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

CRIMINAL APPEAL No. 12 OF 2022.

1.Adina wd/o Subhash Rathod,
Aged about 32 years, Occupation -
Labourer;

2.Ankush s/o Dilip Ade,
Aged about 25 years, Occupation
Labourer,

(Both 1 and 2 residents of Mowada
(Motha), Taluq Ghatanji,
District Yavatmal. ... APPELLANTS.

VERSUS

The State of Maharashtra,
through Police Station Officer,
Police Station, Ghatanji,
District Yavatmal. ... RESPONDENT.

Mr. A.S. Mardikar, Senior Advocate with Shri D.Singh, Advocate for Appellants.
Ms T.H. Udeshi, A.P.P. for Respondent/State.

CORAM : VINAY JOSHI AND
VRUSHALI V. JOSHI, JJ.

JUDGMENT RESERVED ON : 29th APRIL 2024.
JUDGMENT PRONOUNCED ON : 29th JULY 2024.

JUDGMENT (PER VINAY JOSHI, J.) :

Appellants/ original accused nos. 1 and 2 who are convicted by judgment and order dated 29.11.2021 delivered by the Sessions Judge, Yavatmal in Sessions Case No.187/2019 and sentenced to undergo imprisonment for life for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, with payment of fine of Rs.500/- each, and in default of payment of fine, to undergo simple imprisonment for one month, have filed this Appeal under Section 374(2) of the Code of Criminal Procedure, challenging their aforesaid conviction and sentence. The accused no.1 Adina was on bail during the trial, as well as her execution of sentence was suspended during the pendency of this Appeal. Accused no.2 Ankush is in jail till date.

2. The facts as are necessary for the decision of this appeal can be stated in brief as under :

Deceased Subhash Rathod was residing with his wife Adina (Accused No.1- A1) and daughter Sweety aged 6 years and son Kartik aged 5 years at Village Mowada, Taluq Ghatanji, District Yavatmal. PW 6 – Police Inspector Dineshchandra Shukla, who was attached to Ghatanji Police Station was on duty on 09.08.2019. At around 9 a.m. PW 2- Pawan Rathod – informant, who is nephew of the deceased Subhash, came to the police station and informed about Subhash being murdered at his residential house. PW 6 Police Inspector Shukla reduced the information in writing (Exh.26) and registered Crime No.437/2019 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. In pursuance of the directions issued by superiors, PW 6 Shukla handed over the investigation to PW 7 – Police Sub Inspector Kishore Bhujade.

3. On 09.08.2019 in wee hours around 4 a.m. one Dharma Chavhan, neighbour of deceased Subhash Rathod came to the house

of the informant -PW 2 Pawan and informed that someone has snatched gold ornaments of his aunt (Adina – A1) and killed Subhash by means of a weapon. Immediately the informant rushed to the house of his uncle Subhash, who was found lying dead at his house. Subhash has sustained bleeding injuries at his head and face. Blood was spilled over the floor. The informant suspected a foul play by his aunt (Adina – A1), since the deceased was quarreling with her by suspecting her character. The informant Pawan rushed to the concerned police station and expressed his suspicion that his aunt (Adina – A1) might have killed the deceased Subhash with the aid of some one.

4. PW 7 – Investigating Officer PSI Kishore Bhujade visited the place of occurrence and drawn panchnama of the scene of offence (Exh.34). He has collected blood samples, seized mattress, pillow and hairs of the deceased. Photographer was summoned, who took several photographs of the place of occurrence (collectively marked as Exh.95). Inquest panchnama (Exh.35) was carried on the dead both of the deceased Subhash Rathod. It was followed by forwarding the

dead body to Rural Hospital, Ghatanji for autopsy.

5. PSI Kishore Bhujade has arrested Adina (A1) and Ankush (accused no.2 – A2), by drawing arrest panchnama. On the very day, while Ankush (A2) was in police custody, he gave a statement in presence of panchas that he is ready to produce weapon, clothes and ornaments. Memorandum panchnama (Exh.51) was drawn. Ankush (A2) lead the policy party and panchas to his house at village Mohada, from where police seized an iron rod, blood stained clothes and some ornaments by drawing seizure panchnama (Exh.52).

6. On 09.08.2029 itself a lady constable has produced blood stained clothes of Adina (A1), which were seized by PW 6 under seizure panchnama (Exh.54). On 12.08.2019, while accused Adina (A1) was in police custody, she expressed her willingness to produce the weapon. Memorandum panchnama (Exh.30) was prepared in presence of panchas. Accused Adina (A1) led the police to her residence and from cattle shed produced one blood stained pestle, which was seized under panchnama (Exh.31). Seized articles

were forwarded for chemical analyzation. Statement of witnesses came to be recorded and on completion of the investigation, final report was filed.

7. On denial of the guilt, the trial Court has framed the charge vide Exh.17 against both the accused for committing murder of Subhash Rathod by assaulting him with deadly weapon, and thereby committed offence punishable under Section 302 of the Indian Penal Code. Defence of the accused is of total denial and false implication.

8. During cross-examination accused no.1 Adina has raised a defence that during the intervening night of 08.08.2019 to 09.08.2019 unknown robbers snatched her gold ornaments and killed her husband Subhash. Statements of accused were recorded in terms of Section 313 of the Code of Criminal Procedure, but, the response is of total denial.

9. The prosecution has examined as many as 7 witnesses to

establish the guilt of the accused. The defence has not denied that Subhash Rathod met with a homicidal death. The trial Court has recorded conviction on the basis of circumstantial evidence coupled with the aid of Section 106 of the Indian Evidence Act.

10. We have heard Shri A.S. Mardikar, learned Senior Counsel for appellants/accused and Ms T.Udeshi, learned A.P.P. for respondent / State.

Initially the learned Senior Counsel has reminded us the well settled principles regarding appreciation of evidence in cases based on the circumstantial evidence. He has straneously argued that besides seizure of incriminating material, there is no other evidence, thus there is every possibility of innocence of accused. The chain of circumstances is not so complete to exclude the hypothesis of innocence of the accused. It is submitted that the memorandum and consequential seizures are not legally admissible, since there was no disclosure from the accused, which is an essential component of Section 27 of the Evidence Act. The accused cannot be held guilty by taking aid of Section 106, in absence of prosecution failing to establish

the foundational facts. The entire prosecution is based on suspicion, and thus, the trial Court has committed serious error in convicting accused, sans requisite evidence.

11. Per contra, the learned A.P.P. appearing on behalf of the State endeavored to convince us that the impugned judgment of conviction is well reasoned and sustainable in law. It is submitted that accused have not offered explanation during their statement under Section 313 of the Code of Criminal Procedure and, thus, it is a vital circumstance being a case of custodial death. It is argued that seizures and recoveries have been duly established by leading cogent evidence. Chemical Analyzers report discloses that the blood group of the deceased matches with the blood stains found on the clothes of accused, as well as on the weapon. Thus, according to the prosecution there is ample evidence to connect the accused with the crime.

12. In cases where accused were tried for the offence of murder, it is pre-requisite for the prosecution to establish that the deceased met with a homicidal death. In this regard, the prosecution

has relied on the evidence of PW 5- Dr.Shailesh Gofane, who has conducted autopsy, coupled with the post mortem notes (Exh.57) and inquest panchnama (Exh.35). PW 5 Dr. Gofane was attached to the Rural Hospital, Ghatanji at the relevant time. He has conducted autopsy on the dead body on 09.08.2019 and noted the following injuries on the person of the deceased :

External Injuries.

1. Large cresentric CLW above right eye size 4 x 2 x 2 cm.
2. Small cresentric CLW in a right temporal area size 2 x 1 cm.
3. Large elongated CLW size 3 x 4.1 cm between two eyes on forward.
4. Large irregular cresentric CLW size 6 x 2 x 2 cm above left eye
5. Large CLW of size 6 x 5 x 3 cm extending from supra orbital to left temporal region 6 x 5 cm.
6 Irregular inverted T Shape CLW just below left eye size 4 x 2 x 2 cm.
7. Large CLW over right fronto parietal area size 5 x 3 x 2 cm.,
8. Large irregular CLW over parietal area in middle size 9 x 2 x 2 cm.

Internal Injuries.

1. Compound fracture right frontal bone size 5 x 3 x 2 cm.
2. Compound fracture right temporal bone size 2 x 1 cm.
3. Large compound fracture elongated in middle of forehead size 4 x 3 x 1 cm.
4. Large cresentric compound fracture size 6 x 2 x 2 cm. above left eye in left frontal bone.
5. Large irregular fracture behind left eye, left temporal bone size 6 x 2 x 1 cm.

6. Small fracture 2 x 1 x 1 cm. Left zygomo.
7. Large irregular fracture in parietal area.

It is his evidence that those injuries were caused by blunt and heavy object. The cause of death is multiple head injuries with brain hemorrhage, brain herniation and brain tissue disruption. All the injuries were of antemortem nature. He has found that the external injuries nos.1 to 8 had fracture of underlined bones. It is apparent that due to repeated blows on the vital part of the body i.e. head, Subhash succumbed. Moreover, the defence has not challenged that Subhash met with homicidal death, therefore, without hiccup we hold that the deceased met with a homicidal death.

13. The prosecution evidence consists of 7 witnesses. P.W.1 Sweety Rathod, aged 10 years was the eye witness to the occurrence. The trial Court has disbelieved her evidence, which we endorse for the reasons to which we are coming shortly. The trial Court has relied on the evidence of two panch witnesses, Medical Officer and Investigating Officer. The trial Court has relied on the circumstances namely (i) Subhash met with a homicidal death; (ii) death was within

the house; (iii) blood stains were found on the clothes of the accused; (iv) weapons were seized from the accused having blood stains of the deceased; (v) non-explanation by accused about death of Subhash.

14. As regards to the evidence of the isolated eye witness PW 1 Sweety is concerned, at the time of occurrence she was hardly 6 years of age. It is her evidence that on the fateful night, her mother and neighbouring resident Ankush (A2) killed her father by assaulting him with iron rod. She has been thoroughly cross-examined to test the veracity. She admits that in the morning she was woken up by her mother. She saw that her father was lying dead. She has informed others that when she woke up, she saw that her father is dead. She admits that she did not disclose to the police on the same day that she saw both accused assaulting her father. Further she admits that she was taught by the informant Pawan and A.P.P. as to what to depose in the Court. Moreover, she stated that she never disclosed to the police that her mother has killed her father. Lastly, she admits that she is not aware as to who has killed her father. It requires to be noted that the child witness was initially in the custody of the informant Pawan,

when her statement was recorded. Needless to say that the child witnesses are prone to tutoring. On the anvil of above admissions, it is difficult to rely on the testimony of the child witness, who has categorically stated that she has not seen the occurrence. The trial Court has rightly rejected her evidence with which we concur fully.

15. Excluding the evidence of sole eye witness, the prosecution case remains to be based on circumstantial evidence. The law with regard to conviction on the basis of circumstantial evidence has been very well crystallized in the judgment delivered by the Supreme Court in the case of **Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116**. Paragraph Nos. 153 and 154 which are important, are reproduced herein below :

> *"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established: (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be*

proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793 where the observations were made :

> *"19. …..Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."*

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

16. The Supreme Court in case of **Boby .vrs. State of Kerala – 2023 SCC Online SC 50**, in paragraph no.17 has observed as under :

> *"17. It can thus clearly be seen that it is necessary for*

the prosecution that the circumstances from which the conclusion of the guilt is to be drawn should be fully established. The Court holds that it is a primary principle that the accused 'must be' and not merely 'may be' guilty before a court can convict the accused. It has been held that there is not only a grammatical but a legal distinction between ',may be proved' and "must be or should be proved". It has been held that the facts so established should be consistent only with the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. It has further been held that the circumstances should be such that they exclude every possible hypothesis except the one to be proved. It has been held that there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probabilities the act must have been done by the accused."

In the light of above guiding principles we have to examine the case in hand.

17. The trial Court has relied on the following circumstances :

(i) Homicidal death within four walls, in presence of accused no.1 Adina.

(ii) Recovery of blood stained clothes, weapon and ornaments at the instance of accused.

(iii) Finding of blood of deceased on seized articles.

(iv) Motive for accused to commit murder.

The trial Court has convicted both the accused upon a finding that the prosecution has proved the aforesaid circumstances against them. It necessitates us to re-appreciate the entire material to assess whether the evidence is sufficient in legal frame work to convict the accused.

18. It is the prosecution case that while A1- Adina was in police custody, she made a disclosure and in consequence thereof a pestle concealed in the cattle shed was recovered. In order to establish the said fact, the prosecution has relied on the evidence of PW 3- Sagar Bhismore (Panch), in whose presence A1- Adina allegedly made disclosure statement. It is his evidence that on 12.08.2019, he was called by the police to act as a panch. In his presence A1 – Adina made a statement that she had concealed iron pestle, which she is ready to produce. Accordingly memorandum panchnama (Exh.30) was prepared. He deposed that the accused led them to village Mohadi and then from the backside of cattle shed she took out blood stained pestle, which was sealed and seized by the police under

panchnama (Exh.31). Contextually we have gone through the evidence of the investigating officer PW 7- Bhujade, who also deposed that A1 Adina gave statement in pursuance of which pestle was seized under panchnama.

19. In the like manner, the prosecution has examined PW 4 – Pawan Bajpai (Panch), who deposed that on 09.08.2019 in his presence A2 – Ankush made a disclosure statement that he would produce iron rod, mangalsutra (marital cord) and clothes, which was taken down in panchnama (Exh.51). Thereafter A2- Ankush led all of them to village Mohadi and from one house produced those articles which were seized under panchnama (Exh.52). The Investigating Officer (PW 7) has also stated that in his presence accused gave statement that he is ready to produce weapon, clothes and ornaments, which was followed by seizure at his instance.

20. The learned Senior Counsel appearing for accused has strongly criticized this evidence by submitting that none of the panch witness has stated about the disclosure of place by accused from

where the articles were recovered. It is his contention that in absence of the statement of witness about disclosure by accused regarding the place where she/he has concealed the articles, the evidence is of no use. In this regard he relied on the decision of this Court in case of **Manoj Madanlal Tekam .vrs. State of Maharashtra – 2014 SCC Online Bom 1236,** with particular emphasis on paragraph nos.39 and 40, which reads as under :

> *"39. The admissible part of memorandum recorded under Section 27 of the Evidence Act is reproduced hereunder:*
> *"I have concealed the said sword-cane. You come with me and I will take out and produce the said sworn-cane."*
>
> *40. From the aforesaid, it is crystal clear that the appellant has not stated the place where the sword-cane (gupti) was concealed by him. Though, Ananta (PW5) claims from his evidence that such a statement was made in respect of the place in contemporaneous document namely; memorandum statement, it is absent. If the place was not stated by the appellant, the consequent recovery from the pl;ace from where the recovery is made, according to us, is or no use."*

21. The learned Senior Counsel has further relief on the decision of Supreme Court in case of **Subramanya .vrs. State of**

Karnataka – 2022 SCC Online SC 1400 to impress that there shall be evidence about disclosure of a place by accused in presence of panchas, and in absence, it cannot be said that the object is discovered as a consequence of information received from the accused. The relevant observation made in paragraph nos.82 to 87 and 92 are as under :

> *"82. Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:*
>
> > *"27. **How much of information received from accused may be proved.**— Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*
>
> *83. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.*
>
> *84. If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the*

place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses (panchwitnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panchwitnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter.

85. In the aforesaid context, we may refer to and rely upon the decision of this Court in the case of Murli and Another v. State of Rajasthan reported in (2009) 9 SCC 417, held as under:

> *"34. The contents of the panchnama are not the substantive evidence. The law is settled on that issue. What is substantive evidence is what has been stated by the panchas or the person concerned in the witness box……." (Emphasis supplied)*

86. One another serious infirmity which has surfaced is in regard to the authorship of concealment by the person who is said to have discovered the weapon.

87. The conditions necessary for the applicability of Section 27 of the Act are broadly as under:

(1) Discovery of fact in consequence of an information received from accused;
(2) Discovery of such fact to be deposed to;
(3) The accused must be in police custody when he gave information; and
(4) So much of information as relates distinctly to the fact thereby discovered is admissible – Mohmed Inayatullah v. The State of Maharashtra: (1976) 1 SCC 828 ; AIR (1976) SC 483

Two conditions for application: –

(1) information must be such as has caused discovery of the fact; and
(2) information must relate distinctly to the fact discovered Earabhadrappa v. State of Karnataka: AIR (1983) SC 446.

88. …
89. ….

> *90. ….*
> *91. ….*
> *92. Thus, in the absence of exact words, attributed to an accused person, as statement made by him being deposed by the investigating officer in his evidence, and also without proving the contents of the panchnama, the High Court was not justified in placing reliance upon the circumstance of discovery of weapon."*

22. On the same line, the defence has further cited and relied on the observations of Supreme Court made in paragraph no. 5 of the decision in case of **State of Karnataka .vrs. David Rozario and another – (2002) 7 SCC 728,** which reads thus :

> ***"5.*** *The first question is whether the evidence relating to recovery is sufficient to fasten guilt on the accused. Section 27 of the Evidence Act is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. This position was succinctly dealt with by this Court in Delhi Admn. V. Balakrishan (AIR 1972 SC 3) and Md. Inayatullah v. State of Maharashtra (AIR 1976 SC 483). The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The ban as imposed by the preceding sections was presumably inspired by the*

fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequences of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person, who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery. Thus, what is admissible being the information, the same has to be proved and not

the opinion formed on it by the police officer. In other words, the exact information given by the accused while in custody which led to recovery of the articles has to be proved. It is, therefore, necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information. It is now well settled that recovery of an object is not discovery of fact envisaged in the section. Decision of Privy Council in Palukuri Kotayya v. Emperor (AIR 1947 PC 67), is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. (see State of Maharashtra v. Damu (2000) Crl.LJ 2301). No doubt, the information permitted to be admitted in evidence is confined to that portion of the information which "distinctly relates to the fact thereby discovered". But the information to get admissibility need not be so truncated as to make it insensible or incomprehensible. The extent of information admitted should be consistent with understandability. Mere

statement that the accused led the police and the witnesses to the place where he had concealed the articles is not indicative of the information given." (Emphasis supplied)

23. It can be seen that Section 27 of the Evidence Act, requires that the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this information given must relate distinctly to the said fact of recovery of incriminating articles, in absence of a disclosure made by the accused is of no consequence. Neither the panch witnesses nor the investigating agency have deposed the exact statement made by the accused, except their knowledge about the place where the articles were concealed. Contextually, we have gone through both memorandum and seizure panchnamas which are totally silent regarding specific disclosure made by the accused leading to consequential discovery and seizure.

24. The learned A.P.P. has relied on the decisions of Supreme Court in case of (1) **Babu Sahebagouda Rudragoudar and others .vrs. State of Karnataka (Criminal Appeal No.985/2010**

decided on 19.04.2024) and **(2) Ravishankar Tandon .vrs. State of Chhatisgarh (Criminal Appeal No.3869/2023 decided on 10.04.2024)** on the point of memorandum and seizure. We have gone through both the decisions, however, we could not see any proposition laid down by the Supreme Court, which could assist the prosecution. Rather in both the cases, the Court has discarded the evidence of memorandum and seizures, and thus, we are unable to understand as to how these cases would apply to the facts of this case. The prosecution has also relied on the decision in case of **Vasanta Sampat Dupare .vrs. State of Maharashtra (Criminal Appeal No.2486-2487 of 2014 decided on 26.11.2014)**, which according to us does not help the prosecution in any manner.

25. Apart, the defence has also stripped the exercise of disclosure and seizure by pointing some other deficiencies. Both the accused were neighbours residing at village Mohadi, whilst the concerned Ghatanji Police Station was at a distance of 10 kms from their houses, as per the first information report (Exh.27). In that light we have been taken through the memorandum panchnama (Exh.30)

of A1- Adina dated 12.08.2019 made at the police station in between 1.28 p.m. to 1.45 p.m. As per prosecution case, after said panchnama all of them went to village Mohadi i.e. they traveled 10 kms distance and then the accused produced pestle, followed by drawing seizure panchnama. It is pertinent that the second panchnama i.e. seizure panchnama was drawn in between 1.45 to 2.55 p.m., meaning thereby in succession or continuity both panchnamas were drawn. It is hard to understand as to how within fraction of second from police station everybody reached at the distance of 10 kms. where another panchnama was drawn. Likewise, the defence has pointed out similar deficiency in the memorandum statement of A2- Ankush (Exh.51), which was carried on 09.08.2019 from 7.20 to 7.45 p.m., whilst seizure panchnama had commenced from 7.50 to 9.30 p.m. i.e. within a gap of 5 minutes only. There may be a mistake of police in writing the time, but, the said circumstance needs to be taken into account while evaluating the overall effect of said evidence.

26. The learned Senior Counsel took us through the evidence of child witness PW 1 Sweety, in whose evidence it has come that in

the morning when she saw dead body of her father, Articles A and B i.e. iron rod and pestle were lying nearby. She stated that those articles were having blood stains. Moreover, she has stated that in the morning the police asked her whether her father was killed by those articles, to which she has shown ignorance. Evidence of child witness in this regard raises a serious doubt about the whole exercise of memorandum and seizure regarding the weapon used in the commission of crime. In other words, when the weapons were lying near the dead body, finding of these weapons on some other date at some other place cannot rule out the possibility of fabrication to book the accused. We may note that this is not the single statement of PW 1 Sweety, but, the informant Pawan – PW 2 admits in the cross examination that in the evening of the occurrence he has seen the iron rod and pestle at the house. However, immediately he has changed the statement by saying that he has seen those articles when they were produced by the accused. In the background of evidence of PW 1 Sweety, the shaky evidence of PW 2 Pawan is enough for us to raise suspicion about the seizure. Thus, for all these reasons, we find it

extremely unsafe to rely on the circumstance of memorandum and seizure at the instance of both the accused. Since we are not prepared to accept the evidence of memorandum and seizure, the aspect of matching of blood group of deceased with the blood group on the seized articles looses its importance. The seizure of articles itself is doubtful, therefore, chemical analyzer's report will not assist the prosecution in any manner.

27. The prosecution has also relied on the circumstance of finding of blood stains on the clothes of A1 – Adina. It is the prosecution case that on the date of occurrence, in the late evening around 10 p.m. a blood stained saree of A1- Adina was seized under panchnama Exh.54. It is the prosecution case that on that day itself, A1 – Adina was arrested, but, it emerges that in the late evening the police constable has produced clothes, which were seized. Concededly it was not a seizure in terms of Section 27 of the Evidence Act. Moreover, it has come in the evidence of PW 4 Pawan Bajpai – panch, that those clothes were produced by a lady constable from the

cupboard, which were seized by obtaining signature of A1- Adina. Moreover, admittedly A1-Adina was at the house with her husband's dead body. So there can be possibility of receiving blood stains on her clothes by contact. Thus, it is difficult to place reliance on the said circumstance.

28. It is the prosecution case that the gold ornaments which were seized from the house of A2- Ankush were of A1- Adina. In this regard, the prosecution has relied on the evidence of PW 3 Sagar (panch), in whose presence one Asmita Rathod has identified the ornaments to be belonging to A1- Adina. Apparently, in absence of direct evidence of Asmita Rathod, the evidence of PW 3 Sagar cannot be relied about identification. The prosecution has not explained as to why Asmita Rathod was not examined to establish the link between the seized ornaments with A1-Adina. Anyway, since seizure is doubtful the said evidence is of no help.

29. Coming to the aspect of absence of explanation by the accused, the prosecution has invoked the principle laid down under

Section 106 of the Evidence Act. It is argued that it is a case of custodial death and thus, it is for the accused to explain under which circumstances Subhash died. Certainly, the principle under Section 106 of the Evidence Act, would apply to the extent A-1 Adina, provided the prosecution would establish the foundational facts. As regards to A2- Ankush is concerned, there is no manner of applicability of the principle under Section 106 of the Act, nor he is obliged to give explanation.

30. The scope and applicability of the presumption under Section 106 of the Evidence Act, has been considered in catena of decisions. It is well settled that in cases governed by the circumstantial evidence, if the chain of circumstance which is required to be established by the prosecution, is not established, the failure of accused to discharge the burden of Section 106 of the Act, is not relevant at all. When the chain is not complete, even falsity of defence is no ground to base conviction. The general rule is that in a criminal case the burden of proof is on the prosecution and Section 106 of the Act is only designed to meet certain exceptional cases in

which it would be impossible for the prosecution to establish the facts, which are especially within the knowledge of the accused. However, Section 106 does not intend to relieve the prosecution of its duty to prove the guilt of the accused. In other words Section 106 of the Act does not absolve the prosecution of its primary burden.

29. We may refer to the observations of Supreme Court in case of **Shivaji Chintappa Patil .vrs. State of Maharashtra – [2021] 5 SCC 626,** with reference to para nos. 22 & 23, which reads as under :

> *"22. It will also be relevant to refer to the following observations of this Court in the case of Gargi (2019 9 scc 738):-*
>
> > *"33.1. Insofar as the "last seen theory" is concerned, there is no doubt that the appellant being none other than the wife of the deceased and staying under the same roof, was the last person the deceased was seen with. However, such companionship of the deceased and the appellant, by itself, does not mean that a presumption of guilt of the appellant is to be drawn. The trial court and the High Court have proceeded on the assumption that Section 106 of the Evidence Act directly operates against the appellant. In our view, such an approach has also not 9 (2006) 10 SCC 681 10 (2008) 5 SCC 587 10 been free from error where it*

was omitted to be considered that Section 106 of the Evidence Act does not absolve the prosecution of its primary burden. This Court has explained the principle in Sawal Das v. State of Bihar, (1974) 4 SCC 193 in the following: (SCC p. 197, para 10) "10. Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused."

23. It could thus be seen, that it is well-settled that Section 106 of the Evidence Act does not directly operate against either a husband or wife staying under the same roof and being the last person seen with the deceased. Section 106 of the Evidence Act does not absolve the prosecution of discharging its primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or which makes out a prima facie case, that the question arises of considering facts of which the burden of proof would lie upon the accused."

Similarly we would like to refer to the observations made by the

Supreme Court in paragraph nos.20 to 23 in case of **Nagendra Sah .vrs. State of Bihar – (2021) 10 SCC 725,** the same are as under :

> "*20. Now we come to the argument of the prosecution based on Section 106 of the Evidence Act. Section 106 reads thus :-*
>
> > *"106. Burden of proving fact especially within knowledge. – When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him. (b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."*
>
> *21. Under Section 101 of the Evidence Act, whoever desires any Court to give a judgment as to a liability dependent on the existence of facts, he must prove that those facts exist. Therefore, the burden is always on the prosecution to bring home the guilt of the accused beyond a reasonable doubt. Thus, Section 106 constitutes an exception to Section 101. On the issue of applicability of Section 106 of the Evidence Act, there is a classic decision of this Court in the case of Shambu Nath Mehra v. The State of Ajmer (1956 SCR 199) which has stood the test of time. The relevant part of the said decision reads thus :-*
>
> *"Section 106 is an exception to section 101. Section 101*

lays down the general rule about the burden of proof.

" 101. Burden of proof : Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist".

Illustration (a) to Section 106 of the Evidence Act says -

"(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed. A must prove that B has committed the crime".

11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. Emperor and Seneviratne v. R.

12. …..
13. …..

22. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the Court can always draw an appropriate inference.

23. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on 15 him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused."

We may refer to the observations recorded by the Supreme Court in paragraph No. 37 of the judgment in case of **Balvir Sing .vrs. State of Uttarakhand – (2023) SCC Online 1261,** the same are as under :

"37. In Tulshiram Sahadu Suryawanshi and Another v. State of Maharashtra reported in (2012) 10 SCC 373, this

Court observed as under:

> *"23. It is settled law that presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above position is strengthened in view of Section 114 of the Evidence Act, 1872. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process, the courts shall have regard to the common course of natural events, human conduct, etc. in addition to the facts of the case. In these circumstances, the principles embodied in Section 106 of the Evidence Act can also be utilised. We make it clear that this section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but it would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference. It is useful to quote the following observation in State of W.B. v. Mir Mohammad Omar ((2000) 8 SCC 382 : 2000 SCC (Cri) 1516): (SCC p. 393, para 38)*
>
> *"38. Vivian Bose, J., had observed that Section*

> *106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In Shambu Nath Mehra v. State of Ajmer (AIR 1956 SC 404 : 1956 Cri LJ 794) the learned Judge has stated the legal principle thus: (AIR p. 406, para 11)*
> *'11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.*
> *The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge.'"*

32. In substance, the particular ambit of Section 106 of the Evidence Act, can be invoked only if the prosecution is able to establish the foundational facts. No doubt the prosecution sought to invoke the said principle against A1- Adina, since while she was in the company of the deceased under one roof, the later died. However, to

invoke said principle essentially in the cases based on circumstantial evidence, some other facts or circumstances which tend to show the culpability of the accused have to be established. Merely on the basis of said proposition, the prosecution cannot be entirely relieved. In this regard, there is no material against A1- Adina, except there was a quarrel between the husband and wife prior to 10 days. One can take judicial note that a matrimonial hussle is present days is usual affair in every alternate house. Moreover, there is no material to establish that A1- Adina was in illicit relationship with A2- Ankush, which is not disclosed in the complaint. The case is of such a nature that it may raise a needle of suspicion against A1, but, the law require something more to convict a person under the serious charge of murder.

In the aforesaid context, we may profitably quote the following observations made by the Supreme Court in para 13 in the case of **Dharm Das Wadhwani v. The State of Uttar Pradesh, AIR 1975 SC 241**:

> *"13. The question then is whether the cumulative effect of the guilt pointing circumstances in the present case is*

such that the court can conclude, not that the accused may be guilty but that he must be guilty. We must here utter a word of caution about this mental sense of 'must' lest it should be confused with exclusion of every contrary possibility. We have in S.S. Bobade v. State of Maharashtra, AIR 1973 SC 2622, explained that proof beyond reasonable doubt cannot be distorted into a doctrine of acquittal when any delicate or remote doubt flits past a feeble mind. These observations are warranted by frequent acquittals on flimsy possibilities which are not infrequently set aside by the High Courts weakening the credibility of the judicature. The rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of legitimate inferences flowing from evidence, circumstantial or direct. At the same time, it may be affirmed, as pointed out by this Court in Kali Ram v. State of Himachal Pradesh, AIR 1973 SC 2773, that if a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from him." (emphasis supplied)

33. Though A1- Adina has not specifically explained the things in her statement, however, from the line of cross-examination, she took defence that in the midnight, unknown robbers have assaulted her husband and snatched gold ornaments. The trial Court endeavored to explain as to how the said story is improbable. In some

cases, defence may be unacceptable, but, that does not mean that the converse would be to hold the accused guilty. The prosecution has to establish the guilt with requisite standard of proof. As regards to A2-Ankush, we see that none of the circumstance is established against him. We cannot afford a risk of convicting the accused on the basis of slippery material for putting them behind bars for life. Thus, according to us the benefit of doubt belongs to the accused. It is well cherished principles of criminal jurisprudence, that when the situation emerges two views, the view favouring to the accused would take precedence. This is a fit case to accord benefit of reasonable doubt in favour of both the accused and thus the impugned judgment does not sustain in the eyes of law.

34. In view of above, Criminal Appeal is allowed. We hereby quash and set aside the conviction and sentence recorded by the Sessions Judge, Yavatmal for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code against the appellants/accused in Sessions Case No.187/2019 vide judgment and order dated 29.11.2021. They be set at liberty if not required in any

other case.

Both accused shall furnish P.R. bond of Rs.10,000/- each with surety in like amount to the satisfaction of the trial Court, in terms of Section 437A of the Code of Criminal Procedure, for securing their presence before the higher forum.

The fine amount, if deposited by the appellants/accused, shall be refunded to them.

Muddemal property be dealt with in accordance with law.

JUDGE JUDGE

Rgd.