the accused have committed murder of Sanjay in the night of 16th January. From the

circumstances proved by the prosecution, it is established that both the accused have committed murder of Sanjay.

50. For the aforestated reasons, we find no merit in the Appeal. Resultantly, both the Appeals are dismissed.

[PRAVIN S. PATIL, J.]

[NITIN B. SURYAWANSHI, J.]